STATE OF MICHIGAN

COURT OF APPEALS

MAHIN KHODABANDEH, Plaintiff-Appellant, v PARVIN GHOLIZADEH, M.D., Defendant-Appellee.	UNPUBLISHED December 21, 1999 No. 211948 Washtenaw Circuit Court LC No. 97-8197 CK
MAHIN KHODABANDEH and MEHDI SHADMEHR, Plaintiffs-Appellants, v PARVIN GHOLIZADEH, M.D., Defendant-Appellee.	No. 211987 Washtenaw Circuit Court LC No. 97-8979 CK

Before: Neff, P.J., Murphy and J.B.Sullivan*, JJ.

PER CURIAM.

Plaintiffs Mahin Khodabandeh and her husband, Mehdi Shadmehr, appeal as of right from the trial court's grant of summary disposition to defendant Parvin Gholizadeh, M.D., on plaintiff Mahin Khodabandeh's complaint for an accounting and on plaintiffs' subsequent complaint for fraud and conversion. We reverse.

These appeals arise from a dispute between the parties over the ownership of $100,000 which was deposited in a bank in Ann Arbor on August 7, 1987, in the name of plaintiff Khodabandeh. The parties are Iranian citizens whose children were married to each other at that time, but apparently

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

separated in 1989 and divorced in 1993. On August 3, 1988, approximately eleven months after the money was initially deposited, defendant was given power of attorney on the account. According to plaintiffs, who were then living in Tehran, they gave the money to defendant to deposit in a U.S. bank for them, and then executed the power of attorney so that defendant could disburse the funds to plaintiffs' son, Mohammed, in the event that something happened to plaintiffs as a result of the war between Iran and Iraq. According to defendant, she placed the money in plaintiff Khodabandeh's name initially because she might have to return to Iran, but then, having decided to remain in the U.S., left it in plaintiff Khodabandeh's name to gain a tax advantage.

From 1988 through 1991, defendant invested the money in various certificates of deposit and savings accounts in plaintiff Khodabandeh's name, but on October 25, 1991, defendant apparently withdrew the money from the account. On February 7, 1997, plaintiff Khodabandeh filed a complaint for an accounting (Trial Court No. 97-8197). Defendant filed a response asserting that plaintiff Khodabandeh was not entitled to an accounting since the money belonged to defendant. Defendant did not raise latches or the statute of limitations either as an affirmative defense or in subsequent pleadings in that case. Seven months later, on September 24, 1997, plaintiffs filed a second complaint raising two causes of action: (1) conversion, for withdrawing the money that belonged to plaintiff, and (2) fraud, for inducing plaintiffs to execute a power of attorney allowing defendant to withdraw the funds (Trial Court No. 97-8979). Defendant raised both latches and the statute of limitations as affirmative defenses in her answer to the second complaint.

Approximately seven months after the filing of the second complaint, defendant filed a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10), contending that all claims were barred because the statute of limitations had run and because plaintiffs were guilty of laches. While defendant placed the file numbers of both cases on her motion and mentioned the accounting claim in her request for relief, she briefed only plaintiffs' counts for conversion and fraud. Plaintiffs did not file a response until the day of the hearing on the motion. At that hearing, held on April 22, 1998, the court announced that it would grant the motion for summary disposition because plaintiffs had not filed a timely response, thereby violating a local court rule. The court also noted that defendant would be entitled to prevail on her motion if considered on the merits:

> THE COURT: Well, first of all, the Court is going to grant the motion for summary disposition. This case has been pending, there was a scheduling order that made it very clear when the deadline for hearing dispositive motions would be which [sic] has passed because it was to be April 7, 1998. [Defense counsel] filed his motion timely. It was not responded to under our local court rule when [sic] there's a motion for summary disposition which has no response the Court is allowed to grant the motion. And that's what the Court is doing. And furthermore [sic] based on a review of the motion for summary disposition, it appears that the defendant would have obtained the relief anyway. So that's the ruling of the Court.

Plaintiffs contend that the trial court abused its discretion in granting summary disposition to defendant based on plaintiffs' failure to file a timely response to defendant's motion without considering the merits. We agree. Any response to a motion for summary disposition must be filed and served at

least seven days before the hearing. MCR 2.116(G)(1)(a)(ii). There is no express sanction for failure to file a timely response to a motion for summary disposition. However, the provisions of MCR 2.119, dealing with motion practice generally, apply to motions for summary disposition. MCR 2.116(G)(1). Under MCR 2.119(E), even when no response is filed to a motion, the motion is treated as contested unless the parties have stipulated to the entry of an order or if the non-moving party has, on the face of a proposed order, waived notice and hearing on entry of an order. See MCR 2.119(D). The court in this case said that it was relying on a local court rule in granting the motion based solely on plaintiffs' failure to file a response. To the extent that Washtenaw County has a local rule allowing a dispositive motion to be granted without considering the merits, it conflicts with the procedure outlined in MCR 2.119(E), and as a result is invalid. MCR 8.112(A)(1).

The record indicates that on February 6, 1998, the parties stipulated to adjourn both the mediation which was set for February 25, 1998, and the April 7, 1998 settlement conference (by which time all dispositive motions were to be heard) for the reason that defense counsel was beginning a trial. The court signed an order adjourning mediation to March 18, 1998, and adjourning the settlement conference to April 30, 1998. On March 9, 1998, defense counsel noticed defendant's motion for summary disposition, "previously scheduled for April 8, 1998," for April 22, 1998. Between March 13th and 16th, defense counsel served defendant's third, fourth, and fifth set of interrogatories on plaintiffs. Defendant then filed her motion for summary disposition on March 25, 1998. The record indicates that both parties then filed motions to compel discovery.

On appeal, defendant agrees that MCR 2.116 "does not state a specific sanction for failure to [timely] respond" to a motion for summary disposition, but argues that this Court should affirm the trial court's grant of summary disposition because it is "highly unfair" to counsel and the court to withhold a timely response. We reject defendant's claim of unfairness due to the fact that it apparently was defense counsel's schedule which necessitated the adjournment of the motion, and it was defendant who, after renoticing the motion, very shortly thereafter filed voluminous interrogatories to plaintiff. Moreover, we also reject any claim of latches due to defendant's admission, both on appeal and in oral argument, that she placed the $100,000 in plaintiff Khodabandeh's name in order to avoid taxes. See, *Mudge v Macomb Co,* 458 Mich 87, 109 n 23; 580 NW2d 845 (1998) (the "clean hands" maxim closes the doors of a court of equity to one tainted with inequitableness or bad faith however improper may have been the behavior of the other party) .

Defendant cites *Medbury v Walsh*, 190 Mich App 554; 476 NW2d 470 (1991), a case involving the discretionary imposition of sanctions under MCR 2.312, which governs requests for admissions. While the procedure invoked by the court in this case is analogous to a sanction, even if there were a court rule authorizing a sanction such as dismissal, it would not be appropriate in this case. In addition to the factors mentioned above, the record indicates that, because of defense counsel's scheduling conflict, the court adjourned the settlement conference to April 30, 1998, and that, at the hearing on April 22, 1998, plaintiffs' counsel indicated on the record that all the interrogatories had been answered and that he had spoken to defense counsel regarding his "unscheduled vacations" (and also told the court that he would "gladly approach the bench" to explain off the record the reason for them). Under all these circumstances, we conclude the trial court abused its discretion in granting summary

disposition due to plaintiffs' failure to file a timely response to defendant's motion without considering the merits of the motion. See *Grubor Enterprises Inc v Kortidis*, 201 Mich App 625, 629; 506 NW2d 614 (1999); *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

The court's comment that "the defendant would have obtained the relief anyway" does not alter our determination that reversal is required. If the court came to its conclusion based on MCR 2.116(C)(10), no material factual dispute, we conclude that, in addition to the latches defense which we have rejected, the court erred because both lawsuits involve the disputed issue of the ownership of the money. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Similarly, if the court based its ruling on MCR 2.116(C)(7), the statute of limitations claim, we also conclude that the court erred. The question of whether a claim is within the period of limitation is one of law for the court to decide and is therefore reviewed de novo. *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Id.* If no facts are in dispute and reasonable minds could not differ concerning the legal effects of those facts, the court decides as a matter of law whether a plaintiff's claim is barred by the statute of limitations. However, if a material factual dispute exists in such a manner that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.* This Court may go beyond the issues raised on appeal and address issues that, in this Court's opinion, justice requires be considered and resolved. *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998).

Plaintiff Khodabandeh's complaint for an accounting should not have been dismissed on the basis of the running of the statute of limitations. Defendant did not raise the affirmative defense of the statute of limitations until she filed her motion for summary disposition, which occurred more than a year after the complaint for accounting was filed and only after defendant had filed not only her answer but also various motions for discovery, protective order and sanctions. The defense is waived as to that complaint. See, MCR 2.116(D); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90; 535 NW2d 529 (1995) (defenses that go beyond rebutting a plaintiff's prima facie case must be pleaded or they are waived); MCR 2.111(F). Even if defendant had raised the defense, the statute of limitations for an accounting generally is six years. See, *O'Toole v Hurley*, 115 Mich 517, 520; 73 NW 805 (1898) (equity applies the statute of limitations by analogy); *Near v Lowe*, 49 Mich 482, 483; 13 NW 825 (1882) (where there are no equities to the contrary, the legal analogy of six years applies to an action for an accounting). The parties allege that defendant withdrew the money from the account on October 25, 1991, and the complaint for an accounting was filed on February 2, 1997, which is less than six years later and well within the allowable time for filing the action.

We next address plaintiffs' complaint for conversion and fraud. Defendant claims that both counts are subject to the three year period set forth in MCL 600.5805(8); MSA 27A.5805(8) ("the tort section") rather than the six year period set forth in MCL 600.5807(8); MSA 27A.5807(8) ("the contract section"). See, *Fries v Holland Hitch Co*, 12 Mich App 178, 183; 162 NW2d 672 (1968). In *Stringer v Sparrow Hospital*, 62 Mich App 696, 698-699; 233 NW2d 698 (1975), this Court reviewed "the statutes and the often conflicting case law on the limitations of actions in Michigan," and

stated that "the cases evidence a willingness by our courts to look beyond procedural labels to see exactly what a party's complaint is before deciding whether it should be barred." Accord, *Campos v General Motors Corp,* 71 Mich App 23, 25; 246 NW2d 352 (1976) (in some cases, the initial issue is not when the acts complained of occurred or when the claim accrued, but rather the nature of the cause of action stated in the complaint).

In *Huhtala v Travelers Ins Co,* 401 Mich 118; 257 NW2d 640 (1977), the plaintiff sustained injuries in an automobile accident. Then, after the statute of limitations for personal injuries had run, brought suit against the owner's insurance company for failure to make payments which had been promised during the negotiations which occurred after the accident. In reversing the trial court's grant of summary disposition based on the statute of limitations (and this Court's subsequent affirmance of that decision), the Court found that the statute of limitations was six years based on the claim being in the nature of a promissory estoppel. The Court distinguished between an action to recover damages for injury to persons or property wherein the nature and origin of the action is "a [non-consensual] duty imposed by law" and therefore cannot be maintained on a contract theory, and an action such as the *Huhtala* case wherein the nature and origin of the action is a consensual obligation which arose "because [the defendant] chose to promise to do so" and is therefore governed by the six-year statute of limitations. *Id.,* at 127, 130-132.

In this case, the parties were related by the marriage of their children and they had an agreement regarding the $100,000. The nature of that agreement is a disputed question of fact, but it nevertheless was an agreement, was consensual and is therefore governed by the six year statute of limitations. If the trial court based its ruling on the three year statute of limitations, that decision was error.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan