STATE OF MICHIGAN

COURT OF APPEALS

GEORGE BADEEN/ALL OTHERS SIMILARLY SITUATED and MIDWEST RECOVERY AND ADJUSTMENT, INC.,

Plaintiffs-Appellants,

v

PAR, INC., d/b/a PAR NORTH AMERICA, REMARKETING SOLUTIONS, CENTERONE FINANCIAL SERVICES, L.L.C., FIRST NATIONAL REPOSSESSORS, INC., MILLENNIUM CAPITAL AND RECOVERY CORPORATION, RENOVO SERVICES, L.L.C., RENAISSANCE RECOVERY SOLUTIONS, INC., ASR NATIONWIDE, L.L.C., THE M. DAVIS COMPANY, INC., d/b/a U.S.A. RECOVERY SOLUTIONS, REPOSSESSORS, INC., AMERICAN RECOVERY SERVICE, INC., DIVERSIFIED VEHICLE SERVICES, INC., NATIONAL ASSET RECOVERY CORP., CONSUMER FINANCIAL SERVICES, L.L.C., TD AUTO FINANCE, L.L.C., TOYOTA MOTOR CREDIT CORPORATION, NISSAN MOTOR ACCEPTANCE CORPORATION, SANTANDER CONSUMER U.S.A., PNC BANK, N.A., BANK OF AMERICA, N.A., FIFTH THIRD BANK, and THE HUNTINGTON NATIONAL BANK,

Defendants-Appellees,

and

MV CONNECT, L.L.C., d/b/a IIA, L.L.C., GE MONEY BANK, and MANHEIM RECOVERY SOLUTIONS,

Defendants.

FOR PUBLICATION
April 11, 2013
9:05 a.m.

No. 302878
Wayne Circuit Court
LC No. 10-004053-CZ

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

WILDER, J.

On appeal, plaintiffs argue that (1) the trial court erred when it struck plaintiffs' motion for class certification, (2) the trial court erred when it denied plaintiffs' motion to reinstate the class action allegations, and (3) the trial court erred when it granted summary disposition in favor of defendants. We affirm.

This case involves companies ("forwarding companies") that contract with lending institutions to handle the collection services on delinquent accounts. After contracting with the lending institutions, these forwarding companies would in turn retain licensed, repossession agents to carry out repossession on behalf of the lenders. Plaintiffs allege that the forwarding companies themselves need to be licensed as "collection agencies," and their failure to do so is the underlying basis for plaintiffs' lawsuit.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff George Badeen, a licensed collection agency manager, owns plaintiff Midwest Recovery and Adjustment, Inc. ("Midwest Recovery"). Midwest Recovery is a licensed collection agency that is hired by automobile lenders to repossess financed vehicles whose owners have defaulted on their loans. In the past, automobile lenders would contract directly with repossession agents, like Midwest Recovery. However, more recently, lenders are contracting with forwarding companies. Apparently, repossession agents receive less money when hired by forwarding companies than when hired directly by lending institutions. Plaintiffs claim that this practice has caused them harm.

On April 5, 2010, plaintiffs filed a complaint against defendants, which include forwarding companies ("forwarder defendants")[1] and lending institutions ("lending defendants")[2]. In count one of the complaint, plaintiffs sought certification of a class action, in which Badeen would represent the interests of all automobile repossession agencies and owners who held a license to collect debts in Michigan in the preceding six years. In count two, plaintiffs sought an injunction prohibiting the forwarder defendants from violating the Occupational Code, MCL 339.101 *et seq.*, by soliciting or performing collection in Michigan without a license. In count three, plaintiffs asserted a claim of civil conspiracy, alleging that the

[1] The forwarder defendants are Par, Inc. d/b/a Par North Amreica; CenterOne Financial Services, L.L.C.; First National Repossessors, Inc.; Millennium Capital and Recovery Corporation; MV Connect, L.L.C., d/b/a IIA, L.L.C.; Renovo Services, L.L.C.; Renaissance Recovery Solutions, Inc.; ASR Nationwide, L.L.C.; Diversified Vehicle Services, Inc.; National Asset Recovery Corp.; and Manheim Recovery Solutions.

[2] The lender defendants are TD Auto Finance, L.L.C.; Toyota Motor Credit Corporation; Nissan Motor Acceptance Corporation; Santander Consumer U.S.A.; PNC Bank, N.A.; Bank of America, N.A.; Fifth Third Bank; GE Money Bank; and the Huntington National Bank.

forwarder defendants and lender defendants "acted in concert to violate the Occupational Code." In count four, plaintiffs alleged that the forwarder defendants intentionally interfered with plaintiffs' business relations with the lender defendants. In count five, plaintiffs alleged that the forwarder defendants intentionally interfered with plaintiffs' contracts with the lender defendants. In count six, plaintiffs asserted a claim of negligence per se against the forwarder defendants for breach of their statutory duty under the Occupational Code.

On May 14, 2010, plaintiffs filed an amended complaint, which differed only in the naming of a defendant (Remarketing Solutions was named in place of Manheim Recovery Solutions). On September 8, 2010, plaintiff filed a second amended complaint, which differed from the first amended complaint in several substantive ways. In count two of the second amended complaint, plaintiffs sought to enjoin the lender defendants from hiring unlicensed debt collectors. In count three, plaintiffs alleged that the forwarder defendants and the lender defendants acted in concert to violate both the Occupational Code and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* In count six, plaintiffs alleged that the lender defendants also violated their statutory duty under the MCPA. In two additional counts, plaintiffs alleged violations of the Occupational Code and the MCPA. Several defendants filed answers to the complaint or amended complaints.

A. CLASS ACTION CERTIFICATION

On July 21, 2010, Par, Inc. ("Par") filed a notice of Badeen's failure to file a timely motion to certify a class pursuant to MCR 3.501(B), claiming that more than 91 days had lapsed from the date of the original complaint alleging a class action. Other defendants filed similar notices or joinders in the notice.

On July 30, 2010, Badeen filed a motion for class certification, arguing that he was a member of the proposed class; that the proposed class was numerous, making joinder impracticable; that common questions predominated; that Badeen's claims were typical of the class; that he would adequately assert and protect the class; and that a class action would be superior.

Par filed a motion to strike Badeen's motion for class certification, contending that Badeen's motion was untimely. Par argued that once it filed its notice, the class action allegations were deemed stricken as a matter of law and, as a result, Badeen needed to first seek leave of the court to reinstate his class action allegations before he was permitted to move for class action certification. Other defendants filed similar objections to the motion for class certification or concurrences in Par's motion.

On August 11, 2010, Badeen filed a motion to strike the notices of failure to file a motion for class certification. In the brief in support of the motion, Badeen argued that MCR 3.501's 91-day time limit runs from the date of the filing of the most recent amended complaint containing class action allegations because the court rule uses the word "a," not "the." Alternatively, Badeen argued that the class action allegations should be reinstated because his attorney's "misconception of the court rule" constituted excusable neglect as permitted under the court rule.

On August 20, 2010, Par filed a brief in opposition to Badeen's motion to strike. Par argued that the 91-day time limit runs from the filing of the first complaint containing class action allegations based on the language and purpose of the rule. Par further argued that misinterpretation of a court rule does not constitute excusable neglect.

On August, 25, 2010, the trial court held a hearing on the cross motions to strike. The parties' arguments were consistent with their briefs, but defendants additionally argued that plaintiffs would not be prejudiced if the class action allegations were stricken. The trial court held that the 91-day time limit ran from the filing of the original complaint containing class action allegations and that plaintiff's failure to timely file a motion for class certification did not constitute excusable neglect warranting reinstatement of the class action allegations. On September 13, 2010, the trial court entered an order granting Par's motion to strike Badeen's motion for class certification and denying Badeen's motion to strike the notices of failure to file for class certification or to reinstate class action allegations.

B. SUMMARY DISPOSITION

On October 6, 2010, both the forwarder defendants and the lender defendants moved for summary disposition pursuant to MCR 2.116(C)(8). Primarily, they argued that since forwarders are not collection agencies under the Occupational Code, all of plaintiffs' claims necessarily fail. Plaintiffs responded by arguing, in part, that forwarders must be licensed because they solicit lenders to collect claims and are "indirectly" involved in collections.

After holding a hearing, the trial court entered an opinion and order on February 14, 2011, granting defendants' motions for summary disposition. The trial court found that the statutes at issue were unambiguous, that the forwarder defendants were not collection agencies, and that, therefore, plaintiffs failed to state a claim on which relief could be granted. Plaintiffs' appeal to this Court ensued.

II. STANDARDS OF REVIEW

We review issues of statutory interpretation de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). This Court must begin by considering the language of the statute. *Rambin v Allstate Ins Co*, 297 Mich App 679, 684; 825 NW2d 95 (2012).

> In interpreting a statute, a court's goal is to give effect to the Legislature's intent. A court may not construe a statute unless it is ambiguous; if the statute is unambiguous, the court will apply it as written. If a statute is ambiguous, construction is permitted, and the rules of statutory construction "merely serve as guides" toward the ultimate goal of discerning the intent of the Legislature. "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." [*East Lansing v Thompson*, 291 Mich App 34, 36-37; 804 NW2d 567 (2010) (citations omitted).]

A trial court's decision on a motion for summary disposition is also reviewed de novo. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012). "MCR 2.116(C)(8) tests whether a claimant has failed to state a cognizable claim. For

purposes of a motion for summary disposition under MCR 2.116(C)(8), this Court accepts all well-pleaded factual allegations as true, and construes them in a light most favorable to the nonmoving party." *Id.*

"The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). Thus, the goal in interpreting is to give effect to the rule maker's intent as expressed in the court rule's terms, giving the words their plain and ordinary meaning. *People v Fertel*, 283 Mich App 232, 235-236; 770 NW2d 47 (2009). "If the language poses no ambiguity, this Court will not look outside the rule or construe it, but need only enforce the rule as written." *Id.* at 236. But "[i]f judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. While the Court may consider a variety of factors, it should always use common sense." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009) (citations omitted).

III. ANALYSIS

A. CLASS CERTIFICATION

Plaintiffs first argue that the trial court erred when it determined that plaintiffs' motion to certify as a class action was untimely under the 91-day deadline imposed by MCR 3.501. We agree, but for reasons stated *infra*, plaintiffs are not entitled to any relief on appeal.

Badeen filed his motion for class certification on July 30, 2010. This was within 91 days of the first amended complaint filed on May 14, 2010, but more than 91 days after the filing of the original complaint on April 5, 2010. Both the original and amended complaints contained the same class action allegations. Because there are no decisions of this Court or the Michigan Supreme Court addressing whether the motion for class certification must be filed within 91 days of the original complaint or an amended complaint, this is an issue of first impression.

This Court must first consider the language of the court rule. *Id.* The court rule governing class actions is MCR 3.501. MCR 3.501(B) provides, in part:

> (1) *Motion.*
>
> > (a) Within 91 days after the filing of *a complaint* that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.
> >
> > (b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown. [Emphasis added.]

The Supreme Court's use of the word "a" indicates that a plaintiff may file more than one complaint containing class action allegations, as in this case. See *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (noting that "the" and "a" have different meanings, where "the" is a *definite* article, and "a" is an *indefinite* article). Further, while there any many dictionary definitions of the word "a," the definitions most pertinent to this case are "any" or "every." *Random House Webster's College Dictionary* (1997). Accordingly, the court rule is

properly interpreted as meaning that "[w]ithin 91 days after the filing of [*any*] complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action."

Because plaintiffs filed their original complaint on April 5, 2010, plaintiffs had 91 days, or until July 6, 2010,[3] to move for class certification. However, MCR 2.118(A) allows for a party to amend a pleading once as a matter of course as long as 14 days have not lapsed from receiving a responsive pleading. As of May 14, 2010, no defendants had filed or served any answer to plaintiffs' original complaint. Thus pursuant to MCR 2.118(A), plaintiffs were permitted to amend the complaint on May 14, 2010.

Having properly amended their original complaint, plaintiffs' original complaint ceased to have any effect, and plaintiffs were not required to move for class certification by July 6, 2010. As this Court has explained, an amended pleading supersedes the former pleading, making the original pleading "abandoned and withdrawn." *Grzesick v Cepela*, 237 Mich App 554, 562; 603 NW2d 809 (1999), citing MCR 2.118(A)(4), quoting 61B Am Jur 2d, Pleading, pp 92-93; see also *Nippa v Botsford Gen Hosp*, 251 Mich App 664, 679; 651 NW2d 103 (2002), vac'd on other grounds 468 Mich 882 (2003). Because the original complaint became "abandoned and withdrawn" by virtue of the filing of the amended complaint, the July 6, 2010, deadline tied to the original complaint no longer had any effect. Therefore, consistent with our interpretation of MCR 3.105, plaintiffs had 91 days from the May 14, 2010, filing of the amended complaint to move for class certification. Since plaintiffs moved for class certification on July 30, 2010, within 91 days of May 14, 2010, the filing of the amended complaint, we conclude that the trial court erred when it held that plaintiffs' motion was untimely under the court rule.

We reject as unwarranted defendant's contention that permitting an amended complaint to effectively "restart the clock," would introduce undue delay in the initiation of class action litigation. While the timing requirement at issue "was designed to prevent cases from remaining pending for extended periods without the propriety of a class action being raised," *Hill v City of Warren*, 276 Mich App 299, 306; 740 NW2d 706 (2007) (quotations omitted), citing GCR 1963, 208.2(A), the predecessor rule to MCR 3.501(B)(1), a plaintiff may amend its complaint only once as a matter of course and, even then, under significant timing restrictions. MCR 2.118(A)(1). If a plaintiff wishes to amend its complaint after the time for doing so as a matter of course has expired, plaintiff must then either obtain the defendants' consent or obtain the trial court's permission. MCR 2.118(A)(2). The time limitations and additional requirements concerning amendments of complaints are more than sufficient to prevent "cases from remaining pending for extended periods without the propriety of a class action being raised." *Hill*, 276 Mich App at 306.

[3] 91 days from April 5, 2010, is actually July 5, 2010, but the court was closed that day for the Independence Day holiday. Thus, pursuant to MCR 1.108, the next available day that is not a Saturday, Sunday, or legal holiday is used.

B. COLLECTION AGENCIES UNDER THE MCPA AND THE OCCUPATIONAL CODE

Having concluded that the trial court erred in granting Par's motion to strike Badeen's motion for class certification, we next consider plaintiffs' assertion that the trial court erred in finding that defendants were not collection agencies within the meaning of the occupational code and granting summary disposition in favor of defendants on that basis. Because we hold the trial court properly found that the defendants did not violate either the MCPA or the Occupational Code, we affirm the trial court's ruling.

Article 6 of the Occupational Code, MCL 339.601(1), provides that "[a] person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation." MCL 339.904, under the Occupational Code, in turn, prohibits anyone from "operat[ing] a collection agency or commenc[ing] in the business of a collection agency without" being licensed. Plaintiffs claim that the forwarder defendants have violated these sections by acting as collection agencies without being licensed.

MCL 445.252(s) of the MCPA prohibits a "regulated person" from "[e]mploying a person required to be licensed under [MCL 339.901 to 339.916], to collect a claim unless that person is licensed under article 9 of Act No. 299 of the Public Acts of 1980." Plaintiffs claim that the lender defendants have violated this provision by hiring the forwarder defendants to collect claims without the forwarder defendants being licensed.

We find that the forwarder defendants and lender defendants have not violated the Occupational Code or the MCPA because the forwarder defendants are not "collection agencies" under Article 9 of the Occupational Code. MCL 339.901(b) defines "collection agency" as

> a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement.

The plain and unambiguous language supports the trial court's finding that forwarders are not collection agencies because forwarders do not "solicit a claim for collection" when they hire collection agencies. "Solicit" is defined, in part, as "to try to obtain by earnest plea or application," and "to make a petition or request for something desired." *Random House Webster's College Dictionary* (2001). MCL 339.901(a) provides that "claim" and "debt" both have the exact same meaning, primarily an "an obligation or alleged obligation for the payment of money." As a result, "soliciting a claim for collection," found in MCL 339.901(b), means requesting *the debtor* to fulfill his obligation on the debt.

Further, the Legislature's use of the word "indirectly" in MCL 339.901(b) does not indicate that the statute applies to forwarders. The phrase "directly or indirectly engaged in" applies to both the phrase preceding the comma and the phrase after the comma. Thus, a collection agency includes a person who "directly or indirectly engaged in . . . repossessing or

attempting to repossess a thing of value owed . . . ." Grammatically, the comma technically does not belong in the statute because the phrase "repossessing or attempting to repossess a thing of value . . ." is not an independent clause. See Strunk & White, *The Elements of Style* 4d (New York: Longman, 2000), p 5 (noting that a comma is used before a conjunction when it introduces an independent clause). This phrase is not independent because it is clear that the phrase's subject is found back at the beginning of the sentence in another phrase, "a person." However, because of the inordinate number of "ors" in the statute, we discern that the use of the comma was to help identify the two main components of the definition. And because the form of the word "soliciting" matches the form of the word "repossessing," we are convinced that the Legislature intended for "directly or indirectly engaged in" to apply to both similarly, otherwise, the pattern of the section would be asymmetric.

Thus, the issue boils down to whether the forwarder defendants "directly or indirectly engaged in repossessing or attempting to repossess" collateral. We conclude that they did not. "Engage" means "to occupy the attention or efforts of; involve." *Random House Webster's College Dictionary* (1997). And "occupy" is defined as "to fill up, employ, or engage." *Id.* Plaintiffs' complaint alleges that the forwarder defendants hired and contracted with "local, licensed, Michigan debt collection agencies to repossess the collateral sought to be seized." However, the fact that the forwarder defendants contracted out the work demonstrates that they were *not* "occupied" or "involved" with the act of repossession itself. There were no allegations that the forwarding defendants had any involvement or input whatsoever with the actual repossession effort process, and we decline to find that a forwarder who contracts out the *actual repossession process* is "indirectly engaged in repossessing or attempting to repossess." Such an extension of the process would be too attenuated.

Our construction of the phrase "indirectly engaged in repossessing or attempting to repossess" is consistent with the purpose of the statute "to protect the debtor and the creditor from the potentially improper acts of a third-party collection agency." *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 732; 625 NW2d 804 (2001). Because forwarders are not involved with "collection activities" (they do not collect debts, they do not contact consumers, and they are not involved with the actual act of repossession), requiring them to be licensed would not further the purpose of the statute.

Because forwarders are not required to be licensed, the forwarder defendants did not violate the Occupational Code, and the lender defendants did not violate the MCPA. Accordingly, the trial court did not err in granting defendants' motions for summary disposition.

Affirmed. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald