

STATE OF MICHIGAN
COURT OF APPEALS

SHELDON FUTERNICK,

Plaintiff-Appellant,

v

SUMPTER TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

December 21, 2001

No. 225078

Wayne Circuit Court

LC No. 98-840662-CZ

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant. We affirm.

This case is one of several state and federal actions filed by plaintiff in an effort to compel defendant to construct a sewer line to his property known as Holiday Woods Mobile Home Park ("Holiday Woods"). Plaintiff entered into a settlement agreement with defendant in connection with a 1993 federal action, which, in part, required that a sewer line be constructed from proceeds of an initial bond sale to another property owned by plaintiff, known as Holiday West Mobile Home Park. The sewer line to Holiday Woods was to be constructed from proceeds of a second bond sale. It also provided that defendant "shall obtain the second bond sale as quickly as possible."

In 1994, plaintiff filed another federal action to enforce the settlement agreement. Following a bench trial in April 1998, the federal court found that the settlement agreement had not been breached. In December 1998, plaintiff filed the present action in the Wayne Circuit Court to enforce the settlement agreement and seek monetary and injunctive relief, while at the

same time pursuing an appeal in federal court in the 1994 federal action.¹ The trial court in this case denied plaintiff's request for injunctive relief, without prejudice, relative to a sewer line sought by the owner of another mobile home park, Rawsonville Woods Mobile Home Park (Rawsonville Woods). The trial court later granted summary disposition in favor of defendant with regard to certain issues under MCR 2.116(C)(7) (claim barred by res judicata) and under MCR 2.116(C)(10) with respect to an issue concerning whether defendant's financial condition had improved subsequent to the district court's findings in the 1994 federal action, so as to require the bond sale for the construction of the sewer line to Holiday Woods. Plaintiff's motion for rehearing or reconsideration was denied.

On appeal, plaintiff raises several claims relating to the trial court's grant of defendant's motion for summary disposition and the court's subsequent denial of plaintiff's motion for reconsideration. We review the trial court's decision to grant summary disposition under MCR 2.116(C)(7) and (10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the trial court's decision denying plaintiff's motion for reconsideration for an abuse of discretion. MCR 2.119(F)(3); *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000). Having considered plaintiff's various arguments in light of these standards, we conclude that plaintiff has not established any basis for appellate relief.

With regard to the trial court's application of res judicata, plaintiff asserts that he was not attempting to relitigate "settled points" from the 1994 federal action in the present case. Under the broad doctrine of res judicata, however, plaintiff was barred from litigating "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Hence, relitigation would be precluded by res judicata if the settlement agreement was breached based on events preceding the federal court's findings.

Plaintiff also asserts that he wanted the trial court to consider defendant's ability to sell bonds and build a sewer subsequent to the trial in the 1994 federal action. We find, however, that the record does not support plaintiff's position that the trial court declined to consider whether the settlement agreement was breached based on events occurring after the 1994 trial in the federal action. Rather, the trial court found that it was bound by certain rulings in the 1994 federal action and, in particular, rulings made by the district court concerning the manner in which defendant could be compelled to finance the bond sale and the design for the Phase II sewer route. The doctrine of collateral estoppel bars "relitigation of an issue in a subsequent,

¹ Plaintiff's appeal in the 1994 federal action was decided while this appeal was pending. The federal Sixth Circuit dismissed plaintiff's appeal from the April 14 and May 6, 1998, judgments, and affirmed the district court's denial of post-judgment relief. *Futernick v Sumpter Twp*, 207 F3d 305 (CA 6, 2000). Although the Sixth Circuit determined that an August 17, 1998, post-judgment order of the district court did not eliminate its prior retention of jurisdiction, we will not consider the impact of this ruling on the instant case because this issue is not presently before us. We note, however, that the trial court in this case, while noting that the issue "may be moot" in light of its grant of summary disposition under MCR 2.116(C)(7) and (10), indicated in its order granting summary disposition that, "[s]ince the federal court has jurisdiction over the issue of funding, the action in this Court may be subject to summary disposition under the provisions of MCR 2.116(C)(6)"

different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

Although the trial court here incorrectly relied on res judicata as the applicable doctrine for barring relitigation of certain issues decided by the district court, rather than collateral estoppel, this error affords no basis for relief from the order granting summary disposition under MCR 2.116(C)(7), because the right result was reached. See *D’Ambrosio v McCreedy*, 225 Mich App 90, 96, n 3; 570 NW2d 797 (1997). We conclude that plaintiff has not established any basis for relitigating issues concerning the manner in which defendant may be compelled to finance the bond sale and the design for the Phase II sewer route. In reaching this conclusion, we decline to consider plaintiff’s claim that defendant waived its argument regarding the design of the Phase II sewer route as a result of its negotiations in the Rawsonville Woods matter, given plaintiff’s failure to support his waiver argument with citation to supporting authority. See *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984). In any event, for reasons hereinafter discussed, the trial court’s order denying plaintiff’s second motion for injunctive relief is dispositive of his various claims regarding defendant’s negotiations with Rawsonville Woods.

Giving due regard to the issues or claims that plaintiff may not relitigate because of res judicata and collateral estoppel, we have also considered plaintiff’s various arguments concerning his claim that the settlement agreement was breached and, in particular, the trial court’s determination that no genuine issue of fact existed with regard to whether defendant’s financial condition had so improved that it could issue bonds. Having reviewed de novo the substantively admissible evidence upon which the motion for summary disposition was decided, we are unpersuaded that plaintiff has demonstrated a genuine issue of material fact for trial. See MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Nor are we persuaded that summary disposition should have been granted in plaintiff’s favor. See MCR 2.116(I)(2).

We note, in particular, that plaintiff’s affidavit from a proposed expert in opposition to the motion for summary disposition does not show that summary disposition was improper. Plaintiff has not shown that expert testimony was necessary or that his proposed expert’s affidavit was adequate to create a genuine issue of material fact. See, generally, MRE 702; *People v Peterson*, 450 Mich 349, 362-363; 537 NW2d 857, amended 450 Mich 1212 (1995); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989).

We are also unpersuaded that the trial court erred in using the audited reports for the fiscal years ending March 31, 1998, and March 31, 1999, to determine if there was a genuine issue of material fact regarding defendant’s financial condition. We find no record support for plaintiff’s position that the trial court speculated that defendant’s financial condition would not change after March 31, 1999. Rather, the record reflects that the trial court determined that a full fiscal year of financial information was relevant for purposes of evaluating whether there was factual support for plaintiff’s claim. At the hearing on plaintiff’s motion for summary disposition, the trial court observed:

THE COURT: -- Mr. Plunkett [plaintiff's attorney], your client could say now he could bring a lawsuit every single month saying that financial condition has changed. . [sic]

MR. PLUNKETT: I understand.

THE COURT: --There has to be a period of time. I don't know what the rest of the year is going to be. That would be a speculation. As far as doing a half a year finances would not be relevant because you don't know what the full year financial report is going to be. I am going to rely on the 1999 report and 97 98 report.

We conclude that plaintiff has not established any basis for disturbing the trial court's determination of relevancy when deciding the motion for summary disposition with respect to the cause of action pleaded in plaintiff's December 1998 complaint.

We also reject plaintiff's claim that the motion for summary disposition was premature because discovery was incomplete. Summary disposition is proper when further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 567; 618 NW2d 23 (2000), quoting *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). In the case at bar, the record reveals that the trial court was aware of plaintiff's outstanding discovery requests when ruling on defendant's motion for summary disposition, but found that further discovery was not necessary. Having reviewed de novo the record upon which the motion for summary disposition was decided under MCR 2.116(C)(10), we conclude that plaintiff has not established that further discovery had a fair chance of uncovering factual support for his position and, hence, affirm the trial court's order to grant defendant's motion for summary disposition. See *Maiden, supra*. Moreover, having considered the additional proofs filed by plaintiff in support of his motion for rehearing or reconsideration, we hold that plaintiff's arguments present no basis for finding that the trial court abused its discretion in denying that motion. See *Kokx, supra*.

In reaching this conclusion, we decline to consider plaintiff's claim that the trial court erred by granting summary disposition without considering a claim that "obstacles" were placed to prevent the sale of bonds, given plaintiff's cursory treatment of this claim and failure to cite any factual support for his position that an "obstacles" argument was presented to the trial court in opposition to the motion for summary disposition. See, generally, *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) (a party may not leave it to this Court to search for a factual basis to sustain or reject a position); *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987) (this Court may decline to address an issue that is given only cursory treatment, with little or no citation to supporting authority). We further find it unnecessary to address plaintiff's claims concerning whether pending litigation prevented defendant from issuing bonds, given the trial court's ruling that this issue was moot. See, generally, *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

The remaining issue raised by plaintiff that merits our consideration concerns plaintiff's various arguments relating to the Rawsonville Woods matter. We conclude that the trial court's ruling to deny plaintiff's second motion for injunctive relief is dispositive of this matter.

Given the record evidence that the objective of plaintiff's motion was to go beyond maintaining the status quo pending a final hearing concerning rights under the settlement agreement, we conclude that plaintiff's reliance on the standards for issuing a preliminary injunction are misplaced. See *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998). In any event, a trial court's grant or denial of injunctive relief will not be disturbed on appeal absent an abuse of discretion. *Nicholas v Meridan Charter Twp Bd*, 239 Mich App 525, 534; 609 NW2d 574 (2000). "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Id.* at 533-534.

Here, the trial court fashioned a discovery remedy as part of its decision to deny injunctive relief, without prejudice, by including the following requirement in its order:

Defendant's counsel notify Plaintiff's counsel, within three (3) business days after execution of any contract between Sumpter Township and any person or entity on behalf of Rawsonville Woods Mobile Estates mobile home park related to the financing, construction or other aspects of a proposal to build a sewer to Rawsonville Mobile Home Estates mobile home park in Sumpter Township.

Examined in this context, plaintiff has not demonstrated that the trial court abused its discretion in denying injunctive relief. An irreparable injury "must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998). By waiting to see what type of contract, if any, is executed, the trial court's ruling affords a factual basis for determining whether real and imminent danger of irreparable injury might exist, such that enforcement of a contract between Rawsonville Woods and defendant should be enjoined.²

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen

² We note that plaintiff was also denied injunctive relief relative to the Rawsonville Woods matter in the 1994 federal action, but that this was not dispositive of the trial court's order denying the second motion for injunctive relief.