

STATE OF MICHIGAN
COURT OF APPEALS

CHESTER P. HAWKINS,

Plaintiff-Appellant,

v

GOVERNOR OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED

September 12, 1997

No. 186649

Ingham Circuit Court

LC No. 94-078871-CZ

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Plaintiff appeals by leave from the June 14, 1995 order of Ingham Circuit Judge Thomas Brown who, on remand from this Court for further proceedings consistent with *Martin v Dep't of Corrections (On Remand)*, 201 Mich App 331; 505 NW2d 915 (1993), found that plaintiff was not indigent, reaffirmed the imposition of a filing fee for a complaint filed by plaintiff in Ingham Circuit Court on October 20, 1994, and ordered the Michigan Department of Corrections ("MDOC") to collect and send to the Ingham Circuit Court one-half of any funds plaintiff receives until the sum of \$62 is paid. We reverse and vacate the trial court's order.

Plaintiff first argues that there was no evidence of any change in plaintiff's indigency status to justify reinstatement of fees and that the trial court's finding that plaintiff was not indigent was clearly erroneous. We agree. The record reveals that plaintiff's prison account statements consistently showed a negative balance. Plaintiff subsists on monthly \$7 loans from the MDOC. In an affidavit of indigency filed with the trial court on April 12, 1995, plaintiff averred that he had no prison work assignment because of chronic illness. This is essentially the same averment plaintiff made in his affidavit of indigency filed on August 15, 1994 on which the original fee suspension was based. In his April 12, 1995 affidavit, plaintiff also averred that he was indebted to the MDOC for in excess of \$600 which had accumulated over the past five years as a result of receiving various indigent loans. At the June 1995 hearing on remand, plaintiff testified that he was incarcerated by the MDOC. He also testified that his room, board and medical care were provided and that, although these expenses were chargeable against him, he had not yet received a bill. The trial court refused to accept or look at a certificate of accounting offered as evidence by plaintiff, which presumably would have indicated that

plaintiff's circumstances had not changed during the two months since he had last filed an affidavit of indigency. The trial court then found that plaintiff was not indigent because there was no evidence that the MDOC was interested in obtaining repayment for room, board and medical care. The trial court ordered the filing fee reinstated pursuant to MCR 2.002(G).

Filing an affidavit of indigency creates a presumption of indigency. *Hadley, v Ramah*, 134 Mich App 380, 388; 351 NW2d 305 (1984). This Court has held that before "a previously granted waiver or suspension of filing fees and costs under MCR 2.002(G)" may be removed, a trial court must determine "whether there has been a change in indigency status justifying a revocation of the previously granted waiver of filing fees and costs." *Martin, supra* at 335, citing *Jordan v Dep't of Corrections*, 412 Mich 939; 315 NW2d 862 (1982). See also *Brown v Dept' of Corrections*, 439 Mich 971; 483 NW2d 381 (1992). Thus, even though the trial court retains discretionary power to reinstate filing fees and costs pursuant to MCR 2.002(G) if there is evidence that the plaintiff could pay the fees, *Koss v Dep't of Correction*, 184 Mich App 614, 617; 459 NW2d 34 (1990), unless such a revocation is based on a review of the plaintiff's *current* financial status, such a revocation would be an abuse of discretion. See *Martin, supra*; *Hadley, supra*, 134 Mich App 388. The mere fact that a plaintiff is a prisoner and does not pay for room and board is not a sufficient factual predicate for a finding that the plaintiff is not presently indigent. *Hadley, supra* at 389.

At the June 1995 hearing on remand, there was no evidence presented to show that plaintiff's indigency status had changed. That plaintiff did not presently have to pay for his room and board and medical care was not sufficient to overcome the presumption of indigence established by plaintiff's previous affidavits where there was no evidence that plaintiff's circumstances were any different than they had been when the fees were suspended in October of 1994. *Id.*, 389. Considering the entire record, this Court is left with a definite and firm conviction that the trial court committed a mistake when it found that plaintiff was not currently indigent. *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976). Accordingly, the trial court erred when it reaffirmed its imposition of the filing fee.

Plaintiff also argues that the suspension of filing fees is mandatory under MCR 2.002(C) for prisoners receiving loans from the MDOC, that the trial court's refusal to take plaintiff's evidence at the hearing on remand denied plaintiff due process, that the trial court's order violated Const 1963, art 10, § 3, that the trial court's order amounted to a perpetual writ of garnishment or, in the alternative, that the trial court's order should be construed as appointing a receiver, and that the trial court's order violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and federal garnishment law. In light of the reversal of the trial court's order for clear error in finding that plaintiff was no longer indigent, this Court declines to review plaintiff's other claims on appeal.

Reversed and vacated.

/s/ Michael J. Kelly
/s/ Myron H. Wahls