STATE OF MICHIGAN

COURT OF APPEALS

JERILYN WEBER,

Plaintiff-Appellee,

v

DELTA SIGMA PHI FRATERNITY,

Defendant-Appellant,

and

PETER CRAIG TALLMAN

Defendant.

UNPUBLISHED
September 28, 1999

Nos. 203736;213204
Mecosta Circuit Court
LC No. 92-009760 NI

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

In Docket No. 203736, defendant[1] appeals as of right from a judgment entered after a jury verdict awarding plaintiff $237,500. In this appeal, defendant challenges the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). In Docket No. 213204, defendant appeals by leave granted a posttrial order in which the court concluded that both the local Delta Sigma Phi chapter and the national fraternity represented defendants in this case. This Court consolidated consideration of defendant's appeals. We affirm in part and reverse in part.

Plaintiff's complaint sought damages for injuries she sustained during an October 1990 hayride cosponsored by defendant. A vehicle driven by Peter Craig Tallman struck the hay wagon, injuring many riders. After the accident, nine injured riders retained counsel and entered settlement negotiations with insurance representatives for Delta Sigma Phi and Tallman. Proposed settlement offers were circulated during the first half of 1992, and plaintiff's attorney indicated plaintiff's amenability to these proposals. Eight of the injured riders eventually signed releases. Ultimately, however, when presented with a release, plaintiff refused to sign. Plaintiff then obtained a new attorney and initiated the instant action, which resulted in the aforementioned jury verdict.

Defendant first contends that the trial court erred in denying its motion for summary disposition. According to defendant, summary disposition was appropriate because plaintiff's first attorney had apparent authority to sign the settlement offers; his signatures therefore bound plaintiff to the terms of the proposed settlements, despite the fact that plaintiff herself never signed a release. In a 1995 interlocutory appeal from the trial court's denial of its motion for summary disposition, defendant previously presented to this Court these same contentions. This Court previously found that defendant was not entitled to summary disposition concerning the release issue, noting specifically that "[u]nder the circumstances, the question whether the execution of a release is a condition precedent to the settlement agreement or whether it is a term of the settlement is one of fact."[2] Defendant's attempt to revisit this issue makes relevant the law of the case doctrine.

> The doctrine of law of the case provides that where an appellate court has ruled on a legal question and remanded a case for further proceedings, the legal question determined by the appellate court will not be determined differently in a subsequent appeal in the same case where the facts remain materially the same. This doctrine applies only to those questions determined by the appellate court's prior decision and to those questions that are necessary to the court's determination. The doctrine exists primarily to maintain consistency and avoid reconsideration of matters previously decided in the course of a single, continuing lawsuit. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power. The doctrine applies to issues resolved in interlocutory proceedings. [*City of Marysville v Pate, Hirn & Bogue, Inc*, 196 Mich App 32, 34; 492 NW2d 481 (1992) (citations omitted).]

Because defendant's appeal in Docket No. 203736 involves the very same facts and legal arguments defendant previously presented this Court in Docket No. 182185, we conclude that the law of the case doctrine precludes our reconsideration whether the trial court improperly denied defendant summary disposition.[3]

The Delta Sigma Phi national fraternity also argues on appeal that the trial court erred in finding that it was a party defendant in this case when plaintiff failed to ever name it as a defendant or serve it with process. No dispute concerning defendant's identity arose until after judgment had entered for plaintiff. The parties' pleadings referred generally to "Delta Sigma Phi Fraternity." The local fraternity filed a postjudgment motion to set bond on appeal, asserting in part in its brief in support of this motion that "[d]efendant basically has no other assets [besides less than $10,000 insurance coverage] available to satisfy the Judgment." Defendant subsequently filed in support of its motion the affidavit of the local fraternity's alumni control board president and treasurer averring that defendant had less than $500 cash and had no significant financial assets. Plaintiff in her own motion to set bond on appeal subsequently requested that the trial court "make a determination . . . that the Defendant named herein is, in fact, the National Fraternity, as the parent of the local chapter." Whether the trial court had personal jurisdiction over a party represents a legal issue that this Court reviews de novo. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995).

In this case, the trial court properly found that the local and national fraternities constituted separate entities. The national and local fraternities have different officers and different geographical locations. The local fraternity exists within the City of Big Rapids, Michigan. The national fraternity incorporated in Washington, D.C., and operates its national headquarters in Indianapolis, Indiana. It is undisputed that plaintiff never served process on the national fraternity in conformity with the Michigan Court Rules. MCR 2.105(D).

Service of process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses. Neither errors in the content of the service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose. *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987). Plaintiff's instant complaint describes the defendant as "Delta Sigma Phi Fraternity, [] a fraternity and non-profit organization located on the campus of Ferris State College located in Big Rapids, Mecosta County, State of Michigan." The summons identifies defendant's address as "414 Maple, Big Rapids, MI 49307," later repeating defendant's residence as Big Rapids, Michigan.

The fact that the national fraternity may have received from the local chapter a copy of the summons and complaint did not rectify plaintiff's failure to serve the national fraternity. The trial court relied on MCR 2.105(J)(3) as a basis for finding that the national fraternity qualified as a party defendant. This rule explains that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." While MCR 2.105(J)(3) forgives errors in the manner or content of service of process, it does not forgive a complete failure to serve process. *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991). A complete failure of service, e.g., failure to serve the summons with the complaint within the time for service, warrants dismissal for improper service of process, *Parke, Davis & Co v Grand Trunk R Sys*, 207 Mich 388, 391-392; 174 NW 145 (1919); *In re Gordon Estate*, 222 Mich App 148, 157-158; 564 NW2d 497 (1997), despite the potential defendant's knowledge concerning the existence of the plaintiff's intended action. *Forest v Parmalee (On Rehearing)*, 60 Mich App 401, 408-411; 231 NW2d 378 (1975), affirmed 402 Mich 348; 262 NW2d 653 (1978); *Apple v Solomon*, 12 Mich App 393, 395-397; 163 NW2d 20 (1968). The instant case did not involve plaintiff's simple misnomer of the actual party defendant and service on the misnamed party. Instead, plaintiff effectively sought a postjudgment addition of a new party defendant that plaintiff had never served. Accordingly, we conclude that irrespective of the national fraternity's awareness of plaintiff's action against the local fraternity, the trial court erred in determining that MCR 2.105(J)(3) rendered irrelevant plaintiff's failure to properly serve the national fraternity.

All complaint allegations directed toward Delta Sigma Phi involve the local fraternity's sponsorship of and participation in the ill-fated hayride. Our review of the complaint reveals no specific mention of the national fraternity, and no national fraternity involvement in the hayride. Under these circumstances, we conclude that the national fraternity did not know and could not reasonably have

ascertained that plaintiff considered it a party defendant. Thus, the national fraternity was deprived of its opportunity to be heard and to present its objections and defenses. *Bunner*, *supra*.

As the national fraternity suggests, it likely possessed valid objections and defenses to any claims against it arising from the underlying hayride, which the local fraternity cosponsored. See *Colangelo v Tau Kappa Epsilon Fraternity*, 205 Mich App 129; 517 NW2d 289 (1994). In *Colangelo*, plaintiff's decedent died after being struck by two vehicles that were both returning from a party hosted by a local chapter of the national fraternity. *Id*. at 130. On appeal, plaintiff contended that the trial court erred in granting summary disposition of their claim that the national fraternity negligently supervised the local chapter. *Id*. at 132. This Court determined that the national fraternity owed the decedent no duty to supervise the actions of the local chapter, noting that the effect of imposing such a duty would force the central staff of a national organization to maintain continuous contact with every local branch in order to determine what proposed daily activities might possibly harm third parties. *Id*. at 133-136. The Court concluded that, after weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution, the national fraternity owed no duty to supervise the local chapter's actions for the protection of third parties. *Id*. at 136.

The trial court further reasoned that the national fraternity should be bound by plaintiff's judgment because it knew of plaintiff's suit, considered itself a party defendant, and participated in the proceedings. Based on the national fraternity's responses to plaintiff's requests to admit and on the statement in defendant's motion to add a party defendant that defendant "Delta Sigma Phi Fraternity . . . is a national fraternity with a local chapter in Big Rapids," the trial court found that "[i]t is [] reasonably inferable . . . that defense counsel at trial level was appearing on behalf of both the Local and the National."

A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. MCR 2.102(E)(2); *In re Gordon*, *supra* at 158. Under MCR 2.117, a party may appear in an action personally or through an attorney. In this case, the national fraternity did not personally appear before the court. MCR 2.117(A). Thus, the question becomes whether the national fraternity appeared through an act of an attorney "indicating that the attorney represent[ed] [it] in the action." MCR 2.117(B)(1). Two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 182; 511 NW2d 896 (1993). "Appear" means to act "acknowledging jurisdiction of the court or invoking court action on [one's] behalf." *Vaillencourt v Vaillencourt*, 93 Mich App 344, 351; 287 NW2d 230 (1979).

Here, the local fraternity's defense counsel specifically averred that he appeared on behalf of only the local fraternity, not the national fraternity. Defense counsel answered the allegations of plaintiff's complaint, which allegations involved only activities of the local fraternity, by admitting that defendant was the local fraternity. With respect to the national fraternity's responses to plaintiff's requests to admit, several of these requests to admit involved information concerning the national fraternity's operations, policies and rules. The first of plaintiff's requests to admit, which the trial court quoted in its opinion concerning the national fraternity's involvement in this case, did not designate the

national fraternity as a defendant. The national fraternity's admissions that "Delta Sigma Phi Fraternity is a national fraternity with chapters throughout the U.S." and that it "had a local chapter located at Ferris State University in 1990" do not demonstrate that the national fraternity intended to enter the lawsuit, particularly where the substance of most of the other requests to admit involved matters relating to the local fraternity's hayride sponsorship, of which the national fraternity disclaimed any knowledge. Furthermore, the local fraternity's attorney's indication in one paragraph of Delta Sigma Phi's and Tallman's motion to add plaintiff's father as a party defendant that "Defendant, Delta Sigma Phi Fraternity, is a national fraternity with a local chapter in Big Rapids, Michigan at Ferris State University" does not constitute an act from which the national fraternity's intent to appear in the lawsuit may be properly inferred. The trial court itself recognized that "[t]his is the only apparent incident of Defendant so labeling itself in a motion," and the only allegation in this motion that referred to the activities surrounding the hayride indicated that those activities were connected to the local fraternity, not the national fraternity.[4] We conclude that the national fraternity's provision of responses to plaintiff's requests to admit and the lone, isolated record reference to defendant as "a national fraternity with a local chapter in Big Rapids" do not constitute actions by defense counsel indicating that he represented the national fraternity, nor do they evidence the national fraternity's intent to appear by acknowledging the court's jurisdiction or invoking court action on its behalf. *Penny*, *supra*; *Vaillencourt*, *supra*. Because plaintiff failed to serve the national fraternity and because the national fraternity never intended to appear in the action, the trial court erred in finding that the national fraternity was a party defendant.

We affirm the trial court's denial of defendant's summary disposition motion, but vacate the trial court's order that the national fraternity is liable for plaintiff's judgment. We remand for entry of any orders consistent with this opinion necessary to eliminate the national fraternity's involvement in this case. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] Codefendant Peter Craig Tallman, now deceased, is not a party to this appeal. Accordingly, our utilization of the term "defendant" refers to Delta Sigma Phi Fraternity.

[2] *Weber v Tallman*, unpublished order of the Court of Appeals, entered 4/3/95 (Docket No. 182185).

[3] According to defendant, the law of the case doctrine does not apply because this Court did not previously grant defendant leave to appeal. Defendant reasons that therefore "there was no decision on the merits by this forum as to whether Judge Root was correct in denying" its summary disposition motion. Because defendant has cited no authority in support of its position, it has abandoned this argument. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

[4] In plaintiff's brief in support of her answer to defendant's motion to add a party defendant, plaintiff asserted that "Defendant fraternity had sponsored the hayride and furnished alcohol to the riders," thus reflecting plaintiff's view that only the local fraternity was involved in the case.