STATE OF MICHIGAN

COURT OF APPEALS

ALBERT W. SCHOHL, JR. and SHARON SCHOHL,

Plaintiffs-Appellees/Cross-Appellees,

v

LODGE & SHIPLEY COMPANY,

Defendant-Appellant,

and

LODGE & SHIPLEY, INC.

Defendant,

and

COLUMBIA CASUALTY COMPANY,

Garnishee Defendant/Cross-Appellant.

UNPUBLISHED
June 13, 1997

No. 180137
Macomb Circuit Court
LC No. 89-004478-NP

COLUMBIA CASUALTY COMPANY,

Plaintiff-Appellant,

v

ALBERT W. SCHOHL, JR.,

Defendant-Appellee.

Nos. 186167; 187572
Macomb Circuit Court
LC No. 94-002447-NZ

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* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Jansen, P.J., and Reilly and E. Sosnick*, JJ.

PER CURIAM.

In docket no. 180137, defendant Lodge & Shipley Co. appeals by leave granted from a June 10, 1993, order of the circuit court entering judgment in favor of plaintiffs in the amount of $847,906. Garnishee defendant Columbia Casualty cross-appeals from this same order. In docket no. 186167, Columbia Casualty appeals as of right from a May 17, 1995, order granting summary disposition in favor of Albert Schohl pursuant to MCR 2.116(C)(10) regarding Columbia Casualty's abuse of process claim. In docket no. 187572, Columbia Casualty appeals as of right from a July 6, 1995, order awarding costs and attorney fees in the amount of $8,434 in favor of Albert Schohl. We reverse in part in docket no. 180137 and remand for a redetermination of damages, and we affirm in docket nos. 186167 and 187572.

These consolidated appeals have a fairly long and complicated factual and procedural history. This case arises from an injury suffered on the job by Albert Schohl on May 20, 1987, while he was using a squaring shear manufactured by Lodge & Shipley Co. Schohl suffered a partial amputation of the first and third fingers on his left hand. On November 3, 1989, the Schohls filed their complaint against Lodge & Shipley Co., Bill Sloman Machinery, and Wolverine Metal. On December 26, 1989, attorney Michael D. Cavanagh entered an appearance on behalf of Lodge & Shipley, and he answered the complaint on January 17, 1990, denying the existence of Lodge & Shipley Co. and stating that Lodge & Shipley, Inc. existed. On May 7, 1990, the Schohls filed their first amended complaint adding Lodge & Shipley, Inc. and Herr-Voss Corporation as defendants. On June 4, 1990, Cavanagh answered the first amended complaint on behalf of both Lodge & Shipley Co. and Lodge & Shipley, Inc. The attorney answered, in part, that Lodge & Shipley, Inc. is a successor to Lodge & Shipley Co. On June 7, 1991, Cavanagh moved to withdraw as counsel for both Lodge & Shipley Co. and Lodge & Shipley, Inc. The trial court subsequently entered an order granting the motion to withdraw and substituting Richard Ward as counsel.

On September 9, 1991, Lodge & Shipley, Inc. moved to amend its answer to the complaint to state that it had no successor liability. It claimed that the squaring shears were originally manufactured by Lodge & Shipley Co. In 1980, the squaring shear division and its assets were sold to the Herr-Voss Corporation. Lodge & Shipley Co. subsequently sold its remaining assets to Manuflex Corporation, and Lodge & Shipley Co. was dissolved on May 30, 1987. Lodge & Shipley, Inc. was subsequently formed and it entered into a contract to purchase the personal property assets of Manuflex. The sale occurred on December 18, 1990. Despite these claims, the trial court denied Lodge & Shipley, Inc.'s motion to amend its answer, ruling that it was estopped from asserting that it had no successor liability.

On July 2, 1992, Ward moved to withdraw as counsel for Lodge & Shipley, Inc. because he was no longer being paid. On July 30, 1992, Ward's partner, Sherri Cataldo, appeared before the court on behalf of Lodge & Shipley, Inc. only. She informed the court that Lodge & Shipley, Inc. would not be presenting a defense and that it no longer wished to be represented by counsel. The chief financial officer also appeared and admitted liability. The trial court agreed to enter a default judgment.

Schohl requested a judgment in the amount of $300,000,[1] which the trial court took under advisement. The trial court's order of default judgment, entered December 11, 1992, was with regard to liability only against Lodge & Shipley Co. and Lodge & Shipley, Inc.

On March 17, 1993, Ward and Cataldo again moved to withdraw as counsel, and the trial court granted the motion. Schohl then moved for entry of damages totaling $527,906 ($6,705 for medical bills, $11,201 for wage loss, and $15,000 a year for thirty four years). The hearing was held on May 24, 1993, but neither Lodge & Shipley Co. nor Lodge & Shipley, Inc. were present. Schohl testified regarding his damages and this time requested $847,906. The trial court granted judgment in the requested amount of $847,906. Schohl then noticed entry of judgment on May 27, 1993. The order of judgment was entered by the trial court in the amount of $847,906 on June 10, 1993. On June 29, 1993, Columbia Casualty was served with a writ of garnishment. Columbia Casualty was the excess insurance carrier for Lodge & Shipley Co.

On April 21, 1994, Columbia Casualty filed suit against Schohl alleging abuse of process. Columbia Casualty moved for summary disposition in July 1994, but the trial court denied the motion and affirmed the underlying judgment in favor of Schohl and the garnishment in an order dated October 12, 1994. Schohl then moved for summary disposition, the trial court granted his motion, and the court ruled that Columbia Casualty's action was frivolous in an order dated May 17, 1995. Columbia Casualty filed a direct appeal from this ruling on May 23, 1995. Schohl them moved for costs and attorney fees on June 7, 1995, and the trial court awarded Schohl $8,434 in costs and fees in an order dated July 6, 1995. Columbia Casualty also filed a direct appeal from this order.

Because Lodge & Shipley Co. and Columbia Casualty had not filed direct appeals from the trial court's June 10, 1993, order of judgment in favor of the Schohls, Lodge & Shipley Co. filed an application for leave to appeal on November 3, 1994, and this Court granted the application on February 13, 1995. Columbia Casualty filed its claim of cross appeal on February 16, 1995.

No. 180137

In this case, Lodge & Shipley Co. appeals from the trial court's order of judgment in favor of the Schohls in the amount of $847,906. Columbia Casualty also cross appeals as the garnishee defendant. The parties raise a number of issues, mainly challenging the judgment on procedural grounds. We find that Lodge & Shipley Co. was not properly served with notice of plaintiff's request for entry of damages and that such a due process violation requires a remand for a redetermination of damages only.

First, we disagree with Columbia Casualty's argument that the trial court's order of July 8, 1991 removed Lodge & Shipley Co. from the case, thereby invalidating the writ of garnishment due to lack of jurisdiction. The July 8, 1991, order cannot properly be read as removing Lodge & Shipley Co. from the case. That order related to counsel moving to withdraw his representation of both Lodge & Shipley Co. and Lodge & Shipley, Inc. Specifically, the order related to Cavanagh's motion of June 7, 1991, entitled "Defendants' Lodge & Shipley, Inc. and Lodge & Shipley Company Motion to Withdraw as

counsel, for the Lodge & Shipley Company and Lodge & Shipley, Inc." Although the order is not a model of clarity, it clearly relates to this motion, and only involves counsel's motion to withdraw his representation on behalf of Lodge & Shipley Co. Accordingly, we find that the July 8, 1991, order did not remove defendant Lodge & Shipley Co. as a party from the case.

Next, however, we agree with Lodge & Shipley Co. and Columbia Casualty that plaintiffs' failure to serve notice to Lodge & Shipley Co. invalidates the order of default judgment in the amount of $847,906. Lodge & Shipley Co. was still a party to the action after July 8, 1991, and it was entitled to be served with all papers filed in the litigation. MCR 2.107(A)(1). Moreover, where there is no attorney of record, plaintiffs were not entitled to stop serving the party, but should have petitioned the court to direct a manner of service. MCR 2.107(E). Plaintiffs claim that service on Lodge & Shipley, Inc.'s attorney was sufficient to satisfy service on Lodge & Shipley Co.; however, we disagree because those are two distinct parties. In fact, plaintiffs amended their complaint to add Lodge & Shipley, Inc. as a separate defendant. Although Lodge & Shipley, Inc. was a successor corporation to Lodge & Shipley Co., they are clearly separate corporations and were entitled to service as separate and distinct corporations.

In this case, Lodge & Shipley Co. was not served with notice that a default judgment would be taken. A party seeking a default judgment must give notice of the request for judgment to the defaulted party if the party against whom the judgment is sought has appeared in the action or if the pleadings do not state a specific amount demanded (as in this case). MCR 2.603(B)(1)(a)(i), (iii). The fact that Lodge & Shipley Co. was not served with notice that a default judgment would be taken is significant because such notice is required to satisfy due process. *Perry v Perry*, 176 Mich App 762, 770; 440 NW2d 93 (1989). Failure to give notice as required by MCR 2.603(B)(1) invalidates the judgment and requires that it be vacated. *Perry, supra*, p 770. Additionally, failure to give notice under MCR 2.603(B)(1) renders that the requirements of MCR 2.603(D) need not be met. *Perry, supra*.

Plaintiffs' arguments that they complied with the notice requirements bear little consideration. We cannot accept their contention that service on Lodge & Shipley, Inc.'s attorney was sufficient to serve notice on Lodge & Shipley Co. because, as we have already stated, they are two separate and distinct corporations. Moreover, it was clear from the lower court record that Ward would be representing only Lodge & Shipley, Inc. Further, notice of the entry of default judgment after the hearing does not satisfy the notice requirement because the purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that the party may have an opportunity to participate in any hearing necessary to ascertain the amount of damages. *Dollar Rent-A-Car Systems v Nodel Construction*, 172 Mich App 738, 743; 432 NW2d 423 (1988).

Accordingly, Lodge & Shipley Co. was entitled to notice of the request for entry of judgment. The failure of plaintiffs to give the required notice violates due process and invalidates the judgment. The judgment must be vacated and we remand for a new hearing on the issue of damages only. [2] Lodge & Shipley Co. shall be permitted to participate in the hearing regarding the determination of damages.[3] *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512-513; 303 NW2d 234 (1981).

With respect to Columbia Casualty's argument that the default judgment must be set aside because plaintiffs perpetrated fraud on the court, we disagree. Even if there were procedural irregularities, there is nothing to indicate that plaintiffs perpetrated actual fraud on the court. However, in light of the fact that Lodge & Shipley Co. was entitled to notice of the entry of default judgment and did not receive notice, we need not reverse on this basis.

Finally, we order that this case be remanded to a different judge because a review of the record indicates that the original judge would have difficulty in setting aside previously expressed views and findings. Therefore, reassignment is necessary to preserve the appearance of justice. See *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

No. 186167

In this appeal, Columbia Casualty appeals from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of Albert Schohl regarding the abuse of process claim.

We review de novo a trial court's decision on a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion brought under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Baker, supra*, p 202. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. *Id.* The court's task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

To recover upon a theory of abuse of process, a plaintiff must prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding. *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). An example of a meritorious abuse of process claim is where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). A bad motive alone will not establish an abuse of process. *Id.* Rather, there must be some corroborating act that demonstrates the ulterior motive. *Id.*

Columbia Casualty has not presented any evidence raising a material factual dispute showing an ulterior motive on the part of Albert Schohl. Schohl filed his complaint because he had been injured on the job while using squaring shears manufactured by Lodge & Shipley Co. Schohl clearly filed a legitimate complaint. The fact that the Schohls did not properly give notice, or otherwise did not use proper procedure, does not rise to an abuse of process claim. See *Vallance v Brewbaker*, 161 Mich App 642, 647; 411 NW2d 808 (1987) (procedural irregularities do not constitute a basis for the tort of abuse of process, which is concerned with the proper use of procedure for illegitimate aims).

Accordingly, we conclude that the trial court did not err in ruling that Columbia Casualty had not alleged sufficient facts to prove the existence of its claim of abuse of process. Summary disposition was properly granted in favor of defendant Schohl.

No. 187572

In this appeal, Columbia Casualty appeals from the trial court's decision to award defendant Schohl fees and costs totaling $8,434.

The trial court ruled that Columbia Casualty's action was frivolous pursuant to MCL 600.2591; MSA 27A.2591. This Court reviews a trial court's decision whether a claim is frivolous for clear error. *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995). Columbia Casualty's action was devoid of any legal merit. Columbia Casualty did not present any factual evidence to support its abuse of process claim and the facts that it alleges support such a cause of action have been clearly rejected by this Court in previously published decisions. Moreover, rather than file the instant suit against Schohl, Columbia Casualty should have appealed the default judgment in a timely manner and encouraged its insured, Lodge & Shipley Co., to do so as well. Accordingly, the trial court's finding that Columbia Casualty's action was frivolous is not clearly erroneous.

Further, we find no abuse of discretion in the amount of the award. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428; 552 NW2d 466 (1996). The award of costs and fees is therefore affirmed.

In docket no. 180137, we vacate the default judgment in the amount of $847,906 and remand for a redetermination of damages only before a different trial court. We affirm in docket nos. 186167 and 187572.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick

[1] The case had mediated for $45,000 against Lodge & Shipley on April 3, 1991, and the Schohls submitted an offer of judgment in the amount of $65,000 against Lodge & Shipley Co. on August 15, 1991.

[2] We note that should the trial court award future damages, they must be reduced to their present value. *Trpcevski v Kelly*, 158 Mich App 148, 152; 404 NW2d 642 (1986); *McKee v Dep't of Transportation*, 132 Mich App 714, 728; 349 NW2d 798 (1984). The trial court improperly failed to reduce the future damages to present value.

[3] We note that a corporation can appear in a judicial proceeding only by an attorney. *Peters v Desnick*, 171 Mich App 283, 287; 429 NW2d 654 (1988); *Detroit Bar Ass'n v Union Guardian Trust Co*, 282 Mich 707, 711; 281 NW 432 (1938). Therefore, at the hearing on remand regarding the redetermination of damages, Lodge & Shipley Co. must be represented by an attorney.