

STATE OF MICHIGAN
COURT OF APPEALS

YONG IL OH,

Plaintiff-Appellant,

v

MICHAEL KELLY,

Defendant-Appellee.

UNPUBLISHED

March 12, 1999

No. 204194

Kent Circuit Court

LC No. 96-008693 NM

Before: Gribbs, P.J., and Saad and P. H. Chamberlain,* JJ.

MEMORANDUM.

Plaintiff appeals by right the trial court's order granting summary disposition for defendant in this legal malpractice action on the ground of res judicata. We affirm.

Plaintiff's reliance upon the waiver provision of MCR 2.203(A) is unavailing in this case. Even if defendant previously failed to object to plaintiff's nonjoinder of claims arising out of the same transaction or occurrence that was the subject matter of plaintiff's prior lawsuit against defendant, relitigation of the same claim previously raised, whether under the same or a different theory, is still barred. See *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 380 n 5; 521 NW2d 847 (1994).

Plaintiff contends that his previous complaint cannot be read as raising the same legal malpractice claim for "negligent breach of the Defendant's professional duty as an attorney to zealously and competently represent the Plaintiff in the criminal trial" that plaintiff raised in this lawsuit, but only different claims of embezzlement and breach of contract. We disagree. Plaintiff's previous complaint, which expressly purported to be a "Legal Malpractice Complaint," not only alleged embezzlement and breach of contract but also the same breach of professional duties that plaintiff asserts in this case. For example, plaintiff's previous complaint alleged that defendant had failed to "perform the duties of his professional training," "protect his client's rights" and "perform as competent counsel under his profession" when representing defendant in the criminal trial.

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

The fact that plaintiff's complaint in this action alleges facts in support of his legal malpractice claim that were not specifically alleged in his previous complaint does not show that plaintiff is asserting a new claim. At most, plaintiff has merely advanced a factual theory or basis for his legal malpractice claim not specified in his previous complaint. Moreover, plaintiff did in fact previously assert the ineffective assistance of counsel claims from his criminal appeal as a factual basis for his legal malpractice claim in the previous lawsuit, in his unsuccessful motion for "Reconsideration/Relief From Judgment" in that case. Because the trial court's denial of that motion was not on the basis of untimeliness alone, but also because the trial court concluded that the motion raised nothing new to change the trial court's previous summary disposition ruling, that denial was a ruling on the merits for purposes of the doctrine of res judicata. *DeCare v American Fidelity Fire Ins Co*, 139 Mich App 69, 77-78; 360 NW2d 872 (1984), lv den 422 Mich 933 (1985).

Because plaintiff's malpractice lawsuit is barred by the doctrine of res judicata, it follows that the trial court did not err in refusing to stay the proceedings in this case pending the outcome of plaintiff's appeal in the criminal case.

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ Paul H. Chamberlain