

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

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MEDLEN ZETOUNA,

Plaintiff-Appellant,

v

26822 COOLIDGE, INC., d/b/a/ HUNTINGTON  
CLEANERS, INC.,

Defendant-Appellee.

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UNPUBLISHED

October 19, 2006

No. 261551

Oakland Circuit Court

LC No. 2004-057355-CK

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for dismissal. We affirm.

This action arises out of a fire on defendant's premises that damaged plaintiff's clothes, which were being stored there. Plaintiff initiated an action to recover damages, but that suit was dismissed without prejudice for her failure to comply with court orders. It appears from the scant record that plaintiff's case was significantly encumbered by her inability to maintain counsel. Four attorneys had withdrawn over the course of the first litigation, which had proceeded through discovery and was primed for a summary disposition motion. Plaintiff found a fifth attorney and filed a second action, this one. After plaintiff failed to appear at a scheduled ADR hearing, her attorney moved to withdraw. The attorney cited plaintiff's lack of cooperation, and the trial court indicated its willingness to dismiss the case with prejudice, because the suit could not move forward without plaintiff's participation. Although the trial court indicated that it would dismiss the case, it did not sign defendant's proposed order until after it held a separate hearing and heard plaintiff's pro se arguments against the order. After the hearing, the trial court again cited the lack of progress and entered the order.

On appeal, plaintiff first argues that the trial court's order of dismissal was erroneous because it was not made at the type of hearing contemplated by MCR 2.119(A)(1). We disagree. According to MCR 2.119(A)(1), a motion must be made in writing "[u]nless made during a hearing or trial . . . ." MCR 2.119(A)(1). Here, because defendant made an oral motion for dismissal at a hearing, the motion conformed to the requirements of MCR 2.119(A)(1). The hearing was on plaintiff's attorney's motion to withdraw, and although plaintiff received notice of the hearing, she did not appear to oppose the motion. Moreover, the dismissal order was not entered by the trial court until after plaintiff had an opportunity to dispute it with several motions

and a separate adversarial hearing held more than a month later. Therefore, the trial court did not err by considering defendant's oral motion.

Next, plaintiff argues that the order of dismissal was erroneous because the facilitation order did not require plaintiff's attendance at the facilitation proceeding. We disagree. In its facilitation order, the trial court expressly provided that "the [f]acilitator is free to undertake whatever investigation he deems appropriate, including, but not limited to, consultation with the parties and their counsel." The record reflects that plaintiff's counsel informed plaintiff in writing of the mandatory nature of facilitation, and plaintiff acknowledges receipt of those letters. The final letter, received less than three weeks before the facilitation hearing and more than a week after the hearing was set, indicated plaintiff's ongoing communication with her counsel regarding her stalwart unwillingness to participate in facilitation. "Failure of a party or the party's attorney . . . to attend a scheduled ADR proceeding, as directed by the court, may constitute . . . a ground for dismissal under MCR 2.504(B)." MCR 2.410(D)(3)(a). Because the trial court's order plainly conveys that failure to adhere to the facilitator's investigative measures would constitute a failure to adhere to the facilitation order, the trial court did not err by holding that plaintiff violated its order. The trial court's facilitation order provided plaintiff with an avenue to challenge or clarify any action of the facilitator, and plaintiff did not pursue this alternative course. Instead, she simply failed to appear without adequate explanation.<sup>1</sup>

Last, plaintiff argues that the trial court erred by entering the order of dismissal. We disagree. We review for abuse of discretion a trial court's decision to dismiss an action. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993). "The court shall excuse a failure to attend an ADR proceeding, and shall enter a just order other than one of default or dismissal, if the court finds that (i) entry of an order of default or dismissal would cause manifest injustice; or (ii) the failure to attend was not due to the culpable negligence of the party or the party's attorney." MCR 2.410(D)(3)(b). Except for plaintiff's tenuous argument to the contrary, everything in the record indicates that plaintiff's failure to appear was deliberate, and that it was due in substantial part to plaintiff's inability to support her damages claim. The trial court specifically noted plaintiff's recidivism regarding her failure to prosecute her claims, as well as her repeated inability to cooperate with her own counsel. She did nothing to cure the defect but renew her request for more time, and the trial court specifically noted that defendant suffered prejudice every time plaintiff was given another chance to prolong or renew her case. Therefore, the trial court's findings comported with *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995), and it did not abuse its discretion by dismissing this case.

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<sup>1</sup> Plaintiff did not provide a doctor's excuse covering the relevant time period, and her attorney had no explanation for her failure to appear. The trial court was not required to accept her argument that she lacked notice of the hearing, especially in light of the strong evidence to the contrary.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood