

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FREDERICK SKODA,

Plaintiff,

v.

MEMORANDUM OF LAW & ORDER
Civil File No. 10-4865 (MJD/LIB)

LILLY USA LLC, a/k/a
Eli Lilly & Co.,

Defendant.

Alan J. Sheppard, Sheppard Law Office, Counsel for Plaintiff.

Amanda L. Asbury and Ellen E. Boshkoff, Baker & Daniels, LLP, and Jonathan P. Schmidt and Molly B. Thornton, Briggs & Morgan, PA, Counsel for Defendant.

The above-entitled matter comes before the Court upon the Report and Recommendation of United States Magistrate Judge Leo I. Brisbois dated April 11, 2011. [Docket No. 24] Plaintiff filed objections to the Report and Recommendation.

Pursuant to statute, the Court has conducted a de novo review upon the record of the portion of the Magistrate Judge's disposition to which specific written objection has been made. 28 U.S.C. § 636(b)(1); Local Rule 72.2(b). Based

upon that review, the Court **ADOPTS** the Report and Recommendation of United States Magistrate Judge Brisbois dated April 11, 2011 with the following modifications.

First, the Court does not rely upon Kern v. Janson, No. A10-355, 2010 WL 3546867 (Minn. Ct. App. Sept. 14, 2010), which was recently overturned by the Minnesota Supreme Court. The Court modifies the Report and Recommendation to omit reference to the Minnesota Court of Appeals opinion and notes that this omission does not alter the reasoning found in the Report and Recommendation.

Second, the Court provides the following further analysis to supplement the Report and Recommendation's discussion regarding whether Plaintiff could have asserted his claim for commissions in the first conciliation court action:

Under Minnesota law, a plaintiff is not required to supplement his original complaint to include claims arising during the pendency of the first lawsuit in order to avoid res judicata. Drewitz v. Motorwerks, Inc., 728 N.W.2d 231, 240 (Minn. 2007). A claim that "'could have been' brought must be understood to be limited to a claim that existed at the time the first complaint was served." Id. Therefore, the Court does not base its finding of res judicata upon a holding that Plaintiff should have amended his first conciliation court complaint on June 11,

2010, to include a new claim arising in the form of a commission claim under Minn. Stat. § 181.13, based on Defendant's failure to respond to Skoda's June 10, 2010 letter. Rather, the claim for commission payments had already arisen at the time the first conciliation court matter commenced, although the claim for damages under § 181.13 was not yet mature.

Here, Plaintiff's Complaint in the instant federal case seeks payment of commissions under Minnesota Statute § 181.13. Thus, Plaintiff seeks "commissions actually earned and unpaid at the time of the discharge." If the commissions were not actually earned and unpaid at the time that Plaintiff was discharged, he does not have a claim under §181.13. Therefore, Plaintiff's own Complaint demonstrates that he is seeking commissions that were earned but unpaid at the time of his discharge, which occurred before he initiated the first conciliation court lawsuit.

Because Skoda had not sent the demand for commissions to Lilly until June 10, he could not have recovered damages for a violation of § 181.13 for late payment of commissions in his first conciliation court complaint. See Chatfield v. Henderson, 90 N.W.2d 227, 232 (Minn. 1958) ("Until there is a demand as required by the statute, after resignation or discharge, the statutory provisions

have no application.”). However, “immaturity of the claim does not justify ignoring the finality of the judgment whether the prior action be brought in conciliation court or elsewhere.” Mattsen v. Packman, 358 N.W.2d 48, 51 (Minn. 1984). If Skoda seeks to avoid the preclusive effect of the prior judgment, the appropriate avenue is to seek to vacate or set aside that judgment. Id. at 50. See generally Kern v. Janson, -- N.W.2d --, 2011 WL 2848734 (Minn. July 20, 2011).

Here, Skoda’s first conciliation court lawsuit and this current case arise from the same employment relationship with Lilly, the termination of that employment relationship, and the employment contract-based remuneration owed to Skoda that was earned and unpaid at the time of that discharge. Thus, the instant claim for commissions arose from the same factual situation as the suit for salary and could have been resolved in the first lawsuit. See Gasbarra v. Park-Ohio Indus., Inc., 655 F.2d 119, 121-23 (7th Cir. 1981) (holding employee’s new lawsuit seeking fringe benefits, which entitlements arose after the date of the first lawsuit, was barred by res judicata from first lawsuit seeking salary and bonuses because “[b]oth sets of claims arose from the employment relationship between the parties, and from the defendant’s letter . . . terminating the plaintiff’s employment and all rights thereunder” and “[w]hile the individual items of

damages may not have yet accrued at the filing of the first suit, the question of the defendant's liability for the fringe benefits had clearly accrued and was ripe for decision [and] . . . could have been resolved either by declaratory and injunctive relief or by a determination of liability").

Accordingly, based upon the files, records, and proceedings herein, **IT IS**

HEREBY ORDERED:

1. The Court **ADOPTS** Magistrate Judge Leo I. Brisbois' Report and Recommendation dated April 11, 2011 [Docket No. 24], as modified above.
2. Defendant's Motion to Dismiss [Docket No. 4] is **GRANTED**.
3. Plaintiff's Counter Motion for Remand [Docket No. 11] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 22, 2011

s/ Michael J. Davis

Michael J. Davis

Chief Judge

United States District Court