

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOBBS & NEIDLE P.C.,

Plaintiff-Counterdefendant-  
Appellee/Cross-Appellant,

v

ANN MARTIN and ALFRED MARTIN,

Defendants-Counterplaintiffs-  
Appellants/Cross-Appellees.

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UNPUBLISHED  
September 25, 2003

No. 238149  
Wayne Circuit Court  
LC No. 00-004235-CH

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's final order resolving all claims between the parties in LC No. 00-004235-CH. Plaintiff cross-appeals by right from that same order. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

In 1998 the state of Virginia requested the extradition of defendant Alfred Martin, who had escaped from a Virginia prison in 1974. Plaintiff Dobbs & Neidle represented Alfred in the extradition proceedings. In lieu of a cash retainer, defendant Ann Martin granted Dobbs & Neidle mortgages in two properties. Dobbs & Neidle performed legal services for Alfred from November 1998 to February 1999, and subsequently billed Alfred for more than \$45,000 in attorney fees and costs. When Alfred failed to pay the legal bill, Dobbs & Neidle foreclosed on the mortgages.

During foreclosure, Dobbs & Neidle discovered that after Ann had granted it mortgages on the properties, she conveyed the properties to another party. It was also discovered that several persons who owned one of the parcels prior to Ann did not record the sale of the property to Ann, and that Ann failed to discharge a prior mortgage on the property.

In February 2000, Dobbs & Neidle filed suit against the Martins asserting claims of fraud, misrepresentation, and slander of title. Several other persons were also named as defendants in an attempt to quiet title to the properties at issue. The Martins thereafter filed a countercomplaint against Dobbs & Neidle, claiming that the fee charged by it in connection with the extradition proceedings was excessive.

On October 2, 2000, the Martins moved to show cause and to compel discovery on their counterclaim. However, the Martins' counsel failed to appear at the October 13, 2000 hearing on these motions. Consequently, the trial court denied the motions and ordered the Martins to pay \$1500 in costs to Dobbs & Neidle.

The following week, the Martins moved to set aside the order denying their motions and awarding costs. At the hearing on this motion, the Martins' counsel stated that he failed to appear at the October 13, 2000 hearing because of a scheduling error. The trial court permitted the motions to be re-filed, but refused to set aside the award of \$1500 costs. In addition, the trial court ordered that the costs be paid by November 3, 2000.

The Martins thereafter moved to extend the deadline for payment of the \$1500 costs. On November 3, 2000, the trial court denied the motion and ordered payment within ten days. The court further ordered that "[i]f payment of said costs are not paid to [Dobbs & Neidle's] counsel within the time specified herein, a default judgment will enter against [the Martins]." The Martins failed to pay the costs by the deadline set in the order and, on November 22, 2000, the trial court entered a default in favor of Dobbs & Neidle on its complaint, and "dismissed with prejudice" the Martins' counterclaim against Dobbs & Neidle. Following an evidentiary hearing on the issue of damages, the trial court issued a final judgment awarding Dobbs & Neidle \$98,749.77 in damages, and reiterating the Martins' obligation to pay \$1500 costs. The order further stated that "all other claims and counter-claims having arisen in this matter as to these parties only are hereby dismissed with prejudice . . . ."

After securing new counsel, the Martins filed a motion to set aside the default judgment. On July 9, 2001, the trial court denied the motion to set aside the default judgment on the ground that the Martins failed to show "good cause." The court did, however, go on to rule that the dismissal of the Martins' counterclaim was too drastic and, therefore, the dismissal of the counterclaim was amended to be without prejudice, thereby enabling the Martins to re-file their counterclaims as a separate action.

On November 14, 2001, the trial court entered a final order. From this final order, the Martins filed the instant appeal in which they assert that the trial court erred in granting a default and default judgment on the basis of their non-payment of costs. Dobbs & Neidle has filed a cross-appeal, alleging that the trial court abused its discretion in amending the dismissal of the Martins' counterclaim from a dismissal with prejudice to a dismissal without prejudice. For the reasons that follow, we agree that the trial court erred in entering a default and default judgment on Dobbs & Neidle's complaint on the basis of the Martins failure to pay costs ordered in connection with their counterclaim. We find no error, however, in the trial court's decision to amend dismissal of the Martins' counterclaim to a dismissal without prejudice.

### I. Default and Default Judgment

This Court reviews a trial court's entry of a default judgment for an abuse of discretion. *McGee v Macambo Lounge, Inc.*, 158 Mich App 282, 285; 404 NW2d 242 (1987). It is well settled that "a default judgment, to be valid, must be sanctioned by applicable state court rules." *Id.* In the instant case, it is clear from the lower court proceedings that the trial court was not authorized by the court rules to enter a default judgment in favor of plaintiff, where defendants never failed to plead or otherwise defend the original claim.

MCR 2.603(A)(1) states:

If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

The instant case did not involve a situation where defendants failed to plead or otherwise defend against plaintiff's original claim. Rather, defendants failed to obey the trial court's order to pay costs that were assessed pursuant to MCR 2.119(E)(4), as a result of defense counsel's failure to appear at his own motion regarding defendants' counterclaim.

This Court has held that "as part of its inherent right to enforce obedience to its orders, a court has the right to deny its processes to one who stands in contempt of its orders." *Homestead Development Co v Holly Twp*, 178 Mich App 239, 247; 443 NW2d 385 (1989).<sup>1</sup> Similarly, MCR 2.504(B) authorizes a trial court to, on its own initiative, enter an order of involuntary dismissal if a plaintiff, or in this case a counterplaintiff, fails to comply with an order of the court. 3 Dean & Longhofer, Michigan Court Rules Practice, p 53. Unless the court specifies otherwise, the claim is dismissed with prejudice. *Id.* The trial court was, therefore, authorized to dismiss the Martins' counterclaim either with or without prejudice. However, the trial court's entry of a default judgment against defendants on the original claim was an abuse of discretion, as that sanction was not provided for by the court rules. *McGee, supra*.

## II. Amendment of Dismissal

We review a trial court's order of dismissal for an abuse of discretion. *Thorne v Carter*, 149 Mich App 90, 93; 385 NW2d 738 (1986). This Court has held that "[d]ismissal with prejudice of a claim is a harsh remedy and should be applied only in extreme circumstances." *Mudge v Macomb Co*, 210 Mich App 436, 444; 534 NW2d 539 (1995). It is well settled that "our legal system favors disposition of litigation on the merits." *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). Our Supreme Court has noted:

Mindful of the fact that dismissal is a harsh remedy to be invoked cautiously, the trial court should evaluate the length, circumstances, and reasons for delay in light of the need of administrative efficiency and the policy favoring the decisions of cases on their merits, considering among other factors: 1) the degree of the plaintiff's personal responsibility for the delay, 2) the amount of prejudice to the defendant caused by the delay, 3) whether there exists a lengthy history of deliberate delay, and 4) whether the imposition of lesser sanctions would not better serve the interests of justice. [*North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986).]

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<sup>1</sup> Plaintiff relies on *Homestead, supra*, to argue that a trial court has the authority to enter a default judgment against a party where that party has not failed to plead or otherwise defend the claim against it. We are not bound by *Homestead*, MCR 7.215(I), and, to the extent it can be interpreted as authorizing such a default, we decline to follow it.

As noted above, the trial court here had the option of dismissing defendants' counterclaim with or without prejudice. MCR 2.504(B); Dean & Longhofer, *supra* at p 53. Considering the factors set forth in *North, supra*, it cannot be said that the trial court abused its discretion in amending the dismissal of defendants' counterclaim from a dismissal with prejudice to one without prejudice. As noted, costs were assessed because of defense counsel's failure to appear at his own motion, and the trial court recognized as much. Moreover, inasmuch as plaintiff was being represented by one of its principals, it cannot be said that plaintiff was prejudiced by defendants' failure to pay \$1500 costs and, while defendants failed to pay the ordered costs after twice being given the opportunity to do so, it similarly cannot be said that such conduct amounts to a "lengthy history of deliberate delay." Finally, the trial court evidently believed that a dismissal without prejudice would better serve the interests of justice.<sup>2</sup>

Plaintiff also briefly argues that this Court must reverse the trial court's order setting aside the dismissal with prejudice of defendants' counterclaim because dismissal with prejudice is a final judgment on the merits for res judicata purposes. However, this Court has held that to preserve a claim based upon res judicata for appellate review, a party must object on that ground at the lower court level. *In re Hensley*, 220 Mich App 331, 335; 560 NW2d 642 (1996). Plaintiff did not object to the amendment of the dismissal at the lower court level on res judicata grounds. Therefore, we decline to consider this argument.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Richard A. Bandstra  
/s/ Peter D. O'Connell

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<sup>2</sup> We recognize that some case law lends support to plaintiff's argument that the trial court was justified in its initial decision to dismiss defendants' counterclaim with prejudice. See *Marquette v Fowlerville*, 114 Mich App 92, 95-97; 318 NW2d 618 (1982); see also *Banaszewski v Colman*, 131 Mich App 92, 94-95; 345 NW2d 647 (1983). Nonetheless, we do not find that the trial court abused its discretion by reconsidering that decision. *Mudge, supra*; see also *Comstock Construction Co v LHG Investment Co*, 126 Mich App 408, 411; 337 NW2d 82 (1983) (where this Court reversed the trial court's entry of an order dismissing the defendants' counterclaim where the defendant had not acted in bad faith, the concern for docket control did not justify the actions imposed, and the one-hour delay caused by defense counsel's error could have been remedied by the imposition of costs).