STATE OF MICHIGAN

COURT OF APPEALS

NORMAN J. WINDSOR, JR,

Plaintiff-Appellant,

v

DIANA J. GRENIER, JOHN L. GRENIER, DANIEL A. WINDSOR, MARK WHEELER, NORMA WHEELER, and LYNETTE G. SMITH,

Defendants-Appellees.

UNPUBLISHED
October 13, 2016

No. 330850
Mackinac Circuit Court
LC No. 2013-007486-NO

Before: MARKEY, P.J., and MURPHY and RONANYE KRAUSE, JJ.

PER CURIAM.

The trial court issued an order dismissing plaintiff's complaint for failure to file a bond as security for costs and subsequently denied plaintiff's motion for reconsideration. Plaintiff appeals by right. We affirm.

I. FACTS

This case arises from disputes surrounding the assets of Norman J. Windsor, Sr., who is the father of plaintiff and some of defendants, and father-in-law to the remaining defendants. Plaintiff initially brought a 24-count complaint against defendants alleging various torts. Subsequently, plaintiff amended the complaint and reduced his claims against defendants to 21 counts. Plaintiff then moved to amend his complaint. Defendants filed a motion asking the court both to order plaintiff to post bond as security for costs and to deny plaintiff's motion to amend because any such amendment would be futile. Plaintiff responded by filing an affidavit stating that he was financially unable to post a bond. The court ordered plaintiff to post a $25,000 security bond pursuant to MCR 2.109 and subsequently dismissed plaintiff's complaint for failure to file the bond.

II. ANALYSIS

A. SECURITY BOND

On appeal, plaintiff argues that the trial court erred by requiring him to post bond and by dismissing his case for failure to post bond. This Court reviews for an abuse of discretion a trial

court's dismissal of a cause of action for failure to comply with the court's orders. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Similarly, the trial court's decision to order a bond for security for costs is reviewed for an abuse of discretion. *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 633; 502 NW2d 371 (1993). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "A trial court's determinations regarding the legitimacy of the claims and a party's financial ability to post a bond are findings of fact that are reviewed only for clear error." *In re Surety Bond for Costs*, 226 Mich App 321, 333; 573 NW2d 300 (1997). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made, even when there was evidence to support the finding. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Questions of law, including interpretation and application of court rules, are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

Under the Michigan Court Rules, a defendant in a civil action is allowed to bring a motion in the trial court to require a plaintiff to post a bond to cover future costs and expenses. MCR 2.109(A) provides:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety.

A security bond should not be required "unless there is a substantial reason for doing so." *In re Surety Bond*, 226 Mich App at 331. "A 'substantial reason' for requiring security may exist where there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.' " *Id.* at 331-332, quoting *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990). However, MCR 2.109(B)(1) provides that a "court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim, and the party shows by affidavit that he or she is financially unable to furnish a security bond." This Court has opined:

> "[MCR 2.109(B)(1)] attempts to balance the right of a poor plaintiff to seek justice with the need of a defendant to have an opportunity for security. In our view, the rule establishes a strong preference for waiver of the bond where the indigent plaintiff's pleadings show a 'meritorious claim'--i.e., a legitimate cause of action. In cases where the indigent plaintiff's pleadings show a tenuous legal theory, the plaintiff's interest in free access to the courts becomes less significant when weighed against the defendant's greater need for security. In short, the fulcrum of the rule's balance is the legitimacy of the indigent plaintiff's theory of liability. [*Hall*, 186 Mich App at 271-272, quoting *Gaffier v St Johns Hosp*, 68 Mich App 474, 478; 243 NW2d 20 (1976).]

In this case, the trial court properly determined that there was a substantial reason for requiring security for costs because plaintiff's pleadings showed tenuous legal theories. Initially, plaintiff filed a 24-count complaint alleging various claims. Subsequently, plaintiff brought an identical amended complaint against defendants except that he reduced the number of his count to 21. But the counts in the amended complaint were largely not supported by the allegations set forth in the complaint. Further, plaintiff's pleading did not show that the bulk of his claims were meritorious, i.e., legitimate causes of action. "In determining the legitimacy of a claim, a trial court is not strictly limited to considering plaintiff's legal theory, but may also consider the likelihood of success on that theory." *In re Surety Bond*, 226 Mich App at 333.

Here, the trial court expressly found that some of plaintiff's claims had not accrued and that the pleadings appeared to be boilerplate from "how-to-books for just doing a litany of tort complaints." A review of the record shows that this finding was not clearly erroneous. *Id*. While some of the alleged actions of defendants Diana Grenier and Daniel Windsor might be regarded as tortious, plaintiff generally accused defendants of holding secret meetings, planning to pre-probate Windsor Sr.'s estate, pressuring Windsor Sr. to sell his properties, and being infuriated with plaintiff because of the quit claim deed Windsor Sr. executed on his behalf. These are not tortious activities. While he then asserted counts for malicious prosecution, abuse of process, intentional infliction of emotional distress, and invasion of privacy (false light), these counts were largely boilerplate; the bare bones allegations did not legally suffice. Therefore, the trial court had a substantial reason for ordering plaintiff to post bond because his legal theories of liability were largely tenuous. *In re Surety Bond*, 226 Mich App at 331-332.

Further, plaintiff argues that the trial court failed to consider his affidavit of inability to pay. Although it appears that the trial court did not consider plaintiff's affidavit before dismissing the case, it appears the court did so before issuing its order denying plaintiff's motion for reconsideration. It noted that plaintiff did not suggest a lesser amount of bond; he merely contended that he was indigent and that no bond should be required. Moreover, the trial court did not clearly err because plaintiff's claims were tenuous, and his affidavit did not state his income, so did not provide a basis for the trial court to determine that he was truly indigent.

Plaintiff's argument that the amount of bond was unreasonable because $25,000 was more than plaintiff's yearly income is without merit and unsupported by his affidavit. In his affidavit, plaintiff merely stated that he could not afford to post bond, that he had no liquid assets, no assets he could convert, no assets that he could mortgage, and that he would "likely" have to borrow money to pay his attorney. Plaintiff's affidavit does not give any information regarding income. In *Hall*, this Court found the plaintiffs' affidavit sufficient because it showed a total gross household income of approximately $1,500 per month for the support of the plaintiffs and two children. *Hall*, 186 Mich App at 273. The affidavit also showed that the plaintiffs' expenses exceeded their income. Further, the plaintiffs affidavit "expressly *did not include* miscellaneous expenses such as car and house repairs or recreation, [and] "also listed numerous types of personal property that [the plaintiffs] *did not own*, such as stocks, bonds, IRA accounts, life insurance, and boats." *Id*. In this case, plaintiff did not show that his expenses exceeded income, and while he states on appeal that "$25,000 is about twice as much as [plaintiff] receives on Social Security Disability in a year," he did not substantiate this claim in the court below.

Next, plaintiff argues that he was prejudiced by the delay in dismissing the case for failure to post bond because the statute of limitations expired on some of his claims. Plaintiff has failed to identify the claims that have expired due to the statute of limitations, thereby abandoning the claim by failing to brief the merits of the allegation of error. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). An appellant may not merely announce his position and leave it to the Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, it appears that any delay in this case may have been partially attributable to plaintiff. The record shows that Judge William W. Carmody disqualified himself from the case on March 17, 2014, that the case was then assigned to Judge Beth A. Gibson on March 24, 2014, and that the order staying the case and deferring the ruling on the motion for bond until April 21, 2014 was entered on March 26, 2014. The register of actions shows that a transcript was requested for appeal purposes on May 13, 2014 and that a transcript was subsequently prepared on August 4, 2014. Thereafter, there was no activity in the file until December 30, 2014 when plaintiff brought a motion to amend his complaint. Defendants then sought a ruling on the motion for bond on January 2, 2015, and both motions were heard on January 6, 2015. The order regarding bond was then entered on January 28, 2015; reconsideration was sought on February 27, 2015, and denied on March 3, 2015. Thereafter, nothing happened until plaintiff filed a motion to rescind the order requiring a bond on July 8, 2015. The court denied this motion. Defendants then moved to dismiss on September 8, 2015, and the trial court dismissed plaintiff's case on October 7, 2015. While there was an unexplained delay in entering the order for a bond between April 21, 2014 and the January 2, 2015 motion requesting a ruling on the bond, plaintiff could have moved to expedite as easily as defendants.

Plaintiff also argues that the trial court abused its discretion in dismissing his case and by failing to evaluate other options. "[E]xpress authority to dismiss a complaint is conferred by statute and court rule in Michigan." *Maldonado*, 476 Mich at 391. "Circuit courts have jurisdiction to make any order properly to fully effectuate the circuit court's jurisdiction and judgement." MCL 600.611. In addition, MCR 2.504(B)(1) states that "[i]f a party fails to comply with . . . a court order, upon motion by an opposing party, or sua sponte, the court may enter . . . a dismissal of the noncomplying party's action or claims."

In this case, the trial court ordered plaintiff to post a cash or surety bond in the amount of $25,000 within 14 days after service of the order on him. The trial court properly dismissed plaintiff's complaint because dismissal is an appropriate remedy for failing to post a security bond as ordered. *In re Surety Bond*, 226 Mich App at 332. Plaintiff argues that the court did not consider other remedies, apart from dismissal; however, the trial court is not required to consider other remedies because dismissal is an appropriate remedy. *Id.* Moreover, plaintiff does not suggest any remedy that the trial court should have considered, thereby abandoning the issue. *Prince*, 237 Mich App at 197.

B. MOTION TO AMEND COMPLAINT

Plaintiff also argues that the trial court abused its discretion in denying his motion to amend his complaint. A trial court's decision to grant or deny leave to amend a pleading is reviewed for an abuse of discretion, and this Court will only reverse if the court's ruling causes an injustice. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006).

A court does not abuse its discretion if it selects an outcome falling within the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

MCR 2.118(A)(1) provides that "a party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party." After this 14-day window, "a party may amend a pleading only by leave of court or by written consent of the adverse party." MCR 2.118(A)(2). Leave to amend "shall be freely given when justice so requires." *Id*. A motion to amend a complaint "should be denied only for particularized reasons, such as undue delay, bad faith, or a dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowing the amendment, or the futility of amendment." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 728; 808 NW2d 277 (2010).

A review of plaintiff's proposed amended complaint shows that it still failed to state valid claims against defendants. Plaintiff continued to allege the same insufficient facts in support of his claims. Although plaintiff reduced his causes of actions against defendants from 21 counts to seven, the proposed amendment remains identical to plaintiff's first amended complaint. Additionally, plaintiff sought to allege a count of conversion against defendant Diana Grenier for placing her name as a beneficiary on Norman J. Windsor, Sr.'s life insurance policy, from which she would receive $3,000 upon Windsor's death. Because Windsor was still alive, the trial court properly found that this claim had not accrued. Under these facts, the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint because any such amendment would have been futile as plaintiff's proposed complaint was legally insufficient on its face. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause