

STATE OF MICHIGAN
COURT OF APPEALS

JACK GHANNAM,

Plaintiff-Appellant,

v

THERESA STEVENS d/b/a THERESA'S
TRANSCRIPTIONS and SALLY FRITZ,

Defendants-Appellees.

UNPUBLISHED

July 9, 2013

No. 311639

Ingham Circuit Court

LC No. 12-000202-CZ

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Jack Ghannam, appeals the trial court's grant of summary disposition to defendant, Theresa Stevens, d/b/a Theresa's Transcriptions.¹ For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

This appeal arises out of plaintiff's claim that Theresa Stevens failed to produce certain transcripts from his divorce litigation in Oakland Circuit Court. The record reflects that plaintiff filed a claim of appeal from the judgment of divorce on January 4, 2010. On January 1, 2010, plaintiff's counsel, Intissar Alkafaji sent a letter to Stevens and ordered numerous transcripts from the proceedings for purposes of appeal. It is undisputed that \$3,000 was initially paid as part of the amount due for the transcripts. Plaintiff's appeal of the divorce judgment was closed without prejudice in this Court on April 15, 2010, after plaintiff filed for Chapter 7 bankruptcy protection on March 5, 2010.

On April 7, 2010, Stevens sent a letter to Alkafaji stating that, as per their telephone conversation on April 1, 2010, she had completed all of the transcripts and that, upon receipt of

¹ The trial court dismissed Sally Fritz from the action in a prior order and, although he names her as an appellee, plaintiff makes no argument that the trial court erred in dismissing her as a party. Accordingly, plaintiff has abandoned any claims related to Fritz. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

the remaining balance of \$2,836, she would mail them out and file them with the Court of Appeals. On April 13, 2010, Stevens sent Alkafaji another letter, in which she stated:

I am attaching a copy of a letter I received from your client, Mr. Ghannam, today, threatening to sue me and/or my transcription service for the appellate transcripts in this case.

As I stated last week, you are the attorney of record, the request for the transcripts came from you. I have explained what is due and owing to me for the transcripts that sit ready and waiting to be mailed out as soon as I receive the certified check or money order for the remainder of the amount due, which is \$2,836.00.

Once again, it is your responsibility to pay the bill in full before any transcripts are released. I await your certified check or money order.

Plaintiff identified Theresa's Transcriptions as an unsecured, nonpriority creditor in his bankruptcy case and listed his debt as \$2,800 for "transcript fees."

Plaintiff received his bankruptcy discharge in January 2011. On March 15, 2011, plaintiff filed a complaint against Stevens in Pontiac District Court. The complaint alleged that plaintiff and Stevens entered into a contract for transcription services and that plaintiff paid 80 percent of the amount owed under the contract. Plaintiff further claimed that his bankruptcy eliminated any obligation for him to pay Stevens, but that she has refused to produce the transcripts. Plaintiff asked the Court to award him the entire amount of the contract, \$8,600, plus \$500 for "collection costs." On May 26, 2011, the parties stipulated to dismiss the case and the district court entered an order dismissing the case with prejudice.

After the bankruptcy court lifted the automatic stay on the divorce asset, plaintiff asked this Court to reopen his appeal of the divorce judgment. This Court reopened the appeal on December 29, 2011. On January 3, 2012, this Court sent plaintiff a notice that 21 transcripts were not filed for the appeal and that, if plaintiff failed to file the transcripts within 21 days, his appeal might be dismissed. Plaintiff communicated with Stevens numerous times, and Stevens clearly advised plaintiff that she would file the transcripts when she received a certified check for the balance owed of \$2,836. It is undisputed that plaintiff did not remit a certified check to pay the balance owed for the transcripts. On February 9, 2012, this Court dismissed the appeal because plaintiff failed to ensure the timely filing of the transcripts.

On February 27, 2012, plaintiff filed a complaint in Ingham Circuit Court against Stevens, Theresa's Transcriptions, and transcriptionist Sally Fritz. Plaintiff alleged that defendants should be held liable for his inability to proceed with the appeal in his divorce case because of their intentional failure to file the necessary transcripts. Specifically, plaintiff asserted allegations of intentional infliction of emotional distress, breach of fiduciary duty, fraud, and conspiracy. In lieu of an answer, defendants filed a motion for summary disposition, which

the trial court granted on all of plaintiff's claims.² However, the court permitted plaintiff to file an amended complaint against Stevens d/b/a Theresa's Transcriptions to state a claim for breach of contract.

After plaintiff filed his amended complaint, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(5), (6), (7), and (8). Defendant argued that plaintiff's breach of contract claim is barred by res judicata, plaintiff was never a party to a contract with Stevens, if plaintiff was party to a contract, the contract was extinguished in bankruptcy, and his case fails to meet the jurisdictional threshold of the circuit court of \$25,000 because the contract's value was only \$8,600. Plaintiff responded that, even after his bankruptcy, he attempted to pay Stevens by debit card or by sending a check, but she failed to cooperate and that this failure caused him to lose his opportunity to appeal the divorce judgment which, if successful, would have resulted in a large monetary award. The trial court granted summary disposition to defendant on each of the grounds asserted. Plaintiff appeals from this order.

II. DISCUSSION

"We review de novo a trial court's ruling on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Gray v Chrostowski*, 298 Mich App 769, 774; 828 NW2d 435 (2012). We hold that that the trial court correctly granted summary disposition to defendant.

Plaintiff's breach of contract claim is barred by res judicata. "The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies." *Paige v Sterling Heights*, 476 Mich 495, 521-522 n 46; 720 NW2d 219 (2006). In the district court action plaintiff filed in March 2011, he sued Stevens for breach of contract for failing to produce the transcripts after he made partial payment for them. Plaintiff stipulated to dismiss the action with prejudice and the case was dismissed with prejudice on May 26, 2011. "This Court has held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes." *Limbach v Oakland Cty Bd of Cty Road Commrs*, 226 Mich App 389, 395-396; 573 NW2d 336 (1997), citing *Bownridge v Michigan Mutual Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982). Plaintiff argues that the parties and allegations are different, but the record reflects otherwise.

Assuming that plaintiff asked Stevens to produce the transcripts or that Alkafaji acted on plaintiff's behalf in formally ordering the transcripts and, on the basis of plaintiff's assertion that he personally remitted \$3,000 as a deposit, it appears that a contract remained in existence following plaintiff's bankruptcy. Plaintiff has failed to present any evidence that the amount

² Though plaintiff refers once to the claims in his original complaint, he offers no argument that the trial court erroneously dismissed his claims for intentional infliction of emotional distress, breach of fiduciary duty, fraud, and conspiracy. Accordingly, he has abandoned any claim with regard to the ruling on those allegations. *Berger*, 277 Mich App at 712.

owing to Stevens was discharged by the bankruptcy court and no evidence suggests that the trustee assumed the contract. Therefore, the contract is deemed rejected under 11 USC § 365(d)(1). However, this Court has held that the “rejection of an executory contract does not constitute cancellation or termination of the contract.” *Barnett v Blachura*, 242 Mich App 395, 400-401; 618 NW2d 777 (2000).³ Further, the record evidence shows defendant’s continued assurance that she would produce the transcripts if plaintiff paid the remaining balance by certified check or money order, a requirement that defendant repeatedly made clear.

As discussed, plaintiff filed a breach of contract claim in the district court against Stevens for her failure to produce the transcripts from his divorce action, he requested money damages, and he voluntarily dismissed the case with prejudice. In the circuit court, though plaintiff increased the amount of damages requested and alleged that Stevens’s failure to produce the transcripts prevented him from pursuing his divorce appeal, the allegations are the same—that he partially paid for transcripts from the divorce proceedings and Stevens breached their agreement by failing to produce them. This issue, involving the same parties, was actually litigated and resolved in the district court action. Accordingly, plaintiff’s claim is barred by res judicata and the trial court correctly granted summary disposition pursuant to MCR 2.116(C)(7). Because this ground for dismissal was proper, we need not address the other grounds cited by the trial court in support of its decision.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O’Connell

³ An executory contract is one “on which performance is due to some extent on both sides.” *NLRB v Bildisco & Bildisco*, 465 US 513, 522 n 6; 104 S Ct 1188; 79 L Ed 2d 482 (1984) (citation omitted).