

STATE OF MICHIGAN
COURT OF APPEALS

DAVID SUTTON,

Plaintiff-Appellant,

v

ADVANCE PHARMACEUTICAL, INC.,

Defendant-Appellee.

UNPUBLISHED

October 25, 2016

No. 328038

Oakland Circuit Court

LC No. 2014-144679-CZ

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

In this product liability action, plaintiff appeals as of right an order dismissing his case with prejudice. We reverse and remand for further proceedings consistent with this opinion.

This action arises from plaintiff's claim that he suffered severe injuries when he ingested acetaminophen pills manufactured by defendant. Plaintiff, in pro per, filed his complaint on December 22, 2014, alleging claims of failure to warn, improper labeling, and manufacturing defect; defendant answered on January 29, 2015. On March 27, 2015, plaintiff filed a motion to amend his complaint, in which he moved to state similar claims plus a breach of the implied warranty of marketability. Defendant responded, opposing the motion to amend, on April 7, 2015. The trial court granted plaintiff's motion on April 9, 2015. On May 11, 2015, plaintiff filed a motion for entry of default, asserting by affidavit that defendant had failed to file an answer to his amended complaint. In support of his motion to enter default, plaintiff alleged that he had filed an amended complaint in March 2015, relying on his motion to amend complaint. While the motion to amend complaint included the allegations he sought to add, an amended complaint was not attached or filed as a separate document.

On May 14, 2015, defense counsel sent plaintiff an email stating that plaintiff had failed to file his amended complaint and informing plaintiff that she would seek costs if plaintiff did not withdraw his motion. Defendant filed a response to plaintiff's motion for entry of default on May 18, 2015, contending that plaintiff had failed to file his first amended complaint, that plaintiff falsely averred that he filed an amended complaint, and that an entry of default would be improper. Plaintiff refused to withdraw the motion for default and the motion was set for hearing on May 20, 2015.

At the motion hearing, plaintiff attempted to assert that he thought that he had filed his first amended complaint with his motion to amend and that the court had ordered defendant to respond to the complaint when it granted his amendment. The court disagreed and stated:

You filed a motion asking my permission to file an amended complaint. I gave you that permission. You never filed the amended complaint. You never served them with an amended complaint. Now, you're here before me with a motion, wasting their time, asking me to default them for never answering a complaint that you never filed. I'm sanctioning you \$500 for doing that and giving them their \$500 in attorney fees, okay?

The court then added that the sanction was payable within 14 days or plaintiff's complaint would be dismissed. On the day after the hearing, plaintiff filed the amended complaint. Plaintiff never paid the \$500 in sanctions to defendant and his complaint was dismissed with prejudice on June 9, 2015. Plaintiff subsequently filed this appeal.

On appeal, plaintiff argues that the court erred in its imposition of sanctions. Plaintiff asserts that the court erred by not considering his ability to pay before imposing a monetary sanction; failing to determine whether his motion for entry of default was frivolous under MCL 600.2591 as directed by MCR 2.625(A)(2) before ordering him to pay defendant's attorney fees as a sanction; and failing to evaluate all available options on the record and conclude that the sanction was just and proper as required before imposing the extreme sanction of dismissing the case with prejudice. Due to the connectedness of plaintiff's arguments on appeal, we address his arguments collectively. Ultimately, we agree with plaintiff, and hold that the trial court abused its discretion in its imposition of sanctions in this matter.

The trial court's determination of the amount of the sanctions imposed is reviewed for an abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 408; 824 NW2d 591 (2012). A determination whether a claim is frivolous depends upon the particular circumstances of each case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). A trial court's finding whether a claim or defense was frivolous will not be reversed on appeal unless clearly erroneous. *Id.* at 661; *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009). A dismissal of a case for failure to comply with a court order is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008).

Initially, we address the court's imposition of monetary sanctions. Under MCR 2.114, every document of an unrepresented party must be signed by the party. MCR 2.114(C); *Edge v Edge*, 299 Mich App 121, 128; 829 NW2d 276 (2012). That signature certifies that: (1) the signer "has read the document"; (2) to the best of the signer's "knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"; and (3) "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D); *Vittiglio*, 297 Mich App at 406-407. If a pleading is signed by a party in violation of MCR 2.114, the party must be sanctioned. MCR 2.114(E); *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). MCR 2.114(E) provides for sanctions for a violation MCR 2.114:

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

An award of sanctions under MCR 2.114(E) must be reasonable. *Vittiglio*, 297 Mich App at 408.¹

Plaintiff argues that the court's imposition of monetary sanctions was erroneous, specifically arguing that the court failed to consider plaintiff's ability to pay. In considering MRE 2.114(D), it is apparent that plaintiff did not bring his motion for an improper purpose. Based on the record, it appears that plaintiff sincerely believed he had followed the proper procedure and did not understand the technical problem presented. Indeed, while plaintiff had an obligation to know and follow the court rules, we can see how the situation may be confusing, as plaintiff's motion to amend had been filed and contained the amended allegations he wished to pursue. Admittedly, defendant's attorney alerted plaintiff before the motion hearing of the error. While it appears plaintiff maintained his position that he had filed the amended complaint, albeit incorrect, there is nothing to suggest his purpose was improper. Further, plaintiff did file an amended complaint after the hearing. It is also pertinent to remember that this Court has held that pro se litigants are generally held to a less stringent standard when determining if sanctions are warranted. See *People v Herrera*, 204 Mich App 333, 339; 514 NW2d 543 (1994). Based on the record, we do not agree that sanctions were proper pursuant to MCR 2.114(C).

Turning to the reasonableness of the sanction, we agree with defendant that nothing requires the trial court to consider plaintiff's economic status. However, it would certainly seem to be a relevant consideration when assessing reasonable sanctions, particularly here, where plaintiff had established through a waiver of fees that he was indigent and receiving public assistance. Moreover, the court awarded \$500 in attorney fees, which appears to be an arbitrary figure, especially considering that defendant only requested \$400 in attorney fees in its response to the motion for entry of default. For these reasons, the trial court abused its discretion in awarding sanctions.

Next, we address the dismissal of plaintiff's complaint. "Although defendant may move for dismissal of plaintiff's claims for failure to comply with court rules or a court order, MCR 2.504(B)(1), such a dismissal is a drastic sanction." *Woods*, 277 Mich App at 631. The court should consider several factors:

¹ We agree with defendant that the trial court imposed sanctions pursuant to MCR 2.114, although a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F); *Harkins*, 257 Mich App at 576. That rule in turn provides that costs are to be awarded pursuant to MCL 600.2591. *Bourne v Farmers Ins Exch*, 449 Mich 193, 202-203; 534 NW2d 491 (1995); *1300 Lafayette East Coop*, 284 Mich App at 534.

(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. [*Id.* (citation omitted).]

We agree with plaintiff that the trial court abused its discretion in dismissing plaintiff's complaint as a sanction for failing to pay the \$500 in attorney fees. Initially, we note that the trial court dismissed plaintiff's action, a drastic sanction, without any consideration of the required factors. Further, review of the factors reveals that dismissal was not an appropriate sanction. Here, we do not agree that plaintiff's action was willful. At worst, it was a technical error made based on misunderstanding of the court rules. Plaintiff had no history of failure to comply with court rules, and had been very active in pursuing the case. There was no evidence that plaintiff was attempting to deliberately delay the proceedings. Further, given plaintiff's verified indigent status, it is likely he was unable, not unwilling, to pay the \$500 within 14 days. We also note that plaintiff cured the error after the hearing by filing an amended complaint. Any number of lesser sanctions would certainly have better served the interests of justice than dismissal but, notably, the court failed to consider any alternatives. We also see no prejudice to defendant in continuing the case. Defendant had not even requested dismissal of the case and had been fully apprised of the amended allegations for some time. Accordingly, the trial court abused its discretion.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher