

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GLENN R. UNDERWOOD,

Plaintiff,

v.

PATRICIA SELENT,

Defendant.

Case No: 2013-137535-CB

Hon. Wendy Potts

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION OF COMPLAINT PURSUANT TO MCR 2.116(C)(7) AND MCL
600.5805(10)

At a session of Court
Held in Pontiac, Michigan

MAY 15 2014

Plaintiff Glenn Underwood filed this action against his sister and business partner Defendant Patricia Selent alleging several claims regarding their real estate partnership and family probate disputes. This case is one in a series of lawsuits Underwood and his siblings have filed against each other. In 2004, Selent and several siblings who held partnership interests in Underwood Property Management Company (UPMC) sued Underwood alleging that he breached his fiduciary duties as UPMC's managing partner and converted partnership property. Underwood counterclaimed alleging that Selent and the other UPMC partners failed to compensate Underwood for his work as managing partner and were unjustly enriched.

That case was submitted for a bench trial before Judge John McDonald in May 2005 and resulted in a June 20, 2006 judgment against Underwood in the amount of \$392,752. Judge

McDonald's detailed findings of fact and conclusions also removed Underwood as the managing partner of UPMC and ordered much of the partnership real estate holdings to be sold and the money to be deposited into escrow. Underwood appealed the June 2006 judgment, and the Court of Appeals remanded the case for a recalculation of the damages. On remand, Judge McDonald appointed Thomas Carroll as an expert CPA and entered a revised November 24, 2010 judgment adopting Carroll's report and awarding the plaintiffs \$200,823 in damages against Underwood. After Judge McDonald retired, the case was assigned to this Court. Underwood asked for a new trial and relief from judgment, both of which this Court denied. Underwood attempted to appeal that decision but the appeal was dismissed because it was not timely filed.

On November 22, 2013, Underwood filed this action against Selent alleging various wrongdoing stretching back to the 1980s. This is at least the second time Underwood has filed a civil action against Selent. In February 2010, while the 2004 case was still pending on remand from the Court of Appeals, Underwood filed an action against Selent alleging several claims similar to the claims alleged in this case and the 2004 case. The 2010 case was assigned to Judge McDonald who concluded that the claims were barred by res judicata and collateral estoppel and entered an order dismissing Underwood's claims. Underwood appealed and the Court of Appeals affirmed Judge McDonald's decision concluding that res judicata barred Underwood's claims.

In December 2012, Underwood filed an action against his sibling and former partner Lynda Carto alleging nearly identical claims to those alleged against Selent in this case. Carto moved for summary disposition arguing that Underwood's claims are barred by res judicata and the applicable limitation periods. The Court granted summary disposition concluding that most of Underwood's claims against Carto were barred because they were or could have been raised in the 2004 case. The Court also dismissed Underwood's defamation claim because it was time-

barred and based on privileged statements made during a court proceeding. That case is now before the Court of Appeals.

Selent now moves for summary disposition of Underwood's claims under MCR 2.116(C)(7), which determines if a claim is barred as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Selent argues that the claims are barred by res judicata because they were litigated or could have been raised in the 2004 case.

Res judicata bars a subsequent action between the same parties when (1) the first action was decided on the merits, (2) the claims in the second action were or could have been raised in the first, and (3) both actions involve the same parties or their privies. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575 (2001). The first element of res judicata is met because Selent and Underwood were both parties to the 2004 case. The third element is satisfied because the 2004 case was decided on the merits by a final judgment. The only question is whether Underwood's claims in this case were or could have been raised in the 2004 case.

"Res judicata bars not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Sewell, supra* at 575. The allegations in Underwood's complaint largely address matters that occurred before the June 2006 judgment was entered, confirming that nearly all of his claims were raised and decided in the 2004 litigation or could have been raised in that case. Thus, the third element is also met and these claims are barred.

Underwood's response to the motion does not directly address Selent's res judicata argument and, instead, rehashes the alleged errors that he believes occurred in the 2004 case. Underwood also claims that he should be allowed to revisit the 2004 claims because that case was wrongly decided and he did not receive due process. However, Underwood cites no

authority that would allow him to ignore res judicata principles simply because he believes he did not get a fair hearing in a prior case. The purpose of res judicata is to avoid relitigation of claims, to promote finality in litigation, and to prevent repeated vexatious litigation. *Board of County Road Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). To allow an exception to res judicata where a litigant believes that his claims were not correctly decided would defeat the purpose of the doctrine. Underwood's recourse for the alleged errors in the 2004 case was to seek appellate review, which he exercised.

Because all but two of Underwood's claims are premised solely on allegations of wrongdoing that occurred before June 2006, they are barred. Specifically, Selent is entitled to summary disposition of the following claims on res judicata grounds: Count I alleging breach of probate statutes, Count II alleging breach of fiduciary duties under the Uniform Partnership act, Count III seeking an accounting and dissolution of the UPMC partnership, Count IV alleging breach of the partnership contract, Count V alleging obstruction of justice, Count VI alleging conspiracy, Count VII alleging fraud on the court, and Count VIII alleging malicious prosecution.

In his Count IX, Underwood alleges that Selent's husband John Selent defamed him in a November 2013 incident at the Clarkston Post Office. This claim is obviously not barred by res judicata or collateral estoppel based on the 2004 case. However, Underwood has not named John Selent as a party and does not allege that Patricia Selent defamed him during the November 2013 event. To the extent that Underwood premises his defamation claim on statements made by a nonparty, he fails to state a claim.

Underwood also alleges that Selent defamed him during court proceedings in the 2004 case. To the extent that Underwood is alleging defamation that occurred before the June 2006

judgment, his claim is barred by res judicata. Further, statements made by Selent during the 2004 litigation or subsequent court proceedings are likely privileged. *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006). Selent is entitled to summary disposition of any defamation claim premised on statements made before June 20, 2006 or that are subject to privilege.

Underwood's Count IX also appears to allege defamation by Selent that occurred outside of court proceedings after June 2006 judgment was entered. Although these allegations would not be barred by res judicata or subject to privilege, the limitation period on a defamation claim is one year. MCL 600.5805(9). Thus, any claim for defamation occurring more than one year before this action was filed on November 22, 2013 would be untimely. It is not clear from the allegations in the complaint when Selent's alleged defamation occurred. To the extent that Underwood is alleging that Selent defamed him outside court proceedings on or after November 22, 2012, the Court will allow Underwood an opportunity to amend his complaint to state with particularity the circumstances of the alleged defamation and when it occurred.

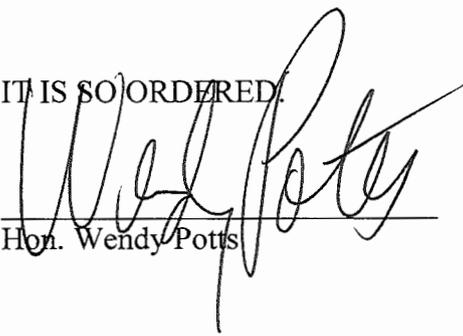
Underwood's Count X alleging practicing law without a license also appears to be premised, at least in part, on events occurring after the June 2006 judgment was entered, and thus would not be barred by res judicata based on the 2004 case. Selent asserts that she did not practice law and was merely representing herself in pro per, while Underwood claims that Selent attempted to represent other parties who did not appear at court proceedings. However, Underwood cites no authority for his novel theory that he can seek damages against Selent for alleged unauthorized practice of law, and this Court is not aware of any such claim. The Court will allow Underwood to submit a supplemental brief limited to five pages citing specific

authority for his unauthorized practice of law claim. If Underwood fails to brief the issue, the Court will dismiss the claim.

For all of these reasons, the Court grants Selent summary disposition of Underwood's Counts I, II, III, IV, V, VI, VII, and VIII and dismisses those claims with prejudice. The Court also dismisses Count IX to the extent it is based on defamation by a nonparty, privileged statements made during court proceedings, or defamation occurring before November 22, 2012. However, the Court will allow Underwood to amend his Count IX to allege with specificity any nonprivileged defamatory statements Selent allegedly made on or after November 22, 2012. The Court reserves its ruling on Underwood's Count X regarding unauthorized practice of law until receipt of Underwood's supplemental brief.

Dated: **MAY 15 2014**

IT IS SO ORDERED.



Hon. Wendy Potts