STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN LEE LANE, a Legally , Incapacitated Person, MARY LOUISE LANE, Individually and as Legal Guardian of STEPHEN LEE LANE, CARL LANE, Individually, and ROBERT LANE, Individually,

Plaintiffs-Appellants,

UNPUBLISHED
July 9, 1996

No. 156801
LC No. 90-014312 NP

v

P & P CYCLE, PRODUCTS, INC., NICHOLS MOTORCYCLE SUPPLY, INC., MONARCH SPORTS SYSTEMS, INC.,

Defendants,

MONARCH HELMETS, INC., a foreign corporation, INDUSTRIAS MEX-CAL, S.A. de C.V., a Mexican corporation, and HENRY KOCH, Individually,

Defendants-Appellees.

Before: White, P.J., and Kavanagh,* and S.N. Andrews,**JJ.

PER CURIAM.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.
** Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal as of right the circuit court's order denying their motion to reinstate this products liability case following the court's dismissal, without prejudice, of their action against Monarch Helmets, Inc., a foreign corporation, Industrias Mex-Cal S.A. de C.V., a Mexican corporation, and Henry Koch, individually. During the pendency of this appeal, Koch was dismissed by stipulation with prejudice. We reverse.

Plaintiff Stephen Lane (Lane) purchased a motorcycle helmet from P & P Cycle Products on June 25, 1986. On June 22, 1987, Lane was involved in a serious motorcycle accident. Plaintiffs contend that Lane's motorcycle helmet split into two pieces upon impact, and caused him to sustain a closed-head injury.

Plaintiffs filed a complaint on June 6, 1990, against P & P Cycle Products, Monarch Sports Systems, Inc., "X Corporation, a predecessor corporation to Monarch Sports Systems, Inc., whose identity is unknown to plaintiffs," and Nichols Motorcycle Supply, Inc.[1] Plaintiffs filed a first amended complaint on July 13, 1990. The complaint identified Monarch Helmets, Inc., and Industrias Mex-Cal as the predecessor corporations to Monarch Sports Systems, Inc., and added those corporations as well as Henry Koch, individually. Industrias Mex-Cal, Koch, and Monarch Helmets were served with summons and the amended complaint at Koch's California address.

An appearance was entered for Monarch Sports Systems on July 30, 1990, by Vandeveer Garzia, and an answer with affirmative defenses was filed on August 15, 1990. On October 23, 1990, Koch filed a motion for summary disposition contesting personal jurisdiction, MCR 2.116(C)(1). The motion stated that he, by and through his attorneys, Vandeveer, Garzia makes "this special and limited appearance to contest jurisdiction by way of this motion for summary disposition . . . ." The motion asserted there was no basis for general or limited personal jurisdiction over Koch individually. Monarch Helmets answered plaintiffs' amended complaint on November 20, 1990, through the same Vandeveer Garzia attorneys indicated on Koch's motion to dismiss, although no separate appearance was entered. Plaintiffs filed a response to Koch's motion for summary disposition and a reply to Monarch Helmets' affirmative defenses. Koch's motion was adjourned several times, and the praecipe was dismissed. The motion apparently never was heard. No appearance, answer or motion was filed in behalf of Industrias Mex-Cal.

A status conference was held before Judge James Hathaway on December 11, 1990, and a scheduling order was entered. On January 11, 1991, Vandeveer Garzia filed a motion to withdraw as attorneys of record for Monarch Helmets, Monarch Sports Systems, and "Henry Koch d/b/a Monarch Helmets." The motion stated defendants owed $6,095.10 in fees for services performed, that on several occasions the firm requested payment in full prior to proceeding with further representation, and that there had been no response to that demand for payment and no arrangement to continue representation. The motion requested that the law firm be permitted to withdraw and that proceedings be stayed for 45 days to allow defendants to obtain new counsel.

Plaintiffs filed objections to the motion, arguing defendants had yet to respond to interrogatories served on October 3, 1990, which requested information regarding the design, manufacture and distribution of the helmet as well as "other information regarding prior ownership and purchase of the defendant corporations," and that plaintiffs had filed a motion to compel. Plaintiffs argued that defendants' failure to respond to discovery had severely prejudiced them, that defense counsels' withdrawal would further frustrate plaintiffs' attempts to obtain discovery, and that if the court inclined to grant relief, the order "should provide that if defendants do not retain a new attorney within forty-five (45) days, they cannot thereafter retain an attorney at any time. A provision as such would prevent defendants from obtaining an attorney just prior to the time of trial, thereby causing further delay of the litigation." Plaintiffs also requested a provision that answers to interrogatories must be submitted prior to withdrawal, or a default would be entered against defendants.

The motion to withdraw was adjourned, the praecipe dismissed, and the motion refiled twice. In the meantime, witness lists were filed. On April 5, 1991, plaintiffs' motion to compel was granted and Monarch Helmets and Koch were given fourteen days to answer the interrogatories. Vandeveer Garzia's motion to withdraw was granted on the same date. The court signed both praecipes.

On April 24, 1991, an order was entered allowing the withdrawal of Vandeveer Garzia and John Lynch effective April 1, 1991. The order stayed proceedings for 30 days from April 1, 1991, "to allow Mr. Lynch's clients to otherwise act in this matter," and required Vandeveer Garzia to accept service on defendants' behalf for fourteen days from April 1, 1991. No appearances were filed in this 30-day period, nor was any action taken by defendants to defend this matter.

Mediation took place as scheduled on May 16, 1991. The case was mediated only as to P & P Cycle and Monarch Sports Systems, although it is unclear whether an attorney participated for Monarch Sports Systems.[2] The case was not mediated as to Monarch Helmets, Industrias Mex-Cal or Koch.

A settlement conference scheduled before Judge Hathaway for July 9, 1991 was adjourned several times, and appears to have been held September 24, 1991, at which time the case was "settled as to certain parties"[3] and the settlement conference was adjourned to January 29, 1992. On October 8, 1991, an order was entered extending discovery until January 29, 1992 and setting a special settlement conference for the same date. The settlement conference was adjourned several times, and on February 15, the case was held for further settlement. In March, a pretrial order was entered as approved by counsel for plaintiffs and Monarch Sports Systems.

On June 1, 1992, the case was reassigned to Judge Susan Neilson as Judge Hathaway's docket successor. The court record indicates that the court sent notice of the reassignment to all attorneys of record, including those whose clients had been dismissed or had settled, but not to Monarch Helmets, Industrias Mex-Cal or Koch. Also on June 1, the parties dismissed Monarch Sports Systems by stipulation. A consent judgment was entered on June 11, 1992.

The docket entries indicate a settlement conference that was scheduled for June 16, 1992 before Judge Hathaway was adjourned to July 29, 1992. Other docket entries indicate scheduled settlement conference dates of July 19 and July 29 before Judge Neilson.

Plaintiffs' counsel, by letter to Koch dated June 18, 1992, gave notice of the July 29 settlement conference and stated that failure to appear could result in a default judgment being entered. On July 15, 1992, more than a year after Vandeveer Garzia had withdrawn, an appearance of counsel was filed on behalf of Monarch Helmets and Koch, by Lavonne Banister. Following the settlement conference, the circuit court dismissed[4] the action against Monarch Helmets, Industrias Mex-Cal and Koch, without prejudice, by order dated July 31, 1992, which stated that defendants' attorney understood and agreed that in the event plaintiffs refiled their action, no statute of limitations defense would be asserted.

Plaintiffs' motion to reinstate the case argued that the purpose of the July 29 settlement conference was to allow plaintiffs an opportunity to enter a default against the remaining defendants, Koch, Monarch Helmets and Industrias Mex-Cal, that plaintiffs had notified defendants of the settlement conference by letter dated June 18, 1992, as the court had required, and that no appearance had been filed on defendants' behalf during the thirty-day period provided in the order permitting defendants' earlier counsel to withdraw. Plaintiffs further argued that at the settlement conference the court erroneously dismissed the action on the basis that defendants had not been served with copies of the pleadings following the withdrawal of their original counsel on April 1, 1991. Citing MCR 2.117, plaintiffs argued they were not required to serve copies of pleadings or notices on defendants when defendants did not file appearances following withdrawal of their original counsel.

Defendants did not timely respond to plaintiffs' motion to reinstate the case, and asked the court to accept their brief at the hearing. That brief is not in the court file, although the hearing transcript indicates the court accepted it.

At the August 14, 1992 hearing on plaintiffs' motion, the following colloquy occurred:

> *THE COURT*: And I remember this case very vividly. This is a case that went all through mediation, was basically ready for trial when we appeared at the settlement conference and it became clear to me that it was extremely likely that the defendant had not been served.
>
> *MR. SUCCAR* [plaintiffs' attorney]: No, no. He was served.
>
> *THE COURT*: Wait, wait, wait. I felt then and now that the defendants were under, excuse me, that the plaintiffs were under an ethical obligation to advise the defendants of proceedings so as to avoid wasting everybody's time including mediation because going through mediation was a waste of time. Now, sir, your position is now, and again you weren't at the hearing, that indeed you did advise him of the mediation. You advised him of everything, all along throughout the year and a half that you didn't take a default, you were advising them of everything.

MR. SUCCAR: No, your Honor, that's not true.

THE COURT: But that was the reason I ordered, dismissed it.

MR. SUCCAR: No, no, your Honor.
That's not true.

THE COURT: No, that's not true that's why I did it or no, it's not true, because that's why I did it.

MR. SUCCAR: I've accepted why you did it.
Their attorney, John Lynch, withdrew.
The Order was after.
And we attached a copy of the Order.
This was all before Judge James Hathaway.

THE COURT: No, I remember.

And I remember saying, if you had only moved for a default a year and a half earlier we would not have wasted everybody's time, *THE COURT*'s time, everybody's time.

MR. SUCCAR: First of all, we didn't waste everybody's time, your Honor.

There were other defendants in the case who proceeded to mediation and who proceeded to various settlement conferences with Judge Hathaway and that aspect of the case was settled.

Now this---

THE COURT: Right.
So that's all gone.
All we've got is this one guy.

MR. SUCCAR: All We've got is this one guy who never filed an appearance.

THE COURT: Well, counsel, I'm going to deny the Motion.

I

Plaintiffs first argue[5] the circuit court improperly denied their motion to reinstate the case as to Industrias Mex-Cal and Koch because the court's dismissal of plaintiffs' claims on the basis that plaintiffs should have served papers on these defendants was improper, since defendants failed to file written appearances or personally appear before the court. As Koch was dismissed by stipulation during the pendency of this appeal, we address only plaintiffs' argument as to Industrias Mex-Cal.

Industrias Mex-Cal was served with plaintiffs' complaint on July 26, 1990, at Henry Koch's California address, but did not file a notice of appearance or answer and did not appear through counsel under MCR 2.117(A).

Two court rules are applicable to the question whether plaintiffs were obligated to provide Industrias Mex-Cal with copies of all papers filed in this action. MCR 2.117 provides that an appearance entitles a party to receive copies of all pleadings and papers:

> (A) Appearance by Party
>
> (1) A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose. In the latter event, the party must promptly file a written appearance and serve it on all persons entitled to service. The party's address and telephone number must be included in the appearance.
>
> (2) Filing an appearance without taking any other action toward prosecution or defense of the action neither confers nor enlarges the jurisdiction of the court over the party. An appearance entitles a party to receive copies of all pleadings and papers as provided by MCR 2.107(A). In all other respects, the party is treated as if the appearance had not been filed.
>
> (B) Appearance by Attorney
>
> (1) In general. An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by the party may be performed by the attorney representing the party.

In addition, MCR 2.107(A) provides:

> (A) Service; When Required
>
> (1) Unless otherwise stated in this rule, every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action.
>
> (2) Except as provided in MCR 2.603, after a default is entered against a party, further service of papers need not be made on that party unless he or she has filed an appearance or a written demand for service of papers. However, a pleading that states a new claim for relief against a party in default must be served in the manner provided by MCR 2.105.

(3) If an attorney appears on behalf of a person who has not received a copy of the complaint, a copy of the complaint must be delivered to the attorney on request.

(4) All papers filed on behalf of a defendant must be served on all other defendants not in default.

In this case, Industrias Mex-Cal never filed a pleading, appearance or motion. Thus, plaintiffs were not required to serve copies of papers filed in this action under MCR 2.117 or 2.107(A). Arguably, Industrias Mex-Cal was entitled under subrule MCR 2.107(A)(4) to service of all papers filed on behalf of other defendants.[6] However, this subrule by its terms only speaks to a defendant's obligation to serve papers on other defendants. The trial court erred in dismissing the case, albeit without prejudice, on the basis that plaintiffs did not provide Industrias Mex-Cal with copies of filings in the case.

II

Plaintiffs next argue the trial court erroneously denied plaintiffs' motion to reinstate as to Monarch Helmets, when Monarch Helmets took no action to defend this matter or obtain new counsel within the court-ordered thirty day period, or thereafter until July 15, 1992.

We have found no Michigan cases regarding the effect of counsel's withdrawal on a party's right to receive subsequently filed pleadings and papers. Nor do the court rules specifically address this question. As to the effect of withdrawal of an appearance, plaintiffs cite the following passage:

> The decisions are generally to the effect that an authorized or otherwise rightful withdrawal or vacation of the appearance of a party defendant leaves the case in the same condition as if it had never been entered. Such withdrawal or vacation carries with it all of the defendant's pleadings, and terminates the jurisdiction acquired by the court by virtue of such appearance to render a personal judgment against the defendant. But jurisdiction acquired by the service of process is not affected by such withdrawal or vacation, and the court may proceed thereafter to render a judgment against the defendant by default or nil dicit. [Anno: Withdrawal or vacation of appearance, 64 ALR2d 1424, 1451.]

Another treatise states the rule this way:

> When defendant's appearance in the cause has, with proper authority or leave, been withdrawn, this leaves the case as if no appearance had been entered, and of itself effects the withdrawal of all his pleadings therein. [6 CJS, Appearances, 57, p 94.]

This general rule, however, is stated to be applicable to situations where a party, and not counsel, withdraws an appearance. The general rule applicable to withdrawal of an appearance by counsel is:

> The withdrawal of an appearance by counsel, for himself, does not amount to a withdrawal of appearance for defendant, nor does it withdraw any pleading which the attorney has filed in defendant's behalf. [6 CJS, 57, p 93-94.]

Nevertheless, taking into account all the circumstances, we conclude the court abused its discretion in dismissing the case against Monarch Helmets.

Monarch Helmets had appeared through counsel by answering plaintiffs' amended complaint on November 20, 1990. Counsel, however, withdrew effective April 1, 1991. The court's order allowing withdrawal of attorneys stayed proceedings for 30 days from April 1, 1991, "to allow Mr. Lynch's former clients to otherwise act in this matter. Vandeveer Garzia shall accept service on behalf of the Defendants . . . for fourteen (14) days from 4/1/91." Monarch Helmets took no steps to defend or obtain counsel in the time period allowed by the court, and indeed took no action until July, 1992.

Although plaintiffs should have served Monarch Helmets with papers filed after its counsel withdrew, we cannot agree that plaintiffs' failure to do so, under the circumstances presented here, warranted dismissing the case and then denying reinstatement on this basis. The issue whether a party is obligated to serve papers on a corporate entity whose counsel has withdrawn and who has not subsequently taken any steps to defend in pro per[7] or through other counsel has not been addressed in Michigan. Moreover, that issue is not the same as the issue presented here: whether a trial court may sua sponte dismiss a case for a plaintiff's failure to serve papers on a party defendant following withdrawal of defense counsel, absent any step to defend and any showing of prejudice.

At the hearing on plaintiffs' motion to reinstate, the trial court appeared to base its denial of the motion in part on the fact that plaintiffs had allowed the case to go to mediation without serving papers on defendant and without earlier moving for default and thus "wasted everybody's time." Although the court's concern with having a two-year old case suddenly revived is understandable, the record indicates that the predecessor trial judge had allowed the case to proceed to mediation in this fashion, and had not required that the remaining defendants be defaulted and a judgment taken against them before the case was resolved as to the participating defendants, P & P Cycle and Monarch Sports Systems. Moreover, it is difficult to see how mediating the case against Koch, Industrias Mex-Cal and Monarch Helmets, all in absentia, would have "[saved anybody's] time." Also, while it is possible that a notice of mediation might have caused defendants to act, a plaintiff is not the entity responsible for sending notice of mediation. Similarly, while a motion for default judgment also might have caused defendants to act, it is difficult to understand why plaintiffs should be penalized because of defendants' reappearance in the case after a year of inaction. Presumably the court would have entered defendants' defaults on July 29, rather than dismiss the case, had defendants not appeared through counsel on July 15. We conclude that given the history of the proceedings, the dismissal of the case against Monarch Helmets was an abuse of discretion.

We vacate the trial court's orders dismissing Industrias Mex-Cal and Monarch Helmets, Inc., and denying plaintiffs' motion to reinstate the case as to these two defendants.

Reversed and remanded.

/s/ Helene N. White
/s/ Thomas G. Kavanagh
/s/ Steven N. Andrews

[1] Nichols Motorcycle Supply, Inc., was dismissed at a relatively early date.

[2] On May 31, 1991, subsequent to the expiration of the 30-day period allowed by the court, an appearance was filed on behalf of Monarch Sports Systems.

[3] This is based on the computer docket entry. There is no document in the court file regarding the September conference. In January, a settlement with P & P Cycle was approved and placed on the record.

[4] There is no record before us of that hearing or those proceedings. Thus, plaintiffs' appellate brief and the transcript of the hearing on plaintiffs' motion to reinstate the case provide the only information we have regarding the trial court's reasons for dismissal.

[5] None of the defendants have filed a brief on appeal. We therefore address the issues without the benefit of defendants' arguments.

[6] Whether MCR 2.107(A)(4) required the other defendants to serve Industrias Mex-Cal is an open question. See 1 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.107, p 153:

> MCR 2.107(A)(4) provides that all papers filed on behalf of a defendant must be served on all other defendants not in default. Most of the time such defendants will already be entitled to service under MCR 2.107(A)(1) (pleading, appearing, or making a motion). What subrule (A)(4) adds is the requirement to serve papers on other defendants who have not yet answered (or filed an appearance, or made a motion) but against whom the time limit for answering has not yet run. Subrule (A)(4) may also require service of papers on those defendants who have not answered, appeared, or made a motion within the time for an answer, so long as a default has not yet been entered against the party under MCR 2.603(A). The ambiguity arises from the fact that MCR 2.107(A)(4) uses the term "not in default," while MCR 2.603 does not use or define the phrase "in default." It probably means one who has been "defaulted," i.e.,

> one against whom the clerk has entered a default under MCR 2.603, but it could also mean one who has failed to answer or otherwise defend within the time for doing so and is therefore liable to be defaulted under MCR 2.603 upon proper motion. Caution certainly counsels service on such persons. [Emphasis added.]

[7] The cases cited in support of the general rule that the withdrawal of an appearance by counsel does not constitute a withdrawal of defendant's appearance do not address the question in the context of whether a corporate defendant will be deemed to be present in the case in pro per where no substitute counsel enters an appearance. In Michigan, a corporation can appear only through an attorney. *Detroit Bar Ass'n v Union Guardian Trust Co*, 282 Mich 707, 711; 281 NW2d 432 (1938); *Peters Production, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287; 429 NW2d 654 (1988). Thus, while an attorney's withdrawal may not generally effect the withdrawal of the client, a corporation that does not secure substitute counsel may very well stand in the position as if no appearance had been filed. But see *Shy v Kersh*, 439 Mich 855, 856-857 (1991)(Levin, J. writing separately).