

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAMS, WILLIAMS, RATTNER &
PLUNKETT, P.C.,

UNPUBLISHED
December 22, 2011

Plaintiff/Counter-Defendant-
Appellee,

v

No. 300122
Washtenaw Circuit Court
LC No. 09-001465-CK

JAY E. KLOIAN,

Defendant/Counter-Plaintiff-
Appellant.

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion for summary disposition of his counterclaim and granting plaintiff's request for voluntary dismissal of its complaint. We affirm.

On December 14, 2009, plaintiff filed a complaint against defendant seeking to recover fees for legal services rendered. Defendant responded, in propria persona, with a counterclaim alleging malpractice, breach of contract, and recoupment claims. On May 14, 2010, plaintiff filed a motion for summary disposition of the counterclaim, arguing that it was time-barred.¹ Defendant did not file a response to the dismissal motion but, on the day of the scheduled hearing, June 9, 2010, filed a motion requesting an adjournment. On that same day, an attorney filed a notice of limited appearance on behalf of defendant related to his request for adjournment. At the hearing on the motion, the circuit court denied defendant's request for an adjournment. Then plaintiff's counsel indicated that, if plaintiff's motion to dismiss defendant's counterclaim was granted, plaintiff would also request the voluntary dismissal of its complaint. The court granted the motion to dismiss defendant's counterclaim based on the statute of limitations, and granted plaintiff's request to voluntarily dismiss its complaint. On June 9, 2010, an order was entered consistent with the court's ruling and the entire matter was dismissed with prejudice.

¹ The proof of service on this motion indicated that defendant was served by mail on May 11, 2010.

Defendant filed a motion for reconsideration, which was denied. On July 1, 2010, defendant filed a motion for disqualification of the circuit court judge. This appeal followed.

Defendant first argues that the court erred by granting plaintiff's request for a voluntary dismissal of its action because the request "was improperly presented as contingent upon granting [plaintiff's] motion for summary judgment." We disagree with defendant's characterization. It is clear from the record that plaintiff was arguing that defendant's claim was barred by the statute of limitations, which expired on March 24, 2007. The court noted, however, that even if the counterclaim was dismissed, defendant could still allege legal malpractice as a defense to plaintiff's claim for fees. Plaintiff's counsel agreed, noting that defendant asserted a recoupment claim which, if successful, would allow defendant to recover the same amount that plaintiff recovered from him. See MCL 600.5823. Thus, plaintiff's counsel indicated that plaintiff would also request the voluntary dismissal of its complaint if defendant's counterclaim was dismissed. Accordingly, contrary to defendant's argument on appeal, the exchange between plaintiff's counsel and the court was not "bargaining" with regard to the dismissal of both the complaint and counterclaim and there was no evidence of illegitimate purpose; thus, this argument is without merit.

We likewise reject defendant's claims that voluntary dismissal was improper because (1) he was not given an opportunity to participate in drafting the dismissal order and (2) his counterclaim "could not have been independently adjudicated." Defendant's arguments are difficult to understand, but we will attempt to address them. First, both the complaint and counterclaim were dismissed following a hearing on plaintiff's motion at which time the court verbalized its decision on these matters. Thus, even if defendant had participated in the drafting of the dismissal order memorializing the court's decision, the result would have been the same—the case would have been dismissed in its entirety. Second, defendant's counterclaim was adjudicated on its merits when the court granted plaintiff's motion for summary disposition on the ground that it was time-barred. See MCR 2.504(B)(3). After defendant's counterclaim was dismissed, then plaintiff's request to voluntarily dismiss its case against defendant was granted. Thus, defendant's arguments are without merit.

Next, defendant argues that the circuit court erred in granting plaintiff's motion for summary disposition because (1) the court lacked jurisdiction, (2) he was not given an opportunity to respond, (3) MCR 2.116 was violated, (4) he was denied the opportunity to conduct discovery, and (5) his counterclaim was not barred by the statute of limitations. We address each argument in turn.

First, defendant argues that the circuit court lacked jurisdiction over this matter because the presiding judge had "previous involvement in the underlying matter" and had a "clear dislike and bias against" defendant; thus, the judge should have been disqualified. We note, however, that defendant's motion to disqualify was untimely filed after the case was dismissed in its entirety; thus, this issue was never decided by the circuit court and is not preserved on appeal. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

In any case, this argument is without merit for several reasons. First, defendant's jurisdictional challenge is unclear and unsupported by citation to apposite legal authority; thus, the issue is abandoned. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750

NW2d 228 (2008). Second, defendant’s claim that the presiding judge’s “previous involvement in the underlying matter” was sufficient to warrant disqualification is unsupported by citation to apposite legal authority; thus, the issue is abandoned. See *id.* Third, defendant’s claim that the presiding judge had a “clear dislike and bias against” him is unclear and unsubstantiated. Bias and prejudice is a ground for disqualification of a presiding judge under MCR 2.003(C)(1)(a). However, “[a] trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption.” *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). It appears that defendant is arguing that the presiding judge’s rulings against him demonstrate such “dislike and bias,” but this claim is rejected.² Judicial rulings against a litigant, even erroneous rulings, generally do not establish bias or prejudice. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Defendant has simply failed to show actual bias or prejudice and has not overcome the presumption of impartiality. See *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003).

Second, defendant argues that he was not given an opportunity to respond to plaintiff’s motion for summary disposition because he was incapacitated; thus, his motion to adjourn should have been granted. Pursuant to MCR 2.503(D)(1), it is within the discretion of the court “to grant an adjournment to promote the cause of justice.” This court reviews for an abuse of discretion the decision on a motion for adjournment. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). The court abuses its discretion when it chooses an outcome that falls “outside the range of principled outcomes.” *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

The proof of service on plaintiff’s motion indicates that the motion was served on defendant by first class mail on May 11, 2010.³ The hearing was scheduled for June 9, 2010. Thus, defendant had 28 days to respond to the motion, prior to the hearing date. Defendant did not, however, respond until the date of the scheduled hearing when he filed a motion requesting its adjournment—through an attorney he retained for that purpose. Defendant attached to his request for adjournment a letter from his physician dated May 28, 2010—17 days after plaintiff’s service of the motion—which indicated defendant’s treatment for high blood pressure “worsened by stress.” Thus, defendant’s physician suggested in the letter that defendant should be “allowed to postpone all legal matters when his blood pressure goes back up, to over 200/100.” The circuit court rejected the suggestion of defendant’s treating physician and concluded that defendant’s alleged “stress” was insufficient to warrant adjournment and would not promote the cause of justice. The court’s denial of defendant’s request for adjournment did not constitute an abuse of its discretion. See *Edry*, 486 Mich at 639.

Third, defendant argues that plaintiff “violated MCR 2.116 by not providing at least 28 days for the hearing on the summary disposition motion.” As detailed above, plaintiff did provide the requisite 28 days notice; thus this claim is without merit. See MCR 2.116(B)(2).

² Defendant states: “The actions of Judge Shelton in this case further demonstrate his bias and prejudice against the Appellant.”

³ The motion was time-stamped by the circuit court on May 14, 2010.

Fourth, defendant argues that he was denied the opportunity to conduct discovery before plaintiff's motion for summary disposition was granted. Generally, summary disposition is premature if granted before discovery on a disputed fact issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). However, when further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position, the granting of summary disposition is proper. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Here, plaintiff's motion for summary disposition alleged that defendant's counterclaim was time-barred. On appeal, defendant argues that he should have been allowed to conduct discovery to support his claims. However, defendant has not set forth how further discovery would have tended to refute the argument that his claims were time-barred. Thus, this claim is without merit.

Fifth, defendant argues that his counterclaim was not barred by the statute of limitations because "MCL 600.5805(6)" allows for tolling for "one (1) year after a disability is removed and clearly a disability was present in this case."⁴ We disagree. Plaintiff had the initial burden to support its claim that summary disposition was proper because the counterclaim was statutorily time-barred. The burden then shifted to defendant to establish that a genuine issue of disputed fact existed as to whether the statute of limitations was tolled. See *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003). Defendant, however, did not respond to plaintiff's motion for summary disposition; thus, defendant did not carry his burden and summary disposition was proper.

In summary, the trial court properly granted plaintiff's motion for summary disposition of defendant's counterclaim and properly granted plaintiff's request to voluntarily dismiss its complaint.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter

⁴ Defendant may be referring to MCL 600.5851 which provides for such tolling.