STATE OF MICHIGAN

COURT OF APPEALS

CLINTON C. LOVETT,

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT CITY COUNCIL, and KATHIE DONES-CARSON,

Defendants-Appellees.

UNPUBLISHED
April 22, 2008

No. 273710
Wayne Circuit Court
LC No. 05-530081-CL

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

PER CURIAM.

Plaintiff Clinton C. Lovett appeals as of right the trial court order dismissing his complaint with prejudice. On appeal, he argues that he was denied due process because defendants' notice and service of process of the dismissal order were insufficient, the trial court abused its discretion in dismissing his case, and he was denied due process because the trial judge was biased against him. We reverse and remand.

I. Basic Facts And Procedural History

Lovett filed a complaint in mid-October 2005, in which he alleged that he worked for defendant, Detroit City Council, as a staff attorney in the Research and Analysis Department, and defendant, Kathie Dones-Carson, was his immediate supervisor. In count one of his complaint, Lovett alleged that defendants violated Michigan public policy by terminating him on October 15, 2002, after he refused to sign a confidentiality form "prohibiting him from ever discussing public business with anyone," and drafted a legal memorandum arguing that he was exempt from signing the form under MCL 15.243(1)(i). In count two, Lovett alleged that defendants violated his rights of due process and equal protection when he "was notified by [Dones-Carson] that he was arbitrary [sic] fired without cause and justification." In count three, Lovett alleged that, as a male over 40 years of age, he was a member of two protected classes under Michigan's Civil Rights Act, which defendants violated by treating him differently than younger, female employees. In particular, Lovett alleged that, unlike younger, female employees, he was not reimbursed for the cost of attending seminars or for business travel expenses, was informed by Dones-Carson that he would have to pay someone to type his work product and could no longer use the department's secretarial services for this purpose, and was called "pops" by the department's managerial personnel.

In early July 2006, defendants moved to dismiss Lovett's complaint because he had failed to appear for properly noticed depositions on three occasions, or, in the alternative, to order him to appear for a deposition within ten days of the entry of the order. In either case, defendants also asked the trial court to order Lovett to pay defendants $220 in stenographer's fees and the cost of filing the motion. Lovett filed a response, in which he argued that the dates on which defendants claimed the depositions were scheduled were after the close of discovery, and thus, notices of such depositions were void because defendants had not sought an order extending discovery. After a hearing before the trial court, the parties agreed to hold depositions of Lovett and Dones-Carson on July 25, 2006.

On July 21, 2006, Lovett filed an ex parte application for an order to suspend the proceedings to permit him to obtain new legal counsel. He claimed that his attorney had failed to prepare him to respond to written interrogatories, requests to admit, and for depositions, had failed to conduct discovery and to obtain his personnel file from defendants, and had failed to send him important documents and notify him of important dates.

The trial court held a hearing on Lovett's motion to stay the proceedings on July 25, 2006. The trial court agreed to stay the proceedings for 45 days in order to give Lovett time to obtain new counsel. The parties agreed to proceed with Lovett's deposition on July 25, 2006, but to delay Dones-Carson's deposition for about 45 days. The trial court also noted that Lovett and defense counsel could call the court around the date of the settlement conference to adjourn the conference, if necessary.

The trial court dismissed Lovett's complaint with prejudice after he failed to appear at the settlement conference on September 11, 2006. At the conference, defense counsel stated:

> Your Honor, today is the date and time set for the Settlement Conference in this case. As you recall, back on July 25th, the plaintiff and his attorney appeared before this Court seeking to remove Mr. Meyer [sic] as Mr. Lovett's attorney. At that time, Mr. Lovett asked for a 45 day stay on the case, indicating that he would find out or seek out other another counsel. To date he has not done that, your Honor. I have not received any word from him what his current status is on the case. I did attempt to contact him this morning. I have not heard back from him.

Defense counsel then stated that he had a motion "to dismiss the case administratively" because of Lovett's failure to appear. After noting that it had previously questioned whether Lovett had a cause of action, and stating, "[so] in a way I'm not surprised he's not here," the trial court agreed to dismiss the case. Pursuant to MCR 2.602(B), the trial court entered the order dismissing Lovett's complaint with prejudice on September 21, 2006. Lovett now appeals.

II. Dismissal With Prejudice

A. Standard Of Review

Lovett argues that the trial court erred in dismissing the case with prejudice because of his failure to appear at the settlement conference. Although Lovett failed to preserve this issue, we may address an unpreserved issue if it presents a question of law and the necessary facts have

been presented.[1] We review a trial court's decision to dismiss an action for an abuse of discretion.[2]

B. Legal Standards

Under MCR 2.401(G) and MCR 2.504(B), dismissal is a possible sanction for a party's failure to attend a settlement conference. However, "[d]ismissal is a drastic step that should be taken cautiously."[3] According to this Court's precedent, "[b]efore imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper."[4] The trial court also should consider whether dismissal is appropriate under the circumstances by considering:

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists 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.[5]

C. Applying The Standards

Here, Lovett failed to appear at three scheduled depositions, which he claims was the result of problems with an attorney that he eventually dismissed. He also claims that his absence from the September 11, 2006 settlement conference was accidental because he was unaware of the conference due to the fact that a new attorney who was evaluating his case was in possession of the case file from August 8, 2006, until September 13, 2006. However, the conference was apparently scheduled before the file was handed over to the new attorney and while Lovett was still represented by counsel. Therefore, he should have appeared at the conference absent further communication from the trial court or defense counsel. Nevertheless, because dismissal is a drastic sanction, we conclude that the trial court abused its discretion in dismissing the case without evaluating all the available options on the record and determining whether dismissal was

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[1] *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004).

[2] *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

[3] *Id.*

[4] *Id.* But see *Dubuc v Golden & Kunz, PC*, 469 Mich 942; 674 NW2d 152 (2003) (Corrigan, C.J., concurring) (stating belief that, contrary to *Vicencio*, the plain language of MCR 2.401(G) does not require a trial court to evaluate all available options on the record before concluding that the sanction of dismissal is proper).

[5] *Vicencio*, *supra* at 507.

the most appropriate option given the circumstances.[6] Accordingly, we remand to the trial court for the requisite consideration of the various factors set forth above.

III. Due Process

Lovett argues that the trial court's entry of the order of dismissal pursuant to MCR 2.602(B)(3)[7] eight days after defendants mailed the notice of presentment, but only three days after he received it, violated his due process rights. Citing MCR 2.105, he argues that, because defendants sent the notice by certified mail, service was complete only upon his receipt of the notice.[8]

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[6] *Id*.; see also *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 420 NW2d 835 (1987) (stating that remand is appropriate because it is the trial court's function in the first instance to go through an analytical process that takes into account on the record all of the options available short of dismissal and come to a reasoned conclusion on the record regarding which sanctions, including dismissal, would be the most appropriate under all of the circumstances).

[7] MCR 2.602 provides, in pertinent part, as follows:

> (B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:
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> * * *
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> (3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.
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> (a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.
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> (b) Objections regarding the accuracy or completeness of the judgment or order must state with specificity the inaccuracy or omission.
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> (c) The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternative proposed judgment or order.

[8] See MCR 2.105 provides, in pertinent part, as follows:

> (A) Individuals. Process may be served on a resident or nonresident individual by
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> * * *

(continued…)

MCR 2.105 governs service of process for the summons and complaint, while MCR 2.107[9] governs service of all other pleadings and papers subsequent to the summons and complaint. Therefore, Lovett's reliance on MCR 2.105 is misplaced. Under MCR 2.107, service of other papers, like the proposed order here, is complete at the time of mailing. Here, defendants mailed the notice of presentment on September 13, 2006, and the trial court entered the order of dismissal eight days later on September 21, 2006. Thus, because the procedural rules were satisfied, Lovett's due process claim is without merit.

IV. Bias

A. Standard Of Review

Lovett argues that he was denied due process because the trial judge was biased. Because Lovett failed to object to the trial court's conduct or move for disqualification under MCR 2.003, this issue is unpreserved.[10] Regardless, we may address an unpreserved issue if it presents a question of law and the necessary facts have been presented.[11] We review de novo constitutional questions, including the question whether a party was denied due process.[12]

B. Legal Standards

MCR 2.003(B)(1) governs judicial disqualification. Lovett never argued below that the trial judge should have been disqualified. Rather, he argues, for the first time on appeal, that he was denied due process because the trial judge was biased.

"The Due Process Clause requires an unbiased and impartial decisionmaker. Thus, where the requirement of showing actual bias or prejudice under MCR 2.003(B)(1) has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis

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(…continued)

> (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail.

[9] MCR 2.107 provides, in pertinent part, as follows:

> (C) Manner of Service. . . . Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.
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> * * *
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> (3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

[10] *Bracco v Michigan Technological Univ* (*On Remand*), 231 Mich App 578, 602 n 16; 588 NW2d 467 (1998); *Meagher v Wayne State Univ*, 222 Mich App 700, 725-726; 565 NW2d 401 (1997).

[11] *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004).

[12] *York v Civil Service Comm*, 263 Mich App 694, 699; 689 NW2d 533 (2004).

of the due process impartiality requirement."[13] Given Lovett's failure to raise this issue below, he does not argue that the trial judge should have been disqualified; however, the issue whether he was denied due process because of the trial court's alleged bias is properly decided according to the same standards. The Michigan Supreme Court has recognized four examples of situations identified by the United States Supreme Court in which "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable": where the judge or decisionmaker

> (1) has a pecuniary interest in the outcome;
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> (2) has been the target of personal abuse or criticism from the party before him;
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> (3) is enmeshed in [other] matters involving petitioner; or
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> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker.[14]

The Due Process Clause requires disqualification for bias or prejudice in only the most extreme cases,[15] and "the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality."[16]

C. Applying The Standards

In arguing that he was denied due process because the trial court was biased against him, Lovett first points to the judge's treatment of his motion to stay the proceedings. At the hearing on his motion, Lovett stated that he had been trying to bring his motion before the trial court for three days. The trial court responded, "We don't do things on three days [sic] notice." Lovett claims that the contrast between this statement and the trial court's willingness to enter the order of dismissal pursuant to MCR 2.603(B)(3) three days after he received the notice of presentment demonstrates the trial court's bias. However, the trial court entered the order eight days after defendants mailed the notice of presentment. Entry of the order does not demonstrate bias because it reflects a reasonable reading of MCR 2.603(B)(3).

Second, Lovett points to the trial court's comments at the settlement conference at which he failed to appear. After defendants' attorney said he had a motion "to dismiss the case administratively" based on Lovett's failure to appear, the trial court replied, "Nothing administrative about it or I'm gonna dismiss it for good. He's not appeared." After defense counsel reminded the trial court of what Lovett was claiming in his lawsuit, the trial court stated: "I remember him making those remarks. And if [sic] struck me then as questionable that he had a recognized cause of action. So in a way I'm not surprised he's not here. This case is

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[13] *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 479; 548 NW2d 210 (1996).

[14] *Id*. at 498 (change in *Cain*; emphasis deleted; citation and quotations omitted).

[15] *Id*.

[16] *Id*. at 497.

dismissed. You may present a judgement [sic] of no cause for action." These comments, at most, cast Lovett's case in a negative light. They do not rise to the level of a violation of due process, as is apparent from the examples set forth in *Cain*, *supra*. Neither these comments, nor anything else in the record, indicate the sort of conflict of interest suggested by the examples in *Cain*. Thus, Lovett has failed to overcome the presumption of judicial impartiality.

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