STATE OF MICHIGAN

COURT OF APPEALS

DARLENE W. GEORGE, Guardian of JOHN GEORGE, JR., incapacitated,

Plaintiff-Appellant,

v

CITY OF DETROIT, and DETROIT POLICE LIEUTENANTS AND SERGEANTS ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
January 28, 1997

No. 184684
LC No. 94-407416-CZ
Wayne Circuit Court

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

PER CURIAM.

In this duty of fair representation action, plaintiff appeals from the circuit court's grant of defendants' motion for summary disposition. We affirm.

I

Plaintiff, a lieutenant with the Detroit Police Department, was represented by defendant, the Detroit Police Lieutenants and Sergeants Association (DPLSA). According to plaintiff, he was harassed by other officers when he attempted to report irregularities in a section of the police department in 1982. Plaintiff suffered emotional and mental problems and took a leave of absence. On January 20, 1984, plaintiff was advised that he was transferred; when he failed to appear, he was labeled AWOL for a week before he was terminated in accordance with Detroit Police policy.

Instead of following the grievance procedure outlined by the DPLSA, in February of 1984, plaintiff, acting in pro per, filed his first lawsuit against defendants in federal court. Because plaintiff did not appear for a second pretrial conference, the lawsuit was dismissed in August, 1984.

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

In 1987, plaintiff filed a second lawsuit in 36th District Court against the City of Detroit for wrongful discharge. In 1991, after defendant filed a motion for summary disposition, the court ruled that plaintiff was insane for purposes of tolling the statute of limitations, but granted defendant's motion for summary disposition, holding that plaintiff had failed to exhaust his remedies under the collective bargaining agreement between the City of Detroit and the DPLSA. Plaintiff appealed to Wayne Circuit Court, which affirmed. This Court and the Michigan Supreme Court both denied leave to appeal.[1]

In October 1993, plaintiff asked the union to pursue his claim through the grievance-arbitration procedures of the collective bargaining agreement; this request (filed nearly ten years after the incident) was refused by counsel for the union as untimely.

Plaintiff then filed this case (his third lawsuit) against both defendants on March 15, 1994. The lower court granted defendants' motion for summary disposition on the basis that the statute of limitations had run and that res judicata applied to bar plaintiff's claim.

II

On appeal, plaintiff raises three arguments: (1) that plaintiff's insanity tolled the statute of limitations for filing claims against the union and his employer, (2) that plaintiff's claim of estoppel stated a claim upon which relief could be granted, and (3) that none of the previous dispositions in any of the previous cases were adjudications on the merits, for purposes of res judicata. After careful review of the record,[2] we conclude that the circuit court did not err in granting defendants' motion for summary disposition on the basis of res judicata.

Res judicata bars a subsequent action between the same parties when the facts and evidence are identical. *Bd of Road Comm'rs for County of Eaton v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). The res judicata doctrine requires that:

> (1) the first action be decided on the merits,
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> (2) the matter contested in the second case was or could have been resolved in the first case, and
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> (3) both actions involve the same parties or their privies. [*Andrews v Donnelly*, No 178248, Nov 22, 1996, slip op at 2.]

Plaintiff contends that the doctrine of res judicata does not apply to the first action he brought against defendants in federal court because that suit was not decided on the merits. In *Makowski v Towles*, 195 Mich App 106, 107-108; 489 NW2d 133 (1992), this Court examined this issue in a case with similar facts. In *Makowski*, as here, a federal court dismissed the plaintiff's case because of his failure to obey the order of the court to attend a final pretrial conference and for lack of progress. *Id*. In *Makowski*, 195 Mich App at 108, the Court held that the plaintiff's subsequent filing in circuit court of an action based on the same matter was barred by res judicata:

> In Michigan practice, an involuntary dismissal due to plaintiff's failure to comply with the court rules or any order of the court will operate as an adjudication on the merits unless the order of dismissal provides otherwise.

Here, the federal court order which dismissed plaintiff's first lawsuit does not provide that it operates as anything other than an adjudication on the merits. Therefore, the first cause of action brought by plaintiff was decided on the merits and accordingly, contrary to the plaintiff's contention, the doctrine of res judicata applies to bar this suit.

Plaintiff next contends on appeal that the doctrine of res judicata does not apply because (1) he did not raise the issue of the union's duty of fair representation in the prior suits, and (2) the federal suit was dismissed due to his failure to appear for a scheduled pre-trial conference, and thus was never litigated on the merits. We disagree.

Plaintiff's first lawsuit (a wrongful discharge action), alleged that the union "did vary the terms of plaintiff's membership in the union or did otherwise exclude, segregate, or discriminate against plaintiff on account of plaintiff's race." He also pleaded there that his termination constituted "a deliberate breach of defendant City of Detroit's contractual obligation and that of the defendant L.S.A." This case was dismissed when plaintiff failed to appear for a scheduled pre-trial conference.

Ten years later, in 1994, plaintiff brought this case, in which he asserts that both defendants breached their contract of employment with him when they terminated him without just cause, and in breach of the terms and conditions set forth in the master agreement between the City of Detroit and the DPLSA. Plaintiff also contends that the DPLSA breached its duty of fair representation by failing to pursue his grievance.

The Michigan Supreme Court has adopted a broad application of the res judicata doctrine. The broad application rule not only bars claims actually decided on the merits in the first litigation, but also those claims which arise out of the same transaction which plaintiff *could have* brought. *Gose v Monroe Auto Equip Co*, 409 Mich 147, 160; 294 NW2d 165 (1980). The test for determining whether two claims arise out of the same transaction or occurrence is whether the same facts or evidence is essential to the maintenance of the two actions. *Schwartz v City of Flint*, 187 Mich App 191, 194-195; 466 NW2d 257 (1991).

This Court has held, in *Martin v East Lansing Sch Dist*, 193 Mich App 166, 180; 483 NW2d 656 (1992), that the duty of fair representation by a labor organization requires that the union fairly and impartially represent all members of the bargaining unit. Further, to prevail on an unfair representation claim, a plaintiff must establish not only a breach of the duty of fair representation, but also a breach of the collective bargaining agreement. *Id*., at 181. Therefore, although plaintiff did not label his claim against the union in the first action a breach of the duty of fair representation, it is evident from the allegations in the complaints that in both cases he would have to prove that in terminating him,

the City of Detroit breached the collective bargaining agreement provisions; and that the union unfairly represented him in comparison to the other members of the union.

Therefore, because the first action was decided on the merits involving the same parties, and because the matter contested in the second case could have been resolved in the first, the doctrine of res judicata bars relitigation of this claim. *Bd of County Road Comm'rs*, 205 Mich App at 375-376. Accordingly, the other two issues raised on appeal are rendered moot and will not be addressed. We find no error in the circuit court's grant of summary disposition to defendants.

Affirmed.

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

[1] The Supreme Court denied leave without prejudice to plaintiff seeking relief pursuant to the grievance and arbitration procedures in the collective bargaining agreement.

[2] When reviewing a motion for summary disposition under MCR 2.116(C)(7), the appellate court must accept the plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff. *Witherspoon v Guilford*, 203 Mich App 240, 511 NW2d 720 (1994). If the facts are not in dispute, the question whether the claim is barred is one of law for the court. *Id.*