STATE OF MICHIGAN

COURT OF APPEALS

GILBERT ALMARAZ,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Defendant-Appellee.

UNPUBLISHED
November 5, 1996

No. 173392
LC No. 92-044225-CZ

Before: Saad, P.J., and Corrigan and R.A. Benson,* JJ.

PER CURIAM.

Plaintiff appeals from an order granting summary disposition to defendant Board of Regents on his national origin discrimination and retaliation claims. The trial court ruled that collateral estoppel barred the instant state claims because the same issues had been tried in federal court. We affirm.

Plaintiff asserts that he was discriminated against as a Hispanic student at the University of Michigan Medical School and, as a result of his complaints to various agencies, he was subsequently the victim of retaliation. He filed claims in both state and federal courts against defendant Board of Regents and numerous individual defendants whom he alleged were agents and employees of defendant Board of Regents. After a lengthy procedural history, the following of plaintiff's claims remained: (1) federal court claims against individual defendant Charles Leland, M.D., for equal protection national origin discrimination, and against the other individual defendants for retaliation, and (2) state claims against defendant Board of Regents for national origin discrimination and retaliation.

The federal court claims against all the individual defendants were tried by jury, which returned a verdict of no cause of action. The jury specifically found that Dr. Leland did not discriminate against plaintiff on the basis of national origin, and that the other individual defendants did not retaliate against plaintiff for filing complaints of discrimination. Defendant Board of Regents then moved for summary disposition in state court on the remaining claims against it, arguing that these claims were barred by

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* Circuit judge, sitting on the Court of Appeals by assignment.

collateral estoppel because the issues of discrimination and retaliation had been determined in the federal case. The trial court agreed and granted summary disposition under MCR 2.116(C)(7).

This Court reviews a summary disposition determination de novo as a question of law. When reviewing a motion for summary disposition granted under MCR 2.116(C)(7), this Court must accept plaintiff's well-pleaded allegations as true, and construe them in a light most favorable to plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Florence v Dep't of Social Services*, 215 Mich App 211, 213-214; 544 NW2d 723 (1996). Further, whether a party is collaterally estopped from disputing an issue addressed or admitted in prior proceedings is a legal question that is reviewed de novo on appeal. *Horn v Dep't of* Corrections, 216 Mich App 58, 62; 548 NW2d 660 (1996).

Plaintiff argues that this case is analogous to *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535-536; 442 NW2d 714 (1989), which determined that res judicata did not bar a similar claim. The issue, however, is whether collateral estoppel applies, not res judicata. We also note that the fact that the federal discrimination case was brought under 42 USC §1983, and the state action was brought under the Elliott-Larsen Civil Rights Act, MCL §37.2101 *et seq.*; MSA §3.548(101) *et seq.*, does not preclude use of collateral estoppel as long as the ultimate issues are the same. See *Schlumm v O'Hagan*, 173 Mich App 345, 354; 433 NW2d 839 (1988), lv den 433 Mich 855 (1989); *Knoblauch v Kenyon*, 163 Mich App 712, 719; 415 NW2d 286 (1987); and *In Re Gerber Trust*, 117 Mich App 1; 323 NW2d 567 (1982).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Horn, supra.* Generally, for collateral estoppel to apply, (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, (2) the same parties must have had a full opportunity to litigate the issue, and (3) there must be mutuality of estoppel. *Id*.

To satisfy the first criteria, the ultimate issues in question in the second action must be the same as in the first. *Bullock v Huster*, 209 Mich App 551, 556; 532 NW2d 202 (1995), vacated on other grounds 451 Mich 884 (1996); *Schlumm, supra*. The issues must have been necessarily determined; that is, essential to the resulting judgment in the first action. They must also have been actually litigated, meaning that they were put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact. *Bullock, supra*. Further, the parties must have had a full opportunity to litigate the ultimate issues in the first action. *Bullock, supra; Schlumm, supra*.

There is no dispute that the ultimate questions of national origin discrimination and retaliation decided by the federal court jury in favor of the individual defendants were necessarily determined and actually litigated, and that the parties had a full and fair opportunity to litigate them. However, plaintiff argues that, although the issues of discrimination may be the same in both actions, the standards are different in federal court from state court. Thus, plaintiff contends, the determinations might be different.

First, plaintiff claims that a "mixed motive" case is allowed under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, but in federal court the judge instructed that "if a defendant's decision was motivated by intentional discrimination, the defendant has a valid defense if the defendant proves, by a preponderance of the evidence, that the same decision would have been made in absence of the discriminatory motive." Plaintiff claims that no such defense exists in state civil rights cases. Because plaintiff cites no authority for this position, he has abandoned it on appeal. A party may not leave it to this Court to search for authority to sustain or reject the party's position. *American Transmissions, Inc v Attorney General*, 216 Mich App 119, 120-121; 548 NW2d 665 (1996). Further, the Board cites *Matras v Amoco Oil Co*, 424 Mich 675, 691; 385 NW2d 586 (1986), which states that "if the discharge of Matras would have taken place without regard to age discrimination, age was not a determining factor in his discharge." Thus, *Matras* states a similar proposition as the federal instruction of which plaintiff complains.

Second, plaintiff argues that little or no "pattern and practice" and "disparate treatment" evidence was presented in federal court. He alleges that the federal judge severely limited the admission of evidence, ruling that only evidence relating to plaintiff and not other minority students could be presented. However, plaintiff's complaint about the exclusion of evidence in federal court should be claimed on appeal to federal court of appeals. The alleged evidentiary error is not a viable argument against the imposition of collateral estoppel. A review of plaintiff's first amended complaint shows that he clearly pleaded his disparate treatment claim. Plaintiff also essentially alleges that the Board discriminated through the individual defendants. Thus, his proofs in federal court would necessarily have had to include that he and other minority students were treated differently from non-minority students, which is the essence of a disparate treatment claim. See *Manning v Hazel* Park, 202 Mich App 685, 697; 509 NW2d 874 (1993). Further, every individual who allegedly engaged in the institutional disparate treatment discrimination has been exonerated. It is difficult to detect any ultimate issue of discrimination that has been left untried.

Third, plaintiff alleges that the standard of proof of discriminatory and retaliatory motivation in federal court was that it had to be a "substantial motivating factor," while Michigan standard requires "one of the reasons that made a difference." SJI2d 105.02. However, this Court has determined that discriminatory intent must be "a significant factor" in the decision. See *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 671; 538 NW2d 420 (1995); *Gallaway v Chrysler Corp*, 105 Mich App 1, 6; 306 NW2d 368 (1981), lv den 413 Mich 853 (1982). Plaintiff does not address the standard of "a significant factor" in relation to "a substantial motivating factor." A synonym for "significant" is "substantial." *The Synonym Finder* (1978), pp 1112, 1186. Therefore, this argument is without merit.

Accordingly, ultimate issues plaintiff asserts against the Board in the instant state action are the same as the issues tried in federal court.

To satisfy the second criteria of collateral estoppel, the same parties or their privies must be involved in both proceedings. *People v Gates*, 434 Mich 146, 155-156; 452 NW2d 627 (1990), cert

den 497 US 1004; 110 S Ct 3238; 111 L Ed 2d 749 (1990); *Duncan v State Highway Comm*, 147 Mich App 267, 270; 382 NW2d 762 (1985). A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties. *Id*., p 271. Plaintiff claims that the Board was not a party to the federal action and has not been exonerated of state civil rights violations. He does not address the concept of privity. However, he alleged in his first amended complaint that the individual defendants tried in federal court were "agents and employees of the Regents acting within the scope of their agency and/or employment." Accepting plaintiff's allegation as true, *Florence, supra*, plaintiff has identified the Board as being in privity with the individual defendants. The Board would clearly have an interest in the subject matter of the federal case against its employees and agents.

To satisfy the third criteria, there must be mutuality of estoppel. *Knoblauch, supra*; *Duncan v State Highway Comm, supra*. Mutuality is present if both litigants in the second suit are bound by the judgment rendered in the first suit. *Id*. However, a well-established exception to the mutuality requirement is a special relationship between the litigants in the two actions, such as principal and agent. In such cases, collateral estoppel can be asserted defensively. *Arim v General Motors Corp*, 206 Mich App 178, 194; 520 NW2d 695 (1994); *Couch v Schultz,* 176 Mich App 167, 170-171; 439 NW2d 296 (1989). Because the individual defendants in the federal case were the agents and employees of the Board, the Board is entitled to assert collateral estoppel defensively.

All the requirements of collateral estoppel have been met. Defendant Board of Regents may plainly use the favorable determination obtained by its agents and employees in the federal court action to preclude plaintiff from relitigating the national origin discrimination and retaliation issues against it in the instant case.

Affirmed.

/s/ Henry William Saad
/s/ Maura D. Corrigan
/s/ Robert A. Benson