

STATE OF MICHIGAN
COURT OF APPEALS

ARMEN BOLADIAN, BRIDGEPORT MUSIC,
INC., SOUTHFIELD MUSIC, INC., NINE
RECORDS, INC., and WESTBOUND
RECORDS, INC.,

UNPUBLISHED
November 22, 2005

Plaintiffs/Counterdefendants-
Appellees/Cross-Appellants,

v

GEORGE CLINTON, MALBIZ MUSIC, INC.,
and OCCUPANTS OF 839 KNAPP HIGHWAY,

No. 261746
Lenawee Circuit Court
LC No. 96-007197-CK

Defendants/Counterplaintiffs-
Appellants/Cross-Appellees.

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

In this landlord-tenant dispute involving a Lenawee County farm located at 839 Knapp Highway near Brooklyn, defendants George Clinton, a composer and musician, his corporate entity Malbiz Music, Inc., and the cotenants of the farm (collectively, Clinton) appeal as of right from the trial court's order granting plaintiffs summary disposition of defendants' countercomplaint on the basis of laches. The counterclaims essentially alleged that plaintiffs Armen Boladian, with whom defendant Clinton had a longstanding business relationship, and the corporate entities formed by Boladian for conducting business, Bridgeport Music, Inc., Southfield Music, Inc., Nine Records, Inc. (collectively, Boladian), and Westbound Records, Inc., breached various agreements of the parties and fraudulently claimed ownership of title to the farm and large amounts of royalties earned by Clinton.

Boladian's cross appeal similarly challenges the trial court's summary disposition order, which also dismissed on the basis of laches Boladian's second amended complaint seeking unpaid rent and alleging defamation by Clinton. We affirm in part, reverse in part, and remand.

I. Basic Facts And Procedural History

On May 24, 1996, Boladian commenced a landlord-tenant summary possession action in Lenawee District Court 2-1 against Clinton and "[a]ll occupants of 839 Knapp Highway [in] Brooklyn, Michigan." Boladian alleged that he owned the farm and that Clinton occupied the farm but had not paid rent since 1985. According to Boladian, Clinton, who owed unpaid rent

totaling \$1,117,000, had ignored repeated “Notices to Quit and a Demand for Possession.” Boladian requested that the district court evict Clinton from the farm and enter judgment against him in the amount of the unpaid rent.

In November 1996, after a two-day summary possession trial, the district court entered a judgment, finding that “plaintiff has a right to possession” and ordering Clinton and any cotenants off the farm. In February 1997, Clinton appealed the district court’s judgment to the circuit court. On May 20, 1997, the circuit court entered an “[o]rder denying appeal and affirming district court judgment,” which Clinton did not further appeal.

Proceedings then continued in the circuit court concerning Boladian’s claim for unpaid rent, which the district court had transferred to the circuit court. Boladian filed a motion for summary disposition premised on collateral estoppel, and the court granted the motion. The court explained that in the prior possession proceeding, it already had made findings that “the lease was valid, . . . there was no oral contract, and that that was [Clinton’s] signature on the lease, and that . . . [Boladian] was the owner of the property,” as well as that Boladian had provided Clinton proper notices to quit. On November 18, 1997, the circuit court entered a judgment for Boladian in the amount of \$1,193,500.

Clinton appealed to this Court, which dismissed the appeal for lack of jurisdiction because the circuit court had not entered a final judgment at the time Clinton filed his claim of appeal.¹ In December 1998, Clinton filed a delayed application for leave to appeal, which this Court granted.² In February 2001, this Court held that the circuit court erred in granting Boladian summary disposition concerning the issue of monetary damages.³ This Court explained:

Prior to bifurcation, defendant filed affirmative defenses, including one that stated that there was an oral agreement under which plaintiff advanced money to pay the land contract vendor on behalf of defendant and plaintiff was to be paid from royalties. Plaintiff moved to strike this affirmative defense, along with the others, arguing that it was outside the scope of the district court’s jurisdiction. The district court granted the motion and the affirmative defenses were stricken.

The issue that appears to have been argued in the district court was that the royalty payments were intended to serve as a purchase price for the property. Plaintiff argued alternate grounds for rejecting defendant’s purchase argument, both that the oral agreement did not exist and that a written agreement was necessary to meet the statute of frauds. The district court did not necessarily

¹ *Boladian v Clinton*, unpublished order of the Court of Appeals, entered November 2, 1998 (Docket No. 208256).

² *Boladian v Clinton*, unpublished order of the Court of Appeals, entered June 3, 1999 (Docket No. 216153).

³ *Boladian v Clinton*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2001 (Docket No. 216153).

determine that the oral agreement did not exist. Where the affirmative defenses were stricken in the district court action, plaintiff failed to establish that the issue of rent was actually presented. The trial court erred in granting summary disposition where there was no showing that the issue was actually and necessarily litigated.⁴

This Court reversed the summary disposition order and remanded to the circuit court “for further proceedings consistent with this opinion.”⁵

On remand, Boladian filed two amendments to his initial complaint and Clinton filed an answer to Boladian’s amended complaints and a counter complaint. The counts in the parties’ pleadings, as amended, included breach of contract, fraud, and defamation, among others, premised on the parties’ business relationship from the 1970s to the 1990s. Clinton primarily challenged Boladian’s claim for unpaid rent on the basis that the parties had entered an April 1985 oral agreement pursuant to which Boladian would pay for the farm on Clinton’s behalf using royalties earned by Clinton. The parties also filed several motions for summary disposition based in part on grounds of collateral estoppel, res judicata, and law of the case in light of prior federal actions involving the parties and the district court possession proceedings, as well as the relevant periods of limitation and the statute of frauds. Contentious discovery also occurred over the course of more than three years.

In December 2004, the circuit court held a hearing to address the parties’ motions for summary disposition. Early during the hearing, the circuit court expressed its view in light of the case history and the parties’ many briefs.

I can tell you where I’m leaning to. I can summarize what I have looked at here.

* * *

And I know there is a lot more to it than what I will probably summarize perhaps. But from what you folks provided for me for the history of this thing, Mr. Clinton entered a land contract with the Sinacolas for the purchase of this farm for \$450,000. That occurred back on October 10th of 1980, if I am not mistaken. On May 10th of 1984 they foreclosed on the land contract and got a judgment against Mr. Clinton for that property. On July the 13th of 1984 Mr. Clinton filed for Chapter 7 bankruptcy and he listed the farm and its foreclosure in the bankruptcy.

The bankruptcy discharge was July 30th of 1985. There were agreements and addendums that were entered into on 3/4 of ’82. There is a writer’s agreement and an addendum on 12/2 of ’83. There was a preliminary joint

⁴*Id.*, slip op at 2.

⁵ *Id.*

venture agreement on 12/2 of '83. And again he filed for bankruptcy on 7/13 of '84.

The Florida case was filed in 1999. That was after the action was filed here. The judgment in the Florida case occurred on January 30th, 2001. Mr. Boladian entered into a land contract with the Sinacolas to purchase the property for \$425,000 and that occurred on April 1st of '85.

On April the 4th of 1985, three days later, Mr. Clinton signed a lease agreement with Mr. Boladian for \$8,500 a month. The lease term was April 1st, of 1985 to April the 1st of 1989. At that time he paid \$5,000.

The lease provided that anything after would turn into a month to month lease. On the very same day as the lease agreement Mr. Clinton and Bridgeport Music by Mr. Boladian signed an exclusive song writer's agreement and addendum, an exclusive executive production action agreement between Mr. Clinton and [Nine] [R]ecords also by Mr. Boladian, all of this to be paid to [sic] by Mr. Clinton for the exclusive song writer's agreement or agreed to be paid to Bridgeport Music instead of Mr. Clinton for a valuable consideration which was not specified in the agreement. Okay.

And there is where the problem starts. That was done after the bankruptcy was filed. It took care of all the other matters but not this matter.

So Mr. Boladian then filed a complaint on May the 22nd of '96 for possession of the farm and unpaid rent in Lenawee County District Court, some 11 years and five months after this agreement for lease was entered into and this agreement between Clinton and Bridgeport was entered into.

Mr. Clinton would have [the court] believe that the agreement which paid all of his royalties and production and so forth was to be applied to the rent and in fact was to be used to pay for the purchase of that property.

Mr. Boladian allowed Mr. Clinton to live there for 11 years and five months without collecting one dime of rent. Okay.

The court of appeals [sic] remanded this matter back on —They made their decision to remand it back in February of 2001. And here is what I think I am left to determine: If in fact there was an oral agreement, which there certainly is. When you look at the sequence of events on the same day after the bankruptcy and the \$8,500 a month lease was entered into, an agreement which turned over everything he had for a valuable consideration, which was not mentioned by anybody certainly would have been helpful at the time—If it had we probably wouldn't be here today—was entered into. And was the agreement to pay for the rent? Was the agreement to pay for the purchase price of this land?

Remember this is in 1985. Okay. And what all of you would like to have this court . . . decide is what took place 19 years ago, having basically done nothing for 11 and a half years, either one of you to enforce your rights. Okay.

Mr. Boladian would like to have a million some odd dollars in back rent. Mr. Clinton would like to have the court say that this property is his. Okay. And it is my opinion that you both slept on your rights and that the doctrine of laches applies and there should be no rent and there should be no land. And that's what I'm going to rule.

* * *

No rent owed to Mr. Boladian because he slept on his rights. The doctrine of laches apply [sic]. When you leave somebody stay on your property for 11 and a half years and do nothing to enforce your rights you get nothing.

And when you claim that the property is yours and you sleep on your rights for 11 and a half years, you get nothing.

* * *

I have in this case, I think, you will agree have given you extremely wide latitude when it comes to discovery to go through all of these issues. And as a result I have all this. And I have done my best to distill this down to what has transpired here.

And what it is is fairly simple. I don't think Mr. Boladian is owed any rent because he slept on his rights for a long time. And I don't think Mr. Clinton is owed that property because he slept on his rights for a long long time.

The circuit court acknowledged that some questions of fact existed, including with respect to the existence and nature of the alleged oral agreement between Clinton and Boladian, but reiterated that Clinton could not proceed because "he has done nothing to protect his rights."

The circuit court next rejected the following contention of Clinton that questions of fact existed concerning the applicability of laches:

Defense counsel: It is with respect to that specific issue of waiver of [sic] laches that I believe there are still questions of fact before Your Honor.

Let me briefly describe what I think they are. We have a [sic] 1985, as the Court noted, all of these agreements being signed. If we accept . . . Clinton's contention that the oral agreement was that royalties generated from Mr. Clinton's works . . . were to be applied towards the purchase of the property and \$100,000 and whatever amounts were otherwise owed to Armen Boladian and his companies, there is a question of fact as to when that oral contract would have been breached. Because there was never an understanding that Mr. Boladian was instantly going to convey title in 1985. The understanding was that over a period of time royalties would be generated. And after that then Mr. Clinton would be entitled to receive title to the property.

We contend that millions of dollars in fact were generated. But as the court is well aware we have tried like the dickens to get an accounting and get the

financial records from Mr. Boladian to show when the funds were generated and what they are offset against.

The Court: These are funds that your client paid income taxes on, I take it?

Defense counsel: No.

The Court: That's correct.

Defense counsel: Because they were going to Mr. Boladian per the agreement. And so—

The Court: If they were going to Mr. Boladian per the agreement and they were payment for land on the land contract your client would owe income taxes on that.

Counsel, you better be careful about what you are representing on behalf of your client. If that's the claim that you are making the Internal Revenue Service may come back and decide that he owes taxes on millions of dollars.

The problem here, Counsel, is nobody has done anything. He hasn't placed a lien on that real estate. He hasn't filed a memorandum of a land contract or an agreement. He didn't file a copy of this agreement that he had with the plaintiff in this case with the registrar [sic] of deeds as a representation of the land contract to protect that property. Mr. Boladian hasn't done a thing to collect the rent.

Now, all of these representations you could be correct. All I'm telling you is that the doctrine of laches applies because neither party did anything to protect their rights. And now you come to this court 11 and a half years later and ask me to protect your rights. And I will not do it because you haven't protected your own rights.

* * *

What I'm saying, though, is that I don't believe that this court should have to determine these [unresolved, underlying] issues [of fact]; that it shouldn't be a question of fact for a jury when both parties haven't done anything for 11 and a half years. How do you expect a jury or anybody else to try to make a determination of what your intent was 11 and a half years ago when you have done nothing to show it?

On March 10, 2005, the circuit court entered an order dismissing Boladian's claims and Clinton's counterclaims on the basis of laches. The order of dismissal further noted that

“Clinton’s challenges to the pre-1984 contracts are dismissed because those contracts were adjudicated in Clinton’s bankruptcy, and Clinton does not now claim otherwise.”⁶

II. Laches

A. Standard Of Review

The parties here challenge the circuit court’s reliance on laches as the basis for dismissing their claims. Clinton contends that the circuit court (1) violated his due process rights by raising the issue of laches for the first time at the December 2004 hearing, which did not afford him adequate time to argue or present evidence contrary to the court’s ruling, and (2) neglected to find that Clinton’s lack of due diligence prejudiced Boladian. Boladian suggests that Clinton had waived the defense of laches by failing to raise it in his district court answer to the original complaint.

When reviewing a trial court’s decision premised on an equitable doctrine like laches, we consider de novo the trial court’s ultimate application of the equitable doctrine but review for clear error the findings of fact supporting the trial court’s ruling.⁷ We also review de novo a trial court’s summary disposition ruling.⁸

B. Raising The Defense Of Laches

A party may raise the equitable defense of laches to:

remedy “the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.” It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.⁹

“It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.”¹⁰ “Whether laches applies depends on the facts of the particular case.”¹¹

⁶ The order also set forth the various issues concerning which questions of fact existed, assuming that “the Doctrine of Laches did not apply.”

⁷ *Shelby Charter Twp v Papesh*, 267 Mich App 92, 108; 704 NW2d 92 (2005).

⁸ *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

⁹ *Dep’t of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996) (citations omitted).

¹⁰ *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004) (quotations omitted).

¹¹ *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 494; 608 NW2d 531 (2000).

C. The Circuit Court's Application Of The Doctrine Of Laches

Clinton incorrectly suggests that, at the December 2004 hearing, the circuit court sua sponte introduced the doctrine of laches as a potential basis for summary disposition. Boladian expressly set forth laches as an affirmative defense to Clinton's countercomplaint. Thus, Clinton had notice that Boladian asserted laches as a defense to the countercomplaint.¹²

Further, Clinton had a reasonable opportunity to argue against the propriety of summary disposition of the countercomplaint premised on laches. We initially note that the parties did not dispute the timing of the several underlying agreements, the date that Clinton began occupying the farm, or that for many years Clinton neglected to submit to Boladian any rent payments or pay property taxes on the farm. The voluminous files attest that the parties had ample opportunity to file many briefs and responses regarding other potential grounds for summary disposition, including the timeliness of their various claims for relief. At the December 2004 summary disposition hearing, the circuit court permitted the parties to address the question of laches. Defense counsel took advantage of the opportunity to argue that questions of fact existed concerning Clinton's diligence in seeking an accounting of the royalties paid toward satisfaction of the alleged oral agreement that Boladian would convey the farm to Clinton. Between the December 17, 2004, hearing and the March 10, 2005 entry of the circuit court's order granting summary disposition, as well as during the subsequent 14-day period for filing a motion for reconsideration,¹³ Clinton had further opportunities, which he did not exercise, to proffer argument or evidence showing that the circuit court erred by granting summary disposition. Under these circumstances, we conclude that Clinton had notice and an adequate opportunity to be heard with respect to the applicability of laches.

Regarding the soundness of the circuit court's invocation of laches under the circumstances of this case, the court correctly observed that between April 1985 and 1996, Clinton never initiated any overt, public action to assert or protect his alleged ownership interest in the farm, which was contrary to the written lease agreement with Boladian. But even assuming that the circuit court properly found that Clinton did not act with due diligence to protect his interest in the farm, the record does not substantiate that the court considered the requisite *prejudice* element of the laches doctrine.¹⁴ The transcript of the summary disposition hearing and the order of dismissal fail to disclose that the circuit court ever connected Clinton's lack of due diligence with any harm or prejudice to Boladian. We conclude that the circuit court impermissibly failed to find the mandatory prerequisite to applying the doctrine of laches, that Clinton's lack of due diligence caused Boladian prejudice.¹⁵

¹² But cf. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 85-86; 492 NW2d 460 (1992) (reversing a trial court's grant of summary disposition because the court had "raised the issues sua sponte on grounds not raised either in the pleadings or in defendants' previously denied motion for summary disposition.") (emphasis added).

¹³ MCR 2.119(F)(1).

¹⁴ See *Rivergate Manor*, *supra* at 507.

¹⁵ See *Yankee Springs Twp*, *supra* at 612; *City of Jackson*, *supra* at 494.

Turning to Boladian's contention that the circuit court erred by dismissing his claim for unpaid rent on the basis of laches, we conclude that Boladian incorrectly suggests that Clinton waived this defense. Clinton did not specifically mention the concept of laches in his original answer to the complaint, from which the district court struck his affirmative defenses. But after this Court remanded the rent claim to the circuit court and Boladian amended his complaint, Clinton filed an answer to the amended complaint that expressly set forth the affirmative defense that "[a]ll or a portion of Plaintiffs' claims are barred by the doctrine of laches."

MCR 2.111(F)(3) contains the following relevant requirement for pleading affirmative defenses:

Affirmative defenses must be stated in a party's responsive pleading, *either as originally filed or as amended in accordance with MCR 2.118* [Emphasis added.]

The pertinent portion of MCR 2.118(A), in turn, states as follows:

(4) Amendments must be filed in writing, dated, and numbered consecutively, and must comply with MCR 2.113. Unless otherwise indicated, *an amended pleading supersedes the former pleading.* [Emphasis added.]

Clinton's inclusion of laches as an affirmative defense in his answer to the amended complaint thus satisfied the plain language of MCR 2.111(F)(3) and, pursuant to MCR 2.118(A)(4), the filing of the amended answer containing the affirmative defense of laches superseded the original answer.¹⁶ Because Clinton included the affirmative defense of laches in his answer to the amended complaint, he did not waive laches as an affirmative defense under MCR 2.111(F)(2).

Boladian does not otherwise challenge the merits of the circuit court's conclusion that laches precluded the claim for unpaid rent. Nonetheless, after reviewing the transcript of the December 2004 summary disposition hearing and the circuit court's March 2005 order of dismissal, we find it clear that the circuit court incorrectly granted summary disposition of the claim for unpaid rent on the basis of laches. Even assuming that Boladian failed to act with due diligence in seeking rent money from Clinton between 1985 and 1996,¹⁷ the circuit court completely neglected to find that this lack of due diligence resulted in *prejudice* to Clinton.¹⁸

¹⁶ *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000); see also *Grzesick v Cepela*, 237 Mich App 554, 562-563; 603 NW2d 809 (1999) (noting that "[b]y its express terms, MCR 2.111(F)(3) must be read in conjunction with MCR 2.118(A)(4)").

¹⁷ At the summary disposition hearing, Boladian's counsel asserted that between 1986 and 1990, Boladian had sent Clinton "seven or eight letters . . . asking for the payment of rent."

¹⁸ *Yankee Springs Twp, supra* at 612; *City of Jackson, supra* at 494.

D. Other Arguments

Boladian suggests on cross appeal that we could affirm the circuit court's dismissal of the countercomplaint on one of the alternate grounds alleged in support of summary disposition, specifically the claim-preclusion doctrines, the periods of limitation, and the statute of frauds. Although none of these issues qualify as preserved for appellate review, given that the circuit court did not address them, we have the discretion to consider unpreserved questions of law when the relevant facts necessary for their resolution appear in the record.¹⁹ Because each side has briefed its respective positions regarding summary disposition of the opposing parties' claims pursuant to MCR 2.116(C)(7), and have submitted voluminous documentary evidence in support of its positions, we are able to review the record de novo and make the following dispositions as a matter of law.

1. Boladian's Claims

In Counts II and IV of Boladian's original complaint, he seeks to recover sums due for Clinton's alleged breaches of the April 1985 lease agreement and for his failure to pay anything during the post-lease period of month-to-month tenancies, which stemmed from the April 1985 lease agreement. We conclude, however, that Boladian is precluded from recovering unpaid rent due more than six years before he filed the original complaint on May 24, 1996.²⁰ To the extent the remaining unpaid rent claims are not barred by laches, they remain viable and the circuit court should further address them.

With respect to Count V of the first amended complaint, which alleges that Clinton defamed Boladian in a VH-1 cablecast on September 2, 1999, Boladian first asserted this claim on July 6, 2001, more than one year after the alleged defamation occurred. Thus, we conclude that Count V is time-barred.²¹

Concerning Count VI, which alleges that Clinton breached a July 1990 loan agreement. Clinton failed to pay any money by the repayment date in mid-January 1991, breaching the agreement. Thus, Boladian should have filed suit within six years, i.e., January 1997.²² Boladian waited to raise this claim, however, until July 6, 2001, more than four years after the period of limitation expired. Thus, we conclude that Count VI is time-barred. Similarly, related Count VII, in which Boladian maintains that Clinton fraudulently pledged, as collateral for the July 1990 loan, master tapes that he did not own, is also barred by a six-year period of limitation.²³

¹⁹ *Bertrand v Mackinac Island*, 256 Mich App 13, 21; 662 NW2d 77 (2003).

²⁰ MCL 600.5807(8); MCL 600.5813.

²¹ MCL 600.5805(9).

²² MCL 600.5807(8).

²³ *Boyle v Gen Motors Corp*, 468 Mich 226, 228-232; 661 NW2d 557 (2003), citing MCL 600.5813 and MCL 600.5827.

With respect to Count VIII alleging that, at some unspecified time, Clinton breached an August 31, 1971 agreement of five-year duration between Bridgeport, Clinton, and Malbiz by writing songs for third parties, we conclude that this claim also falls well outside the six-year period of limitation applicable to contract-based claims.²⁴

Regarding Count IX, which complains that Clinton breached a December 2, 1983 songwriter's agreement between Bridgeport and Clinton by composing for third parties or assigning song rights to third parties, MCL 600.5807(8) once again bars Boladian from raising these allegations because the writer's agreement set forth a term of five years with two potential one-year extensions, and Clinton's unspecified breach thus must have occurred at the latest by December 1990. Thus, Count IX, filed in July 2001, is time-barred.

Concerning Count X, which alleges that Clinton breached an April 4, 1985 "Exclusive Songwriter's Agreement" between Bridgeport and Clinton by composing songs for other entities, this claim likewise is barred by the six-year period of limitation applicable to contract-based actions. The April 1985 exclusive songwriter's agreement had a term of five years, with two potential one-year extensions, and Clinton's breach thus must have occurred by April 1992.

With respect to Count XI, which avers that Clinton tortiously interfered with an April 4, 1985 "Exclusive Executive Production Agreement" between Nine Records, Clinton, and Egmitt (another Clinton entity) by causing Egmitt to obtain production services from third parties, this claim is also time-barred.²⁵ The production agreement provided that it would apply for an initial term of five years and gave Nine Records an option to extend the contract period for another five-year term. Clinton's tortious interference thus must have occurred by April 1995, and Boladian had three years thereafter to bring this claim, but failed to raise it until July 2001.

Regarding Count XII, which asserts that "[p]rior to entering into the Addendum dated December 2, 1983," Clinton fraudulently suggested that he or Malbiz owned "certain copyrights that had not already been assigned to Bridgeport," this claim is also time-barred. If Clinton committed fraud by December 1983, the six-year period of limitation applicable to fraud would have expired by early December 1989,²⁶ and Boladian's failed to raise this fraud allegation until July 2001.

Concerning Counts XIII through XVIII added by the second amended complaint, all of these counts (defamation, invasion of privacy, infliction of emotional distress, conspiracy and unjust enrichment) derive from alleged threats to and disparagement of Boladian in the song "Speed Dreamin,'" which Clinton performed with Warren G and which was published in December 2001. We conclude that collateral estoppel precludes Boladian from relitigating these issues against Clinton because Boladian already unsuccessfully litigated in federal court identical

²⁴ MCL 600.5807(8).

²⁵ *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 253-254; 673 NW2d 805 (2003), citing MCL 600.5805(10).

²⁶ MCL 600.5813.

allegations premised on the “Speed Dreamin’” lyrics against Warren G and several corporate defendants.²⁷

2. Clinton’s Counterclaims

In Count I of the countercomplaint, Clinton alleges that Boladian committed fraud by falsely representing in 1985 that he would pay Clinton’s debt on the farm.²⁸ “Under MCL 600.5827 a [fraud] claim accrues when the wrong is done,” and “[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted.”²⁹ Because a six-year period of limitation governs fraud actions³⁰ and because Clinton filed his fraud counterclaim on July 30, 2001, any fraud that accrued before late July 1995 is time-barred. Given that Clinton does not supply specific time frames in which he allegedly suffered damage caused by Boladian’s promise, and no indication exists that any such damage occurred after July 1995, we find Count I time-barred.

With respect to Count II, which asserts that Boladian committed fraud by either forging Clinton’s signature on the April 1985 lease or by misrepresenting the nature of the lease when Clinton signed it, the period of limitation in MCL 600.5813 likewise bars this claim. Clinton raised the fraud claim in July 2001, 16 years after the alleged acts of fraud occurred, and he once again fails to set forth any fraud-induced reliance on or injury to him that occurred after late June 1995, within six years of the time that he filed the countercomplaint. Additionally, despite Clinton’s testimony in the 1996 summary possession proceeding that he either never signed the April 1995 lease, or did not knowingly sign the lease, the district court specifically found “that the Lease dated April 4, 1985 is valid and was signed by the defendant.” Because the parties previously litigated this issue, collateral estoppel also precludes Clinton from raising the fraud claim again as Count II of the countercomplaint.³¹

²⁷ *Boladian v UMG Recordings, Inc.*, 123 Fed Appx 165 (CA 6, 2005); see also *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 677 NW2d 843 (2004) (explaining that a party may defensively assert collateral estoppel to prevent the opposing party from relitigating an issue that that party has already had a full and fair opportunity to litigate in a prior action).

²⁸ Despite Boladian’s argument to the contrary, in the Lenawee District Court 2-1 summary possession action the court did not necessarily hold that no oral agreement or promises existed between Boladian and Clinton; thus, Boladian incorrectly suggests that the law of the case doctrine bars reconsideration of this issue. See *Boladian v Clinton*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2001 (Docket No. 216153), slip op at 2 (expressly finding that the “district court did not necessarily determine that the oral agreement did not exist”). Regarding the existence of an alleged oral promise by Boladian, we fail to see the relevance of Boladian’s additional contention that Clinton did not list his ownership of any songs in his bankruptcy schedule of assets, especially when Boladian allegedly made the promise in 1985, after Clinton had filed for bankruptcy protection.

²⁹ *Boyle*, *supra* at 231 n 5.

³⁰ MCL 600.5813.

³¹ *Monat*, *supra* at 682-684.

Counts III and IV contain alternate grounds for enforcing Boladian's alleged 1985 oral promise that he would use royalties earned by Clinton to pay his debt on the farm, thus saving Clinton's title: breach of contract (Count III) and promissory estoppel (Count IV).³² Yet it has not been definitively determined whether any oral agreement existed. This Court held that the district court had not necessarily determined the existence of the oral agreement.³³ And although the circuit court at the December 2004 summary disposition hearing expressed its belief that Boladian and Clinton had made some oral agreement around the time of the April 1985 lease and the other April 1985 written agreements, the circuit court did not enter an order specifically finding that an oral agreement did exist and neglected to say what specific terms an oral agreement might contain. Because the parties continue to dispute the existence of the oral agreement and because the record does not delineate the scope of the oral agreement, we remand these factual matters to the circuit court for further consideration to the extent necessary for a resolution of this issue under the doctrine of the statute of frauds or the statute of limitation.^{34, 35}

Count V, in which Clinton characterizes as unconscionable the March 1982 agreement, the December 1983 addendum to the March 1982 agreement, the December 1983 writer's agreement, a December 1983 addendum to the writer's agreement, the April 1985 lease agreement, and the April 1985 exclusive songwriter's agreement and a rider thereto, is time-barred. When considering the alleged unconscionability of contract provisions, courts look to the circumstances surrounding the making of the contract, including the contract's terms at the time of execution.³⁶ Because Clinton waited until July 2001 to raise the claims of unconscionability, more than 16 years after the parties entered the most recent agreement that Clinton characterizes as unconscionable, he has untimely filed these claims.^{37, 38}

³² Contrary to Boladian's contention, the United States District Court for the Northern District of Florida did not address the parties' entire business relationship, or whether the parties entered an oral agreement in 1985. Therefore, collateral estoppel does not bar Count III and Count IV of the countercomplaint. *Monat, supra* at 682-684. Nor does the Florida district court's judgment operate as res judicata to bar Count III and Count IV because the alleged 1985 oral agreement in this case did not arise from the same transaction or events that formed the basis for Clinton's complaint in the federal action, i.e., the parties' pre-1985 recording-related contracts; the federal action involved no issue concerning the farm in Michigan, and no agreement of the parties even incidentally related to the farm. See *McKane v Lansing*, 244 Mich App 462, 466; 625 NW2d 796 (2001).

³³ See footnote 28, *supra*.

³⁴ We reiterate that such fact-finding will be unnecessary if the trial court is able to substantiate a dismissal based on laches.

³⁵ We need not separately consider Count VI, entitled "Setoff," because its viability depends on the existence of the alleged 1985 oral agreement.

³⁶ *Clark v DaimlerChrysler Corp*, ___ Mich App ___, ___ NW2d ___ (Docket No. 252765, issued September 13, 2005), slip op at 3; *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481-482; 578 NW2d 701 (1998).

³⁷ MCL 600.5807(8); MCL 600.5813.

III. Conclusion

We reverse the circuit court's March 10, 2005 order of dismissal on the basis of laches, and remand for (1) the circuit court to make further findings regarding the potential applicability of laches, or (2) further proceedings to address (a) the amounts of unpaid rent that Boladian may be entitled to recover from Clinton under Count II and Count IV of the original complaint, taking into account the applicable period of limitation, and (b) with respect to Clinton's Count III and Count IV, (i) whether an April 1985 oral agreement exists, (ii) the terms of the oral agreement, (iii) whether the period of limitation bars Count III and Count IV, and (iv) whether Boladian should be estopped from asserting the statute of frauds as a defense to the oral agreement. We affirm the circuit court's dismissal of Boladian's Counts V - XVIII and Clinton's countercomplaint Counts I - II and V - VI, albeit pursuant to MCR 2.116(C)(7) (periods of limitation and collateral estoppel).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell

(...continued)

³⁸ Clinton denominated Count V a claim for declaratory relief. Although periods of limitation generally “do not apply to declaratory judgments as such,” periods of limitation do apply “to the claim on which the [declaratory] relief is based.” *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 128; 537 NW2d 596 (1995), quoting *Luckenbach Steamship Co v United States*, 312 F2d 545, 548 (CA 2, 1963).