

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA JEAN C. CHADWICK,

Plaintiff-Appellee,

v

H. BEATTY CHADWICK,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 189527

Benzie Circuit Court

LC No. 94-004392-NZ

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition of defendant's first amended countercomplaint based upon lack of jurisdiction and forum non conveniens and defendant's second amended countercomplaint as untimely. We affirm.

Plaintiff, a Pennsylvania resident, instituted an action on September 7, 1994 to enforce a Pennsylvania money judgment of \$290,000.00 arising out of the parties' Pennsylvania divorce. The Pennsylvania order provided that plaintiff "may enter this judgment as a lien against the property titled in the name of H. Beatty Chadwick, located at 454 Alden Avenue, Frankfort, Michigan." On October 4, 1994, defendant filed his answer to plaintiff's complaint. On February 9, 1995, defendant filed a nine-part countercomplaint, alleging trespass with regard to the Michigan property, trespass to personal property and conversion of Pennsylvania property, conversion of items kept at the Michigan property, abuse of process, malicious prosecution, defamation, invasion of privacy,¹ and intentional interference with business relations. Defendant filed his first amended countercomplaint on March 1, 1995. Rather than answer the amended countercomplaint, plaintiff moved for summary disposition of defendant's countercomplaints pursuant to MCR 2.116(C)(1), (4), and (6) on the basis that first, Michigan courts did not have personal jurisdiction over her merely because she filed her in rem action against defendant's property located in Michigan, and second, the principles of forum non conveniens barred defendant's countercomplaints. Although plaintiff had also requested that the court enter summary disposition on her complaint because defendant failed to state a valid defense, plaintiff subsequently

* Circuit judge, sitting on the Court of Appeals by assignment.

agreed to dismiss her complaint after defendant informed the trial court that the Pennsylvania judgment was not a final order.

The court granted plaintiff's motion for summary disposition and dismissed defendant's countercomplaints for lack of jurisdiction and forum non conveniens, finding that although the court had jurisdiction over the property originally at issue, it lacked jurisdiction over plaintiff on the counterclaim because she was not served or domiciled in the state and had not consented to jurisdiction. See MCL 600.701; MSA 27A.701. It also struck defendant's second amended countercomplaint, which defendant filed on May 8, 1995, as being untimely and awarded defendant sanctions, including reasonable attorney fees, for defending plaintiff's improper action.

Although plaintiff did not raise this issue below, we find that the trial court did not abuse its discretion in dismissing defendant's countercomplaints because they were improperly filed. See *Citizens Mortgage Corp v Second Avenue Ltd Dividend Housing Ass'n*, 72 Mich App 1, 5-6; 248 NW2d 699 (1976), modified on other grounds 400 Mich 836; 255 NW2d 203 (1977). MCR 2.203(E) requires a defendant to file a counterclaim when he files his answer or within fourteen days after filing the answer, per MCR 2.118(A)(1). If the defendant fails to do so, he must either file a motion requesting permission to amend his pleadings or obtain written consent of the adverse party under MCR 2.118(A)(2) in order to file his counterclaim or countercomplaint. The decision whether to permit the amendment of pleadings is also within the trial court's discretion. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 658-659; 213 NW2d 134 (1973); see also *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993). Also, because counterclaims may relate to any subject, not necessarily the original complaint, the court may deny a motion to add counterclaims which, in the end, may be litigated as separate actions. MCR 2.203(E); see also 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 38.

Here, defendant's answer was timely filed on October 4, 1994, but his first countercomplaint was filed approximately four months later on February 9, 1995. Our review of the lower court record shows that defendant failed to file a motion pursuant to MCR 2.118 to request leave to amend his pleadings before he filed either his original or first amended countercomplaint. Moreover, there is no evidence that plaintiff agreed in writing to permit defendant to amend his pleadings. Although leave to amend is freely given where justice so requires under MCR 2.118(A)(2), and *Ben P Fyke & Sons, supra*, under the unusual circumstances of this case, we cannot surmise as we often do that the trial court would have granted leave to amend, particularly because the majority of defendant's counterclaims involve torts arising in Pennsylvania. Cf. *Price, supra* at 469-470. Whether leave to amend could be sought now, after judgment is entered, is doubtful and we find no authority to support such a practice.

Further, because defendant failed to properly file his counterclaim alleging various tort causes of action against plaintiff, the statutes of limitations on those actions has continued to run as they were not tolled. MCL 600.5856; MSA 27A.5856. Thus, defendant's actions for trespass, conversion, and abuse of process, the only torts allegedly occurring in Michigan that could provide limited personal jurisdiction over plaintiff under MCL 600.705(2); MSA 27A.705(2), may be stale because they were

not raised within three years after these alleged claims accrued.² MCL 600.5805(8); MSA 27A.5805(8); see also *Moore v Michigan Nat'l Bank*, 368 Mich 71, 76; 117 NW2d 105 (1962). Accordingly, defendant's original counterclaim and subsequently filed amended counterclaims were improperly before the court, and we find no abuse of discretion in the court's decision to dismiss them, albeit on other grounds. See *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Talbot

Judge Michael J. Kelly concurs in the result principally for the reason that the defendant's second amended countercomplaint was untimely filed after the deadline provided by the trial court at a settlement conference held on December 6, 1994 and is barred thereby.

/s/ Michael J. Kelly

¹ Count VIII of defendant's countercomplaint and first amended countercomplaint both allege, in part, that plaintiff caused defendant's personal telephone calls to be transferred or forwarded from the Frankfort, Michigan home to plaintiff's home in Pennsylvania.

² Defendant's countercomplaints do not state the dates upon which these activities took place, but presumably they occurred relatively soon after plaintiff filed for divorce in 1992. In view of the orders that have been entered against defendant in Pennsylvania to freeze his assets both in and outside the United States and to procure his appearance at the divorce proceedings, we believe that the activities described in the countercomplaints occurred early in this acrimonious divorce proceeding.