

STATE OF MICHIGAN
COURT OF APPEALS

ETTORE SCARCHILLI, SYLVAN SCARCHILLI,
NOEMI SCARCHILLI and LORIAN
SCARCHILLI,

UNPUBLISHED
December 7, 1999

Plaintiffs/Counterdefendants-
Appellants,

v

No. 209139
Wayne Circuit Court
LC No. 96-640691 NM

DYKEMA GOSSETT,

Defendant/Counterplaintiff-Appellee,

and

RAYMOND HUETTEMAN and STEPHEN D.
WINTER,

Defendants-Appellees.

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiffs/counterdefendants ("plaintiffs") appeal as of right from an order denying their motion to set aside an order of dismissal in favor of defendants, Raymond Huetteman and Stephen Winter ("individual defendants"), and defendant/counterplaintiff, Dykema Gossett, and granting default judgment in favor of Dykema Gossett on its counter-claim. We affirm in part, vacate the award of costs and attorney fees in the amount of \$74,792.84, and remand for further proceedings consistent with this opinion.

Plaintiffs filed a legal malpractice claim against defendants. Dykema Gossett filed a counter-claim against plaintiffs for sums due in the underlying action. The trial court granted defendants' motion to dismiss plaintiffs' complaint and Dykema Gossett's motion for default judgment on its counter-claim based on plaintiffs' failure to comply with discovery. The court also awarded costs and attorney fees as a sanction. The court denied plaintiffs' request to set aside the order of dismissal and default judgment.

Plaintiffs first argue that the trial court abused its discretion in denying their motion to set aside the order dismissing plaintiffs' complaint and granting a default on Dykema Gossett's counter-claim based on plaintiffs' failure to comply with discovery. We disagree. A trial court's decision to dismiss a claim because of a discovery violation is reviewed for an abuse of discretion. *Barlow v John Crane-Houdaille, Inc.*, 191 Mich App 244, 251; 477 NW2d 133 (1991). Similarly, whether a default judgment should be set aside is within the sound discretion of the trial court. *Park v American Casualty Ins.*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

Prior to granting dispositive relief based on a discovery violation, a court should consider "whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown." *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994). This Court has long encouraged trial courts faced with the obligation to sanction a litigant to impose sanctions less severe than dismissal or default judgment. Nonetheless, we have never adopted a hard and fast rule that a series of sanctions increasing in severity is a prerequisite to the sanction of dismissal or default judgment. Such a rule would give an abusive litigant free reign to abuse the legal process until nondispositive sanctions are employed. The decision to impose the sanction of dismissal or default judgment ultimately rests in the sound discretion of the trial court. *Barlow, supra* at 251.

Here, plaintiffs failed to comply with defendants' discovery request for approximately nine months. Moreover, plaintiffs were specifically ordered by the court to comply with the discovery requests, but failed to comply with the court's order. Plaintiffs were present at the time the court issued its order and a true copy of the order was served on plaintiffs on the record. The information sought by defendants was critical to their respective cases. The trial court spent countless hours attempting to resolve the legal and discovery disputes between these litigants. Although the court did not make a specific finding that plaintiffs' actions were wilful, the facts established on the record support such a finding and can be inferred by the court's decision to grant defendants' motion. Under the circumstances of this case, we find that the trial court did not abuse its discretion in granting defendants' motion for dismissal and default judgment.

Plaintiffs further argue that the court erred in entering default judgment without conducting an evidentiary hearing to determine damages. We disagree. MCR 2.603(B) suggests that default judgment may be entered on a sum certain alleged in the complaint without holding a hearing on damages. Moreover, defendants' counter complaint contained a claim for payment on an open account or account stated accompanied by a copy of the account due and an affidavit asserting that the account is due and owing to defendants. Pursuant to MCL 600.2145; MSA 27A.2145, the account and affidavit are prima facie evidence of the debt owed to defendants because plaintiffs failed to file a counter affidavit denying the indebtedness with their answer to the counter complaint. Therefore, the trial court did not err in failing to hold an evidentiary hearing on damages before entering default judgment.

Plaintiffs also failed to demonstrate that the default judgment should have been set aside. A motion to set aside a default judgment generally may be granted only if good cause is shown and an

affidavit of facts showing a meritorious defense is filed. *Park, supra* at 66-67. Plaintiffs could not show good cause for setting aside the default judgment where there was no substantial defect or irregularity in the proceeding, there was no reasonable excuse for failing to comply with the discovery order, and there was no manifest injustice in allowing the default judgment to stand. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998). Plaintiffs not only failed to demonstrate good cause, but also failed to set forth a meritorious defense in the face of Dykema Gossett's counter-claim. As previously stated, pursuant to the account stated statute, MCL 600.2145; MSA 27A.2145, plaintiffs failure to file an affidavit rebutting the indebtedness alleged in Dykema Gossett's complaint amounted to prima facie evidence of plaintiffs' indebtedness. Because plaintiffs failed to demonstrate good cause and a meritorious defense, we find that the trial court did not abuse its discretion in refusing to set aside the default judgment. *Park, supra* at 66.

Plaintiffs next argue that the trial court could not have ordered costs and fees pursuant to MCR 2.114 without first conducting an evidentiary hearing. We disagree that an evidentiary hearing is required in all cases.

MCR 2.114 provides that every pleading of an unrepresented party must be signed by the party. MCR 2.114(C). The signature constitutes a certification that: (1) the signer has read the pleading; (2) to the best of the signer's knowledge, information and belief after reasonable inquiry, the pleading 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 pleading 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); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998). If a pleading is signed in violation of this rule, MCR 2.114(E) requires the court to sanction the offending party. *Kitchen v Kitchen*, 231 Mich App 15, 21; 585 NW2d 47 (1998).

Plaintiffs do not cite to any authority which would indicate that an evidentiary hearing is needed prior to the court's determination that MCR 2.114 was violated. The court rule does not indicate that such a hearing is necessary. Whether a separate hearing regarding MCR 2.114 is needed will depend on the facts and circumstances of each case. In those situations where a new case has been filed and the defendant responds with a motion for sanctions pursuant to MCR 2.114, a hearing likely will be necessary to assess the motives of the litigants and determine the factual and legal basis supporting the claim. Conversely where, as here, the litigants have been before the court on numerous occasions for countless hours, the court need not conduct a hearing if it is satisfied that, through the course of litigation, it has been able to assess the compliance or lack of compliance with MCR 2.114. In these situations, a plaintiff is only entitled to minimal due process protections: (1) notice that sanctions may be imposed; and (2) an opportunity to be heard regarding the imposition of sanctions. *People v Herrera*, 204 Mich App 333, 339; 514 NW2d 543 (1994) citing *Morrissey v Brewer*, 424 US 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972); *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976). Plaintiffs were afforded these minimal procedural protections through the Court's motion procedure.

Although we do not find that the trial court erred in failing to hold an evidentiary hearing prior to imposition of sanctions, we do find that the trial court failed to state findings on the record to support the

sanctions imposed. Dykema Gossett filed a motion on September 22, 1997, seeking dismissal of plaintiffs' claims, default judgment on its counter-claim and an award of attorney fees for having to defend itself against plaintiffs' claims. Plaintiffs did not file a response to this motion. On October 3, 1997, the court conducted a hearing on the motion and at the conclusion of arguments stated that it was "going to grant the motion in all respects." An order was entered that same day which dismissed plaintiffs' complaint, awarded a default judgment on the counter-claim in the amount of \$1,067,749.03 and awarded \$74,792.84 in "costs and attorney fees."

The trial court failed to make any findings on the record to support the sanctions that were imposed. We are left to speculate whether the trial court found all or only a portion of plaintiffs' claim violative of MCR 2.116. Because the record is insufficient for this Court to determine whether the trial court erred in awarding sanctions, we remand to the trial court to state under what authority it imposed sanctions and to make specific findings of fact in support of its finding.

When a court finds a violation of MCR 2.114, sanctions are mandatory pursuant to the court rule, yet the amount of the sanction is left to the discretion of the trial court. Sanctions serve two purposes: (1) to deter future violations of the court rules; and (2) to compensate a party that has wrongfully been subjected to court proceedings. Any sanction imposed must serve one or both of these purposes. If the court's primary goal is deterrence of future violations of the court rules, then the minimum sanction capable of achieving that goal should be imposed. Conversely, if the court's sanction is intended to compensate a wronged party reasonable, as opposed to actual, attorney fees directly resulting from the sanctioned party's wrongful conduct may be imposed. The amount of the sanction is left to the sound discretion of the trial court. On remand the trial court should make specific findings of fact regarding the conduct that gave rise to the sanction, the reason for the sanction and the factual basis supporting the amount of any sanction the court imposes. We leave to the discretion of the trial court whether on remand an evidentiary hearing is required to assist the court in resolving the issues identified in this opinion.

Affirmed in part, the sanction of \$74,729.84 is vacated and this matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra