STATE OF MICHIGAN

COURT OF APPEALS

LARRY W. SHAPIRO, Plaintiff-Appellee,	UNPUBLISHED January 24, 2008
v	No. 274502 Wayne Circuit Court
ABDALRAHAM KATRANJI, M.D., Defendant-Appellant.	LC No. 06-609619-AV

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

In this action involving an alleged breach of a sublease agreement, defendant appeals by delayed leave granted the circuit court orders reversing the district court's denial of summary disposition to plaintiff, awarding judgment in plaintiff's favor, and awarding plaintiff sanctions under MCR 7.101(P) (vexatious proceedings). We affirm in part and reverse in part.

In July 2003, the parties, both doctors, signed a six-month sublease agreement under which defendant would pay plaintiff $1,200 monthly for medical office space, a total of $7,200, beginning on August 15, 2003. After signing the sublease agreement, defendant made one payment (it is unclear whether it was for the first month or a deposit). Plaintiff filed suit in district court[1], alleging breach of contract, account stated under MCL 600.2145, and unjust enrichment. Plaintiff's complaint refers to several exhibits: the sublease agreement, plaintiff's affidavit, an invoice that, according to the complaint, "constitutes an account stated," and a December 2003 letter from plaintiff to defendant's counsel demanding payment of past due rent.

On defendant's motion for change of venue, the action was transferred from the 21st District Court in Garden City to the 23rd District Court in Taylor. Following case evaluation, plaintiff moved for summary disposition under MCR 2.116(C)(9) and (C)(10). Defendant filed a cross-motion for summary disposition under MCR 2.116(C)(10). The written motions are not before us, but the hearing transcript is. Defendant maintained that he owed plaintiff nothing because he had agreed to sublease the premises contingent on plaintiff providing proof that the

[1] Although the district court records are not before us, certain pleadings, orders, and opinions therefrom are in the circuit court file.

landlord approved of the subleasing, and that plaintiff never provided such proof. Defense counsel also argued at the hearing that his copy of the complaint had no affidavit of account stated attached, as required under MCL 600.2145. Plaintiff's counsel argued that the exhibits were attached to all copies of the complaint she sent out, or she "would never have signed the proof of service."

The 23rd District Court noted that the court's copy of the complaint had no exhibits or proof of service, and "[t]here sure are a lot of holes in both parties' cases." The district court denied both parties' motions for summary disposition. Plaintiff moved for reconsideration. The district court's opinion and order denying plaintiff's motion for reconsideration stated that "the court found several omissions of pleadings" on plaintiff's part, specifically:

> 1. No affidavits attached to Plaintiff's . . . Complaint that would have required the Defendant . . . to file a counter affidavit.
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> 2. Statement by Defense Attorney, Mohamed J. Zaher, as an officer of the court, that no affidavits were attached to his copy of Plaintiff's . . . complaint.
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> 3. Copy of Property Lease was not signed; nor did it correctly state the subject property; nor the parties executing the lease; nor the date (see attached).
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> 4. Affidavit of [Plaintiff] that was signed before a notary supposedly in 2005 but reflects 2004.

The unsigned lease referred to by the district court is not the sublease at issue, but rather the lease plaintiff entered into for premises at 2020 Middlebelt Road, part of which he later contracted to sublease to defendant. Paragraph 14 of this unsigned lease prohibits the lessee (plaintiff) from assigning or subletting any portion of its interest in the leased premises.

Plaintiff filed an application for leave to appeal to the Wayne Circuit Court. The circuit court entered an order granting plaintiff's application for leave to appeal, and stayed the district court action pending a decision on appeal to the circuit court. Defendant filed a motion to dismiss plaintiff's appeal, arguing that the appeal was untimely. The circuit court denied defendant's motion to dismiss plaintiff's appeal, and sanctioned defendant $500 for filing a frivolous motion.

Following briefing and oral argument, the circuit court entered an order granting plaintiff's appeal, reversed the district court's order denying plaintiff summary disposition, and entered judgment in plaintiff's favor on the account stated claim in the amount of $6,000.

As part of its appeal in the circuit court, plaintiff also sought costs, sanctions, and punitive damages under MCR 7.101(P) (vexatious proceedings), arguing primarily that defendant failed to assert any legitimate or proper defense. Plaintiff requested a total of $38,143.00: $18,746.50 in attorney fees, which included $600 in attorney fees for preparing and arguing the instant motion for sanctions, $650 in costs, and $18,746.50 in punitive damages. Plaintiff submitted itemized statements of 100.2 hours spent by plaintiff's attorneys billed at $175 and $200 an hour, and .9 paralegal hours billed at $85 an hour.

Defense counsel requested more time to respond to plaintiff's motion for sanctions, plaintiff's counsel agreed, and the circuit court put off the issue of sanctions. At a subsequent hearing, the circuit court awarded plaintiff the attorney fees and costs sought, but not punitive damages, ordering defendant to pay $19,396.50.

Following the conclusion of the circuit court appeal, plaintiff moved the district court for case evaluation sanctions under MCR 2.403. After questioning counsel regarding the circuit court's orders and their amounts, the district court entered an order granting plaintiff's motion for attorney fees and costs under MCR 2.403 in the amount of $9,912.76.[2]

This appeal ensued.

I

Defendant first asserts that the circuit court erred by reversing the district court's order denying plaintiff summary disposition. Defendant maintains that plaintiff did not attach an affidavit of account stated to his complaint, and that plaintiff thus was not entitled to the evidentiary advantage of MCL 600.2145, nor was defendant obligated to provide a counter-affidavit. Defendant contends that whether the complaint was served on defendant with an affidavit of account stated is an issue of material fact that a jury should decide.

Defendant also maintains, as he did below, that he "made it plain at the time that he agreed to sublet the office space that he would not be bound by the agreement unless Plaintiff could provide proof that the Landlord agreed to the sublease," and that plaintiff never provided such proof. Defendant contends that this, too, is a question of material fact for a jury.

A

This Court reviews de novo the circuit court's determination on a motion for summary disposition to determine whether plaintiff was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

MCL 600.2145 governs "account stated" or "open account" claims, and provides in pertinent part:

> In all actions brought in any of the courts of this state, to recover the amount due on an open account or upon an account stated, if the plaintiff or someone in his behalf makes an affidavit of the amount due, as near as he can estimate the same, over and above all legal counterclaims and annexes thereto a copy of said

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[2] Defendant devotes a paragraph in his appellate brief to challenge the *district court*'s award of case evaluation sanctions to plaintiff after the circuit court proceedings concluded. The propriety of case evaluation sanctions is not in defendant's statement of questions presented, nor was it in the statement of questions presented in defendant's delayed application for leave to appeal. We thus decline to consider this issue. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

> account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the complaint filed in the cause or with the process by which such action is commenced, such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same. . . . Any affidavit in this section mentioned shall be deemed sufficient if the same is made within 10 days next preceding the issuing of the writ or filing of the complaint or answer.

In *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 429-430; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005), this Court noted:

> "An account stated consists of a "'balance struck between the parties on a settlement . . . .'" *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888.). "'[W]here a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance.'" *Id.* In *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955), quoting from *White v Campbell*, 25 Mich 463, 468 (1872), the Michigan Supreme Court explained as follows:
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> > "The conversion of an open account into an account stated, is an operation by which the parties *assent* to the sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account." [Emphasis in original.]

"If an account stated exists, an unanswered affidavit creates a prima facie case that the party failing to respond owes the other party the amount stated." *Echelon Homes*, *supra* at 435.

B

The district court denied plaintiff summary disposition on the account stated claim on the bases that defendant's attorney stated that he did not receive a complaint with the requisite affidavit attached, and the copy in the court file did not have the affidavit attached, therefore defendant was not required to file a counter affidavit. On appeal to the circuit court, plaintiff's counsel argued in pertinent part:

> The certified copy from the original court, the 21st District, contains all the exhibits. The affidavit of the process server from the 23rd District Court says that

> it was served on the defendant with all the—with the exhibits.[3] The—at the lower court level Mr. Zaher [*defendant's counsel*] stood up and said, your Honor, as an officer of the court, I never received those exhibits. Well, that's great, but they weren't served on him, they were served *on his client*. We served the doctor, so the fact that the lawyer never got them it means nothing. Furthermore, the actual complaint itself, both complaints in the lower court, gave the amounts, referenced the exhibits, came up and said account stated right in the heading, had all the pertinent information in it. And they at least should have prompted someone to make an inquiry to reference exhibits we never received them, but, no, they didn't and instead we had our process servers—I served it with the exhibits.

The circuit court reversed this decision stating:

> All right. I am granting the appellant's prayer for relief. I'm reversing, I believe it's the * * * * 23rd District Court. This was and is a matter of an account stated. There was a lease agreement between the plaintiff and the defendant, the appellate [sic] and appellee, that was a binding contract. It was clear and unambiguous just on its face. The appellee was required to pay under the terms and conditions of the lease. I think there was one payment that was made and no payments thereafter.
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> It appears that the District Court Judge because he believed the exhibits reflecting the lease or the account or the monies outstanding were not attached to the complaint, the plaintiff below, appellant here, was not entitled to summary disposition. I disagree with that. So long as the plaintiff—the defendant himself was served. There was proof of service. There was a legitimate lease. The defendant breached the lease. That's pretty much it. Judgment reversed. . . .

C

As plaintiff's counsel argued at the hearing quoted *supra*, plaintiff presented to the circuit court a certified copy of the complaint filed in district court, which had as attachments, the sublease, plaintiff's affidavit, an invoice, and plaintiff's counsel's letter to defendant demanding payment of past due rent. Plaintiff also presented the process server's affidavit of service stating he served the complaint with exhibits on defendant. Defendant's affidavit did not assert that he had not been served with the attachments. All defendant offered in that regard was defense counsel's statement that the complaint he received did not have the affidavit attached. Under these circumstances, we must reject defendant's assertion that the question whether the affidavit was served with the complaint was for the jury. Because it was uncontested that defendant did

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[3] Plaintiff's counsel provided to the circuit court the Certificate/Affidavit of Service of the process server stating that he served the complaint on defendant with exhibits.

not file an affidavit in conformity with MCL 600.2145, we affirm the circuit court's reversal and grant of judgment on the account stated to plaintiff.[4]

II

Defendant also contends that the circuit court erred by imposing $19,396.50 in appellate sanctions where plaintiff, not defendant, filed the appeal, and the defenses defendant raised were valid legal defenses. We agree.

This Court reviews the circuit court's determination that defendant should be sanctioned under MCR 7.101(P)(1) for an abuse of discretion. See *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). Plaintiff moved the circuit court for sanctions under MCR 7.101(P). MCR 7.101 governs procedure in appeals to circuit court from district court, and subsection (P) provides:

> **(P) Vexatious Proceedings.**
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> (1) The circuit court may, on its own initiative or the motion of a party, dismiss an appeal, assess actual and punitive damages, or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> > (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
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> > (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
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> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceedings, including reasonable attorney fees, and punitive damages in an added amount not exceeding actual damages.

The only published case plaintiff cites, *Wojas*, *supra*, is not applicable. In *Wojas*, after the defendant debtor was found to have no valid defense for not paying the debt, he appealed to

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[4] Defendant also seems to challenge the circuit court's authority to enter judgment on plaintiff's account stated claim, rather than remand to the district court. This argument is not set forth in defendant's statement of questions presented in his delayed application for leave to appeal, or in his appellate brief. Further, defendant has cited no authority in support of this argument, and we see no basis for the claim where an account stated is involved. We conclude that defendant has abandoned this issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

the circuit court, and was sanctioned under MCR 7.101(P)(1)(a) for bringing a vexatious appeal. *Id.* at 479-480. We agree with defendant that since plaintiff took the appeal to the circuit court, defendant could not be properly sanctioned under subrule MCR 7.101(P)(1)(a). Only MCR 7.101(P)(1)(b) is potentially applicable.

Plaintiff had the burden to show that sanctions were permissible under MCR 7.101(P)(1)(b). We conclude that plaintiff failed to do so. Plaintiff did not establish that "a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." Plaintiff's references to defendant missing a court appearance or filing a brief late do not rise to the level required under this rule.[5] We see no support for the circuit court's implied conclusion that defendant's defenses were grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court. Defendant submitted below an affidavit attesting that the sublease was contingent upon plaintiff obtaining written consent from his landlord that the sublease was permissible. The document that purported to be the principal lease between plaintiff and the landlord contained a provision prohibiting subletting. Defense counsel argued that defendant had a right to quiet enjoyment of the leased premises, and could not be assured of that right unless the landlord had consented to the sublease. Further, the district court itself raised the question whether the affidavit was attached to the complaint when it was served, and the circuit court relied on the affidavit of service found in the court file. We cannot conclude that a party in defendant's position was obliged to stipulate to the entry of judgment in the district court or on appeal, which is the import of plaintiff's request for, and the circuit court's award of, sanctions for vexatious proceedings on appeal.

We conclude that the circuit court abused its discretion in awarding plaintiff sanctions under MCR 7.101(P), and vacate the circuit's court concomitant order awarding plaintiff $19,396.50.

We decline plaintiff's invitation to award him sanctions on appeal under MCR 7.216(C).[6]

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[5] We note that the circuit court sanctioned defendant $500 for filing a motion to dismiss plaintiff's appeal, and that defendant did not appeal that ruling.

[6] **(C) Vexatious Proceedings.**

> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> > (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(continued…)

We affirm the circuit court's order reversing the district court's denial of summary disposition to plaintiff and awarding plaintiff $6,000 on his account stated claim. We reverse the circuit court's order granting plaintiff sanctions under MCR 7.101(P)(1). Neither party shall be entitled to tax costs on appeal.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra

(…continued)

> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
>
> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The court may remand the case to the trial court or tribunal for a determination of actual damages.