STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH & ASSOCIATES, P.L.C., Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED April 1, 2010
v	No. 283863 Wayne Circuit Court
DEBORAH SOLAN, f/k/a DEBORAH MCNAMARA, Defendant/Counter-Plaintiff-Appellee.	LC No. 06-622261-CK

Before: DONOFRIO, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing this action after plaintiff's principal, Edgar Dietrich, failed to attend a settlement conference, contrary to the trial court order. We affirm in part and reverse and remand in part.

I

Plaintiff, a dissolved law firm corporation, formerly represented defendant in a divorce action in 1999. The parties never executed a written fee agreement. Defendant maintains that plaintiff's principal, Edgar Dietrich, agreed to represent her pursuant to an arrangement whereby she would provide decorating services for his cottage in Canada in lieu of paying legal fees. After the divorce action was concluded, Dietrich presented defendant with an invoice for legal services in excess of $20,000, but allegedly agreed that defendant could pay only $50 a month toward the outstanding obligation, without interest.

From 2002 to 2006, plaintiff sent defendant monthly statements, and defendant made monthly payments of $50. Dietrich later asked defendant to increase her monthly payments and warned her that interest would be imposed. Defendant did not pay the increased amount. On June 23, 2006, plaintiff brought this action to recover defendant's unpaid balance, asserting claims for breach of contract and account stated. Plaintiff moved for summary disposition on the account stated claim, but the trial court denied the motion, finding that a question of fact existed with respect to the parties' payment agreement.

The trial court scheduled a settlement conference for September 27, 2007. Plaintiff's attorney, Jason Chubb, brought written authorization permitting him to settle the case for no less than $15,000. The matter did not settle and the court rescheduled the settlement conference for December 12, 2007. The parties do not dispute that, at the September settlement conference, the trial court verbally ordered Dietrich to personally attend the rescheduled settlement conference in December. Plaintiff asserts that Chubb never informed it of this order. Dietrich did not appear at the December settlement conference, at which plaintiff was represented by a different attorney. Plaintiff apparently also issued its new attorney written authorization to settle the case for no less than $15,000. The trial court dismissed the case on the ground that Dietrich failed to appear at the December settlement conference, despite having been ordered to do so at the previous settlement conference. Plaintiff thereafter moved to reinstate the action, arguing that it was unaware that the trial court had ordered Dietrich to personally appear at the December settlement conference, and that it did not believe his appearance was necessary because its attorney was authorized to represent plaintiff at the settlement conference. The trial court denied the motion. This appeal followed.

II

Because this case involves the interpretation and application of various court rules, we review de novo the trial court's order of dismissal. *ISB Sales Co v Dave's Cakes,* 258 Mich App 520, 526; 672 NW2d 181 (2003). The rules governing the construction of statutes apply with equal force to the interpretation of court rules. *Rafferty v Markovitz,* 461 Mich 265, 270; 602 NW2d 367 (1999). Clear and unambiguous language in a court rule must be given its plain meaning, and enforced as written. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co,* 274 Mich App 584, 591; 735 NW2d 644 (2007).

III

MCR 2.401(A) provides that a trial court, on its own initiative or at the request of a party, may direct the attorneys of the parties, alone or with the parties, to appear for a conference. MCR 2.401(F) provides that if the court "anticipates meaningful discussion of settlement, the court may direct that the parties to the action, agents of the parties . . . or other persons" attend the conference and have "information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement." Further, MCR 2.401(G)(1) provides:

> (1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).

At the time of the December 2007 settlement conference, MCR 2.504(B)(1) provided[1]: "If the plaintiff fails to comply with these rules or a court order, *a defendant may move for dismissal* of an action or a claim against that defendant." (Emphasis added.)

We reject plaintiff's argument that dismissal was not warranted because the trial court's verbal order at the September settlement conference, requiring Dietrich to personally attend the December settlement conference, was not reduced to writing. To be sure, it is well settled that, generally, a court only speaks through its written orders. E.g., *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77, 85 (2009); *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). MCR 2.602 provides, in relevant parts:

> (A) Signing; Statement; Date of Entry.
>
> > (1) . . . all judgments and orders must be in writing, signed by the court and dated with the date they are signed.
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> > * * *
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> (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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> > (1) The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.
> >
> > (2) The court shall sign the judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's ruling.

"Shall" and "must" are mandatory. *In re Estate of Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008); *Random House Webster's College Dictionary* (2001) ("must" is defined as "necessary; vital").

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[1] MCR 2.504(B)(1) was subsequently amended, effective September 1, 2008, and now provides:

> If a party fails to comply with these rules or a court order, upon motion by an opposing party, *or sua sponte*, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims. [Emphasis added.]

However, amendments to court rules apply prospectively. See MCR 1.102; see also *Reitmeyer v Schultz Equip & Parts Co*, 237 Mich App 332, 337-343; 602 NW2d 596 (1999). Thus, a trial court's noncompliance with a court rule does not become proper if the rule is subsequently amended to permit the court's erroneous decision.

However, the Michigan Supreme Court has carved out exceptions to the written order requirement. In *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977), the Supreme Court articulated the general rule that courts speak through their written judgments, and oral statements by courts are not effective until reduced to writing. However, as this Court noted in *Vioglavich v Vioglavich*, 113 Mich App 376, 381; 317 NW2d 633 (1982), the Supreme Court in *Tiedman* left room for two exceptions to the general rule, including: 1) the parties' good faith reliance and action on the strength of the oral statement, and 2) the courts' unambiguous expression of intent to make the judgment effective immediately, including all of the terms of the judgment on the record. See *Tiedman,* 400 Mich at 575-577.

In *Vioglavich v Vioglavich*, 113 Mich App 376; 317 NW2d 633 (1983), the trial court held a final hearing on May 14, 1976, regarding the plaintiff's divorce complaint. The trial court concluded there had been a breakdown in the marriage relationship, divided the parties' property, awarded custody to the defendant, and stated, "the court will therefore order that the marriage be dissolved." *Id.* at 377. The trial court did not sign the judgment of divorce until June 22, 1976. In the meantime, the plaintiff had applied for a marriage license and married William Wilkinson. *Id.* The plaintiff lived with Wilkinson for approximately four years before he died. *Id.* The administrator of Wilkinson's estate did not list the plaintiff as an heir at law to the estate because the written judgment of divorce had not been entered at the time of her marriage to Wilkinson. *Id.* at 378.

The plaintiff then unsuccessfully filed a motion with the trial court to amend the judgment of divorce nunc pro tunc, arguing that "she proceeded in good-faith reliance upon the circuit court's oral pronouncement of divorce and that she was not aware that her divorce from the defendant was not effective" until the written judgment of divorce was entered. *Id.* at 378-378. This Court noted the exceptions to general rule requiring written orders and stated that the administrator of Wilkinson's estate was seeking to take advantage of a technical defect in the marriage between plaintiff and Wilkinson, despite having full knowledge of that marriage. *Id.* at 379-383, 386. This Court concluded that the trial court abused its discretion in denying the motion to amend the judgment of divorce nunc pro tunc "[b]ased upon the facts presented by each of the parties, the equities presented by the circumstances, and the public policy encouraging the preservation and sanctity of the marriage relationship." *Id.* at 386-387.

The good faith reliance exception in *Tiedman* is similarly applicable to the trial court's verbal order in this case. Like the plaintiff in *Vioglavich,* who relied on the trial court's oral pronouncement of divorce when remarrying, counsel for both parties relied and acted on the trial court's verbal order rescheduling the settlement conference and requiring Dietrich to personally attend. Specifically, absent any written order to do so, both counsel reappeared before the trial court at the time of the rescheduled conference to reengage in settlement negotiations. Since the parties, through the conduct of their trial counsel, demonstrated a good faith reliance on the trial court's verbal order, we conclude that the trial court did not err in dismissing plaintiff's case following Dietrich's failure to comply with the verbal order.

Plaintiff also argues that it was not bound by the court's order because its attorney never informed it of the order. We disagree. "[N]otice to an attorney is notice to the client who employs him." *Reinecke v Sheehy,* 47 Mich App 250, 262; 209 NW2d 460 (1973).

We also disagree with plaintiff's argument that Dietrich was not required to attend the December settlement conference because it was represented by an attorney who had settlement authority. Regardless of its attorney's authority, MCR 2.401(F) authorized the trial court to direct a party or other representative to attend the conference, and the court had ordered Dietrich, plaintiff's principal, to attend the December settlement conference. Further, MCR 2.401(G)(1) provides that grounds for dismissal exist if a party's attorney, or another representative, fails to attend a settlement conference after being directed to do so by the court. Consequently, the violation of the trial court's order requiring Dietrich's attendance at the December settlement conference was a sufficient basis for seeking dismissal.

But we agree with plaintiff that the record fails to disclose that the dismissal order was properly entered. In *Schell v Baker Furniture Co*, 232 Mich App 470, 478-479; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000), this Court observed:

> MCR 2.401(G)(1) states that a party's failure to attend a scheduled conference constitutes *grounds* for dismissal under MCR 2.504(B). Thus, dismissal under MCR 2.401(G)(1) must proceed according to the strictures of MCR 2.504(B)(1), which states that "a defendant may *move* for dismissal of an action or a claim against that defendant" where the plaintiff fails to comply with the court rules or a court order. (Emphasis added.) MCR 2.504(B) provides no mechanism for a court to dismiss a case sua sponte, nor do we find any evidence in the record that defendant moved to dismiss plaintiffs' complaints for their failure to personally attend the Settlement Week conference. [Emphasis in the original.[2]]

The record in this case similarly fails to indicate that defendant moved for dismissal based on Dietrich's failure to attend the December settlement conference. Thus, because the trial court lacked the authority to dismiss the case sua sponte, we conclude that the dismissal order was not properly entered.

Furthermore, as plaintiff argues, the record does not disclose that the trial court considered other available options or appropriate factors before dismissing the case as a sanction for Dietrich's failure to attend the December settlement conference. A trial court's dismissal of a case for failure to comply with the court's orders is generally reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The appropriateness of dismissal as a sanction for violating a court order is evaluated by considering several factors: (1) whether the violation was willful or accidental; (2) the party's

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[2] On appeal to the Supreme Court, that Court only addressed the portion of this Court's decision holding that the chief judge lacked the authority to temporarily reassign cases to himself for purposes of a "settlement week." *Schell v Baker Furniture Co*, 461 Mich 502, 505; 607 NW2d 358 (2000). Because the Supreme Court did not address this Court's interpretation and application of MCR 2.504(B)(1), we conclude that that portion of this Court's decision in *Schell* remains undisturbed.

history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there was 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. *Vicencio v Ramirez,* 211 Mich App 501, 507; 536 NW2d 280 (1995). A court's failure to evaluate all options on the record before entering an order of dismissal constitutes an abuse of discretion. *Id.* at 506-507.

In *Schell*, 232 Mich App at 474-475, this Court concluded that the trial court abused its discretion when it dismissed two cases because of the plaintiffs' failure to attend a settlement conference. The Court stated:

> [I]t is undisputed that plaintiffs' counsel had complete authority to settle the cases and engage in meaningful settlement negotiations. Both cases had been pending since 1994, had progressed without any problems and were ready for trial. Importantly, both cases had been mediated and had regular settlement conferences. There is no evidence whatsoever that plaintiffs had historically avoided settlement discussions or had repeatedly ignored court orders. Indeed, the miscommunication and misunderstanding that occurred between plaintiffs' counsel and plaintiffs was certainly not an intentional act of defiance of a court order, which makes the chief judge's automatic imposition of involuntary dismissal even more troubling. [*Id.* at 476.]

The record in this case does not disclose that the trial court considered the appropriate factors or other available options before imposing the harshest sanction of dismissal. Thus, even if the trial court was in the position to properly consider a motion to dismiss, remand is still required.[3]

IV

Plaintiff also argues that the trial court erred in denying its motion for summary disposition of its claim for an account stated. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). A reviewing court must consider the affidavits and other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact for trial. *Reed*, 475 Mich at 537.

Plaintiff relies on *Keywell & Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002), to argue that there was no genuine issue of material fact with respect to its account stated claim, because it regularly sent defendant billing statements, which defendant responded to by

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[3] In light of our decision, it is unnecessary to consider plaintiff's argument that the trial court erred in denying its motion to reinstate the case.

making partial payments, without objecting to the amount owed. In *Keywell & Rosenfeld*, this Court held that there was a question of fact regarding the existence of an account stated, based on the defendants' acceptance of the plaintiff's periodic billing statements. The Court stated:

> In *Watkins v Ford*, [69 Mich 357, 361; 37 NW 300 (1888),] the Michigan Supreme Court agreed with the articulation of an account balance stated as "a balance struck between the parties on a settlement . . . ." "[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." [*Keywell & Rosenfeld*, 254 Mich App at 331 (citations omitted).]

This Court further stated that in order for the plaintiff to demonstrate that its fees for services to the defendants had become an account stated, the plaintiff had to prove that the defendants "either expressly accepted the bills by paying them or failed to object to them within a reasonable time." *Id.* at 331. The Court added "Proving an account stated '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.'" *Id.*, quoting *Watkins*, 69 Mich at 361 (internal quotations omitted).

The Court in *Keywell & Rosenfeld* concluded that the trial court erred in granting a directed verdict for the defendants, stating:

> This record suggests that there was at least a dispute regarding whether K & R had proved its account stated claim after demonstrating that the Bithells failed to object for years to virtually any of the bills and had explicitly conceded some of them. The Bithells were entitled to challenge the firm's right to recover certain items listed in the bills. However, the trial court erred in not allowing the jury to determine this issue as a whole because, giving K & R the benefit of all reasonable doubts, there was a dispute of fact concerning whether there was an account stated. Thus, K & R is entitled to a new trial on its account stated and unjust enrichment claims. [*Id.* at 332-333.]

The Court also cited *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955), for the statement that the accomplishment of an account stated "does not necessarily exclude all inquiry into the rectitude of the account." *Keywell & Rosenfeld*, *supra* at 332 n 23.

Contrary to what plaintiff argues, *Keywell & Rosenfeld* does not indicate that there cannot be an issue of fact regarding the existence of an account stated where a plaintiff regularly sends invoices to a defendant, who fails to object and makes periodic payments. Rather, the Court stated that the existence of an account stated requires a showing that "the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck." *Id.* at 331. Evidence that a defendant has accepted a plaintiff's billing statements by paying them, or has failed to object to the statements, may serve as proof of mutual dealings, but this does not preclude the possibility that the defendant could prove otherwise; the rectitude of the account remains open to inquiry. *Id.* at 332 n 23.

Here, defendant presented evidence that there was no retainer agreement, and that plaintiff originally agreed to accept her decorating services in lieu of payment for legal services.

She also presented evidence that when plaintiff unexpectedly presented her with an invoice after the completion of services, it was agreed that she could pay $50 a month without interest indefinitely. We agree with the trial court that the evidence established a question of fact with regard to the existence of an account stated. Thus, the trial court properly denied plaintiff's motion for summary disposition.

We affirm the trial court's denial of plaintiff's motion for summary disposition, reverse the order dismissing the case, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens