STATE OF MICHIGAN

COURT OF APPEALS

AUTO-STRASSE, LTD., A Michigan corporation, f/k/a EITEL S. DAHM, INC.,

Plaintiff-Counterdefendant-Appellee,

v

LEE ARCURE and DIANE ARCURE,

Defendants-Counterplaintiffs-Appellants.

UNPUBLISHED
October 3, 2000

No. 213287
Washtenaw Circuit Court
LC No. 96-007405-CE

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendants appeal as of right from an order awarding costs to plaintiff and denying defendants' motion for reconsideration. We reverse.

This case arises out of plaintiff's lawsuit for the refund of a $5,000 security deposit due upon the expiration of its lease with defendants. Defendants filed counter-complaints alleging slander of title and environmental response costs. In September 1995, the case was mediated for $5,000 on plaintiff's claim and $801 on defendants' counterclaim. Plaintiff accepted the mediation award, and defendants, by failing to timely respond, rejected the award. MCR 2.403(L)(1). At the conclusion of the trial, the jury returned a verdict of $4,382.29 for plaintiff and $5,142 for defendants. Although the trial court added interest to these amounts, it left the issue of MCR 2.625 costs open for review. Eventually, the trial court declined to assess costs because neither party had prevailed and entered an order to that effect on November 20, 1996. On December 18, 1996, plaintiff moved for mediation costs under MCR 2.403(O) against defendants and in June 1997 the trial court declined to grant the motion.

Defendants appealed the trial court's decision denying costs pursuant to MCR 2.625; plaintiff did not appeal the order denying mediation sanctions. On August 13, 1997, we vacated the trial court's order denying MCR 2.625 costs to either party. The trial court subsequently gave both plaintiff and defendants the opportunity to submit bills for costs. In light of the trial court's decision to reconsider each party's applicable MCR 2.625 costs, plaintiff filed a motion for reconsideration on the issue of mediation costs pursuant to MCR 2.403(O)(1) – (3). The trial court granted plaintiff's motion and

awarded mediation costs in the form of $23,000 attorney fees, $79 for a motion fee, and $59 for a Federal Express charge.

Defendants first argue that the trial court erred when it failed to deny plaintiff's original motion for mediation costs because it was filed too late. We agree. Whether the trial court followed MCR 2.403(O)(8) is a question of law and such questions are reviewed de novo. *Braun v York Properties, Inc*, 230 Mich App 138, 149; 583 NW2d 503 (1998).

MCR 2.403(O)(8) states that a request for mediation costs "must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." This Court in *Braun* held that the clear language of the court rule must be applied as written. *Braun, supra* at 150. Although the court rule does not define the term "judgment," this Court has stated that "[f]or purposes of the court rule, the *judgment* is the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal." *Id.*; emphasis in original.

The two trial court judges who addressed this question both concluded that plaintiff's motion for mediation sanctions filed December 18, 1996, was timely because it was filed within twenty-eight days of the November 20, 1996 order denying assessable costs. We disagree with this determination because it is contrary to the clear and mandatory language of MCR 2.403(O).

The judgment in this case was entered on June 10, 1996. MCR 2.602(A)(2). The judgment provided that plaintiff prevailed on its claim in the amount of $4,382.29 and that interest would be added in the amount of $620.02 for a total judgment amount of $4,948.31. The judgment further provided that counter-plaintiffs prevailed on their claim in the amount of $5,142 and that interest in the amount of $393.56 would be added for a total judgment amount of $5,535.56. Although the judgment provided that costs could be taxed in accordance with MCR 2.625, the "rights and liabilities" of the parties were determined at the time of the entry of the judgment and therefore, under MCR 2.403(O)(8), a request for costs under the mediation sanction rule was *required* to be "filed and served within 28 days after the entry of the judgment." Plaintiff did not file a motion for mediation sanction costs within twenty-eight days of June 10, 1996. Accordingly, under the plain language of the court rule, plaintiff was not entitled to mediation sanction costs under MCR 2.403(O).

Plaintiff contends that it could not have known whether it was entitled to mediation sanctions until after November 20, 1996, when the trial court determined the amount of assessable costs. However, even aside from the fact that this contention runs afoul of the clear language of the court rule, it also fails as a matter of law and logic. The result of the trial court's decision on that date was to *deny* costs to either party. Thus, plaintiff was in no better position on November 20, 1996, than it was on June 10, 1996, when the judgment was entered. Nevertheless, plaintiff filed a motion for mediation sanction costs on December 18, 1996. Essentially nothing had changed from June 10, 1996, to December 18, 1996; plaintiff therefore could (and should) have moved for mediation sanctions within twenty-eight days of June 10, 1996. After having made a timely motion for mediation sanctions, the determination of the amount of assessable costs and reasonable attorney fees under MCR 2.403(O)(6)

would have awaited an appropriate hearing at a later date. See *B&B Investment Group v Gitler*, 229 Mich App 1, 15-17; 581 NW2d 17 (1998).

Moreover, MCR 2.403(O)(8) provides that the motion for mediation sanctions must be filed *and served* within twenty-eight days. According to plaintiff's proof of service, the motion for mediation sanctions was not *served* on defendants until December 19, 1996 – twenty-nine days after the entry of the order denying costs. Accordingly, even if plaintiff's motion for mediation costs could be considered properly filed by relating it back to the November 20, 1996, order denying costs, the motion for mediation sanctions was still untimely.

Defendants next argue that the trial court abused its discretion in granting plaintiff's delayed motion for reconsideration. We ordinarily review a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). However, defendants contend that the trial court committed legal error by granting reconsideration where the motion for reconsideration was filed outside the mandatory fourteen-day time parameters of MCR 2.119(F)(1) and that the court was therefore without authority to grant reconsideration. The issue of whether the motion for reconsideration was filed in contravention of MCR 2.119(F)(1) is a question of law and such questions are reviewed de novo. *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998). "When a court incorrectly chooses, interprets, or applies the law, it commits error that the appellate court is bound to correct." *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994).

A motion for reconsideration of a decision on a previous motion "*must* be served and filed not later than 14 days after entry of an order disposing of the motion" unless another rule provides for a different procedure. MCR 2.119(F)(1) (emphasis supplied). The court rule lists MCR 2.604(A) and MCR 2.612 as examples of other rules that provide for a different procedure. MCR 2.604(A) provides that an order that adjudicates fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action and is therefore subject to revision before the entry of a final order. That provision does not apply to this case. MCR 2.612 provides that a trial court may provide relief from a judgment or order that suffers from a clerical error, or that was entered against a defendant over whom the court never acquired personal jurisdiction. MCR 2.612(A) and (B). The rule also provides that, "on motion and on just terms," the trial court may provide relief to a party from a final judgment, order, or proceeding on a number of grounds. None of these grounds apply to plaintiff's motion for reconsideration. Given the provision in MCR 2.119(F)(1) permitting application of MCR 2.612, we do not determine that the rule cannot be used to avoid the mandatory fourteen-day time limitation, we simply do not believe that its application is warranted in this case.

The order in this case regarding which plaintiff sought reconsideration – the order denying mediation sanctions – was entered June 10, 1997. Plaintiff sought reconsideration of this order by motion filed December 16, 1997. Plaintiff did not claim that any of the factors listed in MCR 2.612(C)(1) applied to preclude application of the fourteen-day time limitation. Plaintiff's motion was clearly beyond the mandatory fourteen-day time limitation imposed by MCR 2.119(F)(1). The trial

court was therefore without authority to grant reconsideration. We therefore vacate that portion of the trial court's order of June 29, 1998 (entered July 1, 1998) that granted mediation sanctions in the form of attorney fees along with the motion fee and the Federal Express charge.

Defendants next argue that the trial court erred in failing to compare the net mediation evaluations to the net judgments and that the trial court abused its discretion when it awarded attorney fees incurred by plaintiff for the entire litigation when plaintiff only prevailed on a portion of the litigation. Because we have determined that the trial court erred in awarding mediation sanctions, and have accordingly vacated the trial court's order awarding attorney fees, we need not address these issues because they are moot. *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999).

Defendants finally claim that they are entitled to costs in the form of the reasonable expenses they incurred in responding to plaintiff's untimely motion for reconsideration. This claim is based on *Ramsey v City of Pontiac*, 164 Mich App 527, 538; 417 NW2d 489 (1987). In *Ramsey*, the plaintiff was sanctioned because he filed a "delayed" motion for rehearing after the then-existing seven-day time limit for such motions had expired. *Id.* at 535-536. The trial court deemed the motion frivolous because it was untimely and awarded costs pursuant to MCR 2.114(E). *Id.* Defendants contend that they are likewise entitled to costs under MCR 2.114(E) for having to respond to plaintiff's untimely motion for reconsideration. Defendants requested such costs from the trial court, but their request was denied.

MCR 2.114(D) provides that the signature of an attorney on a document "constitutes certification by the signer that"

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document 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 document 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(E) provides that if a document is signed in violation of the requirements of the rule, the court shall impose an appropriate sanction on the person who signed the document. The sanction "may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." The rule applies to motions. MCR 2.114(A). From the existing record, it appears that plaintiff filed the motion for reconsideration in the good faith belief that the motion was proper given the order of this Court remanding this case for reconsideration of the costs issue, and the trial court's opinion granting costs to the parties. The trial court found that the motion for reconsideration of mediation sanctions was proper and, although we disagree with this conclusion, under the facts of this case, we cannot say that plaintiff's motion was frivolous. We conclude that "[c]ontrary to defendant[s'] assertion, plaintiff's [motion] was not devoid of arguable legal merit." *Siecinski v First State Bank of East Detroit*, 209 Mich App

459, 466; 531 NW2d 768 (1995). Therefore, the trial court did not err by denying costs to defendant under MCR 2.114(E).

Reversed.

/s/ Donald S. Owens

I concur in the result only.

/s/ William B. Murphy