STATE OF MICHIGAN

COURT OF APPEALS

GILBERT STANOW,

Plaintiff-Appellant,

v

BEAUMONT CENTER FOR PAIN MEDICINE, an assumed name for WILLIAM BEAUMONT HOSPITAL, AMERICAN ANESTHESIOLOGY OF MICHIGAN, PC, and SEAN CONROY, M.D.,

Defendants-Appellees.

UNPUBLISHED
December 17, 2019

Nos. 346641; 347275
Oakland Circuit Court
LC Nos. 2018-167805-NH;
2018-165819-NH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In these consolidated cases, in Docket No. 347275, plaintiff appeals by leave granted the trial court's order denying his motion for relief from judgment after the dismissal of his medical malpractice action without prejudice for failure to appear at a show-cause hearing.[1] In Docket No. 346641, plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition under MCR 2.116(C)(7) (statute of limitations). We affirm in part and reverse in part.

I. BACKGROUND

Plaintiff alleged that defendant Dr. Sean Conroy committed medical malpractice in performing a procedure on plaintiff in November 2017. By extension, plaintiff filed his claims against Beaumont Center for Pain and Medicine (Beaumont), which was where the procedure was performed, and against American Anesthesiologists (AA), which was the professional corporation that employed Dr. Conroy. Plaintiff's first action, Docket No. 347275, was

[1] *Stanow v Beaumont Ctr for Pain Med*, unpublished order of the Court of Appeals, entered May 30, 2019 (Docket No. 347275).

dismissed without prejudice on August 15, 2018, after plaintiff failed to attend a show-cause hearing. The show-cause hearing was held so that plaintiff could explain why defendants had not been served with summonses—which would expire in five days. That same day, plaintiff filed a second action, Docket No. 346641, alleging the same medical malpractice claims as in the first action. Plaintiff later filed a motion for relief from the trial court's dismissal of the first action, which was denied. Ultimately, the trial court determined that the second action was filed after the expiration of the statute of limitations and granted defendants' respective motions for summary disposition under MCR 2.116(C)(7).

Plaintiff's appeal in Docket No. 346641 relies heavily on the outcome in Docket No. 347275. The crux of his argument on appeal is that the trial court erroneously dismissed the first action, which forced him to file the second action outside the statute of limitations. Plaintiff does not appear to dispute that the second action is beyond the statute of limitations; instead, he contends that the dismissal of the first action was improper and constituted "judicial interference" so this Court should apply equitable tolling of the statute of limitations and allow his claims to proceed.

II. ANALYSIS

A. NOTICE OF INTENT

Defendants Beaumont and AA argue that plaintiff failed to serve them a notice of intent (NOI) and that this warranted dismissal regardless of the statute of limitations. We agree. "This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

> In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. We must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. [*Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000) (internal citation omitted).]

> Under MCL 600.2912b(1),
>
> [e]xcept as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility *unless the person has given the health professional or health facility written notice* under this section not less than 182 days before the action is commenced. [Emphasis added.]

The burden is on the plaintiff to meet the NOI provisions. *Burton v Reed City Hosp Corp*, 471 Mich 745, 754; 691 NW2d 424 (2005). The NOI required by MCL 600.2912b tolls the statute of limitations during the notice period. *Decker v Rochowiak*, 287 Mich App 666, 676; 791 NW2d 507 (2010). See also MCL 600.5856(c). Failure to comply with these notice requirements can

lead to dismissal. *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 80; 869 NW2d 213 (2015). A case cannot be commenced until these notice requirements are met. *Id*. at 80-81.

In this case, plaintiff conceded in his summary disposition response that AA was never properly served an NOI and was therefore entitled to dismissal. We accordingly hold that AA was properly dismissed from the two actions regardless of the other issues raised on appeal. Similarly, we hold that Beaumont was never served an NOI and is entitled to dismissal. In its motion for summary disposition, Beaumont argued that it had never received an NOI despite its repeated requests to plaintiff's counsel to issue the NOI. In plaintiff's response, he failed to address this argument or to otherwise provide documentation of the NOI. By failing to address the argument or provide documentation in his response, plaintiff has forfeited the issue and cannot now argue otherwise on appeal. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002) (defining forfeiture as "the failure to assert a right in a timely fashion").[2] Dr. Conroy concedes that he was served an NOI and, accordingly, the issue whether the sanction of dismissal was proper relates only to the claim against him.

In summary, the trial court did not err by granting summary disposition in favor of AA and Beaumont.

B. DISMISSAL

Plaintiff argues that the trial court's dismissal of the first action was a drastic and harsh sanction warranting reversal. We agree. This Court reviews for an abuse of discretion a trial court's decision to dismiss an action for failure to comply with a court order. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes, *id*., and when it makes an error of law, *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

It appears that the trial court dismissed plaintiff's action under MCR 2.504(B)(1), which provides that "[i]f a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." Trial courts possess the authority to sanction parties, including by dismissing the action. *Maldonado*, 476 Mich at 375-376. But dismissal is a "drastic step that should be taken cautiously." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Before doing so, a trial court must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id*. The failure to do so constitutes an abuse of discretion. *Id*. at 506-507. There are seven factors that a trial court should consider before dismissal is used as a sanction:

[2] We note that, although plaintiff submitted a purported NOI in the *first* action, he failed to do so in his response to defendants' motions for summary disposition, which occurred in the *second* action. Moreover, the NOI was simply a letter addressed to Beaumont; there is no proof of service or post office timestamp indicating that it was ever sent. Beaumont clearly disputed this, and plaintiff failed to even address it in his response brief.

> 1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id*. at 507; see also *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008).]

In this case, there is no indication in the record or in the trial court's order that it considered other alternatives to dismissal or that it evaluated the *Vicencio* factors. The trial court's order stated only that plaintiff failed to appear at the show-cause hearing and that the action was dismissed without prejudice. Accordingly, the trial court's dismissal constituted an abuse of discretion. See *Vicencio*, 211 Mich App at 506-507.

Further, upon consideration of the *Vicencio* factors it is clear that dismissal was not appropriate. First, there is no indication that the violation was willful; in fact, plaintiff's counsel later explained that it was due to a scheduling failure. Second, there was no history of plaintiff failing to comply with previous court orders because, other than the failure to appear or respond, the record gives no indication that plaintiff violated any other orders. Third, there was little prejudice to defendants; the show-cause issue related to notice and serving the non-expired summonses. Defendants have since received notice of the proceedings and accordingly suffered no further prejudice. Fourth, there is no indication from the record that plaintiff had a history of *deliberate* delay. Fifth, plaintiff was denied the requested opportunity to comply with the court order after learning of the scheduling error. Sixth, plaintiff took steps to cure the defect. Plaintiff's counsel called the trial court on the same day the dismissal was entered and offered to appear by noon, which was within a few hours of the originally scheduled hearing at 8:30 a.m. Seventh, clearly, a lesser sanction would better serve the interests of justice. Dismissal is a harsh and drastic sanction for the failure to appear at a *single* hearing, particularly under the facts of this case. Therefore, the trial court abused its discretion when it dismissed plaintiff's first action against Dr. Conroy. It follows that the trial court also erred by granting summary disposition in favor of Dr. Conroy on the ground that the statute of limitations barred plaintiff's second case—which was only filed because of the court's erroneous dismissal of plaintiff's first case.

Accordingly, we affirm the trial court's grant of summary disposition to AA and Beaumont, but we reverse the trial court's dismissal of plaintiff's case against Dr. Conroy and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro