

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WINSTON BROTHERS IRON & METAL CO,

Plaintiff-Appellant,

v

RONALD FINK,

Defendant-Appellee.

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UNPUBLISHED

April 25, 1997

No. 181929

Oakland Circuit

LC No. 93-DA5958

Before: Young, P.J., and Taylor and R.C. Livo,\* JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals by leave granted from the circuit court's order affirming the district court's order of dismissal of the case. We reverse.

This action arises out of defendant's alleged failure to pay interest on a loan from plaintiff and its president, Julian Winston, to defendant and his then wife, Karen Fink. After plaintiff filed suit against defendant only, in September 1992, defendant filed a petition for joinder alleging that, pursuant to MCR 2.205(A), Karen Fink was a necessary party to the action because she was a joint obligor as evidenced by her being a named payee on the loan check issued by plaintiff. In December 1992, the circuit court granted defendant's motion to add Karen Fink as a party-defendant. However, neither party added Karen Fink as a party.

As a result of subsequent mediation, the case was remanded to the district court, which entered an order to show cause why the case should not be dismissed for plaintiff's failure to file pleadings and for failing to serve a summons upon Karen Fink or otherwise join her as a defendant. Plaintiff responded at the district court hearing that nowhere in the circuit court's order was plaintiff required to amend its pleadings or do any other act to join Karen Fink as a defendant. Nevertheless, plaintiff agreed to prepare and file any necessary pleading to add her. The district court held that the circuit court's order unambiguously required plaintiff to take action to add Karen Fink as a party since "no one else can" and dismissed the case with prejudice, as defendant requested.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff subsequently appealed the district court's order dismissing the case which appeal was assigned to the same circuit court judge who ordered joinder. Plaintiff moved the circuit court to reassign the case arguing that the current judge could not hear an appeal which arose out of his own order. At the hearing on plaintiff's motion, the circuit court held that it was only considering the district court's order of dismissal, not its own joinder order. Therefore, the court determined that the appeal was properly before it and denied reassignment. Regarding the merits of the appeal, the court held that the district court did not abuse its discretion in dismissing plaintiff's complaint. On December 30, 1994, plaintiff applied for leave to appeal which this Court granted.

On appeal, plaintiff first contends that the trial court erred in finding that Karen Fink was a necessary party to the action. We review a trial court's decision to add or drop a party to an action for an abuse of discretion. *Hoffmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995).

MCR 2.205(A), which governs necessary joinder of parties, provides:

Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their perspective interests.

However, where a party's presence in the action is not essential to the court rendering complete relief, factors such as judicial economy or avoidance of multiple litigation are not enough to compel joinder. *Hoffmann*, *supra* at 96.

Plaintiff argues that Karen Fink was not a necessary party because Ronald Fink, as one of two joint and several obligors, could be sued individually for judgment in this collection action. We agree. Although there is no written agreement, defendant has not contested plaintiff's assertion that the alleged obligation to repay the loan with interest was joint *and* several. If liability is joint and several, the obligors may be proceeded against jointly or severally. See *J A Fay & Co v James Jenks & Co*, 78 Mich 312, 44 NW 380 (1889); *Badour v Zifkin*, 96 Mich App 325, 332; 292 NW2d 201 (1980). Therefore, plaintiff's failure to obtain service of process over Karen Fink does not preclude his claim against defendant. Therefore, the circuit court abused its discretion in holding that Karen Fink was a necessary party to plaintiff's action and ordering that she be joined.

Next, plaintiff argues that the district court abused its discretion in ordering dismissal of the case. We agree. In general, dismissal of an action is a drastic step that should be taken cautiously, as our legal system favors disposition of litigation on the merits. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Id.* Failure to so evaluate constitutes an abuse of discretion. *Id.* at 506-507.

MCR 2.207 provides that misjoinder of parties is not a ground for dismissal of an action. Both MCR 2.207 and MCR 2.205(B) provide that if a necessary party has not been joined, the court shall

order that the party to appear and join the action unless the court cannot exercise jurisdiction over that party.<sup>1</sup> Because we conclude that Karen Fink was not a necessary party, the district court's dismissal based upon plaintiff's failure to join her in the action was in error. Further, because the court's prior order holding that Karen Fink was a necessary party did not impose an obligation upon plaintiff to serve her with process, the court could not base dismissal on defendant's wilful noncompliance with a court order. MCR 2.205(A) and MCR 2.207 impose the duty to summon a necessary party upon the court ordering the party's appearance. Therefore, the district court abused its discretion in dismissing plaintiff's breach of contract claim based on plaintiff's failure to join Karen Fink as a party to this action.

Lastly, plaintiff argues that the circuit court should have reassigned his appeal from the district court's dismissal of his complaint to a different judge. Since plaintiff failed to seek de novo review of the denial of reassignment by the chief judge of the circuit court, plaintiff has not properly preserved this issue for appellate review. MCR 2.003(C)(3)(a); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.

/s/ Clifford W. Taylor

/s/ Robert C. Livo

<sup>1</sup> There is no assertion that the lower courts had no jurisdiction over Karen Fink absent her consent or voluntary appearance. Assuming arguendo that the court had no jurisdiction over her, the court may still proceed with the action after considering the four factors enumerated under MCR 2.205(B)(1)-(4), which provides:

In determining whether to proceed, the court shall consider

- (1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;
- (2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;
- (3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and
- (4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.