

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLYN CLARK, Personal Representative
of the Estate of WILLIAM TYRONE LACEY,
Deceased,

Plaintiff-Appellee,

v

BELAL F. ABDULLAH, M.D.,

Defendant,

and

BELAL F. ABDULLAH, M.D., P.C.,

Defendant-Appellant.

UNPUBLISHED
December 21, 2006

No. 263071
Wayne Circuit Court
LC No. 04-425721-NH

Before: White, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Defendant Belal F. Abdullah, M.D., P.C., appeals as of right from the trial court's order granting plaintiff's motion for a voluntary dismissal without prejudice.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this wrongful death action after the two-year statute of limitations had expired but within the two-year saving period for wrongful death actions. MCL 600.5852. However, she failed to wait for the expiration of the statutory notice period before filing suit. MCL 600.2912b. Defendant filed a motion to dismiss and scheduled it for hearing in April 2005.

Plaintiff resigned as personal representative and sought voluntary dismissal of this action without prejudice, and a successor personal representative was appointed in March 2005.

¹ Defendant Abdullah, individually, also joined in the claim of appeal, but his individual appeal has been closed due to bankruptcy.

Defendant sought dismissal with prejudice, arguing that *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), was inapplicable and, accordingly, the successor personal representative would not have two years from her appointment in which to file suit. The trial court granted plaintiff's motion for voluntary dismissal without prejudice.

A plaintiff may voluntarily dismiss an action without a court order by filing a notice of dismissal before the defendant serves an answer to the complaint or a motion for summary disposition, whichever first occurs. MCR 2.504(A)(1)(a). Thereafter, the plaintiff must obtain the defendant's consent or an order of the court. MCR 2.504(A)(1)(b) and (2). Unless the court specifies otherwise, such a dismissal is without prejudice. MCR 2.504(A)(2)(b). The trial court's ruling on a motion for voluntary dismissal is reviewed for an abuse of discretion. *Mleczo v Stan's Trucking, Inc*, 193 Mich App 154, 155; 484 NW2d 5 (1992).

In exercising its discretion, the trial court should "weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays." *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). The motion should normally be granted unless the defendant "will be legally prejudiced as a result." *Id.* "The mere fact that the action may be refiled does not constitute 'prejudice,' for MCR 2.504 itself recognizes that refiled is likely to occur, and authorizes the court to impose such terms and conditions on the dismissal as the court deems proper to protect the defendant." 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2504.5, p 53. The court may deny the motion or grant a dismissal with prejudice where the defendant has a valid defense to the action. *Shoulders, supra* at 212-213. The court may refuse to dismiss without prejudice if the defendant has "invested considerable time and expense in preparing to defend against the causes of action pled" and "would be subjected to further expense in defending a new cause of action" if the dismissal were without prejudice. *Makuck v McMullin*, 87 Mich App 82, 86; 273 NW2d 595 (1978).

Here, the mere fact that defendant had a pending motion for summary disposition did not preclude the trial court from granting a voluntary dismissal. Cf. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 564-565; 567 NW2d 456 (1997) (noting that trial court had the option of granting the defendant's motion for summary disposition or the plaintiff's motion for voluntary dismissal, but not both). There is no dispute that plaintiff filed suit before the expiration of the statutory notice period. Dismissal without prejudice is the proper remedy for failure to comply with the notice provisions of MCL 600.2912b. *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005); *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). Therefore, at the time defendant filed its motion, it was entitled only to dismissal without prejudice.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly