RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001216-MR

JEFFREY M. BLUM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 11-CI-01789

KRIS D. MULLINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: This is an appeal brought by an attorney, Jeffrey M. Blum, *pro se*, against another attorney, Kris Mullins. Blum alleges that Mullins committed fraud and/or negligent misrepresentation in the course of representing another client in a case that involved both attorneys. The Fayette Circuit Court found that Blum's claims are barred by the doctrine of *res judicata* and the applicable statute of limitations and dismissed the lawsuit by order entered May 9,

2011. Subsequently, Blum filed a motion to reconsider, and the trial court denied that motion by order entered June 10, 2011. Because the trial court properly determined that Blum's claims are barred by the issue of *res judicata*, we affirm.

Blum's allegations of fraud against Mullins and the appeal to this Court are but the latest in a series of lawsuits and hearings dating back to the 1996 termination of David H. Dixon as a teacher at Cumberland High School in Harlan County. A brief summary of the litigation leading to this case is necessary in order to understand the issues presented on appeal.

David Dixon, a teacher and part-time photographer, admitted to taking photographs of a high school student who was not wearing any clothing from the waist up. *Dixon v. Clem*, 404 F.Supp. 2d 961, 963 (E.D. Ky. 2005). The Superintendent of Harlan County Schools suspended Dixon, and a tribunal convened by the Harlan County Board of Education heard evidence and found Dixon guilty of conduct unbecoming a teacher, and terminated his teaching contract. *Id.* Dixon maintained that, although the student was not wearing clothing from the waist up, she was not "nude" because her nipples were covered with hair or a fishnet. *Id*.

Dixon sought review of his termination by filing an original action in the Harlan Circuit Court. *Id*. Though he did not represent Dixon before the hearing tribunal, Blum represented Dixon before the Harlan Circuit Court and in subsequent proceedings. The Harlan Circuit Court found that the instructions given by the hearing officer were erroneous and ordered the case remanded to the

tribunal. *Id*. On appeal, this Court clarified that while the instructions were erroneous, no additional proof could be offered at the resentencing hearing. *Id*. at 964. On remand, the tribunal, after being properly instructed, again found that Dixon should be terminated. *Id*. Dixon again sought review in the Harlan Circuit Court, which ultimately dismissed that action as untimely. Dixon again appealed to this Court, which affirmed the Harlan Circuit Court. *Dixon v. Board of Education of Harlan County*, 2009-CA-000941, 2011 WL 43230 (Ky. App. 2011).

Not content with the decisions of three judicial bodies that had reviewed his conduct, Blum, on behalf of his client, Dixon, filed a separate action in the United States District Court for the Eastern District of Kentucky in August 2005. *Dixon*, 404 F.Supp.2d 961. The federal lawsuit, as amended, named as defendants the principal, superintendent, hearing officer, and Attorney Susan Coleman Lawson, who was counsel for the Harlan County Schools in the first tribunal and for a period of time thereafter. *Id*. at 965. Appellee Mullins, along with his law partner, represented Attorney Lawson in the federal lawsuit. *Id*. at 962. The suit alleged that the defendants violated Dixon's civil rights by engaging in what the District Court called a "motiveless conspiracy" to ensure that the Superintendent's decision to terminate Dixon was upheld. *Id*. at 965. Dixon, while admitting that he took photographs of a student who was not clothed from the waist up, alleged that the defendants made up some photographs and digitally altered others so that more of the student's nipple was visible. *Dixon v. Clem*, 492 F.3d 665, 672 (6th Cir. 2007).

The defendants moved to dismiss the lawsuit. The U.S. District Court, finding it unnecessary to reach the merits of Dixon's claims, dismissed the case on the basis that it was time-barred. *Dixon*, 404 F.Supp.2d at 965-69. Thereafter, Dixon filed a motion to reconsider and a motion to disqualify the presiding judge, Honorable Danny C. Reeves. Both motions were denied. *Dixon v. Clem*, 419 F.Supp.2d 947 (E.D. Ky. 2006) (denying motion to reconsider); *Dixon v. Clem*, 2006 WL 1718197 (E.D. Ky. 2006) (denying as moot the motion to disqualify).

Most pertinent to this case is the U.S. District Court's imposition of sanctions upon Blum. While Dixon's motion to reconsider was pending, certain of the defendants—*not* Mullins' client, Lawson—filed a motion for attorneys' fees. The District Court declined to award attorneys' fees against Dixon personally, observing that although his allegations "were extremely close to the line" and his arguments were "largely specious," Dixon's lawsuit was not filed in bad faith. *Dixon v. Clem*, 2006 WL 751235 at *1 (E.D. Ky. 2006). However, the District Court found that Blum, as Dixon's lawyer, had engaged in improper conduct during the litigation. *Id*. at *2. The Court found that Blum's conduct included "the pressing of specious legal claims and filings in this case which either contained inappropriate language, claims and assertions (requiring unnecessary responses) or which were inappropriate *en toto*." *Id*. Relying upon a federal statute that allows fees to be assessed directly against counsel who multiply the proceedings and cataloging the litany of Blum's inappropriate conduct, the U.S. District Court held

that he should pay the defendants' legal fees incurred in responding to certain arguments and filings. *Id*. at *2-4. The Court ordered that "[t]he Defendants' counsel are instructed to submit affidavits to the Court detailing that portion of their time which was spent reviewing and responding to Records No. 26, 31 and 32." *Id*. at *5.

In compliance with the District Court's order, Mullins and another defendant's counsel filed affidavits setting forth the amount of fees incurred in responding to the three filings found by the Court to be particularly egregious. *Dixon v. Clem*, 2006 WL 1388507 (E.D. Ky. 2006). Mullins' affidavit is the document at issue in this case. In response, Blum objected to the affidavit and moved to disclose their counsel's billing records. Blum argued that the fees stated in Mullins' affidavit were not caused by the three filings the Court found most objectionable.

In a detailed analysis, the District Court rejected this argument. The Court found that the time stated in Mullins' affidavit "represents an appropriate amount of time spent on the given tasks" and that amounts requested by Mullins were entirely reasonable. *Id*. at *3. The Court denied Blum's motion to compel disclosure of time records, finding that the "affidavit[] submitted by . . . Mullins [is] in compliance with the form required by this Court's previous Order and directive." *Id.* The Court ordered Blum to pay $6,514.00 as a sanction for the legal fees Mullins' client, Lawson, incurred in response to Blum's vexatious filings. *Id*. at *5.

Blum appealed the sanction order, as well as the District Court's other rulings against Dixon, to the Sixth Circuit Court of Appeals. *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007). Blum raised arguments regarding the propriety of the sanctions imposed against him, including the propriety of Mullins' affidavit, and the Sixth Circuit rejected them. *Id*. at 678-79. The Court stated "[s]imply put, the record in this case fully supports the district court's decision to impose sanctions on Blum." *Id*. at 678. The Sixth Circuit admonished that "we cannot emphasize enough that Blum needs to learn his lesson at some point: His behavior, whether motivated by bad faith or not, not only reflects poorly on himself and his profession, but, far more importantly, is of no benefit to his clients." *Id*. at 679. The Sixth Circuit affirmed the District Court in all respects.

Blum commenced the instant law suit in the Fayette Circuit Court on April 4, 2011, alleging that Mullins committed fraud and negligent misrepresentation in submitting his affidavit to the United States District Court in compliance with its order. Blum's complaint sets forth that Mullins' affidavit does not correctly set forth the amount of time spent in responding to the three filings referenced by the District Court. These same arguments were presented to the U.S. District Court and the Court of Appeals for the Sixth Circuit.

Mullins moved the Fayette Circuit Court to dismiss the lawsuit. In support of this motion, Mullins argued that the complaint was barred on three independent grounds: *res judicata*, statute of limitations, and judicial statements privilege/witness immunity doctrine. Blum filed no objection to the motion to

dismiss and did not appear at the hearing on the matter. The court found that Blum's claims were barred by *res judicata* and the statute of limitations and dismissed the complaint accordingly in its judgment entered May 9, 2011. The court did not rule upon the application of the witness immunity doctrine or judicial statements privilege.

Arguing that he did not receive notice of the hearing, Blum moved to vacate the May 9, 2011, judgment. In his motion to vacate, Blum argued the merits of Mullins' motion to dismiss as to *res judicata* and statute of limitations, but did not respond to the arguments regarding the judicial statements privilege or witness immunity doctrine.

The Fayette Circuit Court granted Blum's motion to vacate insofar as it would reconsider the rulings on the motion to dismiss. After oral argument, the trial court denied Blum's motion to vacate judgment, again finding that Blum's lawsuit was barred by *res judicata* and the statute of limitations. The court did not rule upon Mullins' arguments regarding the witness immunity doctrine and judicial statements privilege in its June 10, 2011, order. This appeal now follows.

On appeal, Blum presents two central arguments to this Court. First, he argues that the trial court improperly found that his claims were barred by the one year statute of limitations in Kentucky Revised Statutes (KRS) 413.245. Instead, Blum argues that the more general five year statute of limitations provided in KRS 413.120(12) applies. Blum's second argument is that his complaint was not barred by the doctrine of *res judicata*.

> A motion to dismiss for failure to state a claim upon which relief may be granted 'admits as true the material facts of the complaint.' So a court should not grant such a motion 'unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . .' Accordingly, 'the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true.' This exacting standard of review eliminates any need by the trial court to make findings of fact; 'rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?' Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), reh'g denied (Aug. 26, 2010) (internal citations and footnotes omitted).

In his brief, Blum focuses on the applicability of the particular statute of limitations. We agree with Blum that the determination of this issue rests solely on our Supreme Court's resolution of *Abel v. Austin*, 2010-SC-000426, 2010 WL 2132745, which is currently before the Court on discretionary review. But because we hold that Blum's claims are barred by the doctrine of *res judicata*, regardless of which statute of limitation applies, we need not await the determination by the Supreme Court of the applicable statute of limitations.

In this lawsuit, Blum contends that Mullins' affidavit filed in the federal court action cannot be correct and seeks a determination of the amount of time Mullins spent responding to the subject filings. Blum's claims are identical to

those made in the federal action, and thus are a collateral attack on the sanctions order entered in that matter. After Mullins filed his affidavit in compliance with the Court's order, Blum responded to the affidavit in three separate filings. First, he filed a direct response and argued that the three pleadings the Court singled out for sanctions did not cause defendants to incur any fees and that Mullins' affidavit to the contrary contained false statements of fact. Second, Blum filed a motion to compel Mullins to provide his billing records, arguing that Mullins' affidavit did not make the requisite showing that any fees were caused by the three filings for which Blum was sanctioned. Third, Blum replied again on his motion to compel, arguing that Mullins affidavit was not truthful. In fact, certain portions of Blum's complaint in the instant action appear to have been copied verbatim from the arguments presented to the U.S. District Court.

In order to grant the relief Blum seeks, the Fayette Circuit Court would have to re-examine the pleadings before the U.S. District Court to determine whether Judge Reeves correctly sanctioned Blum. Kentucky law simply does not permit Blum to re-litigate these issues, and certainly not in an original action in the Fayette Circuit Court. *See*, *e.g. Spicer v. Spicer*, 236 S.W.2d 474, 476 (Ky. 1951) (a judgment is presumed valid and cannot be collaterally attacked unless it appears from the face of the record that the judgment is void).

> Res judicata is a rule of universal law pervading every well-regulated system of jurisprudence. It has two bases, embodied in the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation; the other,

> the hardship on the individual that he should be vexed twice for the same cause.

Barnett v. Commonwealth, 348 S.W.2d 834, 835 (Ky. 1961) (internal citation omitted). The doctrine is broad in application. "[A] final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time." *Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002) (internal citation omitted). In the instant case, Blum is asking this Court to force the Fayette Circuit Court to examine the exact issues the federal court decided in the previous action. This, we simply cannot do. Blum's claims are barred by *res judicata*, as the trial court so properly held.

Because Blum's claims are barred, we need not address Mullins' claims that the witness immunity doctrine and the judicial statements privilege also apply. Arguably, those issues are not appropriate for our review because the trial court did not rule upon them.

Based on the foregoing, we affirm the Fayette Circuit Court's May 9, 2011, order granting Mullins' motion to dismiss and the subsequent June 10, 2011, order denying Blum's motion to vacate that order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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