STATE OF MICHIGAN

COURT OF APPEALS

WESLEY GANSON,

Plaintiff-Appellant,

V

DETROIT PUBLIC SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
January 21, 2021

No. 351276
Wayne Circuit Court
LC No. 18-001363-CK

Before: K. F. KELLY, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Plaintiff, Wesley Ganson, appeals as of right the trial court order granting defendant's, Detroit Public Schools, motion to dismiss under MCR 2.116(C)(8). We affirm.

I. BACKGROUND

Plaintiff began working for defendant in 1985. In June 2009, defendant decided not to renew plaintiff's contract. In December 2010, the Office of Retirement Services (ORS) informed plaintiff by letter that he did not meet the eligibility requirements for an incentivized retirement because plaintiff had not worked between November 1, 2009 and May 1, 2010. In February 2011, plaintiff unsuccessfully appealed the decision of the ORS in the State of Michigan Administrative Hearing System. An administrative law judge (ALJ) found that plaintiff did not qualify for incentivized retirement benefits because plaintiff failed to prove by a preponderance of the evidence that he was employed by the defendant during the six-month period ending on May 1, 2010. The ALJ's findings of fact and conclusions of law were adopted by the Public School Employees' Retirement Board in September 2012.

In August 2016, plaintiff filed a two-count complaint for breach of fiduciary duty against defendant related to the nonpayment and retention of his retirement benefits in the United States District Court for the Eastern District of Michigan. A federal district court magistrate recommended dismissal of the case in defendant's favor. When neither plaintiff nor defendant challenged the magistrate's recommendation, it was adopted by a federal district court judge.

In February 2018, plaintiff filed the instant case against defendant for breach of contract in the Wayne County Circuit Court. Plaintiff alleged that after his contract was not renewed in 2009, he was appointed by defendant's school board to the position of Executive Director of Student Affairs at Wayne State University. He alleged that this employment sufficed to qualify him as an employee performing out of system public education services pursuant to MCL 38.1306. Plaintiff alleged that upon retirement, he "was supposed to receive an early buyout package for the remainder of the Plaintiff's life and a multiplier for a period of six (6) years following the termination of his employment[.] . . .Along with the early buyout incentive, the Plaintiff was supposed to receive a multiplier that would provide the Plaintiff $100 per month for a period of six years. . . . [Plaintiff alleged that he] was informed that he would be provided with his early buyout retirement benefits if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010." Plaintiff pled that he had fulfilled that requirement when he "worked for Spain Elementary for three (3) days". According to the complaint, "[t]he Plaintiff was not provided with the aforementioned multiplier and thus has not received $7,200 that he was supposed to receive." Further, "[b]etween the time that the Plaintiff attempted to collect on his early retirement benefits and the time that he was entitled to receive them, he has been damaged in the amount of approximately $300,000." Relevant to this appeal, attached to the complaint was a one-page-document titled "CONTRACT FOR EXECUTIVE DIRECTOR OF THE CENTER FOR STUDENT ADVOCACY SERVICES" and that listed "PARTIES, PURPOSES, DUTIES, REPORTS, TERMS OF EMPLOYMENT, COMPENSATION AND REPRESENTATIONS" as subpoints 1.1 through 1.10. There was no signature page.

Defendant filed a motion to dismiss under MCR 2.116(C)(8) that argued plaintiff failed to state a claim upon which relief could be granted because plaintiff failed to attach the complete contract to the complaint as required by MCR 2.113(F)(1), and that the claim was barred by the statute of limitations and res judicata. The court granted the motion to dismiss for plaintiff's failure to attach the whole contract as required under MCR 2.113(F) and under res judicata. On appeal, plaintiff challenges the application of the statute of limitations to his claim and whether the trial court erred in dismissing his complaint under MCR 2.113(F).

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019).]

"[W]hether a claim for unjust enrichment can be maintained is a question of law, which we [also] review de novo." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d

898 (2006). We also review de novo as a question of law whether an action is barred by the statute of limitations. *Parks v Niemiec*, 325 Mich App 717, 719; 926 NW2d 297 (2018).

III. ANALYSIS

Plaintiff first argues that defendant: 1) misled the court into believing that the accrual date for plaintiff's breach of contract claim was when the contract was signed, and 2) that the trial court erred in agreeing with defendant. The record does not support either assertion. To the contrary, in its brief in support of its motion to dismiss, defendant argued that the period of limitations for breach of contract claims "accrue at the time of the wrong upon which the claim is based was done regardless of the time when damage results" and that the statute of limitations began to run in this case in 2010 when plaintiff received a decision from the ORS. Defendant maintains that same theory on appeal.

The record also does not support plaintiff's assertion that the trial court agreed with defendant's statute of limitations argument. Rather, at the hearing for the motion to dismiss, the court declined to address the statute of limitations despite it having been pled and argued, as evidenced by the following colloquy:

> *Defendant*: The second basis, Your Honor, is even assuming that the entire contract had been filed, one, the defendant Detroit Public Schools is not a party to it.
>
> And even if it was filed again in it's entirety. The statute of limitations would bar the complaint.
>
> *The court*: So do we even need to address it when we know it wasn't filed completely?
>
> *Defendant*: I was just giving all of the arguments.
>
> *The Court*: I appreciate that. Yeah. And then you also have the issue of res judicata.

The record does not reflect a holding from the court regarding the statute of limitations issue. Neither was this issue a basis for the court's decision to dismiss.

Plaintiff next argues that his breach of contract claim is not barred by the statute of limitations and continues to accrue because the defendant's failure to pay plaintiff any retirement benefits constitutes a continuing breach where each failure to pay is a new breach. This argument was not raised before the trial court and is considered waived on appeal. See *Walters v Nadell*, 481 Mich 377, 38; 751 NW2d 431 (2008) (citation omitted) ("Michigan generally follows the 'raise or waive' rule of appellate review."). While this Court "may overlook preservation requirements when the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented," *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010), we decline review of this issue because its consideration is not necessary for a proper determination of the case. The court granted defendant summary disposition on the bases of the contract not being attached to the complaint in

full and res judicata — not the statute of limitations. Consideration of this issue, even if determined to be in plaintiff's favor, would not disturb the trial court's ruling or change the end result.

Plaintiff also argues that defendant's retention of all of plaintiff's retirement benefits constitutes unjust enrichment. We disagree. "Our Supreme Court has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another." *Morris Pumps*, 273 Mich App at 193 (quotation marks and citation omitted). "When unjust enrichment exists, the law operates to imply a contract in order to prevent it." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327–28; 657 NW2d 759 (2002) (quotation marks and citation omitted). "However, a contract will be implied only if there is no express contract covering the same subject matter." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Like a claim of breach of contract, the statute of limitations period for a claim of unjust enrichment is six years. MCL 600.5813 ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); MCL 600.5815 ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought...."). To prove a claim of unjust enrichment, the plaintiff must show "(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc v Morang–Kelly Investment, Inc*, 302 Mich App 59, 64; 836 NW2d 898 (2013).

Plaintiff's claim of unjust enrichment fails for multiple reasons. The claim would first be barred by the statute of limitations. Absent a date from plaintiff as to when the breach occurred, the ALJ's findings established that plaintiff knew as early as 2010 and as late as 2011 that he was being denied incentivized retirement benefits, however, he did not file the complaint in the instant matter until over six years later in 2018. MCL 600.5813; MCL 600.5815. Second, plaintiff's reliance on the continuing wrongs doctrine to extend the statute of limitations for his unnjust enrichment claim is of no avail where the doctrine is no longer recognized in Michigan. *Marilyn Froling Revocable Living T. v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009). Third, plaintiff cannot prove the second element of an unjust enrichment claim — that defendant retained a benefit — when defendant was not the holder of plaintiff's retirement funds. While it is true that defendant received the benefit of plaintiff's labor and length of employment, defendant is not the entity responsible to pay plaintiff's retirement benefits. According to the ALJ's proposal for decision, the ORS, acting on behalf of the Public School Employees' Retirement System denied plaintiff an incentivized retirement. Thus, plaintiff's retirement benefits were retained by the Public School Employees' Retirement System, which is in turn, maintained by the state of Michigan, not the defendant. See *AFT Michigan v State of Michigan*, 497 Mich 197, 202; 866 NW2d 782 (2015) ("the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 *et seq.*, . . . governs the Michigan Public School Employees' Retirement System (MPSERS).").

Plaintiff additionally argues that the trial court erred in dismissing his complaint 1) under MCR 2.113(F) because the contract was attached to the complaint, and 2) because defendant failed to assert the defense of lack of an existence of an agreement in its first responsive pleading. Importantly, plaintiff does not challenge the trial court's additional basis for dismissal based on res judicata.

To prevail on his claim for breach of contract, plaintiff must establish by a preponderance of the evidence that "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016). "If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading .... " MCR 2.113(C)(1). "[T]he written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).[1]

In his complaint, plaintiff referred to the contract as Exhibit E. According to the lower court record received by this Court and the certified copy of the lower court record submitted by defendant, exhibit E consisted of a letter from the Detroit Public Schools' superintendent recommending plaintiff for the position of director of student advocacy, a resolution from the Detroit Public Schools Board of Education to implement the student advocacy pilot program, and a document titled "Contract for Executive Director of the Center for Student Advocacy." This last document was one page, listed one section titled "Parties, Purposes, Duties, Reports, Terms of Employment, Compensation and Representations", and had subsections 1.1 through 1.10. It did not contain any other sections or pages. Upon receipt of the complaint, defendant's counsel twice alerted plaintiff by e-mail that the document was only one page. At the hearing on the motion to dismiss, plaintiff's counsel could not attest before the court as to whether he attached the contract in its entirety to the complaint. The court, in receipt of extensive communications between counsel in which the defendant repeatedly asked for the entire contract and plaintiff counsel's equivocation, found that the entire contract was not attached to the complaint.

Even if the trial court erred and the plaintiff either included the entire contract or supplemented his complaint with the additional page alleged to have been omitted, his breach of contract complaint would not have survived legal scrutiny and defeat. The second page contained subsections 1.11 through 1.17 and was signed by a school board representative, interim superintendent, plaintiff, two witnesses, and a notary. While the additional page stated that "The relationship of the Executive Director to the School District is that of an employee", it said nothing about the incentivized benefits plaintiff claims he was promised which would form the basis of the alleged breach. Plaintiff has failed to provide proof of the promises upon which his contractual claim was based: entitlement to an early buyout and a multiplier for six(6) years post retirement. if he worked for Detroit Public Schools for one day between the period of time between November 1, 2009 and May 1, 2010. While plaintiff claims this information was conveyed to him, he offers no basis upon which to legally augment, supplement, or modify a written contract. Thus, even if the trial court erred in finding that the entire contract was not filed with the complaint and erred in affording him the opportunity to amend, the court reached the correct conclusion that the contract claim was fatally flawed.

[1] MCR 2.113(F) has been redesignated MCR 2.113(C), and has been modified without substantive changes to accommodate "a statewide uniform e-Filing process," effective September 1, 2018, 501 Mich ——, and again modified without substantive changes, effective August 14, 2019 and January 1, 2020. See 503 Mich. ——, ——.

Plaintiff next argues that defendant waived its right to assert the lack of an existence of an agreement because it did not plead the affirmative defense in its first responsive pleading. We disagree.

"A party generally must raise the affirmative defense of release in his first responsive pleading or be deemed to have waived the defense." *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 647; 620 NW2d 310 (2000); See MCL 2.113(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended . . ."). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). According to the lower court record, defendant attached to its answer to plaintiff's complaint affirmative defenses that included: "Plaintiff has failed to plead the existence of a valid contract." and "Plaintiff has failed to attach a contract as required by Michigan law."

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron