Ferris & Salter, P.C. v. Thomson Reuters Corporation Doc. 6

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ferris & Salter, P.C.,

Plaintiff,

v.

Thomson Reuters Corporation,
d/b/a West Publishing Corporation,
d/b/a FindLaw,

Defendant.

FILE NO. 0:12-cv-00109-JRT-SER

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND TO ENLARGE ANSWER PERIOD

INTRODUCTION

This is the second lawsuit commenced by Plaintiff Ferris & Salter, P.C., a Michigan law firm, against Defendant Thomson Reuters Corporation, d/b/a West Publishing Corporation, d/b/a FindLaw, arising out of contracts under which Defendant provided website development and internet advertising services to Plaintiff. The first lawsuit was dismissed, without prejudice, by the Honorable Julian Abele Cook, Jr., one of the judges of the United States District Court for the Eastern District of Michigan. *See Ferris & Salter, P.C., v. Thomson Reuters Corp.*, No. 2:11-cv-12448 (E.D. Mich. Oct. 19, 2011) ("Dismissal Order") (copy attached to the accompanying Declaration of John K. Rossman ("Rossman Decl.") as Ex. 1). The dismissal was based upon forum selection provisions contained in the parties' contracts; but, in enforcing those provisions, Judge Cook necessarily concluded that Plaintiff's purported "professional negligence" claim had no merit and that Plaintiff's only potential claim sounded in contract. *Id.* at 5-6.

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Specifically, Judge Cook held that "under Minnesota or Michigan law -- no professional negligence action will lie against computer engineers and technicians." *Id*.

Plaintiff has now commenced the present lawsuit, but has ignored Judge Cook's express ruling that "no professional negligence action will lie." Just as it did in its initial lawsuit, Plaintiff purports to assert a claim for "professional negligence" in Count I of the Complaint. Based upon (1) issue preclusion (also known as collateral estoppel), (2) the "law of the case" doctrine and (3) the legal authorities supporting Judge Cook's legal conclusion, Defendant moves to dismiss the purported "professional negligence" claim and submits this memorandum of law in support of said motion.[1]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff entered into a contract with West Publishing Corporation on or about September 29, 2006, for FindLaw website development and internet advertising services. *See* Exhibit A to the Declaration of Michael Mokosaik ("Mokosaik Decl.").[2] Plaintiff entered into an addendum to the September 29, 2006 contract on or about June 15, 2009, also for FindLaw website development and internet advertising services. *See* Mokosaik Decl., Ex. B. Each of the contracts had a forum selection clause in which Plaintiff consented to exclusive jurisdiction in Minnesota, as well as an express limitation on damages. *See* Mokosaik Decl., Exs. A and B.

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[1] Defendant also seeks an order, pursuant to Fed. R. Civ. P. 6, enlarging the time period for serving an answer until ten days after the Court rules on Defendant's motion to dismiss Count I of the Complaint.

[2] A copy of Mr. Mokosaik's Declaration (with exhibits), which was filed in the prior federal court proceeding in the Eastern District of Michigan, is attached to the accompanying Declaration of Mr. Rossman as Ex. 2.

The September 29, 2006 agreement states:

> **General Provisions**
>
> This Order Form is subject to approval by West in St. Paul, Minnesota and is governed by Minnesota law. The state and federal courts sitting in Minnesota will have exclusive jurisdiction over any claim arising from or related to this agreement. (remaining paragraph intentionally omitted)

Mokosaik Decl., Ex. A at p. 5 of 12. In that same vein, that agreement further provides:

> **23. General Provisions**
>
> This Agreement will be governed by and construed under the laws of the State of Minnesota, without regard to conflicts of law provisions. The parties agree that the state and federal courts sitting in Minnesota will have exclusive jurisdiction over any claim arising from this Agreement, and each party consents to the exclusive jurisdiction of such courts. (remaining paragraph intentionally omitted)

Id. at p. 8 of 12. Moreover, choice of law and choice of forum language nearly identical to the above-quoted provisions was also incorporated into the June 15, 2009 FindLaw Order Form Addendum and attached FindLaw Master Services Agreement. Mokosaik Decl., Ex. B at p. 12 of 12.

In addition to choice of law and choice of forum provisions, the parties' written agreements also contain express limitation of liability clauses. Mokosaik Decl., Ex. A at p. 8 of 12 and Ex. B at p. 12 of 12. The clause in the FindLaw Master Services Agreement reads as follows:

> **16 LIMITATION OF LIABILITY**
>
> WEST'S, ITS AFFILIATES' AND ITS AGENTS' ENTIRE LIABILITY HEREUNDER, IF ANY, FOR ANY CLAIM FOR DAMAGES RELATING TO THIS AGREEMENT WHICH ARE MADE AGAINST THEM, WHETHER BASED IN CONTRACT

> OR TORT (INCLUDING NEGLIGENCE), SHALL BE LIMITED TO THE AMOUNT OF CHARGES PAID BY SUBSCRIBER RELATIVE TO THE PERIOD OF OCCURRENCE OF THE EVENTS WHICH ARE THE BASIS OF THE CLAIM. IN NO EVENT WILL WEST, ITS AFFILIATES OR ITS AGENTS BE LIABLE FOR ANY LOST PROFITS OR ANY CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, INDIRECT OR SPECIAL DAMAGES, ARISING FROM OR IN ANY WAY RELATED TO THIS AGREEMENT OR RELATING IN WHOLE OR IN PART TO SUBSCRIBER'S RIGHTS HEREUNDER OR THE USE OF OR INABILITY TO USE THE SERVICES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Id., Ex. B at p. 12 of 12. The clause in the September 29, 2006 agreement does not include the last sentence, but otherwise is not significantly different than the above-quoted provision. *Id.*, Ex. A at p. 8 of 12.

According to the parties' written agreements, Defendant agreed to host a website for Plaintiff and provide related services. *See* Mokosaik Decl., Exs. A and B. Plaintiff alleges, however, that, in November 2008, "Defendant's professional computer engineer employees and agents negligently destroyed the previous connection/link" that had directed website inquiries to Plaintiff's e-mail accounts. Compl. ¶ 18. Plaintiff further alleges that this problem was not discovered and repaired for approximately fifteen months, after which Defendant found 730 e-mails that should have been -- but were not -- forwarded to Plaintiff's e-mail accounts over that period of time. *Id.* ¶¶ 19 and 22. As a result of Defendant's alleged negligence, Plaintiff contends that it lost numerous clients and hundreds of thousands of dollars in attorney fees. *Id.* ¶ 24.

Ignoring the forum selection clauses contained in each of the agreements that the parties executed, Plaintiff filed suit against Thomson Reuters Corporation in Washtenaw

County, Michigan, on May 4, 2011. Rossman Decl., Ex. 3. Thomson Reuters caused the case to be removed to the United States District Court for the Eastern District of Michigan (pursuant to 28 U.S.C. § 1441); then, based upon the forum selection clauses contained in the parties' agreements, brought a motion to dismiss or, in the alternative, to transfer the case.

In an Order dated October 19, 2011, Judge Cook granted Defendant's motion to dismiss. Dismissal Order at 9. As noted in the Introduction to this memorandum, the order for dismissal was based upon the forum selection provisions contained in the parties' contracts, as well as upon Judge Cook's conclusion that Plaintiff's purported "professional negligence" claim had no merit under either Michigan or Minnesota law. *Id*. at 5-6. In particular, Judge Cook held that "under Minnesota or Michigan law -- no professional negligence action will lie against computer engineers and technicians." *Id*.

The dismissal was "without prejudice," and did not limit "Plaintiff's ability to refile [the] action in an appropriate forum." *Id*. Seizing upon that fact, Plaintiff subsequently filed the present action in this District.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although such a motion requires the court to accept as true all factual allegations in the complaint, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S. Ct. at

1950. Furthermore, a court may grant a motion to dismiss "based upon a dispositive issue of law." *Wilson v. Dryden*, 169 F. Supp. 2d 1010, 1012 (D. Minn. 2001) (citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)).

In ruling on a motion to dismiss under Rule 12(b)(6), "[t]he court may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record," without converting the motion to one for summary judgment. *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 889 (8th Cir. 2002) (quotation omitted). *See also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 199 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint").

ARGUMENT

A. Several Grounds Exist for Dismissing Count I of the Complaint.

Defendant seeks dismissal of Count I of the Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), on grounds that (1) issue preclusion bars Plaintiff from relitigating Judge Cook's previous ruling that Plaintiff may not pursue a professional negligence action against Defendant, (2) Judge Cook's ruling is the "law of the case," and (3) numerous courts have refused to recognize professional negligence claims against a computer consultants.

1. *Issue Preclusion Bars Plaintiff from Resurrecting the Professional Negligence Claim that Judge Cook Expressly Rejected.*

In connection with Defendant's motion to dismiss or transfer the action that Plaintiff commenced in Michigan, the parties contested the question of whether Plaintiff

could properly assert a claim of “professional negligence” or whether, as Defendant contended, Plaintiff could only present a contract claim that, under the forum selection clauses in the parties’ agreements, would indisputably have to be heard by a state or federal court in Minnesota. Dismissal Order at 3-6. Moreover, Judge Cook expressly ruled on that legal issue in his Dismissal Order. *Id*. at 5-6. As a result, principles of issue preclusion prevent Plaintiff from trying to litigate that issue again in the present case.

In the Eighth Circuit, issue preclusion has five elements:

> (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

Robinette v. Jones, 476 F.3d 585, 589 (8th Cir. 2007) (quoting *Anderson v. Genuine Parts Co.*, 128 F.3d 1267, 1273 (8th Cir. 1997)). Significantly, however, “recent decisions have relaxed traditional views of the finality requirement.” *Id*. (quoting *In re Nangle*, 274 F.3d 481, 484-85 (8th Cir. 2001)) (alteration omitted). “‘[F]inality’ in the context [of issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.” *John Morrell & Co. v. Local Union 304A of the United Food and Commercial Workers*, 913 F.2d 544, 563 (8th Cir. 1990) (quoting *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961)).

Consistent with the above-described "relaxed" standard of finality, the Eighth Circuit has given preclusive effect to a determination made in the context of a motion to dismiss a previous action without prejudice, stating that "an *issue* actually decided in a non-merits dismissal is given preclusive effect in a subsequent action between the same parties." *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (quoting *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999) (emphasis in original)). Similarly, in *Robinette*, the Eighth Circuit gave preclusive effect to issues that were "resolved by preliminary rulings" in a previous action that the plaintiff had voluntarily dismissed without prejudice before any judgment on the merits was entered. 476 F.3d at 589-90.

Like the courts in the above-cited decisions, this Court should give preclusive effect to Judge Cook's ruling that "no professional negligence action will lie against computer engineers and technicians," even though that previous ruling was made in the context of a dismissal without prejudice. Indeed, the principles of issue preclusion employed by the Eighth Circuit *require* this Court to dismiss Count I of the Complaint. All of the necessary elements are satisfied. Plaintiff was a party to the previous suit. The purported "professional negligence" claim that Judge Cook rejected is, word-for-word, the very same purported claim that Plaintiff has set forth in Count I of the Complaint in this lawsuit. The viability of that purported claim was plainly litigated before Judge Cook. Judge Cook's resolution of that issue was essential to his decision to dismiss the Michigan action. And, under the Eighth Circuit's "relaxed" finality requirement, the fact that Judge Cook dismissed the Michigan action "without prejudice" does not prevent this

Court from giving preclusive effect to Judge Cook's determination that Plaintiff cannot properly pursue a professional negligence action against Defendant.

2. *The "Law of the Case" Doctrine Supports Dismissal of Plaintiff's Previously Rejected Professional Negligence Claim.*

As noted above, Judge Cook based his dismissal ruling, in part, upon his conclusion that "no professional negligence action will lie against computer engineers and technicians." Dismissal Order at 5-6. That conclusion is the "law of the case" and, as such, should be followed by this Court. For that reason, even if issue preclusion does not apply, this Court should dismiss Plaintiff's purported "professional negligence" claim.

"The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings." *Kansas Pub. Employees Ret. Sys. v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 687 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998); *see also Hammann v. 1-800 Ideas.com, Inc.*, 455 F. Supp. 2d 942, 956 (D. Minn., 2006). The doctrine rests on the principle that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). By preventing relitigation of settled issues in a case, the doctrine "protect[s] the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986) (citing *Liddell v. Missouri*,

731 F.2d 1294, 1304-05 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) and *In re Exterior Siding & Aluminum Coil Antitrust Litig.*, 696 F.2d 613, 616-17 (8th Cir. 1982)).

"Law of the case" has been described as "a doctrine of discretion, not a command to the courts." *Little Earth*, 807 F.2d at 1440 (citing *Arizona v. California*, 460 U.S. at 618). However, the Eighth Circuit has also noted that the doctrine "'is something more than mere courtesy, … since it has substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.'" *In re Exterior Siding,* 696 F.2d at 616 (quoting *German v. Universal Oil Prods. Co.*, 77 F.2d 70, 73 (8th Cir.1935) and *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900)). Thus, a previously decided issue should be reconsidered "only if substantially different evidence is subsequently introduced or the decision is clearly erroneous and works manifest injustice." *Little Earth*, 807 F.2d at 1440 (citing *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983)).

Here, there is no reason to overrule Judge Cook's legal conclusion that neither Michigan nor Minnesota law recognizes a cause of action for professional negligence against computer engineers and technicians. Because Judge Cook's ruling was based upon the law, not upon any particular evidence, Plaintiff cannot hope to overcome that ruling by introducing "substantially different evidence." *See Little Earth*, 807 F.2d at 1440. Instead, Plaintiff must show "the decision is clearly erroneous and works manifest injustice." *Id*. Plaintiff cannot make such a showing, however. Accordingly, Judge Cook's ruling should remain the "law of the case" and Plaintiff's purported professional negligence claim should be dismissed.

3. ***Judge Cook Correctly Held that Plaintiff May Not Pursue a Professional Negligence Action Against Defendant.***

Even if neither issue preclusion nor the "law of the case" doctrine were applicable, this Court should still be guided by Judge Cook's analysis, which correctly reveals that Plaintiff's purported "professional negligence" claim has no merit. Like Judge Cook, this Court should see through Plaintiff's transparent effort to avoid the terms of the service contracts (including the limitation of liability clauses), and should reject Plaintiff's erroneous contention that the circumstances of this case permit a "professional negligence" claim against Defendant.

In opposing Defendant's motion to dismiss or transfer the previous action that Plaintiff commenced in Michigan, Plaintiff failed to introduce any legitimate factual or legal support for its allegations that the FindLaw personnel are "professionals" and that this matter involves "professional services." Instead, Plaintiff twice mischaracterized the following statement from a Minnesota case, by leaving out the highlighted language:

> A "professional service," ***within the meaning of an insurance exclusion*, "**is one calling for specialized skill and knowledge in an occupation ... [t]he skill required to perform a professional service is predominantly intellectual or mental rather than physical."

Piper Jaffray Cos. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa., 967 F. Supp. 1148, 1156 (D. Minn. 1997) (emphasis added) (quoting *Ministers Life v. St. Paul Fire & Marine Ins. Co.*, 483 N.W.2d 88, 91 (Minn. Ct. App. 1992)). In other words, in quoting *Piper Jaffray* at two different places in its opposition to Defendant's motion to dismiss or transfer the Michigan case, Plaintiff employed ellipses to obscure the fact that the *Piper Jaffray* court's statement was intended to apply only to the interpretation of a

professional services exclusion in an insurance policy. *See* Plaintiff['s] Answer to Defendant's Motion to Dismiss, *Ferris & Salter, P.C., v. Thomson Reuters Corp.*, No. 2:11-cv-12448 (E.D. Mich.) [Doc. No. 6, Pg ID 59 & 62]. Since Plaintiff's dispute with Defendant does not involve interpretation of a professional services exclusion in an insurance policy, Judge Cook correctly concluded that "*Piper Jaffray* is inapplicable to this controversy." Dismissal Order at 4. This Court should likewise reject any argument that *Piper Jaffray* somehow authorizes Plaintiff to pursue a "professional negligence" claim against Defendant.

While it appears that no Minnesota court has yet ruled on the issue, Judge Cook correctly points out that courts applying the law of other states (including Michigan and Wisconsin) have held that computer consultants are not professionals and have refused to permit professional negligence claims arising out of computer-related services:

> There is no basis under Michigan law or, for that matter, in the vast majority of those states whose courts have considered the issue, to deem computer consultants and service providers professionals. *Heidtman Steel Prods., Inc. v. Compuware Corp.*, No. 3:97CV7389, 2000 WL 621144, at *14 (N.D. Ohio Feb. 15, 2000) (applying Michigan law and dismissing professional malpractice claim against computer consultant because "[t]here is no precedent in Michigan to recogniz[e] computer consultants as professionals"); *see also, e.g.*, *Columbus McKinnon Corp. v. China Semiconductor Co.*, 867 F. Supp. 1173, 1182-83 (W.D.N.Y. 1994) ("There is no basis in law for extending the doctrine of professional malpractice to cover independent computer consultants. To lift the theory of malpractice from its narrow origin of personal, professional services to a lay patient or client and apply it to the law of commercial contracts would obfuscate the necessary boundaries of these two areas of law."); *Racine Cnty v. Oracular Milwaukee, Inc.*, 767 N.W.2d 280, 286 (Wis. Ct. App. 2009), *aff'd on other grounds*, 781 N.W.2d 88 (Wis. 2010) ("We have found convincing explanations from well-respected treatises and persuasive on-point authority from other

> jurisdictions that convince us that computer consultants are not professionals as that term is used in the tort of professional negligence."); *Rapidigm, Inc. v. ATM Mgmt. Servs., Inc.*, No. GD02-17261, 2003 WL 23146480 (Pa. Com. Pl. July 10, 2003) ("Most courts which have considered professional negligence claims raised against computer consultants have ruled that claims for economic loss should be governed only by contract law.").

Dismissal Order at 5. *Accord UOP v. Andersen Consulting*, 1997 WL 219820, *5-6 (Conn. Super. Ct. 1997); *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351, 1361 (D. N.J. 1992).

There is no reason to believe that a court applying Minnesota law would reach a different result. Just as "[t]here is no precedent in Michigan to recogniz[e] computer consultants as professionals," *Heidtman Steel Prods.,* 2000 WL 621144, at *14, there is likewise no such precedent in Minnesota. Thus, a Minnesota court would most likely follow the courts from such nearby jurisdictions as Wisconsin and Michigan, and hold that computer consultants may not be sued for professional negligence. Absent binding Minnesota precedent to the contrary, this Court should dismiss Plaintiff's purported "professional negligence" claim.

B. The Court Should Grant Defendant's Motion to Enlarge the Time Period for Responding to Count II of the Complaint.

Because the present motion involves only Count I of the Complaint, Defendant, in an abundance of caution, requests that the Court enlarge the time period for responding to Count II of the Complaint. Specifically, Defendant moves the Court, pursuant to Fed. R. Civ. P. 6(b)(1)(a), for an order extending the deadline for Defendant to answer or otherwise plead to a date fourteen days after the Court rules on the present motion.

Good cause exists for the requested enlargement, as Defendant may otherwise be forced to file two separate answers (one to Count II and, if Defendant's motion to dismiss is denied, one to Count I). Furthermore, if Defendant is required to respond to Count II while the motion to dismiss Count I remains pending, the timeline for making initial disclosures and beginning discovery could commence under Local Rule 26.1(f), even though the parties will not know whether disclosures and discovery regarding Count I is warranted.

Counsel for Defendant contacted counsel for Plaintiff to seek Plaintiff's consent to the requested extension. Rossman Decl. ¶ 5. Plaintiff's counsel failed to respond. *Id*.

CONCLUSION

The Court should dismiss Plaintiff's purported "professional negligence" claims (*i.e.*, Count I of the Complaint), pursuant to Fed. R. Civ. P. 12(b)(6). Judge Cook's previous ruling that Plaintiff may not pursue a professional negligence action precludes relitigation of that issue. Moreover, even if issue preclusion did not apply, Judge Cook's ruling would still be the "law of the case." Finally, aside from issue preclusion principles and the "law of the case" doctrine, the Court should dismiss Plaintiff's purported "professional negligence" claim for the simple reason that (as Judge Cook recognized) a strong majority of courts have held that computer consultants may not be sued for professional negligence.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

Dated: March 14, 2012

By: s/Peter A. Koller
Peter A. Koller (#150459)
John K. Rossman (#244831)
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 877-5000
kollerp@ moss-barnett.com
rossmanj@moss-barnett.com

Attorneys for Defendant

1956105v3