STATE OF MICHIGAN

COURT OF APPEALS

DAVID LUDOWESE,

Plaintiff,

v

GOLEN TRAFFIC & LOGISTIC, INC.,

Defendant-Cross-Defendant-Third-Party-Plaintiff-Appellee,

and

KINNIE ANNEX TRUCK RENTAL, INC.,

Defendant-Cross-Plaintiff,

v

GREAT LAKES H R SOLUTIONS, LLC,

Third-Party-Defendant-Appellant.

UNPUBLISHED
October 21, 2008

No. 279896
Macomb Circuit Court
LC No. 2006-003720-NI

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Third-party defendant Great Lakes H R Solutions, LLC (Great Lakes), appeals the trial court order that denied its motion for summary disposition on a claim brought against Great Lakes by third-party plaintiff Golen Traffic & Logistic, Inc. (Golen), even though Golen's claim was dismissed on Golen's own motion. Great Lakes also appeals the trial court's denial of its motion for leave to amend its third-party answer to add a counterclaim against Golen. We affirm.

On August 29, 2006, plaintiff David Ludowese filed suit against Golen and defendant Kinnie Annex Truck Rental, Inc. (Kinnie), alleging that, in November 2004, he was preparing to load a truck owned by Kinnie and leased to Golen when he suffered multiple injuries caused by a

defective backdoor on the truck. Ludowese was in the course of his employment when the accident occurred, and he alleged that Golen "leased" him and others from Great Lakes under an employee leasing agreement between Great Lakes and Golen.[1] Ludowese alleged that he was an employee of both Golen and Great Lakes. The complaint asserted that Golen breached the contract with Great Lakes by not carrying worker's compensation insurance and by violating payroll submission requirements that ultimately resulted in Golen being responsible for worker's compensation matters. Plaintiff alleged a negligence cause of action against Kinnie relative to the truck's defective backdoor, a negligence claim against Golen that was also based on the defective backdoor, and a breach of contract claim against Golen that postured Ludowese as a third-party beneficiary of the Golen-Great Lakes service contract.

Golen subsequently filed a third-party complaint against Great Lakes on December 6, 2006, alleging that Great Lakes was required to maintain worker's compensation insurance under the service contract, that Great Lakes, to the best of Golen's knowledge, maintained a worker's compensation insurance policy under which Ludowese redeemed a claim for benefits in the amount of $50,000, that Ludowese's claims were barred under the exclusive remedy provision of the worker's compensation act, MCL 418.131, and that if any party was liable to Ludowese it was Great Lakes by virtue of the terms contained in the service contract.[2] Golen maintained that Great Lakes breached the contract and that Great Lakes had a duty to defend and indemnify Golen pursuant to the contract.[3]

Kinnie, the owner of the truck, filed a cross-claim against Golen, contending that Golen had agreed to indemnify Kinnie, under a separate contract (Golen-Kinnie contract), for any injuries or damages arising out of the ownership, use, or maintenance of the truck. Kinnie additionally alleged that Golen breached the Golen-Kinnie contract by failing to procure liability insurance on the truck or, alternatively, by failing to name Kinnie as an additional insured.

Great Lakes filed a motion for summary disposition pursuant to MCR 2.116(C)(7) in regard to Golen's third-party complaint, arguing that the service contract contained an agreement

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[1] The document is entitled "Great Lakes H R Solutions Client Service Agreement." We shall refer to it simply as the "contract" or "service contract." The contract indicates that Great Lakes is a leasing organization and is in the business of providing employees and administrative services to other companies. Under the contract, Great Lakes agreed to provide Golen with personnel and accompanying administrative services needed to operate Golen's business.

[2] The service contract provides that Great Lakes "agrees to furnish and keep in force during the term of this Agreement workers' compensation insurance to cover Leased Employees." The contract further provides that Golen is responsible for submitting certain payroll information and that Golen "agrees to pay on behalf of [Great Lakes] for any worker compensation injury for any employee that payroll is not processed on a concurrent basis."

[3] The service contract indicates that Great Lakes "agrees to defend, indemnify and hold harmless [Golen] against all actions concerning employment-related issues brought by any [Great Lakes'] employee against [Golen] for the term of this Agreement, except for those actions brought as a result of [Golen's] negligence."

to arbitrate and that all of the claims in the third-party complaint arose out of, or were related to, the service contract. The contract provides:

> Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be resolved by arbitration administered by the American Arbitration Association and judgment rendered by the arbitrator may be entered in any court having jurisdiction. This Agreement shall be interpreted and enforced under the laws of the State of Michigan.

Kinnie also moved for summary disposition against Golen on its cross-claim, arguing that the indemnification and insurance provisions in the Golen-Kinnie contract entitled it to a judgment in its favor and against Golen for any amounts that Kinnie might become obligated to pay Ludowese on his complaint.

On April 16, 2007, the trial court heard argument on the summary disposition motions and took the matters under advisement. On June 4, 2007, Ludowese filed a motion for approval of a settlement agreement reached with Kinnie and Golen, pursuant to which Kinnie agreed to pay Ludowese $2,500 and Golen agreed to pay Ludowese $32,500. On June 11, 2007, a hearing was held on the motion to approve the settlement. Counsel for Golen indicated that the settlement would result in resolution of all the claims in the case. Counsel for Great Lakes stated that it was not a party to the settlement, that there remained the issue of the third-party complaint, that Great Lakes' motion for summary disposition remained pending, and that it had not yet had an opportunity to file a counterclaim for breach of contract against Golen. Golen's attorney responded that any counterclaim by Great Lakes would be untimely and that there was no motion for leave to file a counterclaim presented to the court. Further, Golen's counsel stated that it was prepared to dismiss its third-party complaint against Great Lakes. The trial court then ruled:

> Let me give you a ruling, first of all, on the pending motion to dismiss. That motion is denied.
>
> I think that the judicial economy and complex nature of this case, the multiple parties, the original complaint against multiple parties coupled with the third party complaint would frustrate the ends of justice were I to grant arbitration with respect solely to [Great Lakes'] dispute with Golen.
>
> The Court in its opinion needs to take jurisdiction of the entire matter so that complete justice can be rendered. That . . . motion to dismiss is denied.
>
> The motion to approve the settlement is granted. The Court is very familiar with the facts and circumstances of this case, having participated in a settlement conference that by the Court's memory went beyond three hours and into the lunch hour from a 9:00 o'clock starting point. The Court believes that, that the amount agreed upon is reasonable.

The trial court then noted that Golen was making an oral motion to dismiss its third-party complaint against Great Lakes, and the motion was granted. Thereafter, the following colloquy occurred:

Great Lakes' Attorney: Your Honor, just for clarification, the third party complaint that you granted the motion to dismiss, is that with or without prejudice, just for clarification purposes.

Golen's Attorney: We request it be dismissed with prejudice, Your Honor.

Great Lakes' Attorney: If they want to dismiss all claims against us with prejudice, we have no objection.

Trial court: That is fine with me as well.

On June 19, 2007, Golen submitted proposed orders on the trial court's bench rulings under the 7-day rule, MCR 2.602(B)(3), and Great Lakes timely objected. Great Lakes also requested leave to amend its answer to state a counterclaim against Golen given that the summary disposition motion based on the arbitration provision had now been denied. On July 16, 2007, a hearing was held on a motion to settle the orders and the motion for leave to file a counterclaim against Golen. Three orders resulted from that hearing, all being dated July 16, 2007. One order indicates approval of the settlement agreement between Ludowese and Kinnie and Golen and dismisses Ludowese's action against Kinnie and Golen with prejudice. The order also dismisses Kinnie's cross-claim against Golen. The order then provides, "This is a final Order pursuant to MCR 2.602 and resolves all pending claims and closes this case." Another order formally denies Great Lakes' motion for summary disposition, which had presented the argument concerning the agreement to arbitrate. The third order first recognizes the dismissal of Ludowese's action against Kinnie and Golen and then proceeds to grant Golen's oral motion for dismissal of the third-party complaint against Great Lakes.[4] None of the orders directly or expressly address Great Lakes' motion for leave to file a counterclaim against Golen; however, there is the one order that does state that all pending claims are resolved and the case is closed. At the hearing to settle the orders, the trial court did in fact address the motion for leave to file a counterclaim and found that it was untimely and futile.[5]

On appeal, Great Lakes argues that the trial court should have enforced the arbitration agreement and dismissed Golen's third-party complaint as requested in Great Lakes' motion for summary disposition brought under MCR 2.116(C)(7). Great Lakes further maintains that the trial court erred in denying its motion for leave to file a counterclaim against Golen after denying the motion for summary disposition. Finally, Great Lakes contends that the voluntary dismissal of the third-party complaint should not bar a future claim against Golen on the basis of res judicata or collateral estoppel.

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[4] The trial court crossed out the following language that had been included in the order as drafted by counsel: "the Court dismissing with prejudice and without costs any and all claims which were made, or could have been made by the parties to the 3rd party action."

[5] After the trial court stated that it was denying the opportunity to file a counterclaim, counsel for Golen interjected, "We understand that denial is with prejudice as to any subsequent filings," to which the court responded, "I'm simply denying the motion."

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

With respect to the arbitration argument presented by Great Lakes, we do not dispute that an agreement to arbitrate, which provides for a judgment to be entered on an arbitrator's award by a court having jurisdiction, is valid, enforceable, and generally irrevocable under the Michigan arbitration act (MAA), MCL 600.5001 *et seq.* *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 153; 742 NW2d 409 (2007).[6] However, the claims that Great Lakes sought to summarily dismiss under the arbitration agreement and MCR 2.116(C)(7) were contained in Golen's third-party complaint, and that complaint was dismissed on Golen's own motion and no longer survives. There is no purpose or reason to address the arbitration issue where the ultimate relief sought by Great Lakes is dismissal of the third-party complaint, and where that relief has already been granted. As argued by Golen, the issue is effectively moot. Mootness precludes litigation or continued litigation of claims where the actual controversy no longer exists, *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n 15; 716 NW2d 561 (2006), or where a subsequent event renders it impossible to fashion a remedy, *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). There no longer is an existing controversy regarding Golen's third-party complaint, and the dismissal of the complaint following denial of the motion for summary disposition leaves no reason to fashion a remedy. Accordingly, we need not resolve the issue whether the trial court erred in denying Great Lakes' motion for summary disposition.[7]

With respect to the filing of a counterclaim by Great Lakes against Golen, Great Lakes contends:

> Great Lakes did not assert a counterclaim against Golen or request leave to state a counterclaim against Golen while its summary disposition motion was pending because such actions could be construed as being inconsistent with arbitration and could result in a waiver of the right to proceed to arbitration. . . . Once the trial court denied Great Lakes' motion for summary disposition, it promptly requested leave to file counterclaims against Golen. Under these circumstances, the trial court abused its discretion when it denied Great Lakes' motion for leave to file counterclaims against Golen.

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[6] We also recognize this Court's statement in *Christy v Kelly*, 198 Mich App 215, 217; 497 NW2d 194 (1993), cited by Great Lakes, which provides, "That arbitration would not promote judicial economy is likewise not grounds to refuse to enforce an otherwise valid arbitration agreement."

[7] To the extent that Great Lakes seeks a ruling from us on the arbitration issue simply to clear a path for a future arbitration proceeding against Golen and/or to preclude Golen from potentially litigating an issue in a court forum, we still find the issue moot for purposes of this appeal as the third-party complaint was dismissed and matters pertaining to future actions or proceedings are hypothetical in nature and thus not ripe for review (see discussion infra).

"[A] counterclaim may be combined with an answer." MCR 2.110(C). An answer and a counterclaim constitute pleadings. MCR 2.110(A). MCR 2.203(E) provides:

> A counterclaim . . . must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118. If a motion to amend to state a counterclaim . . . is denied, the litigation of that claim in another action is not precluded unless the court specifies otherwise.

Here, a counterclaim was not filed with Great Lakes' answer to Golen's third-party complaint; therefore, MCR 2.118 directs the manner by which Great Lakes could seek to file a counterclaim. MCR 2.118(A) provides in relevant part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

MCR 2.118(A)(1) is not applicable, nor does Golen consent to an amendment to add a counterclaim. A trial court's decision on a motion to amend a pleading is reviewed for an abuse of discretion on appeal. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An abuse of discretion occurs when the trial court chooses an outcome falling outside a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Ordinarily, a motion to amend a pleading should be granted, and it should be denied only on the basis of undue delay, bad faith or dilatory motives, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing an amendment, and futility. *Weymers, supra* at 658.

Here, the record supports the trial court's determination that the request to file a counterclaim was untimely, i.e., there was undue delay. We reject Great Lakes' argument that failure to timely file or to timely seek permission to file a counterclaim was justified in order to prevent a finding that the arbitration issue was waived. A general rule of pleading is that a party may "state as many separate claims or defenses as the party has, *regardless of consistency* and whether they are based on legal or equitable grounds or both." MCR 2.111(A)(2)(b)(emphasis added). Thus, filing a counterclaim in a court action while also inconsistently alleging that the case should be heard in arbitration and not the court system is expressly permissible under the court rules. Great Lakes guarded and did not waive its right to make the arbitration argument by listing it as an affirmative defense in its answer. MCR 2.111(F)(3). This Court has stated that a party can be deemed to have waived the right to arbitration by filing an answer containing a counterclaim against the plaintiff "*without demanding arbitration*." *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 589; 637 NW2d 526 (2001); *Hendrickson v Moghissi*, 158 Mich App 290, 300; 404 NW2d 728 (1987)(emphasis added). Therefore, if Great Lakes had simply filed its

answer, filed an accompanying counterclaim, and demanded arbitration as it did by way of affirmative defenses and a timely motion to dismiss on the basis of the agreement to arbitrate, there would not have been a waiver of the arbitration issue and Great Lakes would have fully protected itself by preserving the counterclaim.[8] There was no need to delay raising a counterclaim until after the trial court made an actual ruling on the motion to dismiss the third-party complaint on arbitration grounds. The trial court's denial of the motion for leave to amend to add a counterclaim did not constitute an abuse of discretion.

Finally, Great Lakes argues that the dismissal of Golen's third-party complaint should not bar a future claim by Great Lakes against Golen on the basis of res judicata or collateral estoppel. We note the language in MCR 2.203(E) cited above regarding a rejected motion to amend to file a counterclaim and the instigation of a new suit.[9] We decline, however, to address its applicability or the doctrines of res judicata and collateral estoppel, given that the issues are not ripe for review and fall outside the context of this case and appeal, as virtually conceded by Great Lakes itself.[10] No claims have been filed against Golen by Great Lakes in either an arbitration or courtroom forum, and the issues would be for a court or possibly an arbitrator in that forum to decide should litigation commence, followed perhaps by review by another panel of this Court. In general, the doctrine of ripeness precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic Council, supra* at 371 n 14. The issues of res judicata and collateral estoppel need to be addressed in another forum, not here, should Great Lakes initiate arbitration or court proceedings against Golen, which is a contingent future event that may not ever occur.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

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[8] Great Lakes could very easily have also included a statement in a counterclaim that it did not reflect a waiver of its arbitration argument.

[9] We would also note that Golen's third-party complaint appears to ultimately have been dismissed without prejudice. See MCR 2.504(A)(2)(b). However, we make no conclusive ruling on the issue.

[10] Great Lakes states that it "is including this issue in an abundance of caution to avoid any argument that it waived this issue by not raising it in this appeal."