

STATE OF MICHIGAN
COURT OF APPEALS

CARL PIONTKOWSKI, D.D.S.,
Plaintiff-Appellee,

UNPUBLISHED
July 10, 2012

v

MARVIN S. TAYLOR, D.D.S., P.C.,
Defendant-Appellant.

No. 303963
Oakland Circuit Court
LC No. 2010-115045-CK

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In 2009, plaintiff Carl Piontkowski, D.D.S., sued his employer, defendant Marvin S. Taylor, D.D.S., P.C., in the Oakland circuit court. Piontkowski's complaint alleged that Taylor breached an independent contractor agreement by firing Piontkowski without first providing him 90 days' written notice. Taylor's answer stated as an affirmative defense that an arbitration agreement barred Piontkowski's claim. The parties entered a stipulated order dismissing Piontkowski's complaint with prejudice and proceeded to arbitration.

The arbitration yielded an award in Piontkowski's favor. When Taylor failed or refused to pay, Piontkowski filed an action in the Oakland circuit court seeking confirmation of the arbitration award. Taylor moved to dismiss the action, claiming it was barred under the doctrine of res judicata. The circuit court disagreed and entered judgment against Taylor. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

Piontkowski filed his initial circuit court complaint against Taylor on November 3, 2009. The complaint averred that on August 7, 2009, Piontkowski informed Taylor "that he needed to leave the office for a few hours to take care of some personal business due to Defendant's failure to provide Plaintiff with a timely paycheck." According to the complaint, Taylor subsequently fired him "for allegedly walking out of the office without management approval and leaving patients without care." The complaint asserted that Taylor had breached the parties' written independent contractor agreement by terminating Piontkowski's employment without providing him 90 days' written notice and by failing to "fully compensate" Piontkowski for services rendered.

Taylor's answer averred that Piontkowski breached the independent contractor agreement "by walking out of the office without management approval and for leaving his patients." Several of Taylor's affirmative defenses pleaded the existence of an arbitration agreement barring Piontkowski's claim. Both parties attached to their initial pleadings a copy of their independent contractor agreement, which set forth in paragraph 15 the following arbitration provision:

Any dispute between the parties regarding any provision in this Agreement (except for the provisions allowing any aggrieved party equitable relief, disputes over which shall be resolved at the option of the aggrieved party through court litigation and not arbitration) shall be resolved by binding arbitration before the American Arbitration Association in Detroit, Michigan according to its rules of commercial arbitration. Judgment upon an award of the arbitrators may be entered by either party in any court of competent jurisdiction.

In December 2009, the parties' attorneys filed with the court a stipulation and order dismissing the case with prejudice. Piontkowski's counsel personally signed the stipulation and signed defense counsel's name "with permission." A separate stipulated dismissal was later filed bearing Taylor's attorney's true signature.

The parties then participated in an arbitration conducted by the American Arbitration Association. Piontkowski and his counsel personally attended the arbitration hearing; Taylor and his representative appeared by telephone. The arbitrator ultimately determined that Taylor had breached the independent contractor agreement and awarded Piontkowski \$65,000.

In November 2010, Piontkowski filed a second complaint in the Oakland circuit court. The first paragraph of this complaint states: "This action is to confirm an arbitration award. This action is brought pursuant to MCL § 600.5001 and MCR 2.602(1)." The complaint asserted that Taylor "has failed or refused to pay the award as set forth in the arbitrator's decision." Taylor moved for summary disposition under MCR 2.116(C)(7) and (C)(10), asserting "this current case is barred by the doctrine of res judicata." Piontkowski filed a cross-motion for summary disposition pursuant to MCR 2.116(I)(1). The circuit court denied Taylor's motion and granted summary disposition to Piontkowski, ruling: "The new case is about confirming the arbitration award, it's not litigating the underlying merits of the 2009 case." The court then entered a judgment confirming the arbitration award.

II. ANALYSIS

Taylor contends that because the parties consented to dismissal of the 2009 action with prejudice, the doctrine of res judicata barred Piontkowski from prosecuting the 2010 case. "The doctrine of res judicata was judicially created in order to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999) (quotation marks and citation omitted). Res judicata bars a second lawsuit when (1) the first action was decided on the merits, (2) "both actions involve the

same parties or their privies,” and (3) the matters contested in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). The res judicata doctrine “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* Res judicata constitutes an affirmative defense. *E & G Finance Co, Inc v Simms*, 362 Mich 592, 596-597; 107 NW2d 911 (1961). “The burden of establishing the applicability of res judicata is on the party asserting the doctrine.” *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). “The question whether res judicata bars a subsequent action is reviewed de novo.” *Adair*, 470 Mich at 119.

A. The 2009 Action Does Not Preclude the 2010 Action

In the circuit court, Taylor argued that the “with prejudice” dismissal of the 2009 action barred the 2010 action. In support of his motion for summary disposition, Taylor filed a brief consisting of the following three substantive paragraphs:

The previous action brought by this same Plaintiff (Carl Piontkowski, D.D.S.) against this same Defendant (Marvin S. Taylor, D.D.S., P.C.) was based upon the same exact purported Independent Contractor Agreement between the parties dated January 10, 2009. That action was dismissed with prejudice by this Court on December 16, 2009.

The case law in Michigan is clear that “. . . a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes.” *Limbach v Oakland County Board of County Road Commissioners*, 226 Mich. App. 389, 394; 573 NW2d 336 (1997). “A voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes.” *Brownridge v Michigan Mutual Insurance Co.*, 115 Mich. App. 745, 748; 3211 [sic] NW2d 798 (1982).

This motion is brought pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). There is no genuine issue as to any material fact and Defendant Marvin S. Taylor, D.D.S., P.C., is entitled to judgment and a dismissal of this matter with prejudice as a matter of law.

Notably, Taylor’s initial circuit court brief omitted any mention of the arbitration. Taylor made no claim that he had refrained from participating in the arbitration, or that he had raised during the arbitration the affirmative defense of res judicata. In Taylor’s reply to Piontkowski’s circuit court response brief, Taylor included one sentence regarding the arbitration: “It appears that no attorney represented Defendant at the arbitration and Defendant did not attend or participate in the arbitration hearing.”¹ Thus, Taylor did not raise or preserve a legal argument in the circuit court that the res judicata doctrine precluded the arbitration. Rather, Taylor’s legal

¹ As discussed *infra*, Taylor’s statement is not accurate. Taylor and his “representative” attended the arbitration hearing by telephone.

argument focused exclusively on whether the 2009 circuit court action precluded the 2010 circuit court action. Accordingly, we address that issue.²

Here, two of the three claim preclusion elements set forth in *Adair* are easily satisfied. A voluntary dismissal with prejudice serves as an adjudication on the merits for res judicata purposes. *Limbach*, 226 Mich App at 395. And the same parties were involved in both the initial and the subsequent circuit court actions. The disputed issue involves only the third res judicata element, whether the matters contested in Piontkowski's second case were or could have been resolved in the initial lawsuit.

Piontkowski's initial suit for breach of contract stemmed from events that occurred before the arbitration. His action seeking confirmation of the arbitration award arose only after the arbitration had been completed. Plainly, Piontkowski could not have brought an action to confirm the arbitration award before the arbitration resolved in his favor. In other words, his 2010 claim was not ripe in 2009. Res judicata does not bar a claim that has not ripened at the time the first complaint was filed. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14-15; 672 NW2d 351 (2003). Accordingly, the 2009 case did not resolve the issue presented in the 2010 case.

An alternative legal analysis buttresses our conclusion. In determining whether Piontkowski's claim for confirmation of the arbitration award could have been raised in the 2009 case, we apply the transactional test set forth in *Adair*. According to the transactional test, the "determinative question" is whether the claims in the arbitration confirmation case arose from the same transaction as the breach of contract claim. *Adair*, 470 Mich at 124. "Whether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit" *Id.* at 125 (emphasis omitted), quoting 46 Am Jur 2d, Judgments, § 533, p 801. Restatement Judgments, 2d, § 24(2), similarly provides:

² The dissent characterizes as "absurd" our discussion of the res judicata issue Taylor presented to the circuit court and the sole issue which the circuit court actually decided: "It is absurd to suggest that plaintiff's relitigation (in arbitration) of the dismissed claim is challengeable on res judicata grounds only if the plaintiff – in his initial 2009 case – had pled a claim seeking confirmation of a then-nonexistent arbitration award. But, in essence, that is the majority's position." *Post* at 4. We agree with the dissent that Taylor's circuit court argument lacks merit. But "absurd" or not, this is the only issue Taylor preserved for appeal.

What factual grouping constitutes a “transaction”, and what groupings constitute a “series”, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.

The facts of Piontkowski’s two cases are separated by time, space, origin and motivation. An alleged breach of contract prompted the first case. Taylor’s failure to pay an arbitration award, a new and intervening controversy that sprang to life only after the arbitration had concluded, generated the 2010 suit. Logically and pragmatically, general res judicata principles do not support preclusion of the confirmation action.

B. The First Action Did Not Preclude the Arbitration

Nor do we find meritorious Taylor’s claim, raised for the first time in his reply brief on appeal, that the stipulated order dismissing Piontkowski’s breach of contract claim with prejudice divested the arbitrator of jurisdiction. An issue is not preserved for appellate review unless it is raised, addressed, and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). “Generally, an issue not raised before and considered by the trial court is not preserved for appellate review.” *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Res judicata is a judicially-created doctrine, *Pierson Sand & Gravel, Inc*, 460 Mich at 380, and should be “invoked only after careful inquiry.” *Brown v Felsen*, 442 US 127, 132; 99 S Ct 2205; 60 L Ed 2d 767 (1979).

To preserve for appellate review a claim based upon res judicata, a party must lodge a timely objection raising that defense. *In re Hensley*, 220 Mich App 331, 335; 560 NW2d 642 (1996). Taylor’s one-sentence, factually inaccurate reference to the arbitration in the circuit court, unaccompanied by any evidence supporting it, did not suffice to preserve the res judicata claim he now presents. Accordingly, we need not reach this issue. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We consider Taylor’s belated, unpreserved res judicata argument only because it forms the centerpiece of the dissenting opinion.

In Taylor’s reply brief filed in this Court, Taylor for the first time asserted that the arbitration “was a nullity and was barred by res judicata.” We would credit Taylor with having raised a legitimate argument, but for three irrefutable facts. First, Taylor failed to raise his res judicata argument before the arbitrator, waiving this affirmative defense to arbitration. Second, Taylor participated in the arbitration, reaffirming that he consented to arbitrate Piontkowski’s claims. Finally, Taylor neglected to either file a motion in the circuit court staying arbitration, or a motion to vacate the arbitration award, waiving it for the third and fourth times. Instead, Taylor waited to raise any res judicata challenge until: (1) the arbitration award was rendered in Piontkowski’s favor, (2) Piontkowski sought to confirm the award in circuit court, and (3) the circuit court ruled in Piontkowski’s favor. Moreover, Taylor waited to raise the res judicata issue on which the dissent now relies until filing a reply brief on appeal. Taylor had at least four chances to litigate whether res judicata barred the arbitration. Instead, he took a “wait-and-see”

position, hedging his bets on a favorable award. His failure to timely object to the arbitration on res judicata grounds and his voluntary participation in that proceeding constitutes an unequivocal waiver.

Because res judicata is an affirmative defense, Taylor was obligated to raise it before the arbitrator. In *Amtower v Roney & Co (On Rem)*, 232 Mich App 226, 233; 590 NW2d 580 (1998), this Court held that “the timeliness of a claim is a procedural matter and, therefore, within the arbitrator’s jurisdiction.” We continued: “Michigan law also provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches.” *Id.* We discern no rational basis for excluding res judicata from the list of potential defenses that must be raised before an arbitrator. As then United States District Judge Sotomayor opined, “I, like other Courts of this District, find the logic of allowing arbitrators to decide procedural defenses to arbitration equally compelling in the context of res judicata and collateral estoppel.” *The North River Ins Co v Allstate Ins Co*, 866 F Supp 123, 129 (SDNY, 1994). On this point we expect the dissent would agree, given the dissent’s reliance on *DAIIE v Gavin*, 416 Mich 407, 432; 331 NW2d 418 (1982), to emphasize that arbitrators are bound by the controlling legal principles governing the rights and duties of the parties. But arbitrators are not mind readers. They cannot intuit defenses that remain obscure and unmentioned. This Court’s review for arbitral legal error is limited to errors that appear on the face of the award. *Id.* at 443. The face of this arbitral record contradicts any notion that Taylor raised res judicata as an affirmative defense. Accordingly, Taylor first waived his res judicata defense when he declined or neglected to raise it in the arbitration forum.³

³ The American Arbitration Association’s Commercial Arbitration Rules and Mediation Procedures, <http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afLoop=181404312768235&_afWindowMode=0&_afWindowId=10bj3xydgx_84#%40%3F_afWindowId%3D10bj3xydgx_84%26_afLoop%3D181404312768235%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_adf.ctrl-state%3D10bj3xydgx_136> (accessed June 25, 2012), provide in relevant part:

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

In addition to raising a res judicata defense before the arbitrator, another important avenue for relief remained available to Taylor. Because the parties had agreed to statutory arbitration governed by the Michigan Arbitration Act, MCL 600.5001 *et seq.*, Taylor could have moved in the circuit court for an order staying the arbitration. MCR 3.602(B). Taylor failed to avail himself of this method for vindicating his res judicata defense.

Instead of invoking the res judicata doctrine during arbitration or in the circuit court, Taylor arbitrated. The record evidence establishes that Taylor participated in the arbitration without challenging the authority of the arbitrator to render a final, legally valid decision. “[B]y voluntarily participating in the arbitration process without objection, [Taylor] waived” any contention that res judicata barred the arbitration proceeding. *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009). “[A] party may not participate in an arbitration and adopt a ‘wait and see’ posture, complaining for the first time only if the ruling on the issue submitted is unfavorable.” *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99-100; 323 NW2d 1 (1982). “Having proceeded without objection on arbitrability,” Taylor may not now challenge the award in circuit court. *American Motorists Ins Co v Llanes*, 396 Mich 113, 114; 240 NW2d 203 (1976). In *Llanes*, our Supreme Court adopted the following rule:

“If a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue.” Anno: Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability, 33 ALR3d 1242, 1244. [*Id.* at 114-115.]

After waiving any arbitrability claim by taking part in the process, Taylor had one final opportunity to argue for avoidance of the consequences of his previous waivers. MCR 3.602(J)(1) provides that “[a] request for an order to vacate an arbitration award under this rule must be made by motion.” The court “shall vacate an award” if the arbitrator “exceeded his or her powers.” MCR 3.602(J)(2)(c). Subsection (J)(3) provides that a motion to vacate an arbitration award must be filed within 91 days after the date of the award. Taylor never moved to vacate the arbitration award, even after Piontkowski filed an action seeking confirmation of the award.

(c) *A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.* [Emphasis added.]

Based on this record, we conclude without hesitation that Taylor waived his res judicata defense. He acquiesced in the arbitration and cannot now be heard to complain that it should not have occurred.

Despite overwhelming evidence of Taylor's repeated waivers, the dissent insists that Taylor did not waive his res judicata claim, our "factual premise is without any basis in the record," our conclusion is simply "wrong," and our entire res judicata analysis "turns logic on its head." *Post* at 4 and 7. We respectfully submit that in making these allegations, the dissent has overlooked the basic legal principles governing summary disposition. In other words, our dissenting colleague has embroidered for Taylor an appellate parachute containing very large holes.

Taylor sought summary disposition of Piontkowski's 2010 action pursuant to MCR 2.116(C)(7) and (C)(10), while Piontkowski filed a cross-motion for judgment on the pleadings. When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). We confine our review of summary disposition rulings to the evidence actually placed before the trial court rather than what is presented for the first time on appeal. *Grand Rapids v Harper*, 25 Mich App 447, 449; 181 NW2d 581 (1970).

As articulated by the dissent, Taylor's argument centers on the dual contentions that Taylor refused to participate in the arbitration, and that his non-participation negates our waiver analysis. The circuit court record resoundingly refutes that Taylor refused to participate in the arbitration and that any ground exists for excusing his many waivers of a res judicata defense.

In support of his motion for summary disposition of Piontkowski's 2010 case, Taylor filed in the circuit court: (1) the arbitration award, (2) the parties' independent contractor agreement; (3) Piontkowski's 2009 complaint, and (4) the 2009 stipulation and order of dismissal with prejudice. Only the arbitration award speaks to the issue the dissent now raises, so we reproduce the first page of the award, in its entirety, here:⁴

⁴ The second page merely continues reciting details of the award itself.

The award omits any mention that Taylor objected to the proceedings, declined to offer any evidence, or otherwise refused to participate in the proceeding. Rather, it establishes that Laura Taylor appeared at the arbitration “representing Respondent” and that Taylor also appeared. That these two individuals appeared by telephone rather than personally is of no moment, as arbitration is an informal proceeding. The record also supports that Taylor presented no evidence to dispute “*the amount in question: \$65,000.*” (Emphasis added). Nothing in the written award supports a conclusion that Taylor refrained from presenting other evidence, withheld argument, or lodged any objection to the arbitration. Nor does any evidence support that Taylor brought to the arbitrator’s attention the stipulated dismissal order, or contested the arbitrator’s authority to conduct the arbitration based on the res judicata effect of the 2009 stipulation. Of course, Taylor had an opportunity in the subsequent circuit court action to present evidence that it withheld consent to arbitrate or presented the 2009 order to the arbitrator. Tellingly, Taylor failed to offer any such evidence.

Thus, we simply cannot agree with the dissent’s premise that Taylor’s participation in the arbitration is supportable only “by supplementing the record with non-existent evidence.” *Post* at 7. The record is perfectly adequate, and the time for supplementation has long past. As the moving party seeking summary disposition, Taylor bore the burden of creating a factual record setting forth his version of events. “In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence.” *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). As the proponent of an affirmative defense, Taylor bore the same burden. Plainly, Taylor failed to carry his burden. Taylor produced no evidence supporting his belatedly-advanced contention that he deliberately withheld participation in the arbitration to preserve his res judicata claim. Taylor submitted no evidence even remotely suggesting that he merely listened on the telephone, as the dissent now contrives from whole cloth.⁵ Unsupported allegations simply do not establish facts or fact questions. *Smith v Globe Life Ins Co*, 460 Mich

⁵ Likely Taylor failed to present any evidence because, until filing a reply brief in this Court, Taylor’s argument focused on the “absurd” contention that the mere existence of the 2009 case barred the 2010 case.

446, 454-455; 597 NW2d 28 (1999). Viewed in the light most favorable to Piontkowski, the record establishes that Taylor participated in the arbitration, failed to support with evidence a res judicata defense, and left behind a trail of unequivocal waivers.⁶

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

⁶ We respectfully disagree with the dissent's characterization of the record as reflecting that Marvin Taylor and Laura Taylor merely "answer[ed] the telephone" when the arbitrator called. Nor do we agree with the dissent's contention that Piontkowski should have advised the arbitrator of the 2009 dismissal with prejudice. *Id.* at 8. Had the Taylors merely listened silently as the proceedings unfolded, they were obliged to establish that fact with evidence. The arbitration award simply does not support the dissent's speculation. And no law supports that Piontkowski bore any responsibility to present the arbitrator with the dismissal order. We question why Taylor did not do so, and suggest that the remedy for this substantial omission may lie elsewhere. *Limbach*, 226 Mich App at 396.