STATE OF MICHIGAN

COURT OF APPEALS

SUITE B, INC.,

Plaintiff-Appellant,

and

FARIDA HOLDINGS, LLC,

Plaintiff,

v

CITY OF INKSTER, BYRON NOLEN, INKSTER CITY COUNCIL, FELICIA RUTLEDGE, and CHARLES K. NOLEN,

Defendants-Appellees,

and

TIMOTHY WILLIAMS, CLARENCE ODEN, JR., SANDRA WATLEY, STEVEN CHISOLM, KIM HOWARD, and CONNIE R. MITCHELL,

Defendants.

UNPUBLISHED
December 21, 2021

No. 355438
Wayne Circuit Court
LC No. 18-012209-CZ

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

In this action related to the nonrenewal of plaintiff, Suite B, Inc.'s ("Suite B"), license to operate a marijuana dispensary in Inkster, Michigan, Suite B appeals as of right from the final order granting summary disposition under MCR 2.116(C)(8) and (C)(10) to the last remaining defendant, Charles K. Nolen, and dismissing the case. Specifically, Suite B challenges the earlier trial court orders (1) denying it leave to amend the complaint; (2) granting summary disposition

without allowing amendment of the complaint; and (3) denying related motions for reconsideration.[1] We vacate and remand for further proceedings.

I. BACKGROUND

Suite B was issued a marijuana dispensary license by the city of Inkster in 2016. At that time, Suite B was wholly owned by Patrick Wimberly. Wimberly had a misdemeanor conviction from the 1990s. Wimberly's attorney, Byron Nolen, helped prepare the application for the license, and soon thereafter became mayor of Inkster. In late 2016, Wimberly was convicted of two Ohio misdemeanors for having marijuana in his car in Ohio. Suite B's license was renewed in 2017. In early 2018, three new shareholders purchased stock in Suite B. Suite B's application for renewal of the license in 2018, was denied by City Clerk Felicia Rutledge. Rutledge cited misdemeanor convictions of Wimberly and one of the other shareholders as the reason for denial. Suite B followed the appeal procedures in Inkster Ordinance 858 and appealed to the mayor—Byron Nolen—and then to the Inkster City Council, but the denial was upheld.

According to Suite B's shareholders, Byron Nolen made a comment about one of the new shareholders being part of the "Chaldean mafia," and pressured the shareholders to transfer their interest in Suite B to an unnamed woman. Byron Nolen told the shareholders to discuss the matter with his cousin, Charles Nolen, who was an unofficial advisor to the mayor. According to the shareholders, Charles Nolen further pressured them to transfer their interest to the unidentified woman, and, at one point, requested he be given a 3% interest in the company as well. According to the shareholders, they were assured if they complied, Suite B could continue to operate, and something could be arranged so they could continue to receive some of the profits.

In September 2018, Suite B, along with one of its shareholders, Farida Holdings, LLC, brought suit alleging claims for breach of duties, tortious interference with a business relationship or expectancy, and civil conspiracy. Defendants included the city of Inkster, Inkster City Council, Byron Nolen, Felicia Rutledge, and the individual city council members ("Inkster defendants"),[2] as well as Charles Nolen. While this suit was ongoing, Wimberly challenged Byron Nolen in the Inkster mayoral election. Both sides accused each other of using the lawsuit for campaign purposes. Wimberly won the mayoral election at the end of 2019, and then transferred his interest in Suite B to one of the other shareholders.

---

[1] Although Suite B states on appeal that it is appealing two denials of reconsideration insofar as they continued to deny its request for leave to amend, it makes no arguments in support of that position. As such, any challenge to the denials of reconsideration is abandoned. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (holding that appellant may not "announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims"). Nonetheless, as explained below, because we conclude that the trial court abused its discretion by denying Suite B's request to amend its complaint, we need not address this argument.

[2] Rutledge and the individual city council members were dismissed by stipulation below, though the parties on appeal appear to believe Rutledge is still a defendant. Farida Holdings, LLC was also dismissed as a plaintiff below.

In April 2020, Suite B moved for leave to amend the complaint to add various claims and allegations, and Inkster defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Suite B later filed a "revised and amended" motion to amend the complaint, requesting to add causes of action for: (1) unlawful seizure of property in violation of the Fourth Amendment; (2) a deprivation of equal protection in violation of the Fourteenth Amendment; (3) deprivation of procedural and substantive due process in violation of the Fourteenth Amendment; (4) appeal of the license revocation; (5) writ of mandamus; (6) superintending control; (7) violation of 42 USC 1983; (8) civil conspiracy under 42 USC 1983; and (9) injunctive relief. Suite B also included a request to amend its complaint in its opposition to Inkster defendants' motion for summary disposition.

The trial court denied Suite B's motion to amend the complaint, stating that the motion was denied "as both futile and due to the age of this case." Suite B moved for clarification to determine which version of its motion to amend the complaint was denied, and also moved for reconsideration. The trial court issued orders confirming it would not grant either version of Suite B's motion for leave to amend the complaint. The trial court denied the motion for reconsideration, stating: "Plaintiff's request for leave to file an amended complaint remains denied as it is untimely." The trial court granted summary disposition to Inkster defendants under MCR 2.116(C)(7) and (C)(10). Suite B requested reconsideration of the grant of summary disposition, again requesting permission to amend its complaint. The trial court denied reconsideration. The trial court gave minimal explanation of its decisions denying leave to amend the complaint and granting summary disposition to Inkster defendants. The trial court finally granted summary disposition under MCR 2.116(C)(8) and (C)(10) to Charles Nolen, and closed the case.

II. ANALYSIS

On appeal, Suite B argues it was wrongly denied the chance to amend its complaint, both before and after summary disposition was granted to Inkster defendants.[3] Suite B does not otherwise challenge the grants of summary disposition.

[3] If summary disposition is granted under MCR 2.116(C)(8), (9), or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). It is not entirely clear how this provision applies in this case because Suite B never moved again for leave to amend after summary disposition was granted, and summary disposition was granted to Inkster defendants under both MCR 2.116(C)(7) and (C)(10). We note that Suite B requested to amend its complaint in its motion for reconsideration following the trial court's order granting summary disposition in favor of Inkster defendants. Nonetheless, we need not explore this question further in this case because the same standards are generally used to evaluate denials of leave to amend regardless of whether MCR 2.116(I)(5) applies. See *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 209; 920 NW2d 148 (2018); *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 125, 142-145; 715 NW2d 398 (2006) (analyzing the denial of leave to amend issued before summary disposition was granted); *Weymers v Khera*, 454 Mich

This Court reviews the trial court's decision to grant or deny motions to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). "An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. A trial court necessarily abuses its discretion when it makes an error of law." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 208; 920 NW2d 148 (2018) (cleaned up).

After the initial 14-day period for amending a complaint as of right has expired, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). The rule on amending pleadings is "designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result[.]" *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973) (cleaned up). Our Supreme Court has explained:

> A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons:
>
> > [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .
>
> If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. [*Weymers*, 454 Mich at 658-659 (cleaned up; alterations in original).]

More recently, this Court has stated: "The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile." *Jawad A Shah, MD, PC*, 324 Mich App at 208 (cleaned up).

In this case, the trial court gave two, very brief, explanations of its reasons for denying leave to amend. The trial court first stated that the motion was denied "as both futile and due to the age of this case." In response to Suite B's motion for clarification, the trial court stated: "Plaintiff's request for leave to file an amended complaint remains denied as it is untimely."

The trial court's most consistent reason for denying leave to amend was thus delay. Importantly:

> Delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing

---

639, 645-646, 658-666; 563 NW2d 647 (1997) (analyzing the denial of leave to amend after grant of summary disposition, with reference to MCR 2.116(I)(5)). Moreover, Suite B agrees "the analysis for a denial of an opportunity to amend following the grant of a summary disposition motion relies on much [of] the same considerations as a denial of a motion to amend a complaint."

> party suffered actual prejudice as a result. "Prejudice" in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. Rather, "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. [*Weymers*, 454 Mich at 659 (cleaned up).]

The trial court made no findings regarding prejudice or bad faith. Inkster defendants argue they would be prejudiced because the late addition of federal constitutional claims may deprive them of the opportunity to remove the case to a "federal venue with extensive familiarity in litigating federal rights claims." Inkster defendants cite no caselaw supporting this kind of prejudice, and do not explain why trial in a Michigan court would prevent them from "receiving a fair trial"—the only relevant prejudice in this situation. See *Weymers*, 454 Mich at 659; see also *VHS of Mich, Inc v State Farm Mut Auto Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 352881); slip op at 9 ("Notably, plaintiff does not claim that the proposed amendment would prevent it from receiving a fair trial."); *Wolfenbarger v Wright*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350668); slip op at 12 ("[T]here is nothing to show that defendant would have been denied a fair trial if the complaint had been amended.").

A trial court may properly find prejudice and deny leave to amend because of delay when the motion to amend comes on the eve of trial. Specifically:

> [A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Weymers*, 454 Mich at 659-660.]

See also *id.* at 662, 666 (upholding denial of leave to amend requested, in part, "because the amendment sought to introduce a new claim just before trial . . ."); *Wolfenbarger*, ___ Mich App at ___; slip op at 12 (upholding denial of leave to amend with regard to a new allegation which would have required investigation "[w]ith trial starting imminently"). However, in the instant case, there was no trial scheduled. Additionally, the trial court did not find prejudice.

The trial court also made no mention of bad faith. Inkster defendants argue bad faith can be inferred from Suite B's unnecessary delay, asserting that Suite B waited months to file a request to amend the complaint *after* it had all the information on which its proposed new claims and factual allegations relied. However, when delay is inexcusable, "[t]he remedy is not to deny the amendment . . . but, rather, the remedy is to sanction the offending party to reimburse the opponent for the additional expenses and attorney fees incurred." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 321; 503 NW2d 758 (1993); see MCR 2.118(A)(3).

We have recently emphasized the need for a trial court finding of prejudice or bad faith, if denial of leave to amend is premised on delay, see *VHS of Mich, Inc*, ___ Mich App at ___; slip op at 8-9; *Wolfenbarger*, ___ Mich App at ___; slip op at 11-12, as well as the importance of the

trial court providing explanation of its basis for denying leave to amend, see *Jawad A Shah, MD, PC*, 324 Mich App at 208.

Because the trial court failed to explain its reasoning, it is unclear whether the trial court in fact believed there were grounds to deny leave to amend on the basis of delay alone—a legal error—or whether the trial court actually found prejudice or bad faith, but did not say so. "A trial court necessarily abuses its discretion when it makes an error of law." *Id.* (cleaned up). In this case the record does not reveal whether the trial court's decision was based on a mistake of law, hindering this Court's review. See *Janczyk v Davis*, 125 Mich App 683, 693; 337 NW2d 272 (1983) (remanding when the trial court based its "decision on an incorrect assumption and thus never exercised [its] discretion."); see also *City of Jackson v Thompson-McCully Co*, LLC, 239 Mich App 482, 489; 608 NW2d 531 (2000) (remanding because the trial court's findings were "insufficient for this Court to determine whether the trial court reached the proper result"); *In re Estate of Adams*, 257 Mich App 230, 237; 667 NW2d 904 (2003) (vacating award of attorney fees and remanding for further explanation when this Court was "unable to determine if the fees were properly awarded" because of insufficient explanation by the trial court). This Court cannot perform the trial court's fact-finding function. See *Anspaugh v Imlay Twp*, 480 Mich 964, 964; 741 NW2d 518 (2007) (remanding to the trial court and cautioning this Court to avoid "appellate fact-finding"); *In re Beers*, 325 Mich App 653, 677; 926 NW2d 832 (2018) (noting the danger of appellate fact-finding if this Court attempted to apply standards and criteria "not employed by the trial court").

We recognize that we may nevertheless affirm the denial of leave to amend if the amendments would be futile. *Jawad A Shah, MD, PC*, 324 Mich App at 208, 209. "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (cleaned up). On appeal, Inkster defendants make a variety of arguments attempting to establish the futility of many of the proposed amendments to the complaint with regard to all or most of the remaining defendants.[4] Perhaps because the trial court did not specify the basis of its futility determination, and also provided minimal explanation of its grant of summary disposition to Inkster defendants, the parties' arguments are scattered, and do not address all of the claims with regard to each defendant.[5]

Given that the parties have not fully briefed the futility of all the claims with regard to all defendants, and the trial court's apparent focus on delay, rather than futility, as the main reason for denying leave to amend, we decline to undertake a thorough analysis of whether all of the proposed amendments to the complaint would be futile. Instead, we vacate the order denying leave

[4] Defendant Charles Nolen has not filed a brief on appeal.

[5] We do not consider Inkster defendants' mootness argument, since it relies on documents outside the appellate record, and this Court denied the request to expand the record on appeal. *Suite B Inc v Inkster*, unpublished order of the Court of Appeals, entered May 19, 2021 (Docket No. 355438).

to amend, and remand.[6] On remand, the trial court should provide further explanation of its decision to deny leave to amend or take other action consistent with this opinion.

Vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick

[6] Suite B's appeal concerns only the denial of leave to amend. Suite B does not otherwise argue that summary disposition was wrongly granted. Therefore, nothing in this opinion should be taken to address the merits of the challenges related to granting summary disposition to Inkster defendants or Charles Nolen. We only address the denial of leave to amend.