STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WALKER,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
September 14, 2004

No. 248860
Ingham Circuit Court
LC No. 02-001477-CZ

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

Plaintiff William Walker, a prisoner in the custody of defendant Michigan Department of Corrections (MDOC), sued MDOC to compel it to comply with its own policies and to remove certain rule violations from Walker's record. The trial court granted MDOC's motion for summary disposition under MCR 2.116(C)(3) after Walker mailed the summons and complaint to MDOC using first-class mail rather than registered or certified mail with return receipt requested as required by court rule. Walker appeals as of right. We reverse. Although the manner of service did not strictly comply with the court rule, MDOC actually received a copy of the summons and complaint within the permitted time.

II. Basic Facts And Procedural History

Walker has been repeatedly transferred between several prisons and correctional facilities. According to Walker's complaint, the various facilities have different rules governing prisoner conduct, and MDOC routinely enforces those rules without providing notice of what they are. Walker alleged that he has not received safety orientations or prisoner guide books, even though MDOC is required to provide both. Walker also alleged that MDOC and MDOC's employees had engaged in various other forms of misconduct. Walker sued MDOC, seeking an order compelling MDOC to comply with the mandatory provisions of its procedural policies and an order compelling MDOC to remove from Walker's record all violations of rules that had not been previously explained to him.

MDOC filed a limited appearance to contest jurisdiction on the ground that Walker had failed to serve MDOC properly with process. Walker moved for substituted service, explaining that he was not only indigent and unable to afford certified mail, but was also precluded by

MDOC from using certified mail without a court order. The trial court's opinion makes reference to a letter that it sent Walker that it believed would cause MDOC to allow him to serve it by certified mail. However, there is no indication in the trial court record that such a letter was sent to or received by Walker, nor did the trial court enter an order specifying that MDOC should permit Walker to send certified mail.

MDOC moved for summary disposition under MCR 2.116(C)(3) on the same ground. MDOC argued that, under MCR 2.105, service of process must be accomplished through registered or certified delivery with a return receipt, but that Walker used first-class mail. Walker moved to sanction MDOC on the ground that the court rules forbade dismissing his suit under the circumstances. Without ruling on Walker's motion for sanctions, the trial court granted MDOC's motion, stating:

> Plaintiff wrote this Court for an order to require the MDOC to allow him to serve the Defendants by certified mail. After some confusion, this Court sent Walker a letter stating that the Michigan Court Rules require him to serve the Defendants by certified mail and that the letter to him from the Court should be sufficient for MDOC to allow him to serve the defendants by certified mail. The Court also stated in the letter that it would not issue an order unless Plaintiff could prove that the MDOC refused to allow him to serve the Defendants by certified mail. Plaintiff has failed to provide any such proof.
>
> Therefore, it is hereby ordered that the Respondent's Motion to Dismiss is granted and the case is dismissed.

III. Summary Disposition[1]

A. Standard Of Review

We review de novo issues involving interpretation of a court rule[2] as well as the trial court's decision on a motion for summary disposition.[3]

B. MCR 2.105(J)(3)

The trial court granted MDOC's motion for summary disposition under MCR 2.116(C)(3) for insufficient service of process. Service of process requires a plaintiff to send the summons and a copy of the complaint by registered or certified mail with return receipt requested.[4] Walker instead sent them by first-class mail.

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[1] We note that Walker's brief is difficult to read. We have endeavored to ascertain Walker's arguments on appeal to the best of our ability.

[2] See *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] MCR 2.105(A)(2).

Walker argues that summary disposition was improper under MCR 2.105(J)(3), which states: "An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." We agree. When the language of a court rule is unambiguous, we "must enforce the meaning expressed, without further judicial construction or interpretation."[5] MCR 2.105(J)(3) unambiguously prohibits dismissal for improper service of process if the defendant was timely informed of the action.

Apart from the plain language of the court rule, this Court has expressly held that MCR 2.105(J)(3) is a mandatory provision, and "if defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules."[6] While "MCR 2.105(J)(3) . . . does not forgive a failure to serve process[,]" it does "forgive [] errors in the manner or content of service of process."[7]

While MDOC did not explicitly acknowledge receipt of the summons and complaint, it attached, as exhibits to its brief in support of summary disposition, copies of the envelopes in which Walker had mailed the summons and complaint. All of the envelopes were postmarked September 30, 2002. One envelope was stamped as received in October of 2002. These facts indicate that MDOC actually received the summons and complaint. Further, MDOC's limited appearance to contest jurisdiction on November 4, 2002 indicates that it was aware of the action at that time, which effectively constitutes an acknowledgment of receipt.[8] MDOC acknowledged that the summons, according to its own terms, expired on December 23, 2002. From these facts, we conclude that MDOC actually received the summons and copy of the complaint and was actually informed of the cause of action during the lifetime of the summons. Therefore, the trial court erred in granting MDOC's motion for summary disposition.[9]

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[5] *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

[6] *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986).

[7] *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991). See also *In re Gordon Estate*, 222 Mich App 148, 157-158; 564 NW2d 497 (1997) (observing that although a complete failure of service warrants dismissal, dismissal is not necessarily warranted if a party is notified of the action within the required time).

[8] See *Hill*, *supra* at 613-614 (the defendant effectively acknowledged receiving the summons and complaint by retaining counsel and filing a summary disposition motion).

[9] *In re Gosnell*, 234 Mich App 326, 344; 594 NW2d 90 (1999). The only authority cited in support of MDOC's position is an unpublished opinion of this Court, which has no precedentially binding effect. MCR 7.215(C)(1). In any event, this Court noted in that case that two people were not properly served because they had not signed a return receipt, but "importantly, the defects were not in plaintiff's manner of service, but in a complete failure to serve the parties." *Keenan v Michigan Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2003 (Docket No. 234106). Therefore, this Court upheld the trial court's dismissal of the action because of a complete failure of service, not because the service was improper. Thus, *Keenan* actually supports plaintiff's position, not MDOC's.

IV. Sanctions

A. Standard Of Review

We review a trial court's finding regarding whether a document was signed in violation of MCR 2.114 for clear error.[10]

B. MCR 2.114

Walker argues that sanctions are appropriate given MDOC's attorney's clear violation of MCR 2.114(D). This Court has explained that MCR 2.114 mandates sanctions against a party or an attorney if that party or attorney signs a document that is not "well grounded in fact and [] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" to the best of the signor's knowledge or is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[11] MCR 2.114(F) further imposes sanctions on a party that pleads a frivolous claim or defense, meaning the attorney failed to conduct an objectively reasonable inquiry into the factual and legal basis of the document.[12]

We note that Walker is not entitled to sanctions under MCR 2.114(F) because he is proceeding in propria persona and has incurred no actual costs as a result of MDOC's motion.[13] We remand the case to the trial court to determine what, if any, sanctions would be appropriate under MCR 2.114(E).

V. Rehearing Before A Different Judge

Walker requests that this case be heard before a different judge on remand. This Court has the authority to remand a case to a different judge.[14] This remedy is appropriate "if the original judge would have difficulty in putting previously expressed views or findings out of his or her mind, if reassignment is advisable to preserve the appearance of justice, and if reassignment would not entail excessive waste or duplication."[15] Having considered these criteria, we conclude that reassignment is not justified in this case. Although the trial court's ruling was erroneous, we find no indication in the record that the trial judge harbored any personal animus toward Walker that would preclude the ability to render a fair judgment on remand.[16] Accordingly, we decline Walker's request to remand the case to a different judge.

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[10] *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998).

[11] *Attorney General v Harkins*, 257 Mich App 564, 575-576; 669 NW2d 296 (2003). See also MCR 2.114(E).

[12] *Id*.

[13] See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 725-727; 591 NW2d 676 (1998).

[14] MCR 7.216(A)(7); *Hawkins v Murphy*, 222 Mich App 664, 674; 565 NW2d 674 (1997).

[15] *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

[16] See *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596-598; 640 NW2d 321 (2001).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette