

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHIGAN FIRST CREDIT UNION,

Plaintiff/Counter-  
Defendant/Appellant,

v

BARBARA J. SMITH and SARAH TROUPE,

Defendants/Counter-  
Plaintiffs/Appellees.

UNPUBLISHED

June 21, 2011

No. 296670

Oakland Circuit Court

LC No. 2007-082217-CZ

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Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff/counter-defendant (“plaintiff”) appeals as of right from the trial court’s order dismissing its complaint against defendants/counter-plaintiffs (“defendants”) pursuant to MCR 2.116(C)(6) and MCR 2.504(B)(1). On appeal, plaintiff argues that the trial court erred when it concluded that plaintiff had violated various court rules and rules of professional conduct and that plaintiff’s claims were already pending in another action. We reverse and remand.

Plaintiff first argues that the trial court erroneously concluded that at the time its complaint was filed in this case, a similar claim was pending in 36<sup>th</sup> District Court and, therefore, dismissed plaintiff’s case under MCR 2.116(C)(6). This Court reviews a trial court’s decision whether to grant summary disposition under MCR 2.116(C)(6) de novo. *Valeo Switches & Detection Sys v EMCom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006).

MCR 2.116(C)(6) permits a court to grant summary disposition where “[a]nother action has been initiated between the same parties involving the same claim.” The rule is a “codification of the former plea of abatement,” designed to “protect[] parties from being harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation.” *Frohriep v Flanagan*, 275 Mich App 456, 464; 739 NW2d 645 (2007), rev’d in part on other grounds 480 Mich 962 (2007) (internal quotation omitted). “[T]he two suits must be based on the same or substantially same cause of action, and as a rule the same relief must be sought.” *Id.* (internal quotation omitted).

Plaintiff filed a complaint against defendant, Barbara Smith, in 36<sup>th</sup> District Court in 2005, apparently for money owed on a loan for her vehicle and repossession of that vehicle. Smith filed a counter-complaint in that case alleging a breach of fiduciary duty, breach of

contract, conversion, fraudulent misrepresentation and concealment, and embezzlement, arising out of plaintiff's conduct with respect to Smith's auto loan and bank account with plaintiff. In part, Smith alleged that plaintiff stole \$40,000 from Smith's account using improper accounting methods. Plaintiff's complaint in this case contains counts for slander, libel, and defamation arising out of defendants' public statements that plaintiff stole \$40,000 from Smith.

While there may be a common underlying *fact* at issue—whether plaintiff actually stole \$40,000 from Smith—between the two cases, there are no actual *claims* in common. The plain language of MCR 2.116(C)(6) pertains to actions involving “the same claim.” Further, the claims are not even brought by the same party, precluding any need to protect a party from harassment by duplicative litigation. *Frohriep*, 275 Mich App at 464. Thus, we conclude that MCR 2.116(C)(6) is not applicable to the facts of this case that the trial court erred when it granted summary disposition under this rule.

Plaintiff next argues that the trial court also erred when it dismissed plaintiff's complaint for failure to comply with court rules and orders under MCR 2.504(B)(1), because the alleged underlying failures did not occur. This Court reviews dismissal of a case for failure to comply with court rules or a court order for an abuse of discretion. *Woods v SLB Property Mgmt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008). The interpretation of court rules is a question of law that is reviewed de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). This Court reviews the proper application of the law to the facts de novo. *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 299; 777 NW2d 437 (2009).

Plaintiff first addresses the court's conclusion that plaintiff violated MCR 2.113(C)(2) by failing to disclose in the caption to its complaint the pending action in 36<sup>th</sup> District Court. The rules governing statutory construction are equally applicable to court rules. *Reed v Breton*, 279 Mich App 239, 242; 756 NW2d 89 (2008). This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008). If the statutory language is unambiguous, no judicial construction is required and the plain meaning of the language must be applied. *Id.*

MCR 2.113(C)(2) provides:

The caption of a complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff, or of a plaintiff appearing without an attorney:

(a) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

(b) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/[\_\_\_\_\_ Court], where it was given docket number \_\_\_\_\_ and was assigned to Judge \_\_\_\_\_. The action [remains]/[is no longer] pending.

The caption on plaintiff's complaint stated, in relevant part: “There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this

complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge. . . .” The trial court complained that plaintiff’s caption included the qualification, “in this Court.” Clearly, there is no requirement in MCR 2.113(C)(2) that pending or resolved actions exist in the same court as the instant action in order to be disclosed. Accordingly, plaintiff’s statement does not technically comply with MCR 2.113(C)(2).

The trial court further concluded that plaintiff violated MCR 2.113(C)(2) because even if its statement correctly reflected MCR 2.113(C)(2)(a)—without the “in this Court” qualification—it would be untrue. The court concluded that all of Smith’s claims had been filed before plaintiff filed its complaint in this case. Plaintiff argues that at the time it filed its complaint in this case, there was no counterclaim in 36<sup>th</sup> District Court regarding whether plaintiff stole \$40,000, the truth of which could provide a defense to plaintiff’s claims against defendants in this case. Specifically, plaintiff argues that the second amendment to Smith’s counter-complaint—titled a “supplement”—contained the relevant claim and was not filed until sometime after April, 2007, when plaintiff filed the complaint in this case. Defendants averred to the trial court that the first and second amendments were filed together in February, 2007. There was no dispute that the second amendment—the “supplement”—contained the relevant claim.

The 36<sup>th</sup> District Court register of actions does not have any record of a counter-complaint until June 7, 2007, when it states that Smith served plaintiff with the counter-complaint in court. The register of actions next lists a response to Smith’s counter-complaint and amended counter-complaint on June 14, 2007. The only mention of the supplement to counter-complaint in the register of actions is on September 7, 2007. All of these dates are after April, 2007, when plaintiff filed its instant complaint. Further, the counter-complaint and the amended counter-complaint are listed in one entry and the supplement to counter-complaint is listed in a separate entry, providing some evidence that the supplement was not filed with the amended counter-complaint as defendants aver. On the other hand, the copy of the amended counter-complaint provided by defendants is stamped February 8, 2007, although it does not have any indication of a court or other entity in the stamp. There is no entry in the register of actions for February 8, 2007.

We conclude that there is no clear basis upon which the trial court could have concluded that Smith’s claim regarding the \$40,000 was pending in 36<sup>th</sup> District Court in April, 2007, when plaintiff filed its claim in this case. Neither party presented any conclusive evidence to the lower court of when Smith’s various pleadings were filed. The original complaint filed by plaintiff in the 36<sup>th</sup> district court, recall, was based upon Smith’s non-payment of a car loan obtained from plaintiff. The trial court thus erred when it concluded that plaintiff substantively violated MCR 2.113(C)(2) by stating that there were no pending actions arising from the same transaction or occurrence in its complaint.

Plaintiff next argues that the trial court erred when it concluded that plaintiff violated the trial court's order to produce documentation. On January 13, 2010, the trial court ordered plaintiff to produce plaintiff's motion for stay from the Wayne Circuit Court,<sup>1</sup> that court's order of stay, and a transcript of the proceedings within 14 days. The trial court indicated to plaintiff that "sometimes transcripts might take longer but if it takes longer then you'll have to let me know."

Within 14 days, plaintiff produced a motion for summary disposition that it had filed in Wayne County Circuit Court, explaining that there was no actual motion for stay but that the order had been entered at the hearing on the motion for summary disposition. Plaintiff also produced the Wayne County Circuit Court's order of stay, and the trial court accepted both documents as in "compliance with the court's prior order." Plaintiff did not produce a transcript within 14 days because it was unable to obtain the transcript from Wayne Circuit Court in the allotted time. Instead, plaintiff produced a letter dated the day after the trial court's order addressed to the Wayne Circuit Court court reporter requesting the transcript, plus a copy of the check transmitted with that letter. At the hearing, plaintiff advised the trial court that the court reporter had written to him in a letter dated January 22, indicating that the transcript would be ready within 30 days. Plaintiff provided the transcript two days later at a February 5, 2010 hearing.

The trial court concluded, "Now I have a transcript. I'm not sure if it's the official transcript or not. I reviewed it. It's late. It wasn't provided in the time the court requested and, apparently, in a last-ditch effort to undermine the pending motion, it's now been provided." The trial court concluded that "the plaintiff has failed to comply with the court's January 8 [sic] order requiring production of certain documents, most particularly the transcript." There was clearly no basis to support the trial court's conclusion. The trial court expressly deemed the motion and order provided to be in compliance with its order. The trial court further acknowledged that obtaining the transcript may take more than 14 days and expressly requested that, in that case, plaintiff make that known to the trial court. Plaintiff did so. There is no indication that plaintiff delayed in attempting to obtain the transcript. The trial court erred when it concluded that plaintiff violated its court order.

Plaintiff next argues that the trial court erred when it concluded that plaintiff asserted "contradictory or groundless" positions. The trial court first noted that plaintiff had argued on October 29, 2007, in Wayne Circuit Court that the result of this case would be controlling on the issue of the \$40,000 in that case. As of October 29, 2007, a prior trial court judge had granted summary disposition in this case in plaintiff's favor and the matter was pending before this Court. Plaintiff's argument was, therefore, that because there was no genuine issue of material fact regarding whether plaintiff stole Smith's money, claims to that effect in Wayne Circuit Court should be dismissed.

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<sup>1</sup> The 36<sup>th</sup> District Court action was eventually removed to Wayne Circuit Court.

The trial court contrasted this statement with plaintiff's statement in its response to defendants' motion to show cause in this case that "this matter before this Court involves a completely separate transaction" from the Wayne Circuit Court action. The trial court failed to note, however, that the very next sentences in plaintiff's response state, "*At the time the [complaint] was filed . . . there had been a counter-complaint and an amended counter-complaint, brought by defendant Smith, only, relating to [plaintiff's] repossession of her vehicle and payments made on the vehicle. The matter had nothing to do with libel, slander and defamation or the making of false statements . . . which is the subject of the [complaint].*"

Thus, the trial court's conclusion that plaintiff was brazenly making contradictory arguments in separate courts is also not supported by the facts. Plaintiff's defense of the caption in its complaint was founded upon its statement that, at the time its complaint was filed, there was no claim in 36<sup>th</sup> District Court regarding the \$40,000. We concluded above that the trial court erred when it concluded otherwise. Moreover, this was merely plaintiff's argument in support of its perception of the facts, irrespective of whether the trial court concluded the argument was sound. The trial court erred when it concluded that plaintiff violated one or more court rules or rules of professional conduct with these statements.

Finally, plaintiff argues that its attorneys did not violate any rules of professional conduct, as asserted by the trial court. Regardless of whether they did, MRPC 1.0(b) provides that "[f]ailure to comply with an obligation or prohibition by a rule is a basis for invoking the disciplinary process." The rules do not indicate that their violations merit dismissal of an action.

MCR 2.504(B)(1) provides: "If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." This Court has identified seven non-exclusive factors that a court should consider when deciding whether to dismiss a case pursuant to MCR 2.504(B)(1):

- (1) whether the violation was willful or accidental;
  - (2) the party's history of refusing to comply with previous court orders;
  - (3) the prejudice to the opposing party;
  - (4) whether there exists a history of deliberate delay;
  - (5) the degree of compliance with other parts of the court's orders;
  - (6) attempts to cure the defect;
  - and (7) whether a lesser sanction would better serve the interests of justice.
- [*Woods*, 277 Mich App at 631 (internal quotation omitted).]

Moreover, "dismissal is a drastic sanction." *Id.*

We conclude that the trial court clearly abused its discretion when it dismissed plaintiff's case pursuant to MCR 2.504(B). Despite some minor technical errors, the trial court erred when it concluded that plaintiff and its attorneys violated a host of rules and court orders. Further, we do not perceive any pattern of delay or willful violations or prejudice to defendants in the minor violations. The trial court's decision to resort to the "drastic sanction" of dismissal was outrageous and unwarranted by the facts of this case.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Deborah A. Servitto