STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA OSTROSKE,

Plaintiff-Appellee/Cross-Appellant,

v

MALCOLM PLEDGE,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 25, 2000

No. 210127
Oakland Circuit Court
LC No. 97-552212 NO

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross appeals from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (claim barred because of prior release), but denying defendant's request for sanctions. We affirm in part, reverse in part, and remand for further proceedings.

There is no merit to plaintiff's claim that the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(7). In reviewing a motion for summary disposition under MCR 2.116(C)(7), the plaintiff's well-pleaded allegations are accepted as true, and the court examines the pleadings, affidavits, depositions, admissions, and documentary evidence submitted in the light most favorable to the nonmoving party. If the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact, then the trial court must enter judgment without delay. MCR 2.116(I)(1); *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996).

In this case, the record clearly shows that the May 29, 1996, order entered by Judge Nichols incorporated the parties prior settlement and release, which was placed on the record in open court on February 26, 1996, and reconfirmed at the hearing on May 29, 1996. As the trial court observed, there is no basis to plaintiff's attempt to bifurcate the settlement agreement. Specifically, there is no merit to plaintiff's claim that the release was not part of the settlement agreement ordered by Judge Nichols merely because it was not signed by either party. As set forth in MCR 2.507(H):

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding *unless it was made in open court*, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney. [Emphasis added].

It is well established that an agreement or consent made in open court by the parties or their attorneys is binding upon the parties. See *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506; 442 NW2d 720 (1989); *Fear v Rogers*, 207 Mich App 642; 526 NW2d 197 (1994); *Brunet v Decorative Engineering, Inc*, 215 Mich App 430; 546 NW2d 641 (1996). Even though the release was never signed by either party, it is clear from the oral statements of the parties' respective counsel in open court that the parties themselves agreed to the terms of the release, that the release itself was part of the settlement agreement, and that the release was incorporated into the May 29, 1996, order entered by Judge Nichols. Therefore, the release was enforceable under MCR 2.507(H). Contrary to plaintiff's assertion, there is no indication in the record that only a specific and limited settlement agreement, pertaining only to the partition action, was ordered by Judge Nichols. Because the trial court properly granted summary disposition to defendant on the basis that plaintiff's claim was barred by the release, it is unnecessary to address whether summary disposition was also warranted on the independent ground that plaintiff's lawsuit was barred by the applicable statute of limitations.

We agree with defendant that the trial court clearly erred in denying its request for sanctions under MCR 2.114 and MCL 600.2591; MSA 27A.2591. We conclude that sanctions were warranted against plaintiff for filing a frivolous lawsuit because plaintiff's position was devoid of arguable legal merit. MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii). Plaintiff was present before Judge Nichols on February 26, 1996, when the settlement, including the mutual release for any past or future claims, was placed on the record. Further, plaintiff had previously specifically moved to have Judge Nichols enforce the settlement that was placed on the record, which included the release. After the hearing on May 29, 1996, Judge Nichols granted plaintiff her requested relief in an order that plaintiff's former counsel prepared for the court. As previously discussed, there is no arguable factual or legal merit to plaintiff's claim that the settlement agreement pertained only to the financial partition of the property, or that the release was not part of the settlement agreement. Because plaintiff's position was devoid of arguable legal merit, the trial court clearly erred in denying defendant's request for sanctions. See *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169-170; 550 NW2d 846 (1996), and *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). Moreover, if plaintiff's present counsel had conducted a reasonable inquiry into the factual and legal viability of the pleadings before signing them, as he had an affirmative duty to do under MCR 2.114(D), he would have realized that a binding settlement and release approved by plaintiff had been placed on the record before Judge Nichols and incorporated into the court's May 29, 1996, order. Accordingly, we remand for a determination of sanctions in accordance with MCL 600.2591; MSA 27A.2591 and MCR 2.114(D).

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin