

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT PONTE,

Plaintiff-Appellant,

v

Estate of PAMELA PONTE, by WENDY S.
REINHARDT, Personal Representative, KEITH
REDLIN, THOMAS COLBY, SPENCER
PONTE, and AMERICAN CENTURY
INVESTMENT SERVICES, INC.,

Defendants-Appellees.

UNPUBLISHED

April 24, 2012

No. 300789

Washtenaw Circuit Court

LC No. 09-001276-CZ

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision and order granting summary disposition in favor of all defendants pursuant to MCR 2.116(C)(8). For the reasons stated in this opinion, we affirm.

I. FACTS & PROCEEDINGS

This case arises from a previous divorce case, which resulted in the entry of a judgment granting a divorce to plaintiff and his ex-wife Pamela Ponte. The judgment awarded Pamela a share of plaintiff's retirement account, but assigned the parties' entire prejudgment debt to plaintiff. Plaintiff appealed the judgment arguing, in part, that the trial court inequitably assigned the parties' entire prejudgment debt to him. This Court agreed that it was inequitable to require plaintiff to pay the parties' entire debt. *Ponte v Ponte*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 274667). Therefore, this Court vacated that portion of the divorce judgment and "remand[ed] for an amended judgment assigning 50 percent of the debt, minus the credit card debt relating to [plaintiff's] payment of attorney fees, to [Pamela]." *Id.* at 1, 3.

In July 2007, the trial court in the divorce case entered a Qualified Domestic Relations Order (QDRO) instructing defendant American Century Investment Services, Inc. (American Century), the agency that handled plaintiff's retirement fund, to award 50 percent of the account to plaintiff and 50 percent of the account to Pamela. American Century thereafter transferred half of the amount in plaintiff's retirement account to Pamela. Pamela died on March 12, 2009,

after the transfer was completed. The retirement funds passed to plaintiff's children, as beneficiaries of Pamela's estate.

After Pamela's death, plaintiff brought this action against American Century, Wendy S. Reinhardt (the personal representative of Pamela's estate), and three of Pamela's children, Keith Redlin, Thomas Colby, and Spencer Ponte, seeking recovery of the retirement funds. Plaintiff's second amended complaint alleged claims for conversion and for fraudulent transfer under the Uniform Fraudulent Transfers Act, MCL 566.34(1)(a).

All defendants moved for summary disposition under MCR 2.116(C)(8). Although the case was originally assigned to Judge Timothy P. Connors, the chief judge reassigned the case to Judge Nancy Francis, who presided over the divorce case between plaintiff and Pamela. Plaintiff thereafter filed a motion to disqualify Judge Francis on the ground that she was biased. Judge Francis and the chief judge both denied the motion, concluding that there was no evidence of bias. Judge Francis subsequently granted defendants' motion for summary disposition and denied plaintiff's motion for leave to file a third amended complaint. This appeal followed.

II. SUMMARY DISPOSITION

Plaintiff claims that the trial court erred when it granted summary disposition in favor of defendants in regard to all of his claims.

We review a trial court's decision on a motion for summary disposition de novo. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). "A movant is entitled to summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.'" *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005), quoting MCR 2.116(C)(8). In determining whether the moving party has met this standard, the appellate court "accepts as true all well-pleaded facts." *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984). "Only if the allegations fail to state a legal claim will summary disposition pursuant to MCR 2.116(C)(8) be valid." *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993).¹

¹ We disagree with plaintiff's argument that it was improper for the trial court to take judicial notice of, and to consider, the divorce judgment, the QDRO, and this Court's decision in the divorce appeal when evaluating plaintiff's claims under MCR 2.116(C)(8). It was proper for the trial court to take judicial notice of the files and records within that same judicial circuit in which the trial court was acting. MRE 201(b); *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). Further, plaintiff's claims were based in part on the distribution of assets and the assignment of debt pursuant to plaintiff and Pamela's divorce judgment, as modified by this Court's decision on appeal. Plaintiff's second amended complaint specifically referred to the underlying divorce case and the divorce judgment, and provided the lower court docket number for that case. The second amended complaint also specifically referred to this Court's decision on appeal and provided this Court's docket number. The trial court observed that the divorce judgment, the QDRO, and this Court's decision were all physically present in the court file for

Plaintiff first claims that his second amended complaint sufficiently alleged the elements of common law and statutory conversion of his retirement account, and that accordingly, summary disposition pursuant to MCR 2.116(C)(8) was not appropriate. Specifically, Plaintiff argues that the “trial court’s decision makes sense only if the division of marital debt is considered in a vacuum, separate from the other elements of the marital estate. However, in this case, the marital debt which must be reallocated on remand in the trial court is sufficiently large to require adjustment of the entire property division, specifically [plaintiff’s] retirement assets, in order to satisfy this marital debt.”

“The tort of conversion is ‘any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.’” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Statutory conversion consists of knowingly “buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.” MCL 600.2919a. “An action for the conversion of bank account funds . . . can be maintained only if there was an obligation on the defendant’s part to return or deliver the specific money entrusted to it.” *Check Reporting Servs, Inc v Mich Nat’l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991).

Plaintiff’s argument on appeal is premised on the assumption that the remand order from this Court required reallocation of the entire property division and that any reallocation would implicate the division of his retirement account. Consequently, plaintiff asserts that after remand to the trial court, defendant American Century’s disbursement of 50 percent of the retirement account pursuant to a QDRO to his wife, which is now held in part by the other defendants following her death who refuse to return the funds, constitutes an actionable claim for conversion. We disagree with plaintiff’s characterization of the remand order, and reject his argument that the trial court was required or even permitted to reopen and reallocate the marital property.

In the appeal of the divorce action, this Court concluded that the “trial court reached an inequitable result when it assigned the parties’ entire prejudgment debt to defendant” and remanded the case to the trial court for entry of an amended judgment that vacated “that portion of the judgment of divorce” and “for [entry of] an amended judgment assigning 50 percent of the debt, minus the credit card debt relating to defendant’s payment of attorney fees, to plaintiff.”² The judgment of divorce was affirmed in all other respects.

Plaintiff argues that adjustment of the original distribution of the marital assets was required because the order was “interwoven” with the rest of the property division. Plaintiff the divorce case. Because that file was a matter of public record and was located in the same county in which this present action was filed, and plaintiff specifically referred to the divorce case in his second amended complaint, the trial court properly considered the divorce judgment, the QDRO, and this Court’s decision in that case as part of the pleadings “for all purposes.” MCR 2.113(F)(1)(a) and (2). Accordingly, it was not improper to consider those items in reviewing defendants’ motions for summary disposition under MCR 2.116(C)(8).

² In that case Robert Ponte was the defendant and Pamela Ponte was the plaintiff.

acknowledges that no Michigan decision has addressed the issue, but cites several cases from other states holding that reversal of one component of a property division judgment requires adjustment of the entire original property division judgment.³ We find the cases cited by plaintiff inapplicable because this Court's remand order did not contemplate a reexamination of the entire property distribution. Importantly, this Court in fashioning a remedy on remand for the equity did not make any reference to the 50 percent split of plaintiff's retirement account. Further, the remand did not necessitate reexamining or adjusting the distribution of the retirement account funds in the judgment of divorce because this Court's instruction to the trial court on remand was tailored to address and correct the only error in the divorce judgment and in all other respects affirmed. Under these circumstances, the distribution of the plaintiff's retirement funds was not at issue on remand. Consequently, the distribution according to the terms of the divorce judgment can not constitute conversion. They were lawfully distributed to plaintiff's former wife pursuant to a QDRO. Accordingly, the trial court properly granted summary disposition in favor of defendants because defendants did not have an obligation to return the retirement assets to plaintiff. *Check Reporting Servs, Inc*, 191 Mich App at 626.

Plaintiff relatedly argues that the trial court erred in determining that he could not maintain a claim for conversion because he had no ownership interest in the transferred funds. Plaintiff's argument is without merit. Plaintiff's former spouse Pamela was awarded 50 percent of plaintiff's retirement funds in the judgment of divorce. The trial court entered a QDRO which instructed American Century to award half of the retirement funds to plaintiff and the other half to Pamela. Thus, the trial court in this case properly determined that plaintiff did not have ownership of 100 percent of the retirement account funds. Pursuant to the divorce judgment, and the QDRO enforcing that judgment, plaintiff was only entitled to 50 percent of the value of his retirement account. This Court's prior decision in the divorce case remanding to the trial court for reassignment of the marital debt did nothing to alter the one-half interest in the retirement account that plaintiff and Pamela were each awarded.

Plaintiff also claims that summary disposition was improper in regard to his fraudulent transfer claim. Specifically, plaintiff argues that the trial court erred in determining that his retirement account was exempt from the Uniform Fraudulent Transfer Act (UFTA).

The trial court determined that plaintiff failed to state a claim under the UFTA because plaintiff's retirement account was exempt from execution and thus not subject to the act. We agree with plaintiff that the trial court's determination that his retirement account was exempt from the UFTA was error.

The conditions under which a transfer is fraudulent are set forth in MCL 566.34(1):

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the

³ Judicial decisions from foreign jurisdictions are not binding on Michigan courts, but may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor or the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

The trial court found that the retirement account assets were exempt from the UFTA based on exemptions set forth in MCL 600.6023(1)(l) and (k); however, the plain language of those exemptions states that the exemptions do not apply to retirement plans that are subject to a court order pursuant to a judgment of divorce. Because the retirement account was subject to a QDRO that was issued pursuant to a judgment of divorce, the exemptions do not apply and the trial court erred in determining that “the retirement fund is exempt from execution and thus is not subject to the Fraudulent Transfer Act.”

Despite the trial court’s error, we may affirm a trial court’s decision if it reached the right result, even if for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Plaintiff and Pamela did not have a creditor-debtor relationship within the meaning of the UFTA. MCL 566.31(d) defines “creditor” as “a person who has a claim.” MCL 566.31(f) defines “debtor” as “a person who is liable on a claim.” A “claim,” in turn, is “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, equitable, secured, or unsecured.” MCL 566.31(c). Plaintiff did not have a personal right to payment of one half of the marital debt by Pamela. By virtue of the judgment of divorce, the QDRO, and this Court’s decision in the divorce appeal, Pamela owned 50 percent of the marital assets and 50 percent of plaintiff’s separate assets. She was also assigned 50 percent of the marital debt. However, this did not transform plaintiff into a creditor and Pamela into a debtor. Even though this Court instructed the trial court to assign Pamela 50 percent of the marital debt on remand, she was entitled to pay that debt in whatever fashion she determined, whether by paying it from her one-half share of the marital assets, her one-half share of the retirement account funds, or by some other source. Because plaintiff and Pamela did not have a creditor-debtor relationship, plaintiff failed to state a claim for relief under the UFTA. Accordingly, summary disposition pursuant to MCR 2.116(C)(8) was proper.

In light of our conclusion that plaintiff cannot establish a creditor-debtor relationship as required under the UFTA, we need not reach plaintiff’s related assertions that Pamela’s designation of beneficiaries constituted a “transfer” under MCL 566.31(l) and that Pamela actually intended to “hinder, delay or defraud” under MCL 566.34(1)(a).

III. PLAINTIFF'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

Plaintiff next argues that the trial court abused its discretion in denying his motion for leave to file a third amended complaint.

We review a trial court's decision to grant or deny a request for leave to file an amended complaint for an abuse of discretion. *Ben P. Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 658-659; 213 NW2d 134 (1973). An abuse of discretion standard recognizes that there is often "no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court does not abuse its discretion when it selects a reasonable and principled outcome. *Id.*

MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." Motions to amend should only be denied for particularized reasons, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowing the amendment, or if the amendment is futile. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Plaintiff's stated reason for moving for leave to file a third amended complaint was to cure technical defects alleged by defendants in their motions for summary disposition. The fact that the trial court previously allowed plaintiff to amend his complaint multiple times demonstrates plaintiff's failure to cure deficiencies by amendments previously allowed. *Id.* Further, "[a]n amendment is futile "where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded," *Dowerk v Oxford Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998), or where "it merely . . . adds allegations that still fail to state a claim," *Lane*, 231 Mich App at 689.

Plaintiff's third amended complaint restated the conversion and fraudulent transfer claims already made. The breach of contract, violation of fiduciary duty, and negligence claims that plaintiff sought to add were all premised on plaintiff's ownership of 100 percent of his retirement funds, but the divorce judgment and this Court's decision in the divorce appeal, which were both referenced in plaintiff's proposed third amended complaint, established that plaintiff did not own 100 percent of the retirement funds. Pursuant to the judgment of divorce, plaintiff and Pamela each had a one-half interest in the value of the retirement funds. Thus, the new counts that plaintiff sought to add were futile. Accordingly, we conclude that the trial court properly exercised its discretion in denying plaintiff's motion for leave to file a third amended complaint.

IV. REASSIGNMENT & BIAS

Plaintiff next argues that the chief judge improperly reassigned his case to Judge Francis, and that Judge Francis should have been disqualified because she is biased against him.

To the extent this issue involves the interpretation and application of court rules, our review is de novo. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007). But "[b]ecause the chief judge has the discretion to reassign cases for 'good cause,' the abuse of discretion standard also applies." *Id.*, quoting MCR 8.111(C). Thus,

we “review de novo whether the trial court properly applied and complied with the court rule, but apply the abuse of discretion standard to the decision to reassign the case.” *Id.*

“[I]f one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge.” MCR 8.111(D)(1). Here, Judge Shelton reassigned this case to Judge Francis, who had been assigned plaintiff’s divorce action, because “[a] companion or previous case involving the same subject matter or marriage, or arising from this same transaction, event or occurrence, or a common question of fact . . . has been previously assigned to another judge of this circuit.”

“Actions arise from the same transaction or occurrence only if each arises from the identical events leading to the other action.” *Nat’l Waterworks*, 275 Mich App at 261. The divorce action arose from the breakdown of the marriage of plaintiff and Pamela. This action for conversion and fraudulent transfer arose as a result of the transfer by American Century of one half of the amount in plaintiff’s retirement account to Pamela, pursuant to the divorce judgment, and the subsequent disbursement of those funds to Pamela’s designated beneficiaries upon Pamela’s death. Under these circumstances, the divorce action and the conversion and fraudulent transfer action do not arise from the same transaction or occurrence. *Id.* Rather, they merely share common issues. “The mere fact that similar legal issues were involved . . . does not mean that . . . the actions arose out of the same transaction.” *Armco Steel Corp v Dep’t of Treasury*, 111 Mich App 426, 437; 315 NW2d 158 (1981), *aff’d* 419 Mich 582 (1984). Accordingly, Chief Judge Shelton erred in reassigning this case to Judge Francis.

In order to be entitled to relief, however, plaintiff must show that he was prejudiced by the improper reassignment of the case to Judge Francis. *Nat’l Waterworks*, 275 Mich App at 261. Prejudice may be shown by establishing that “the reassignment of the case . . . was motivated by impermissible considerations or that the lower court judge was biased or partial.” *Kloian v Schwartz*, 272 Mich App 232, 243; 725 NW2d 671 (2006). MCR 2.003(C)(1)(a) provides that disqualification of a judge is warranted if “[t]he judge is biased or prejudiced . . . against a party[.]” “Due process requires an unbiased and impartial decision maker.” *Kloian*, 272 Mich App at 244. “[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality.” *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

In support of his claim of bias, plaintiff relies on a series of rulings made by Judge Francis which were adverse to him. However, “a showing of ‘personal’ bias . . . must have its origin in events or sources of information gleaned outside the judicial proceeding.” *Id.* at 495-496. “The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment.” *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). The mere fact that Judge Francis ruled against plaintiff does not establish bias, let alone a “probability of actual bias . . . [that] is too high to be constitutionally tolerable.” *Crampton v Dep’t of State*, 395 Mich 347, 351; 235 NW2d 352 (1975).

Plaintiff presented his claims of bias to both Judge Francis and to Chief Judge Shelton. Judge Francis denied the motion, stating that she was not biased against plaintiff and could look at the case in a fair and open way. Judge Francis admitted that plaintiff was “very wearing,” but

stated that part of her job is “to respond to the wearing people” and that she is not biased against plaintiff. Chief Judge Shelton denied plaintiff’s motion for disqualification because plaintiff failed to offer any evidence of actual bias or prejudice. Although the record reveals some degree of discord between Judge Francis and plaintiff throughout the divorce case and this case, it does not reflect that it rose to the level of actual bias or prejudice.

Plaintiff has not demonstrated that either Judge Francis or Chief Judge Shelton erred in denying his motion to disqualify Judge Francis because of bias. *Henry*, 282 Mich App at 679. Accordingly, he has also failed to demonstrate that he was prejudiced by the improper reassignment of this case to Judge Francis.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad