

STATE OF MICHIGAN
COURT OF APPEALS

BANK ONE NA,

Plaintiff-Appellee,

v

HOLSBEKE CONSTRUCTION, INC,

Defendant-Appellant,

UNPUBLISHED

September 25, 2007

No. 268251

Macomb Circuit Court

LC No. 04-001542-CZ

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted the December 20, 2005 order granting Bank One, NA's motion in limine to strike defendant's setoff¹ claims. We reverse the ruling of the trial court and remand for further proceedings consistent with this opinion.

Plaintiff sued defendant to recover an alleged account receivable owned by defendant to the Bell Company, a now-defunct corporation. In July of 2003, defendant and Bell entered into a contract where defendant hired Bell as a subcontractor for various projects for the Detroit Public Schools. Bell began the work, but abandoned the project having failed to do most of the work and also failing to pay for labor and materials used in the work. Defendant ultimately corrected the problems created by Bell by finishing the work never completed by Bell, paying off suppliers and laborers who had not been paid by Bell, as well as paying approximately \$77,000 to suppliers and union pension funds on behalf of Bell.

¹ As a preliminary matter, although the parties and the trial court refer to defendant's counterclaim as a setoff claim, it is technically a claim in recoupment. When an account debtor (defendant) is sued by an assignee of a debt (plaintiff) and raises a counterclaim based on a claim the debtor would have against the assignor of the debt (Bell), which is separate from the assigned debt, the counterclaim is known as a setoff. *In re Thompson Boat Co*, 230 Bankr 815, 823 (ED Mich, 1995); Black's Law Dictionary (8th ed). If the counterclaim under the same circumstances arises from the same transaction as the assigned debt, the counterclaim is known as a claim in recoupment. *In re Thompson, supra*; Black's Law Dictionary (8th ed). Here, the counterclaim is for recoupment.

In October 2003, plaintiff entered into a surrender agreement with Bell as a result of Bell's default on loans extended by plaintiff. After Bell assigned its accounts receivables to plaintiff, plaintiff sued defendant for the assigned debt. Defendant asserts plaintiff's claim is subject to set off because Bell allegedly breached its subcontractor's contract underlying the assigned account, forcing defendant to incur the described costs. Defendant also raised a counterclaim for the amounts it had paid and lost on the Bell contract.

Defendant then commenced an action against Bell in Wayne Circuit Court, alleging claims of breach of contract, unjust enrichment, and promissory estoppel. Plaintiff motioned to intervene in the Wayne Circuit case and defendant opposed the motion, arguing that because Bell did not assign its liabilities to plaintiff, plaintiff would owe nothing to defendant as a result of the Wayne Circuit case. After plaintiff's motion to intervene was denied, plaintiff brought the instant motion in limine in this case. Plaintiff asserts that defendant "cannot claim damages against Bell in Wayne County court and also assert those same damages as offsets in this Macomb County action." The trial court agreed and dismissed defendant's counterclaim. Because the trial court dismissed the counterclaim based on an argument citing MCR 2.116(C)(6), we will treat the court's action as granting a motion for summary disposition. We review a trial court's decision to grant a motion for summary disposition de novo. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Under Michigan's version of the relevant UCC provision, an account debtor's right to assert a setoff, claim in recoupment, or a contract right against an assignee is governed by MCL 9404, which provides in pertinent part as follows:

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (2) through (5), the rights of an assignee are subject to all of the following:

(a) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract.

* * *

(2) Subject to subsection (3) and except as otherwise provided in subsection (4), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (1) only to reduce the amount the account debtor owes.

"The essential conditions or elements of election of remedies are: (1) the existence of two or more remedies; (2) an inconsistency between the remedies; and (3) a choice of one of them." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 91; 443 NW2d 451 (1989) (citations and internal quotation marks omitted). Because plaintiff can assert an election-of-remedies defense based on another suit to which it is not a party, the position that defendant adopted in the Wayne Circuit Court case is not inconsistent with defendant's position in this case. Despite the fact that Bell did not assign its liabilities to plaintiff in the sense that defendant's claim in recoupment against plaintiff could not yield an affirmative recovery owed by plaintiff to defendant, MCL

440.9404(2), it is also true that defendant has the statutory and contractual right to limit damages owed to plaintiff as Bell's assignee through its recoupment claim. MCL 440.9404(1).

Plaintiff is correct that defendant argued in the Wayne Circuit Court case that the assignment from Bell "includes Bell's assets, but does not include any of Bell's liabilities." However, it is clear that the substance of defendant's argument in the Wayne Circuit Court case is that plaintiff could not be liable to defendant as a result of those proceedings because even though Bell assigned rights to plaintiff, Bell did not delegate any duties to plaintiff, nor did plaintiff serve as guarantor to Bell's performance. When, as here, the assignee does not claim to be a holder in due course, an assignment of a debt is per se subject to any setoffs and claims of recoupment because nothing in MCL 440.9404 provides that the rights contained therein can only be asserted when duties are also delegated or the assignee acts as the assignor's guarantor. Cf. *First of America Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996) ("An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed.")

Further, it is not in keeping with prior precedent or statutory intent for this Court to find that defendant has a choice of pursuing one remedy over the other. *Jim-Bob, supra* at 91. If, as defendant alleges, it is entitled to damages as a result of Bell's breach that exceed the damages defendant allegedly owes to either plaintiff or Bell, asserting the claim in recoupment against plaintiff and foregoing a claim against Bell would not remedy the alleged wrong by Bell. The claim in recoupment could, at most, nullify any claim by plaintiff, but it could not yield an affirmative recovery from plaintiff to defendant. MCL 440.9404(2). Similarly, the implication that a judgment favorable to defendant in the Wayne Circuit Court case could serve as a remedy for the damages asserted in the instant action assumes that Bell is solvent and that defendant would collect from Bell. Further, because the Wayne Circuit Court case is not before the Macomb Circuit Court, it cannot be said that Bell would not defend by arguing that defendant's damages in the former case should be limited by the value allegedly conveyed by Bell to defendant. Thus, barring defendant's claim in recoupment in the instant case could mean that the alleged value from Bell would be counted against defendant twice and that defendant could be required to pay on account in the instant case that it may in fact owe nothing on. Accordingly, there has not been an election or choice between two remedies, because defendant would have to give up its potential recovery from Bell or give up any potential of diminishing the claim by plaintiff if it were to choose one remedy to the exclusion of another. Further, any fear that defendant might receive a double recovery is premature. Moreover, any potential double recovery could be dealt with if such a situation were to arise.

Plaintiff next argues that MCL 440.9404 does not apply to this case because defendant's position in the Wayne Circuit Court case that the assignment did not assign Bell's liabilities to plaintiff constituted "an enforceable agreement" by defendant "not to assert defenses or claims." MCL 440.9404(1). Michigan's Uniform Commercial Code provides, "'Agreement' means *the bargain of the parties in fact* as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act." MCL 440.1201 (emphasis added). The argument that defendant presented in the Wayne Circuit Court case, which plaintiff opposed, cannot be said to be "the bargain of the parties in fact." In other words, because there was no mutual assent between parties, there was no agreement. Cf. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362,

372-373; 666 NW2d 251 (2003) (“Where mutual assent does not exist, a contract does not exist.”)

Defendant’s action in the Wayne Circuit Court case does not qualify as a “course of dealing” or “course of performance.” Course of dealing means the parties’ prior dealings with each other before the agreement at issue was reached. MCL 440.1205. Course or performance means the parties’ actions in carrying out the agreement at issue. See MCL 440.2208. An argument advanced in litigation is not a course of dealing or course of performance. Moreover, because the clause referencing course of dealing and course of performance in MCL 440.1201 is found in a prepositional phrase, it is necessarily qualified by the phrase “the bargain of the parties in fact.” MCL 440.9404(1).² Put another way, MCL 440.9404(1) suggests that course of dealing and course of performance are not substitutes for an actual bargain but evidence of the parties’ bargain.

Plaintiff also argued below as follows: “The basis to prohibit [defendant] from presenting any evidence of offset as to [plaintiff’s] claims to recover The Bell Company’s receivables is well established the [sic] common rule of abatement of prior action. MCR 2.116(C)(6) is a codification of the former plea of abatement of prior action.” MCR 2.116(C)(6) does not bar defendant’s claim in recoupment because it applies when “[a]nother action has been initiated between the same parties involving the same claim.” “A “party” to an action is a person whose name is designated on record as plaintiff or defendant.” *Fast Air, supra* at 544, quoting Blacks Law Dictionary (5th ed). Plaintiff is not a party to the Wayne Circuit Court case. Further, although *Fast Air* acknowledged that “MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action,” *id.* at 545, it noted that the purpose of the plea of abatement was to prevent “parties” from being “harassed by new suits brought by the same plaintiff involving the same questions as those in *pending* litigation,” *id.* at 546 (citations and quotation marks omitted; emphasis in original). *Fast Air*’s characterization of the responsive plea as the “former plea in abatement” also suggests that the plea is no longer valid under the modern pleading system beyond its recognition in MCR 2.116(C)(6) or any other applicable rule. Thus, to the extent plaintiff implies that there is a plea of abatement similar to but separate from MCR 2.116(C)(6) as to non-parties, any such argument lacks merit.

In any event, plaintiff cites no authority holding that the former plea of abatement could be invoked in reference to a suit in which the party raising the plea was not a party, nor are we aware of any such published authority in Michigan. See, e.g., *Chapple v Nat’l Hardwood Co*, 234 Mich 296, 298-299; 207 NW 888 (1926) (holding that abatement applies when the parties are the same in both suits and the suit in both cases are predicated on the same facts). Because neither MCL 2.116(C)(6) nor any plea in abatement can bar defendant’s claim in recoupment, it

² The Legislature is presumed to know the rules of grammar, *Lansing Mayor v Pub Service Comm*, 257 Mich App 1, 14; 666 NW2d 298 (2003), and “statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended,” *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) (citation and quotation marks omitted).

is unnecessary to address whether either rule would apply based on when the two cases were filed.

Plaintiff next argues that defendant's position in the Bell case is a stipulation because the requirements of MCR 2.507(G)³ are satisfied. MCR 2.507(G) provides as follows:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

For reasons already considered, defendant's argument in the Wayne Circuit Court case, which plaintiff opposed, is not an agreement between the plaintiff and defendant. Similarly, it is not a "consent between the parties or their attorneys" because plaintiff opposed defendant's position. MCR 2.507(G). Moreover, the argument that Bell did not assign any liabilities to plaintiff is a true statement for reasons already considered, and making this argument did not suggest that defendant would waive any claims of setoff or recoupment because neither claim is a liability to plaintiff. Such claims asserted against an assignee cannot yield an affirmative recovery, for reasons already considered.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray

³ Plaintiff identifies the subrule as MCR 2.507(H). Although the language quoted was once found in MCR 2.507(H), the amendment of the court rule effective May 1, 2006 now places the cited language in MCR 2.507(G).