

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CASTLE VENTURES, INC.,

Plaintiff-Appellant,

v

MICHIGAN ASSOCIATION OF POLICE – 911,  
d/b/a MICHIGAN ASSOCIATION OF POLICE,

Defendant-Appellee.

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UNPUBLISHED

June 3, 2003

No. 236489

Oakland Circuit Court

LC No. 01-030131-CK

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(6). We reverse and remand.

I. Factual and Procedural History

This case arises out of two contracts between the parties whereby plaintiff agreed to provide defendant with telemarketing services in the form of pledge solicitations. The separate contracts entered into by the parties were respectively called the MAP Solicitation Protective Vest Program Agreement (the vest program contract) and the MAP Solicitation Program Agreement (the solicitation contract). In 1998, plaintiff filed the initial action, claiming that defendant had wrongfully terminated its contracts with plaintiff. However, plaintiff failed to attach a copy of the solicitation contract to the complaint. Later, at an arbitration hearing, when plaintiff sought to address both contracts, defendant objected on the basis that plaintiff had failed to attach a copy of the solicitation contract to the complaint. Defendant argued that the solicitation contract was not relevant or a part of the action. The arbitrator agreed, concluding that the solicitation contract was not part of the 1998 action. Further, the arbitrator did not permit plaintiff to amend its complaint to include the solicitation contract. The trial court later denied plaintiff's motion to amend its complaint to include the solicitation contract. In March 2001, plaintiff filed the complaint in the present case, alleging that defendant wrongfully terminated the solicitation contract. This time, plaintiff attached the solicitation contract to the complaint. However, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(6), concluding that the claim in the present case regarding a breach of the solicitation contract should have been brought with the 1998 action because the parties and the issues involved in the two cases were identical.

## II. Analysis

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(6) because the claim in the present case is not identical to the claim in the 1998 action. We review *de novo* the grant of a motion for summary disposition under MCR 2.116(C)(6). *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). When a party files a pleading, he must join every claim that he has against the opposing party at the time of serving the pleading "if it arises out of the same transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." MCR 2.203(A). "The primary reason for the rule against splitting a cause of action is that the defendant should not be unreasonably harassed by a multiplicity of suits." *Chatham-Trenary Land Co v Swigart*, 245 Mich 430, 435; 222 NW 749 (1929). A trial court may dismiss a complaint under MCR 2.116(C)(6) where "[a]nother action has been initiated between the same parties involving the same claim." "MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action." *Fast Air, Inc, supra* at 545. The purpose of this rule is to "stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation. In other words, its purpose is to prevent 'litigious harassment' involving the same questions as those in pending litigation." *Id.* at 546, quoting *Rowry v Univ of Michigan*, 441 Mich 1, 20-21; 490 NW2d 305 (1992) (Riley, J., concurring) (emphasis deleted from *Fast Air, Inc*). Thus, the purpose of the MCR 2.203(A) and MCR 2.116(C)(6) are the same: to protect defendants from having to defend against multiple suits based on the same claim. "MCR 2.116(C)(6) does not require that all the parties and all the issues be identical." *JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Rather, the two suits must be based on the same or substantially the same causes of action. *Id.* A motion based on MCR 2.116(C)(6) is properly granted where resolution of the action will require examination of the same operative facts as the pending action. *JD Candler Roofing Co, Inc, supra* at 601.

Plaintiff does not dispute that the present case involves the same parties as the 1998 action. However, plaintiff argues that, because the present case involves the breach of a contract that was not a part of the 1998 action, the claims in the two actions are not the same. We agree. Defendant argued at the arbitration hearing that the solicitation contract was separate from and not relevant to the 1998 action. The arbitrator and the trial court agreed with defendant and disallowed plaintiff from bringing its solicitation contract claim. When plaintiff attempted to amend its complaint to join its solicitation contract claims, both the arbitrator and the trial court refused to allow plaintiff to amend its complaint to include the solicitation contract. When plaintiff brought the present action, defendant contended that plaintiff's new claim alleging a breach of the solicitation contract must be dismissed because it should have been joined with the 1998 action. Defendant cannot have it both ways. Defendant successfully argued to the trial court and the arbitrator that the solicitation contract was separate from the 1998 action and that plaintiff should not be permitted to argue that defendant breached this contract—defendant may not now argue that plaintiff's claim that defendant breached the solicitation contract involves the same claim as the 1998 action and should be dismissed.

Furthermore, we conclude that the 1998 action and the present action involve entirely separate and distinct, albeit similar, contracts. We cannot conclude under MCR 2.116(C)(6) that "[a]nother action has been initiated between the same parties involving *the same claim.*"

(Emphasis added.) Furthermore, the purposes of MCR 2.203(A) and 2.116(C)(6) are not served by allowing defendant to oppose plaintiff's inclusion of its solicitation contract claims in the 1998 action and then move to dismiss plaintiff's present solicitation contract claims because they were not joined earlier. Plaintiff's present claim concerning the solicitation contract was not brought for the purpose of harassing defendant or to litigate the same claims as those presented in the 1998 action. *Fast Air, Inc, supra* at 546. The parties have never litigated the issue of the solicitation contract. *Id.* Therefore, summary disposition under MCR 2.116(C)(6) was improper.

Reversed and remanded. We do not retain jurisdiction.<sup>1</sup>

/s/ Helene N. White

/s/ Brian K. Zahra

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<sup>1</sup> In light of our disposition above, we need not address plaintiff's other issues on appeal.