

STATE OF MICHIGAN
COURT OF APPEALS

KIRK HANNING,

Plaintiff-Appellant,

v

MARTY MILES COLLEY and DUMITRU
JITIANU,

Defendant-Appellees.

UNPUBLISHED

May 20, 2008

No. 278402

Oakland Circuit Court

LC No. 06-076903-nf

Before: White, P.J., and Hoekstra and Smolenski, JJ.

WHITE, P.J. (*concurring*).

Conceding that plaintiff's complaint could be read as including, but did not clearly assert, a claim for excess wage loss, plaintiff's answers to defendant Jitanu's discovery requests, filed in October, 2006, put defendants on notice that plaintiff would be claiming lost income, and might be calling named experts and offering exhibits to support that claim. Similarly, plaintiff's deposition testimony in November of 2006 supported this claim. Additionally, plaintiff's case evaluation summary, filed at the end of March, 2007, for the mid-April case evaluation, clearly set forth a claim for excess wage loss. Under these circumstances, I conclude that the court abused its discretion in finding in May, 2007, that plaintiff had engaged in dilatory tactics, and that defendants would suffer substantial prejudice if the amendment were allowed.

I also agree with plaintiffs that MCR 2.118(A)(3) did not provide the court with authority to require that plaintiff pay, as a condition of the amendment, all defendants' reasonable attorney fees from that point forward, including for additional discovery and trial. The rule provides for reimbursement for additional expenses, including reasonable attorney fees, that would have been unnecessary had the request for amendment been filed earlier. I fail to see how trial attorney fees would be affected by the timing of the amendment.

Lastly, plaintiff cannot now be faulted for declining to file the amended complaint. At the hearing, the court stated that it was denying the motion to amend, and then stated that if plaintiff was willing to pay "every red cent of reasonable attorney costs from this moment on to keep the case alive," then he could proceed with the case and file the amendment. The court's written order states that "the Motion is granted solely upon the Plaintiff agreeing to reimburse the Defendant for all reasonable attorney fees incurred following the date of this Motion, including discovery, motion practice, and trial." Because plaintiff did not agree to pay the fees,

it was reasonable to simply appeal the dismissal, rather than file the amendment and refuse to pay the attorney fees.

/s/ Helene N. White