

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT J. McISAAC,

Plaintiff-Appellee,

v

WARREN GENERAL EMPLOYEES
RETIREMENT SYSTEM,

Defendant-Appellant.

UNPUBLISHED

February 8, 2005

No. 248031

Macomb Circuit Court

LC No. 02-003175-CK

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ an order denying its motion for summary disposition. We affirm.

This case arises out of a labor dispute involving plaintiff and the City of Warren. Plaintiff, a sanitation worker with the City of Warren, was terminated in 1988 due to alleged excessive absenteeism. Because plaintiff was a member of AFSCME Local 1250, he appealed his dismissal to an arbitrator and was reinstated to his former position and awarded \$54,260.80 in back pay.² The arbitrator retained jurisdiction “for the purpose of resolving any disputes concerning the back pay award.” Plaintiff’s taxable compensation in 1991 totaled \$89,665.71 and included both his wages for that year and the lump sum payment of \$54,260.80 in back pay.

On October 28, 1998, defendant approved plaintiff’s request for retirement, which plaintiff had submitted on October 20, 1998. The collective bargaining agreement (CBA) in place at the time plaintiff retired provided that the average of a worker’s two highest years of annual compensation would be used to determine the final average compensation (FAC) to

¹ *McIsaac v Warren General Employees Retirement System*, unpublished order of the Court of Appeals, entered July 21, 2003 (Docket No. 248031).

² The arbitrator awarded plaintiff the \$54,260.80 in back pay for the years 1988, 1989, and 1990. In awarding back pay, however, the arbitrator examined plaintiff’s absentee record and determined that plaintiff had missed work thirty-six percent of the time. Therefore, to avoid awarding plaintiff a windfall, the arbitrator awarded him sixty-four percent of the pay he would have received had he worked full time during the time he was terminated.

determine the worker's final pension benefit. When calculating plaintiff's FAC, defendant ignored defendant's W-2 compensation for 1991. Rather, defendant had allocated the back pay award on plaintiff's pension work sheet as though he had been working during the period of his discharge.

Plaintiff brought suit seeking to compel defendant to include his 1991 W-2 earnings as one of his two highest years of compensation in calculating his FAC. According to plaintiff's complaint, when calculating the FAC for other members of the retirement system, defendant had used the total amount they earned in a particular year plus lump sum payments for work done in prior years as one of their two highest years of annual compensation. Defendant asserted that it properly calculated plaintiff's pension and moved for summary disposition under MCR 2.116(C)(4), (7), (8) and (10). The trial court denied the motion without a great deal of explanation, stating simply: "Motion for summary disposition is denied. We're going to delve into it a little further."

On appeal, defendant first contends that the trial erred in denying its motion for summary disposition because plaintiff failed to state a claim upon which relief could be granted. We disagree.

We review a decision to grant or deny summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition may be granted under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-moving party. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The motion may be granted only when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

Plaintiff's complaint alleged that the CBA requires that plaintiff's pension be calculated based on plaintiff's two highest years of annual compensation. The complaint further asserted that when calculating plaintiff's pension, defendant failed to use his annual compensation in 1991, one of his two highest compensation years. If we accept plaintiff's well-pleaded factual allegations as true, which we must, plaintiff's compensation in 1991 was one of his two highest years, and defendant ignored it in calculating his pension. Such an action would entitle plaintiff to relief. Therefore, we reject defendant's contention that plaintiff's complaint failed to state a claim upon which relief could be granted and conclude that the trial court did not err in denying defendant's motion for summary disposition under MCR 2.116(C)(8).

Defendant next contends that the trial court erred in denying its motion for summary disposition based on lack of subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies and because there is no case or controversy. We disagree.

According to defendant, the trial court lacked subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies because he did not file an appeal or seek clarification of the 1991 back pay award from the arbitrator. Under MCR 2.116(C)(4), summary disposition for lack of subject matter jurisdiction is proper when a plaintiff has failed to exhaust

its administrative remedies. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). “[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Holman v Industrial Stamping & Mfg Co*, 344 Mich 235, 260; 74 NW2d 322 (1955), quoting *Myers v Bethlehem Shipbuilding Corp*, 303 US 41, 50; 58 S Ct 459; 82 L Ed 638 (1938).

Defendant contends that because the instant case involves a dispute over the implementation of plaintiff’s 1991 back pay award, plaintiff should have filed an appeal of the arbitrator’s opinion or sought clarification of the arbitrator’s award. We disagree. The dispute in this case involves whether defendant properly calculated plaintiff’s FAC and properly determined plaintiff’s pension. The arbitrator issued its opinion and award in 1991, but the amount of plaintiff’s pension was not determined until plaintiff retired in 1998. Because the issue of calculating plaintiff’s FAC was never before the arbitrator, we reject defendant’s contention that plaintiff failed to exhaust his administrative remedies by failing to appeal or seek clarification of the back pay award from the arbitrator.

We likewise reject defendant’s contention that plaintiff failed to exhaust his administrative remedies with defendant’s board of trustees. On June 11, 1998, plaintiff requested that defendant consider his W-2 earnings for 1991 in calculating his FAC. Shortly thereafter, defendant’s board denied plaintiff’s request. Following the board’s denial of his request, plaintiff filed a grievance. The board denied the grievance on September 9, 1998. Because defendant’s board had twice ruled against plaintiff’s request to consider his 1991 earnings in calculating his FAC, any further appeal of that decision to the same board would have been futile. A party seeking a declaratory ruling need not exhaust administrative remedies when to do so would be futile. *Michigan ex rel Oakland Co Prosecutor v Dep’t of Corrections*, 199 Mich App 681, 694; 503 NW2d 465 (1993). Consequently, we conclude that plaintiff exhausted his administrative remedies and that the trial court had subject matter jurisdiction over his claim.

Additionally, defendant contends that the trial court lacked subject matter jurisdiction because no actual controversy existed. Plaintiff’s complaint sought declaratory relief. Under MCR 2.605(A)(1), courts “may declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted.” Defendant is correct that the existence of an actual controversy is a condition precedent to the granting of declaratory relief. *Citizens for Common Sense in Gov’t, supra* at 54-55. We find that an actual controversy exists in this case because plaintiff asserts that defendant breached its CBA by failing to properly calculate his FAC. Defendant’s failure to properly calculate his FAC affects plaintiff’s monthly pension. Such an injury is more than merely hypothetical and satisfies the actual controversy requirement. See *id.* Thus, the trial court did not err in denying defendant’s motion for summary disposition pursuant to MCR 2.116(C)(4).

Defendant next asserts that the trial court erred in denying its motion for summary disposition based on the statute of limitations. According to defendant, plaintiff’s complaint is barred because it was not filed within the six-year statute of limitations for breach of contract actions because the arbitrator issued its opinion and award in 1991 and plaintiff waited until 2002 to file suit challenging the application of the award. We disagree.

Under MCR 2.116(C)(7), a court may grant summary disposition to all or part of a claim when a claim is barred because it was filed beyond the period set forth in the applicable statute of limitations. *Vandenberg v Vandenberg*, 253 Mich App 658, 660; 660 NW2d 341 (2002). The six-year statute of limitations for breach of contract actions applies to alleged violations of collective bargaining agreements. *AFSCME, AFL-CIO, Michigan Council 25 & Local 1416 v Highland Park Bd of Ed*, 214 Mich App 182, 188; 542 NW2d 333 (1995), *aff'd* 457 Mich 74 (1998).

In this case, plaintiff first requested that defendant's board calculate his pension based on his 1991 earnings in June 1998. The board denied his request and subsequently denied plaintiff's appeal of the denial of that request on September 9, 1998. The statute of limitations began to run on September 9, 1998. *Id.* at 191. Plaintiff filed his complaint on July 12, 2002, well within the six-year statute of limitations. Thus, the trial court did not err in denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Defendant next contends that plaintiff's actions are barred by the doctrine of laches because plaintiff waited several years before filing his claim. We disagree.

Application of the equitable doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce a claim against a defendant. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). A defendant invoking the doctrine "must prove (1) a lack of diligence on plaintiffs' part and (2) prejudice to the defendant." *Regents of the University of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 734; 650 NW2d 129 (2002).

Defendant asserts that it detrimentally relied on plaintiff's failure to seek administrative redress or a clarification by the arbitrator. However, the record does not demonstrate any change in circumstances during the passage of time that would result in prejudice to defendant. Because defendant has failed to demonstrate any prejudice as a result of plaintiff's delay in filing suit, the trial court did not err in refusing to bar plaintiff's claim under the doctrine of laches.

Defendant finally contends that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10). We disagree.

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

Section 25-216 of the City of Warren Code and Article 37 of the CBA provide that an employee's pension is to be calculated based on the employee's FAC. Plaintiff alleges that former City of Warren Mayor Ronald Bonkowski was awarded a lump sum back pay award in the form a wage increase and that defendant included Mayor Bonkowski's back pay in

calculating his FAC. According to plaintiff, because defendant considered Mayor Bonkowski's lump sum payment in calculating his FAC, there is a question of fact regarding the interpretation of both § 25-216 of the City of Warren Code and Article 37 of the CBA. We agree.

Article 37 of the CBA between the City of Warren and plaintiff's union defines "final average compensation" as:

Final average compensation shall mean the average of the three (3) highest years of annual compensation received by a member. . . . Effective October 11, 1991, members shall have a two (2) year final average compensation for the calculation of their benefits.

Section 25-207 of the City of Warren Code provides a similar definition for determining an employee's FAC. Both the Code and the CBA are silent regarding whether lump sum back pay can be considered when calculating an employee's FAC.

Plaintiff asserts, and it is not disputed, that both he and Mayor Bonkowski were members of the same pension plan. Moreover, plaintiff alleged in his complaint that "[d]efendant has . . . included lump sum accounts for income earned and accrued for prior years' service but not payable during those years for other members." Plaintiff also attached documentary support to his brief opposing defendant's motion for summary disposition which support his claim that Mayor Bonkowski, like plaintiff, received a lump sum back payment (for a raise) and that defendant included the lump sum back payment in calculating Mayor Bonkowski's FAC when he retired in 1995. Plaintiff's complaint and documentary evidence show that because of defendant's conduct and past practice of calculating its employees' pension benefits, there is, at a minimum, a question of fact regarding whether defendant may consider lump sum back payments when calculating an employee's FAC. Defendant would have this Court rule that the plain language of the City of Warren Code and the CBA prohibit the consideration of lump sum back payments when calculating an employee's FAC. However, to the contrary, we conclude that plaintiff, by offering documentary evidence regarding defendant's prior conduct, has established a genuine issue of material fact for the fact finder on this issue. Because plaintiff has offered documentary evidence that defendant has allowed a lump sum back payment to be considered when calculating another employee's FAC upon retirement, a question of fact exists for the fact finder to determine whether plaintiff was entitled to have his back pay considered in the calculation of his FAC. We note that our holding in this case should not be interpreted as a mandate for the trier of fact to find in favor of plaintiff. We merely hold that plaintiff has established a question of fact on this issue. Therefore, we hold that the trial court did not err in denying defendant's motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff