

STATE OF MICHIGAN
COURT OF APPEALS

YUN ZHONG QUI, a/k/a JOHN QUI,

Plaintiff-Appellee,

v

XI ZHOU, a/k/a CI ZHOU,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 245570

Wayne Circuit Court

LC No. 00-039070-CZ

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff following entry of a default judgment and entry of a jury verdict addressing damages. We reverse and remand.

Plaintiff filed a complaint alleging that defendant, a female coworker at the City of Detroit waste water treatment plant, had raised false allegations against him. Specifically, it was alleged that defendant reported that plaintiff had used inappropriate language in the workplace, had broken into her home and stolen her diplomas, had stolen her green card and money from her locker, and had falsified his time records. The allegations were investigated by the department of human resources and were dismissed as groundless. It was alleged that, as a result of the investigations, defendant was given warnings regarding her report of false allegations. The complaint further alleged that defendant sought a personal protection order against plaintiff and went to police to report that plaintiff had sexually assaulted her. Plaintiff alleged that he voluntarily cooperated with the police, and charges were not filed against him regarding defendant's allegations. Consequently, plaintiff filed a complaint alleging defamation, malicious prosecution, abuse of process, and intentional infliction of emotional distress.

An answer to the complaint was not filed, and plaintiff obtained a default judgment in the amount of \$30,000. After defendant's wages were garnished, a motion to set aside default judgment was filed. Therein, it was alleged that defendant received the complaint, but noted that she was not properly identified by name in the complaint. Defendant notified plaintiff's counsel of the error and returned to sender all pleadings. The trial court granted the motion to set aside the default judgment.

After a hearing regarding the defense motion for summary disposition,¹ defense counsel moved to withdraw and substituted counsel filed an appearance on September 20, 2002. On October 16, 2002, the trial court held a final pre-trial conference at which substituted defense counsel did not appear. Apparently, the trial court was able to reach defense counsel by telephone. It was alleged that defense counsel did not have the date recorded, even though prior counsel had forwarded the case file. The trial court apparently sua sponte ordered a default judgment based on counsel's nonappearance. At the next hearing, the trial court denied the motion to set aside the default judgment, concluded that a judgment of liability in favor of plaintiff was appropriate, and set the matter for a jury trial with regard to the issue of damages only.

On October 30, 2002, defense counsel filed an emergency motion to stay the proceedings. Therein, defense counsel noted that defendant had been involuntarily admitted to psychiatric facilities at least five times during the last two years. According to the psychiatric records, defendant believed that staff at the waste water treatment plant raped her. Additionally, defendant believed that she was being raped during her stay at the psychiatric facility. Defense counsel asked that a conservator be appointed to represent defendant because she was a mentally incompetent person. The trial court denied the motion for stay and failed to address the competency and guardianship issue. The case proceeded to a jury trial on the issue of damages, and the jury returned a verdict in favor of plaintiff.

Defendant contends that the trial court erred in granting a default judgment based on nonappearance of counsel at a scheduled conference. We agree. The trial court's imposition of sanctions is reviewed for an abuse of discretion based on the facts and circumstances of the case. See *Bass v Combs*, 238 Mich App 16, 25-26, 604 NW2d 727 (1999). MCR 2.401(G) governs the failure to attend or participate in a conference and provides as follows:

- (1) Failure of a party or the other party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).
- (2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that
 - (a) entry of an order of default or dismissal would cause manifest injustice; or
 - (b) the failure was not due to the culpable negligence of the party or the party's attorney.

¹ The trial court granted the motion in part by dismissing the malicious prosecution claim and limiting the time frame of the allegations encompassing the defamation claim.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

The harshest sanction, dismissal for a plaintiff or a default judgment against a defendant, should be reserved for the most egregious violations of the court rules. See *Schell v Baker Furniture Co*, 232 Mich App 470, 477; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000). It is inappropriate to dismiss a case that had proceeded through the litigation process, been subject to settlement, and had been mediated, merely based on a party's failure to personally appear at a conference where there is no evidence that the appearance had any bearing on the outcome of the conference. *Id.*² When a trial judge summarily disposes of a case without considering other options, the disposition is tantamount to a form of strict liability. *Id.* "Our legal system favors disposition of litigation on the merits." *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). A non-exhaustive list of factors to consider before imposing a sanction include: (1) whether the violation was willful or accidental; (2) a history of refusing to comply with court orders; (3) any prejudice to the opposing party; (4) the existence of 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. *Id.*

In the present case, we do not have a transcription of the record regarding the failure to appear at the scheduled conference. Additionally, there is no transcript of the telephone conversation between the trial court and defense counsel. At the hearing regarding the default judgment, the trial court merely stated:

This is the date and time set for a default judgment. It is a non-appearance default judgment. A hearing date was set. Neither the defendant nor Defendant's Counsel appeared. When the Court made contact with defense Counsel, he indicated he just didn't have it written down and the Court indicated that we were going to proceed with the default.

There is no indication on this record that the trial court explored other options less than the extreme sanction of default judgment. Specifically, the trial court was required³ to excuse a failure to attend and was required to enter a "just order" short of dismissal or default judgment *if* the court concluded that the failure was not due to the culpable negligence of the party. MCR 2.401(G). In the preserved record, there is no indication that the trial court made findings regarding culpable negligence. The trial court merely stated that defense counsel did not have the date calendared, but did not make any inquiry into why the date was not calendared. Defense counsel acknowledged that he received the file forwarded from initial counsel, but stated that he

² See also *Haynes v Hannah*, 468 Mich 918; 662 NW2d 757 (2003), wherein the Supreme Court held that the failure to appear was excusable based on a scheduling conflict not resolved by the trial court. Although a Supreme Court peremptory order, such orders are binding precedent where the underlying rationale can be understood. See *Brooks v Engine Power Components*, 241 Mich App 56, 61-62; 613 NW2d 733 (2000).

³ The use of the term "shall" denotes mandatory, not discretionary action. See *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 485; 679 NW2d 98 (2004).

did not receive notice of the date of the conference in the file.⁴ Moreover, defense counsel provided a sworn affidavit in accordance with that assertion. The trial court did not address these claims, take sworn testimony, or make factual findings regarding the validity of defense counsel's assertions.⁵

Moreover, under the facts and circumstances of this case, the trial court's decision was an abuse of discretion. *Bass, supra; Shell, supra*. In this case, defendant is an immigrant from another country diagnosed with psychosis and schizophrenia. When defense counsel alerted the trial court to the most recent involuntary commitment, the trial court refused to address defendant's capacity. However, the court rules address a party's capacity and provide that:

If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, who is not responsible for the costs of the action unless, by reason of personal misconduct, he or she is specifically charged costs by the court. It is unnecessary to appoint a representative for a minor accused of a civil infraction. [MCR 2.201(1)(c).]

In this case, there were legitimate concerns regarding the capacity of defendant, when counsel for the defense⁶ learned of the capacity issues in light of any information filtered by defendant, and the defense of the causes of action delineated in the complaint in light of the question of defendant's capacity.⁷

Defendant also alleges that the trial court erred in failing to grant summary disposition of the abuse of process claim. We agree. We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions and documentary evidence offered in support of and in opposition to a dispositive motion shall

⁴ We note that the date of the conference appears on the back of the court's scheduling order. It is unclear if substituted defense counsel received the originals of the file forwarded by prior counsel or if copies were received. Thus, it is unknown whether defense counsel received this schedule, and the trial court did not make any inquiry or order the production of the file at the default judgment hearing.

⁵ The trial court advised defendant to admit fault because "[y]ou'd do a whole lot better by saying it's your fault and you're sorry, but if you want to continue saying it's not your fault."

⁶ It is unclear if defendant's initial trial counsel was aware of the involuntary commitments.

⁷ Specifically, it is unclear if defendant could have fulfilled the intent requirements of the causes of action in light of her psychiatric history.

be considered only to the extent that the content or substance would be admissible as evidence. *Maiden, supra*.

To recover based on a claim of abuse of process, the plaintiff must plead and prove an ulterior purpose coupled with an act in the use of process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). An improper motive alone is insufficient. Rather, there must be some corroborating act to establish the ulterior motive. *Id.* Standard and legitimate use of process, even with bad intent, does not constitute malicious abuse of process. *Meehan v Michigan Bell Telephone Co*, 174 Mich App 538, 569; 436 NW2d 711 (1989), quoting *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911). The misconduct required to establish an abuse of process claim is not premised on wrongful procurement or initiation of proceedings, but rather the utilization of process for a purpose other than that which it was designed to accomplish. *Meehan supra* at 569-570, quoting *Moore v Michigan National Bank*, 368 Mich 71, 75; 117 NW2d 105 (1962). “A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure ...” *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987). For example, the use of discovery consistent with the procedural court rules must be coupled with the improper purpose to burden and increase the expenses for the opposing party in an attempt to conclude the litigation on favorable terms. *Id.*

In the present case, the trial court erred in denying the motion for summary disposition with regard to the abuse of process claim. Review of the complaint reveals that plaintiff alleged that defendant abused the criminal investigatory process by submitting false information to police. However, plaintiff failed to allege “subsequent misuse” of this information by defendant. *Meehan, supra*. Accordingly, we reverse the trial court’s denial of the motion for summary disposition where the pleadings failed to identify the subsequent act through which defendant derived a benefit from the ulterior use of information.

However, with regard to the defamation and intentional infliction of emotional distress claims, we note that defendant failed to meet her initial burden of demonstrating that there was no genuine issue of material fact with admissible documentary evidence. *Maiden, supra*. While it is clearly questionable whether defendant could form the requisite intent requirements, defendant did not support her motion for summary disposition with admissible documentary evidence from her treating physicians (such as affidavits) or the actual medical records themselves.⁸ Accordingly, we remand these remaining claims to the trial court for proceedings consistent with this opinion.

⁸ We note that defendant submitted a summation of her psychiatric history after the motion for summary disposition was heard. The summation and actual medical records were filed later in the litigation when the motion to stay and to set aside the default judgment was filed. Thus, the trial court did not have the opportunity to evaluate whether the intent elements of the offense could be satisfied, and plaintiff did not need to rebut the intent requirement without proper support from defendant first. *Maiden, supra*. Defendant failed to establish that the claims of

(continued...)

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

(...continued)

defamation and intentional infliction failed as a matter of law. Our reversal of the entry of the default judgment renders the challenge based on instructional error moot. We presume that, on retrial, the parties will properly preserve any issue of error for appeal.