STATE OF MICHIGAN

COURT OF APPEALS

NORTHWEST MICHIGAN LAW FIRM, P.C. and G & B II P.C.,	UNPUBLISHED April 1, 2010
Plaintiffs-Appellants,	
v	No. 283775 Livingston Circuit Court
DENNIS MCLAIN AND SHARON MCLAIN,	LC No. 06-22463-CK
Defendants-Appellees.	

Before: K.F. KELLY, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

In this action to collect unpaid attorney fees, the trial court denied plaintiffs' motion for summary disposition under MCR 2.116(C)(10), and subsequently granted defendants' motion for attorney fees and costs from the prior action pursuant to MCR 2.504(D). Plaintiffs failed to comply with this order, resulting in dismissal of the action in an order dated January 31, 2008. Plaintiffs now appeal, and we affirm.

I. FACTS AND PROCEEDINGS

Plaintiffs represented defendant Dennis McClain, and possibly his wife, Sharon McClain, in various legal matters in the 1990s. By April 1996, defendants had allegedly accrued approximately $150,000 in unpaid legal fees owed to plaintiffs. Also in April 1996, defendant Sharon McClain negotiated a settlement of a wrongful death action in which she was personal representative of her daughter's estate. Defendants signed an agreement promising to pay plaintiffs the unpaid legal fees out of the settlement proceeds, with a payment of $100,000 up front, and the balance to be paid within two weeks. Plaintiffs allegedly threatened to issue a lien to block distribution of the wrongful death settlement proceeds if defendants did not sign this agreement. Defendants paid $100,000 in accordance with the agreement, and subsequently paid an additional $10,000, but the balance remained unpaid. Defendants allegedly incurred an additional $130,000 in legal fees to plaintiffs between April and June 1996.

Plaintiffs brought an action against defendants in Oakland Circuit court to recover the unpaid fees in December 1996. The action dragged on for nine years, including periods in which the action was stayed for arbitration, but no resolution was achieved. In 2004, plaintiffs voluntarily dismissed the action without prejudice. In 2006, plaintiffs reinitiated the action in Livingston Circuit Court. The action was based on general claims of breach of contract and

account stated for unpaid fees, and also on breach of the April 1996 agreement to pay the debt out of the settlement proceeds.

Plaintiffs moved for partial summary disposition under MCR 2.116(C)(10), arguing that there was no question of fact that defendants breached their agreement to pay fees incurred as of April 1996 out of the wrongful death settlement proceeds. Defendants opposed the motion on the ground that there was a question of fact concerning whether the agreement was invalidated because they signed it under duress. They also moved to amend their pleadings to assert an affirmative defense of duress. The trial court granted defendants' motion to amend and denied plaintiffs' motion for summary disposition.

Defendants also moved for attorney fees and costs pursuant to MCR 2.504(D). The trial court granted the motion and ordered an evidentiary hearing to determine the amount of fees and costs due. Following the hearing, the trial court ordered plaintiff law firms to pay the McLains compensation in the amount of $59,215.66 ($56,119.14 legal fees, plus $3096.52 costs). The order provided that the case would be stayed for a period of 45 days; if plaintiffs failed to submit an affidavit verifying payment in that period, the case would be dismissed. Plaintiffs moved the trial court to lift the stay and compel defendants to arbitrate, but the trial court denied the motion. Plaintiffs failed to comply with the order to pay defendants $59,215.66, and the trial court dismissed the action. Plaintiffs now appeal.

II. DENIAL OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

We review de novo a trial court's disposition of a motion for summary disposition. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiffs maintained that there was no genuine issue of material fact that defendants promised in writing to pay fees accrued as of April 1996. The trial court determined that the McLains' assertion of the defense of duress established a genuine issue of material fact regarding the enforceability of the promise, thus precluding summary disposition. See *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005), wherein the Court held that duress is a traditional defense to the provisions of an unambiguous contract. Here, plaintiffs contend that there can be no valid defense of duress because the trial court improperly and belatedly granted defendants' motion to amend their pleadings to include the defense and because defendants failed to establish a genuine issue of fact in support of this defense. Plaintiffs are incorrect on both points.[1]

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[1] A trial court's decision to grant or deny a party leave to amend a pleading is reviewed for abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. However, leave to amend may be denied for particularized reasons, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice
(continued…)

Contrary to plaintiffs' argument, the trial court did not abuse its discretion in granting the motion to amend. There was no delay, bad faith, or dilatory motive on the part of the McLains, or undue prejudice to plaintiff law firms, that renders the trial court's decision an abuse of discretion. Although the McLains did not separately list duress as an affirmative defense in either their initial answer or first amended answer and affirmative defenses, they stated in their answer, in response to plaintiffs' allegations, that Sharon McLain signed the "gun to the head letter" under duress after attorney William Garratt threatened to block distribution of the settlement proceeds from the wrongful death action. Consequently, plaintiffs had clear notice that defendants intended to assert the defense of duress in the first response to plaintiffs' complaint. Clearly, the assertion of this defense was not a surprise to plaintiffs, and the defendants did not conceal their intention to raise it.

Plaintiffs also argue that the assertion of the defense was futile, because defendants failed to plead facts in support of the defense, and failed to establish a genuine question of material fact. What constitutes duress is a question of law, and whether duress exists in a particular case is a question of fact. *Clement v Buckley Mercantile Co*, 172 Mich 243, 253; 137 NW 657 (1912). "In order to void a contract on the basis of economic duress, the wrongful act or threat must deprive the victim of his unfettered will." *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991). In order to prevail on a claim of duress, the defendants to a breach of contract action must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes. "Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998).

Plaintiffs say that defendants failed to establish that plaintiffs engaged in unlawful conduct to coerce them to sign the agreement. We find no error in this regard. Defendants made sufficient allegations and raised sufficient proofs to establish at least a question of fact regarding unlawful conduct by plaintiffs. Michigan's Rules of Professional Conduct for attorneys prohibit an attorney from representing a client if the representation of that client "may be materially limited by . . . the lawyer's own interests" unless the attorney believes that the representation will not be adversely affected and the client consents after consultation. MRPC 1.7(b). Plaintiff law firms created a conflict of interest when Garratt allegedly threatened to jeopardize defendants' resolution of the wrongful death settlement in order to serve his own interests of receiving immediate payment. Furthermore, there is no clear basis for inferring that Garratt had any legitimate legal grounds to block distribution of the settlement funds. The anticipated amount of the settlement was far in excess of defendants' alleged debt to plaintiff law firms. A trier of fact could infer that Garratt was implicitly threatening to employ illegal means to hold the settlement monies hostage in order to induce defendants to pay. Accordingly, the trial court did not abuse its discretion in allowing the amendment, or in denying plaintiffs' motion for partial summary disposition.

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to the opposing party, or when an amendment would be futile. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

Defendants established sufficient evidence that they acted in the belief that Garratt was threatening serious injury to their "fortune," in the form of the expected wrongful death settlement proceeds. *Farm Credit Svc*, 232 Mich App at 681-682. Accordingly, the trial court did not abuse its discretion in allowing the amendment. It also did not err in denying plaintiff law firms' motion for summary disposition, because there is sufficient evidence to establish a question of fact regarding the viability of defendants' defense of duress.

III. DEFENDANTS' MOTION FOR ATTORNEY FEES UNDER MCR 2.504(D)

Plaintiffs also raise several challenges to the trial court's decision to grant defendants' motion for attorney fees under MCR 2.504(D), and its ultimate dismissal of plaintiffs' action for failure to comply with the order to pay attorney fees. We affirm.

A trial court's award of attorney fees and costs is reviewed for abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). The question of whether the trial court properly interpreted and applied a court rule is a question of law that is reviewed de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005); *Peterson*, 283 Mich App at 235. The trial court's findings of fact regarding an award of fees are reviewed for clear error, and questions of law are reviewed de novo. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

The trial court ordered payment of defendants' attorney fees pursuant to MCR 2.504, which provides as follows, in pertinent part:

> (A) **Voluntary Dismissal; Effect.**
>
> (1) *By Plaintiff; by Stipulation.* Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs
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> (a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs; or
>
> (b) by filing a stipulation of dismissal signed by all the parties.
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim.
>
> (2) *By Order of Court.* Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
>
> (a) If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the court shall not dismiss the action over the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.

* * *

(D) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based on or including the same claim against the same defendant, the court may order the payment of such costs of the action previously dismissed as it deems proper and may stay proceedings until the plaintiff has complied with the order.

Subsection (D) recognizes that a plaintiff may not avoid the payment of costs merely by dismissing an action and commencing a new action. *Hill v LF Transportation, Inc*, 277 Mich App 500, 510; 746 NW2d 118 (2008).

Plaintiffs argue that MCR 2.504(D) does not authorize an award of attorney fees accrued in a previously dismissed action, and they assert that the term "costs" does not encompass attorney fees. Under Michigan law, the term "costs" does not include attorney fees, *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004), but, the narrow issue of whether costs includes attorney fees under MCR 2.504(D) has been resolved in favor of awarding attorney fees under MCR 2.504(D). *Sirrey v Danou*, 212 Mich App 159, 160-161; 537 NW2d 231 (1995); *McKelvie v City of Mt Clemens*, 193 Mich App 81; 483 NW2d 442 (1992). Plaintiffs disagree with these decisions, as we do, but *Sirrey* establishes binding precedent under MCR 7.215(C) and (J)(1) for allowing the imposition of attorney fees under MCR 2.504(D). Plaintiffs also contend that MCR 2.504(D) is inapplicable where the action is dismissed by a court order under MCR 2.504(A)(2), and that it applies only where the prior action was dismissed without a court order pursuant to MCR 2.504(A)(1). This argument is erroneous because the plain and unambiguous language of the court rule makes no distinction between the two means of dismissing an action with respect to the award of costs under subsection (D). See *Peterson v Fertel*, 283 Mich App 232, 235-236; 770 NW2d 47 (2009), holding that courts must apply court rules in accordance with their plain language.

Plaintiffs also argue that under the doctrines of res judicata and collateral estoppel, costs are barred by the order of dismissal in the 1996 action, which dismissed the action without costs. Plaintiffs misconstrue these doctrines. The doctrine of res judicata is generally employed to prevent multiple suits litigating the same cause of action. The doctrine bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 212-213; 699 NW2d 707 (2005). The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent cause of action between the same parties where the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily resolved in the prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Here, the issue of the McLains' entitlement to costs under MCR 2.504(D) was not, and could not have been, decided in the 1996 action. The order dismissing the 1996 action disallowed costs at the time the order was entered, but the circumstances giving rise to an order of costs under MCR 2.504(D)—plaintiffs' re-filing of the same action—were not present at the time the order was entered. Accordingly, neither the

doctrine of res judicata nor collateral estoppel barred defendants from subsequently seeking costs under MCR 2.504(D) after plaintiffs revived the action in Livingston County in 2006.

Plaintiffs also argue that MCR 2.504(D) does not authorize recovery of costs incurred while an action is stayed and/or is in arbitration. The arbitration proceedings in the 1996 action involved statutory arbitration under the Michigan Arbitration Act, MCL 600.5001 *et seq*. The arbitration provision in the fee agreement provided that the arbitration award would be enforced by the circuit court, rendering the agreement valid, enforceable, and irrevocable. MCL 600.5001(2). The trial court stayed the action so that it would be submitted to arbitration; only the parties' failure to complete arbitration and the subsequent dismissal of the action prevented the arbitration proceedings from culminating in an award to be enforced by the court. Under these circumstances, where arbitration was an inherent part of the civil action, there is no reason why costs pertaining to arbitration would not be recoverable under MCR 2.504(D). We find no merit at all in plaintiffs' argument that awarding costs arising from arbitration contravenes Michigan's public policy of favoring arbitration.

Plaintiffs also argue that the attorney fees and costs awarded were not reasonable, and that they included items that should not have been included as recoverable costs. A trial court's determination of the reasonableness of attorney fees awarded is reviewed for abuse of discretion, while the findings of fact on which the trial court bases its award of attorney fees are reviewed for clear error. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). Although plaintiffs' witness contended that the properly billable items came to no more than $13,000, and were possibly as low as $9,000, defendants' witness determined that only $35 of the $56,119 charged was in error. The trial court found that defendants' witness's testimony was more credible, and we defer to this determination. *Drumm v Brodbeck,* 276 Mich App 460, 465; 740 NW2d 751 (2007); MCR 2.613(C). Moreover, defendants' witness testified that defendants' attorneys provided services valued at $116,298.50, but billed defendants for only $56,119.14. Under these circumstances, we do not find clear error in the trial court's finding that defendants incurred reasonable attorney fees in the amount of at least $56,119.14 in the defense of the 1996 action, excluding services provided for unrelated purposes.

Plaintiffs also argue that no attorney fees or costs may be recovered under MCR 2.504(D) without proof that the defendant clients actually paid the fees. Nothing in MCR 2.504(D) requires proof that costs or attorney fees were actually paid as a prerequisite to ordering payment by the party who re-filed the previously dismissed action.

Finally, plaintiffs argue that the trial court erred in reimbursing defendants for the costs of producing work product that could be recycled in defending the 2007 action. The legal premise of this argument is correct: this Court held in *Sirrey*, 212 Mich App at 161, that "a plaintiff should not be required to pay a defendant's costs and attorney fees to the extent that the work product from the dismissed action is usable in the subsequent action." Here, the trial court made the factual finding that the work product from the prior action was not usable because so much time had passed since the 1996 action. This finding was not clearly erroneous.

IV. PLAINTIFFS' MOTION FOR A STAY TO COMPEL ARBITRATION

Plaintiffs argue that the trial court should have granted their motion for a stay to compel arbitration instead of dismissing their action for failure to comply with the order. MCR 2.504(D)

provides that the trial court "may stay proceedings until the plaintiff has complied with the order." The use of the term "may" indicates that the court's action is discretionary rather than mandatory. *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 339; 766 NW2d 30 (2008), aff'd 483 Mich 885 (2009). Accordingly, we review the trial court's decision for abuse of discretion.

Plaintiffs did not assert the arbitration agreement until after defendants gained a significant advantage by successfully opposing plaintiffs' partial summary disposition motion and by prevailing on a motion for attorney fees and costs that would substantially offset plaintiff law firms' anticipated damage award. Under these circumstances, the trial court did not abuse its discretion by denying plaintiffs' motion to lift the stay and compel arbitration.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ William C. Whitbeck