

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT NORWOOD, Personal Representative of
the Estate of JUSTIN ALAN NORWOOD,
PATRICIA NORWOOD and ADRIAN
NORWOOD,

Plaintiffs-Appellants,

v

SAED SAM SABOURY,

Defendant-Appellee

and

MARK THEMICAL HOWELL,

Defendant.

UNPUBLISHED
June 25, 1999

No. 208430
Ingham Circuit Court
LC No. 96-083285 NO

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

The trial court denied plaintiffs' motion to vacate the order dismissing defendant Saboury for lack of service of process. Plaintiffs appeal as of right, and we reverse.

We review a trial court's decision whether to set aside an order of dismissal for an abuse of discretion. *Limbach v Oakland Co Bd of Co Road Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997). Under the circumstances of this particular case, we find that the trial court erred in refusing to set aside an improvidently (as to defendant Saboury) issued order of dismissal.

On November 7, 1996, the trial court entered an order dismissing Saboury¹. The order specifically stated in part, "it further appearing that defendant . . . Saed Sam Saboury having *neither* been served with process within 91 days from the filing of the first complaint in the action *nor* has the said defendant filed any pleading in the action within that period of time". Plaintiffs correctly argue that this order was erroneous. Saboury had been properly served on August 21, 1996, although a proof of

service was not filed with the court. In addition, defendant Saboury filed an appearance, answer and affirmative defenses on October 11, 1996, four weeks before the case was dismissed for lack of service. MCR 2.104(B) provides that failure to file a proof of service does not affect the validity of the service. MCR 2.105(J)(3) provides that an action *shall* not be dismissed for improper service of process unless the service failed to inform the defendant of the action. See also *Hill v Frawley*, 155 Mich App 611, 613; 40 NW2d 328 (1986) (if a defendant receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules). As a matter of law, the trial court's dismissal of Saboury was improper.

Plaintiff argues that the trial court abused its discretion in failing to set aside Saboury's dismissal because the dismissal was clearly improper. We are thus called upon to determine whether plaintiff is entitled to relief from the trial court's improper order. We find that he is under the circumstances.

Plaintiffs' motion was not filed within twenty-eight days after notice of the order of dismissal was given, and therefore, MCR 2.102(F) clearly cannot afford any relief.

Apparently because they could not meet the requirements of MCR 2.102(F), plaintiffs moved to vacate the dismissal under MCR 2.612. MCR 2.612(A)(1) provides:

Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

The purpose of MCR 2.612(A) is to make an order "accurately reflect that which was actually done and decided by the trial court." *McDonald's Corp v Canton Twp*, 177 Mich App 153, 159; 441 NW2d 37 (1989). In this case, the trial court mistakenly determined that Saboury had neither been served nor filed any pleadings. It can be argued that there was no clerical mistake in the order itself, however, because it accurately reflected what the trial court had determined. While it was a mistake to include Saboury in the order of dismissal where he had been served and had filed pleadings, the mistake was substantive and not clerical. Thus, relief could not be granted pursuant to MCR 2.612(A)(1).

Plaintiff argues, in the alternative, that MCR 2.612(C) applies. It provides:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

* * *

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), (c), within one year after the judgment, order, or proceeding

was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

Plaintiffs claim that their motion was brought within a reasonable period and within one year pursuant to the court rule and that their reason for trying to vacate the dismissal, specifically that the court made a mistake, was compelling. They also argue that there was no prejudice to defendant. In light of these factors, they conclude that the trial court abused its discretion in failing to grant their motion. We agree.

“The ‘mistake’ envisioned by the rule is the type of inadvertent mistake made in the course of litigation, often by the court itself.” 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), p 475. In this case, there was clearly a mistake made by the court and plaintiffs brought their motion within a reasonable time of learning of the error and well within the one year provision of MCR 2.612(C)(2). In *Lark v Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980), this court, when looking at the predecessor to MCR 2.612(C), indicated that the court rule should operate in “extraordinary circumstances where the failure to set aside the court’s final determination will result in substantial injustice.” We find that such a circumstance exists in this case, especially where Saboury was timely sued, was properly served, was aware of the case and had prepared to defend it. It was an abuse of discretion for the trial court to fail to vacate the erroneous order and reinstate the case.

Reversed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

¹ Several other defendants were dismissed at the same time. The dismissal of the cause of action against those defendants is not at issue in this appeal.