STATE OF MICHIGAN

COURT OF APPEALS

DONALD FLAKE,

Plaintiff-Appellant,

v

CITY OF DETROIT, WILLIAM L. HART, MICHAEL FALVO, DERRICK ROYAL, BETH PETERSON, MARTIN MITTON, ALDO CIBRARIO, DANIEL CARR, and HAROLD GUREWITZ,

Defendants-Appellees.

UNPUBLISHED

No. 202443
Wayne Circuit Court
LC No. 93-315698 CZ

ON REMAND

Before: Griffin, P.J., and Taylor and White, JJ.

GRIFFIN, P.J. (dissenting).

Plaintiff was a member of a class action lawsuit that contested the constitutionality of the City of Detroit's mandatory random drug testing program. After the parties reached a settlement agreement, plaintiff appeared before Judge Kaufman of the Wayne Circuit Court to complain that the proposed settlement excluded a reinstatement remedy. Judge Kaufman advised plaintiff that reinstatement of employment exceeded the scope of the proposed settlement. Recognizing that plaintiff would be bound by the terms of the settlement if he remained a class member, Judge Kaufman informed plaintiff that he could not seek reinstatement unless he opted out of the class and pursued an independent action. After being advised of the consequences, *plaintiff decided on the record not to opt out of the class*. Plaintiff stated to the court that he "would probably *opt in*…for the reason that I have no representation." (Emphasis added.)

Thereafter, Judge Kaufman ruled that anyone seeking to opt out at such a late stage would have to file an appropriate motion establishing grounds for relief. Following plaintiff's decision to remain a class member, a consent judgment was entered on April 7, 1993. The judgment provided injunctive and monetary relief and, by its terms, released "all claims which might have been made in this matter" and was binding on all class-members who had not opted out.

On June 3, 1993, plaintiff filed the instant lawsuit for reinstatement. Based on a constitutional challenge to the same drug testing procedure, which was the subject of the April 7, 1993, judgment, plaintiff contested the same acts that were at issue in the class action judgment; only the remedy of reinstatement rather than damages was different. In lieu of an answer, defendants moved for summary disposition. While defendants' motion was pending before the trial court in the instant case, plaintiff filed a motion before Judge Kaufman seeking to opt out of the class action lawsuit. Judge Kaufman denied plaintiff's belated motion and ruled that plaintiff is bound by the April 7, 1993, consent judgment. Thereafter, plaintiff filed a motion in the present case asking the trial court to allow him to opt out of the class. The trial court refused, relying on Judge Kaufman's ruling that plaintiff is bound by the consent judgment. The trial court then found that, by its terms, the consent judgment covered all claims that were or could have been brought by the class members and granted defendants' motion for summary disposition in defendants' favor.

Plaintiff now disputes the application of res judicata and collateral estoppel to the present action by contesting his inclusion in the class of plaintiffs who settled the former lawsuit. However, "[c]ollateral 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." *Porter v Royal Oak,* 214 Mich App 478, 485; 542 NW2d 905 (1996), citing *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990).

I agree that plaintiff is estopped from rearguing whether he could have opted out of the class action lawsuit. On this issue, I concur and join the following conclusion reached by the majority: "We conclude that plaintiff cannot, in this proceeding, collaterally attack the decision made in the class action that plaintiff was a class member." (Majority opinion at p 4.)

Further, in the prior action, plaintiff was fully advised as to the consequences of remaining in the class but decided to remain a class member. The lower court held that plaintiff's postjudgment motion to opt out of the class was untimely and properly denied. Plaintiff may not relitigate Judge Kaufman's final order in this collateral proceeding. *Porter, supra* at 485; see *Nottingham Partners v Trans-Lux Corp,* 925 F2d 29 (1991).

As a class member, plaintiff is also estopped from attacking either the legality of the comprehensive settlement or Judge Kaufman's ruling that plaintiff could not seek the remedy of reinstatement without opting out of the suit. Accordingly, plaintiff is bound by the consent judgment in the class action lawsuit that released "all claims that might have been made . . ." by members of the class contesting defendants' drug testing policy. MCR 3.501(D)(5). Accordingly, summary disposition pursuant to MCR 2.116(C)(7) was the correct result. See *Porter, supra* at 488; *People v Lucas,* 188 Mich App 554, 577; 470 NW2d 460 (1991).

Unlike the majority, however, I would hold that under the doctrine of res judicata the judgment in the class action precludes plaintiff from maintaining the present lawsuit. "Michigan follows a broad rule of res judicata which bars not only claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." *Courtney v Feldstein,* 147 Mich App 70, 75; 382 NW2d 734 (1985); see *Gose v Monroe*

Auto Equipment, 409 Mich 147, 160-161; 294 NW2d 165 (1980). *Curry v Detroit*, 394 Mich 327, 332; 231 NW2d 57 (1975); *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994). Res judicata applies when (1) the first action was decided on the merits, (2) the issue in the latter case could have been resolved in the first case, and (3) both actions involve the same parties and their privies. *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994); see, generally, *Gose, supra*. This doctrine applies to consent judgments, *Schwartz v City of Flint*, 187 Mich App 191, 194-195; 466 NW2d 357 (1991), and class action lawsuits. *Theisen v Dearborn*, 5 Mich App 607, 619; 147 NW2d 720 (1967), remanded on different grounds 380 Mich 621 (1968).

Although the majority expressly acknowledges that a broad construction of res judicata is appropriate, the majority nonetheless concludes that the present suit is not foreclosed because "plaintiff could not have brought his claim for reinstatement earlier and exercised reasonable diligence." The issue is not whether plaintiff could have sought reinstatement by exercising reasonable diligence, but whether class members as a collective unit could have pursued reinstatement as the desired remedy. Indeed, the reinstatement issue could have been presented in the previous case, because plaintiff and several other employees lost their jobs as a result of the allegedly unconstitutional strip searches.[1] However, pursuant to the consent judgment, damages were evidently chosen as the remedy which best represented the interests of the entire class. As previously recognized by Michigan courts, class actions are motivated in part by convenience: "For convenience…and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Pressley v Wayne Co Sheriff*, 30 Mich App 300, 318; 186 NW2d 412 (1971), quoting from *Smith v Swormstedt*, 57 US 288, 303; 14 L Ed 942 (1853). Similarly, consent judgments, particularly those that resolve class action litigation, entail compromise and do not always satisfy the purposes of the individual members of the class. Cf. *United States v Armour & Co*, 402 US 673, 681-682; 91 S Ct 1752; 29 L Ed 2d 256 (l971).

In summary, the prior class action involved the same drug testing procedure that plaintiff presently contests. Although the issue of reinstatement was not litigated in the prior suit, plaintiff's "claim" for reinstatement, which supposedly differentiates the two causes, is in fact not a new "claim" but merely an equitable remedy. *Rowry v Univ of Michigan*, 441 Mich 1, 9; 490 NW2d 305 (l992); *Keys v Hopper*, 207 Mich App 504, 507; 525 NW2d 905 (1994). By remaining in the class and accepting a portion of the comprehensive $950,000 monetary settlement in lieu of his desired remedy of specific performance, res judicata bars plaintiff's attempt to seek the remedy in this subsequent proceeding. See *King v South Central Bell Telephone & Telegraph Co & Communication Workers, AFL-CIO*, 790 F2d 524, 528-531 (1986); *Manji v New York Life Ins Co*, 945 F Supp 919 (1996); *Nottingham Partners* v *Dana*, 564 A2d 1089, 1106 (1989); see, generally, *American Pipe & Construction Co v Utah*, 414 US 538, 548; 94 S Ct 756; 38 L Ed 2d 713 (l974).[2] Plaintiff cannot have it both ways; he cannot as a class member benefit from the consent judgment but not be bound by its terms. The question of preclusion does not depend on whether "justice was done in the first suit," but on whether the merits of the prior action had been considered and decided. *Banks v Billups*, 351 Mich 628, 635; 88 NW2d 255 (l958).

Finally, it appears that plaintiff has not satisfied a condition precedent to bringing the present action. As the Supreme Court held in *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163-164; 458 NW2d 56 (1990), tender of consideration received is a condition precedent to the right to repudiate a settlement agreement. Plaintiff's complaint contains no allegation that he complied with this condition precedent.

For these reasons, I respectfully dissent. I would affirm.

/s/ Richard Allen Griffin

[1] But see *Middlebrooks v Wayne Co,* 446 Mich 151; 521 NW2d 774 (1994).

[2] *Cooper v Federal Reserve Bank of Richmond,* 467 US 867; 104 S Ct 2794; 81 L Ed 718 (1984), is clearly inapplicable to the present case. In *Cooper*, the issue was whether a class action regarding an employer's general pattern of discrimination barred class members from bringing suits alleging a specific discriminatory conduct. Because a finding of no systematic discrimination does not address isolated incidents and the trial court had "pointedly refused to decide the individual claims…", the Court held that res judicata did not bar suits alleging specific instances of discriminatory conduct. Here, on the other hand, plaintiff contests the exact same acts that were at issue in the class action suit. Plaintiff simply seeks a different remedy that is barred by the terms of the settlement.