STATE OF MICHIGAN

COURT OF APPEALS

DETROIT MACOMB HOSPITAL CORPORATION,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

PAIN DATA DIAGNOSTICS, INC.,

Defendant/Counterplaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
February 26, 2002

No. 223124
Macomb Circuit Court
LC No. 98-000739-CH

DETROIT MACOMB HOSPITAL CORPORATION,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

PAIN DATA DIAGNOSTICS, INC.,

Defendant/Counterplaintiff-Appellant/Cross-Appellee,

and

DAN SCHWARB, DDS,

Defendant.

No. 223125
Macomb Circuit Court
LC No. 98-002038-CH

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Pain Data Diagnostics, Inc. (hereinafter defendant), appeals as of right challenging the trial court's order dismissing its breach of contract counterclaim for failure to provide discovery

and the trial court's entry of a default judgment against it on plaintiff's principal claim for rent. On cross-appeal, plaintiff challenges the trial court's denial of its summary disposition motions as alternative bases for affirmance. We reverse and remand.

I

Defendant first contends that the trial court erred in summarily imposing the harsh sanction of dismissal of its counterclaim for alleged discovery abuse, without evaluating on the record plaintiff's allegations, the relevant circumstances or other lesser sanctions. This Court reviews for an abuse of discretion a trial court's imposition of discovery sanctions. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). A trial court has authority to enter an order of dismissal as a sanction for a party's violation of a discovery order. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994), citing MCR 2.313(B)(2)(c).

> The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.* [*Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999) (emphasis added).]

A nonexhaustive list of factors that should be considered before imposing the sanction of dismissal includes the following: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with previous discovery requests or court orders, (3) the prejudice to the opposing party, (4) whether there exists a history of the party's deliberate delay, (5) the degree of compliance by the party with other parts of the court's orders, (6) the party's attempts to timely cure the defect, and (7) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

Applying these standards to the instant case weighs heavily in favor of defendant's argument that dismissal was improper. We note that no reference was made to any specific court order that defendant violated and that our review of the record does not reveal a "history of recalcitrance or deliberate noncompliance [by defendant] with discovery orders, which typically precedes the imposition of such a harsh sanction." *Thorne*, *supra* at 633-634. Moreover, the record reflects that the trial court neither gave careful, or any, consideration to the pertinent factors before imposing the sanction of dismissal, nor did it consider what sanction was just and proper in the context of this case. Rather, the court summarily granted plaintiff's motion for dismissal without providing any explanation or discussion on the record or in its order. Furthermore, the court made no finding, and the record is unclear, regarding what, if any, prejudice plaintiff suffered because of defendant's alleged noncompliance with outstanding discovery requests; plaintiff asserts only general, nonspecific claims of prejudice. We conclude that the trial court abused its discretion by summarily making its decision to dismiss the breach of contract counterclaim without considering on the record the relevant factors and the alternative sanctions available. *Bass*, *supra*.

Accordingly, we reverse the order of dismissal and remand for reconsideration of this issue, during which the trial court should consider whether any discovery violation occurred and then, if necessary, evaluate the relevant factors in determining an appropriate sanction.[1]

II

Defendant next argues that the default judgment entered on plaintiff's rent claim is invalid because the trial court based the default on a prior, invalid escrow order, which the court lacked authority to enter, and improperly included future rent in the default judgment without allowing evidence of mitigation. This Court reviews for an abuse of discretion a trial court's decision to enter a default. *Sturak v Ozomaro*, 238 Mich App 549, 569; 606 NW2d 411 (1999). The scope of a trial court's powers, however, involves a question of law that we review de novo. *Traxler*, *supra* at 280. A trial court's authority to enter a default or a default judgment against a party must fall within the parameters of the authority conferred under the court rules. *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 420; 536 NW2d 553 (1995).

After denying plaintiff's motion for summary disposition of its rent claim, the trial court on its own motion entered an order requiring that defendant place into an escrow account with the court clerk the amount of past due rent, $62,200. When defendant failed to make this payment, the court found defendant in contempt and granted plaintiff's motion for entry of a default judgment. Approximately one month later, the trial court granted plaintiff's motion for a default judgment in the amount of $279,300, which plaintiff asserted represented the total amount due and owing for past and future rent.

We agree that the initial default and subsequent entry of the default judgment both must be reversed because the court lacked authority to enter the escrow order. Neither the trial court nor plaintiff offered any persuasive authority to support the escrow order. Although plaintiff refers in its brief on appeal to MCR 4.201(H), that rule does not apply to this case. The rule provides that an interim order may be entered "[o]n motion of either party, or by stipulation, for good cause." *Id.* It is undisputed that in this case neither party moved for or stipulated to such an order. Furthermore, at the time the court entered the escrow order this matter did not involve a summary proceeding to recover possession of premises. Plaintiff already had possession of the premises through a writ of restitution, with which defendant apparently complied. Additionally, the escrow order was retroactive and did not involve "a reasonable rent for the premises from the date the escrow order is entered." MCR 4.201(H)(2)(a). We lastly note that MCR 4.201(H) does not contemplate the entry of a default for a defendant's failure to comply with an escrow order, but provides for the noncomplying party's waiver of a jury trial regarding the issue of possession. MCR 4.201(H)(2)(a)(iii).

Because the court lacked authority to *sua sponte* order defendant to place $62,200 into escrow, the court likewise abused its discretion when it entered the default and default judgment against defendant on the basis of the unauthorized order.[2]

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[1] In light of our decision, we need not specifically address defendant's claim that the order of dismissal should be reversed because the court confused the parties.

[2] Given our disposition of this issue, we need not address defendant's remaining claims
(continued…)

III

Defendant lastly asserts on appeal that the trial court erred when it granted plaintiff's motion for leave to amend its witness list. We will not disturb a trial court's decision regarding whether to permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion, *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993), which exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Plaintiff argued below that several third-party subpoenas issued to obtain information relevant to its defense of defendant's counterclaim uncovered information regarding the identities of many (forty-four) previously unidentified witnesses. We cannot conclude that the trial court abused its discretion in accepting plaintiff's explanation for the need to amend its witness list, especially given defendant's failure to specifically indicate how the addition of the witnesses would prejudice it. Defendant did not indicate, for example, that the addition would affect the trial date or otherwise cause undue delay and did not demonstrate that the trial already had been postponed repeatedly because of a lack of diligence on plaintiff's part.[3]

IV

On cross-appeal, plaintiff first contends that even if defendant's counterclaim for breach of the parties' 1993 professional services contract was improperly dismissed because of discovery abuses, the trial court nonetheless should have granted summary disposition of the counterclaim pursuant to MCR 2.116(C)(7). Plaintiff relies on what it labels a "release" provision within the parties' subsequent, May 1996 agreement, which states as follows:

> Both DMHC and PDD will agree to abide by the clauses under their August 9, 1993 contract regarding performance following termination, including all issues of confidentiality and nondisclosure. This termination was taken by DMHC in December 1994. DMHC and PDD will agree to *indemnify and hold harmless each other for liability, damages, or expenses that come about from billing issues or collection activities or arising from their previous contractual relationship and the billings done by DMHC for PDD covered under their contract of August 9, 1993*. [Emphasis added.]

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. When reviewing the trial court's decision, this Court accepts the nonmoving party's well-pleaded allegations as true and considers the relevant documentary

(…continued)

concerning the proper amount of a default judgment.

[3] We note, however, that contrary to plaintiff's suggestion, merely reserving in a witness list the right to subsequently identify additional witnesses does not conclusively entitle a party to add witnesses at any later date.

evidence in the light most favorable to the nonmoving party. *Diehl v Danuloff*, 242 Mich App 120, 122-123; 618 NW2d 83 (2000).

A contract generally must be construed according to its plain and ordinary meaning. If the contractual language is clear and unambiguous, its meaning is a question of law. *UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If the terms are ambiguous or fail to clearly express the intentions of the parties, however, the trier of fact must determine the parties' intent. *Id*. at 492. A contract qualifies as ambiguous if its language reasonably may be understood in different ways.[4] *Id*. at 491.

Viewing the evidence in the light most favorable to defendant, we conclude that the trial court properly denied plaintiff's motion for summary disposition on the basis of the alleged release. The plain language of the instant provision does not appear to contain a release. We first note that nowhere does the provision contain the term "release." Plaintiff improperly utilizes interchangeably the terms "release" and "indemnify" or "hold harmless." A "release" connotes the discharge "from an obligation, duty, or demand" or "the act of giving up a right or claim" that bars a cause of action or surrenders legal rights or obligations between the parties to the agreement. Black's Law Dictionary (7th ed), p 1292. In contrast, to "indemnify" means to give someone security against, or to reimburse someone for, "a loss suffered because of a third party's act or default." *Id*. at 772. The phrase "hold harmless" similarly refers to an agreement to "absolve (another party) from any responsibility for damage or other liability arising from the transaction." *Id*. at 737.

Even if the provision arguably could be interpreted as a release, it is ambiguous in this regard.[5] Accordingly, the trial court properly denied plaintiff's motion for summary disposition because the meaning of the provision's language constitutes a question of fact.

V

Plaintiff further argues that it is entitled to summary disposition on its rent claim pursuant to MCR 2.116(C)(10) because defendant undisputedly breached the parties' lease agreement by failing to pay rent. In reviewing a motion for summary disposition brought under subrule (C)(10), this Court considers the affidavits, pleadings, depositions, admissions and any other relevant documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Contrary to plaintiff's suggestion, the trial court made no determination on the merits with regard to plaintiff's claim that defendant breached the parties' lease agreement. The district

[4] The initial question whether contractual language is ambiguous is a question of law that we consider de novo. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

[5] As the trial court noted when it denied plaintiff's motion for summary disposition on the basis of the alleged release, "Dr. Schwarb has proffered evidence the 'release' was intended to shift the risk of third-party lawsuits arising out of plaintiff's billing and collection practices, not to release any claims defendant . . . had against plaintiff."

court in which plaintiff initially filed its claim for unpaid rent determined only that plaintiff had the right to possess the leased premises. Before the trial court, defendant asserted that the lease agreement was unenforceable because of plaintiff's failure to perform a condition precedent. A condition precedent is a fact or event that the parties intend must exist or take place before there is a right to performance. *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953). Some evidence indicated that the instant lease agreement contained a condition precedent, specifically that plaintiff had to provide defendant an "account status report . . . or this entire Agreement shall be null and void," but that plaintiff never supplied this report. Viewing this evidence in the light most favorable to defendant, we conclude that the trial court properly denied plaintiff's motion for summary disposition with respect to its claim for rent because material questions of fact exist. *Ritchie-Gamester*, *supra*.

We affirm the trial court's order permitting plaintiff to amend its witness list, and we affirm the trial court's denials of plaintiff's motions for summary disposition with respect to its own claim for unpaid rent and defendant's breach of contract counterclaim. We reverse the trial court's order dismissing defendant's breach of contract counterclaim as a sanction for discovery violations by defendant, and we reverse and vacate the default and default judgment the trial court entered with respect to plaintiff's claim for unpaid rent pursuant to the parties' lease agreement. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage