

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

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OSPREY EAST,

Plaintiff-Appellant,

v

MICHAEL BIBER, OSPREY S.A., LTD., DOUG  
BLATT, JOHN BLATT, and CHARLES A.  
PINKERTON, III,

Defendants-Appellees.

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UNPUBLISHED  
September 2, 2014

No. 313691  
Livingston Circuit Court  
LC No. 12-026604-CZ

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Plaintiff Osprey East appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(6) to defendants Michael Biber, Osprey S.A., Ltd., Doug Blatt, John Blatt, and Charles Pinkerton, III, and thereby dismissing plaintiff's complaint for monetary damages for breach of contract and fiduciary duty, conversion, civil conspiracy to convert or embezzle, declaratory judgment, and unjust enrichment, as well as other declaratory relief. We affirm.

Biber is an attorney who represented Webber Investment Company and Webber Development Company (collectively, the Webber Entities). He also represented Doug Blatt, John Blatt, and Pinkerton (collectively, the secondary investors). The Blatts, Biber, and Pinkerton formed Osprey S.A. to invest in real estate sometime prior to 2000. In 2003, the Webber Entities joined Osprey S.A. to form Osprey East also to invest in real estate. The Webber Entities own 50% of Osprey East and Osprey S.A. owns the other 50%. Plaintiff alleged that in 2006, Biber and Osprey S.A. began diverting large sums of money to themselves and caused Osprey East to fail to distribute cash flow to its members and made material transactions without the votes required by the operating agreement.

In August 2010, Osprey East, at the direction of Osprey S.A., filed a complaint against Osprey S.A. and the Webber Entities through attorney Kelly Myers. This is referred to as the Myers complaint. The Myers complaint sought declaratory relief regarding the parties' roles when Osprey S.A. exercised its option to sell its membership interest in Osprey East, payment of management fees and other expenses, reimbursement for overhead expenses, intercompany loans, and the ownership of Osprey Commerce Center. This action was consolidated with

another action that Osprey S.A. had filed against the Webber Entities, which contained the same allegations as the Myers' complaint, with the exception of one additional count. The Webber Entities also filed a counterclaim and a third-party complaint against Osprey S.A. to add Biber and the Lyon Properties Associates, of which Biber is the managing member, as third-party defendants. Their complaint sought monetary damages for breach of contract and fiduciary duty, fraudulent misrepresentation, oppression of minority members, legal malpractice, negligence, and innocent misrepresentation.

In December 2011, the parties to the consolidated action entered into a stipulated order agreeing not to add parties to the litigation except by a consent order or upon leave of the court after granting a motion filed *before* February 29, 2012. However, on February 29, 2012, the Webber Entities sought to amend its counter-complaint in the consolidated action to add a count against new third-party defendants, the Blatts and Pinkerton. The trial court denied the motion because it violated the stipulated order. That same day, Osprey East, admittedly at the direction of the Webber Entities, filed the present complaint, which was substantially similar in form to the Webber Entities' amended counter-complaint, and also contained much of the same claims already pending in the consolidated action. Consequently, defendants moved to dismiss the complaint pursuant to MCR 2.116(C)(6) due to the pending action involving the same parties and claims. The trial court granted all defendants' motions, determining that that the causes of action and the evidence is substantially the same and a line had to be drawn. The trial court also noted that the filing of the present action was "a very artful attempt" to avoid the stipulated order.

Subsequently, Osprey East moved for reconsideration, which was denied. Osprey East appealed to this Court, but the claim of appeal was dismissed for lack of jurisdiction because the trial court's May 24, 2012 order was not a final order because it did not dispose of the claims as to the Blatts or Pinkerton. *Osprey East v Biber*, unpublished order of the Court of Appeals, entered September 10, 2012 (Docket No. 311895). Consequently, the trial court entered a final order on October 9, 2012, dismissing all claims against all defendants with prejudice.

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendants pursuant to MCR 2.116(C)(6) and MCR 2.203(A) because the two actions did not involve the same parties and the same issues. Plaintiff also argues that the trial court erred in dismissing the case with prejudice as a sanction for failing to follow the court's order. We disagree.

We review motions for summary disposition *de novo* and a trial court's dismissal of a case for failure to comply with the court's orders for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999).

MCR 2.116(C)(6) allows for summary disposition when "[a]nother action has been initiated between the same parties involving the same claim." The rule "is a codification of the former plea of abatement by prior action." *Fast Air, Inc*, 235 Mich at 545. The purpose of the rule is described as follows:

“The courts quite uniformly agree that parties may not be harassed by new suits brought by the same plaintiff involving the same questions as those in *pending* litigation. If this were not so repeated suits involving useless expenditures of money and energy could be daily launched by a litigious plaintiff involving one and the same matter. Courts will not lend their aid to proceedings of such a character, and the holdings are quite uniform on this subject.” [*Id.* at 546, citing *Chapple v National Hardwood Co*, 234 Mich 296, 297; 207 NW 888 (1926).]

This Court has stated that

MCR 2.116(C)(6) does not require that all the parties and all the issues be identical. Rather, the two suits must be between the same parties and involving the same claims. Thus, complete identity of the parties is not necessary, and the two suits must be based on the same or substantially the same cause of action.” [*JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986).]

Here, the parties to the action are the same. Contrary to plaintiff’s argument, it is irrelevant whether the Webber Entities or Osprey S.A. directed Osprey East to file the two actions, Osprey East is still a party in the two actions. Additionally, although the second action adds Biber, the Blatts, and Pinkerton in their individual capacity, not all defendants have to be the same. MCR 2.116(C)(6) may still apply as long as the actions are based on substantially the same facts. See *Chapple*, 234 Mich at 299. Resolution of the present action requires examination of the same operative facts as in the first action, and both actions arise out of the same transaction or occurrence, that is Osprey S.A.’s mishandling of Osprey East’s money and assets. To allow the maintenance of the present action results in “useless expenditures of money and energy,” *id.* at 297, particularly considering that there had already been extensive discovery in the first action and the trial court was attempting to narrow the issues. Moreover, a majority of the issues in the present action will be litigated in the first action, and the claims against the secondary investors could have been added to the litigation in the first action. At the very least, if it is true, as plaintiff argues, that attorney Myers declined to add the secondary investors as parties in the first action due to a conflict, the Webber Entities on behalf of Osprey East could have sought out another attorney and added the secondary investors before the February 29, 2012 deadline ordered by the trial court. Instead, the Webber Entities moved to amend their counterclaim and third-party complaint, knowing it was filed untimely in violation of the stipulated order, and also filed the present action acting under Osprey East, raising the same claims they sought to include in the amended counterclaim and third-party complaint. This is exactly the type of litigious harassment that MCR 2.116(C)(6) seeks to avoid.

Plaintiff relies on *Frohiop v Flanagan*, 275 Mich App 456; 739 NW2d 645, judgment rev’d in part 480 Mich 962 (2007), for the proposition that even though the lawsuit arises out of the same set of facts and the parties are similar, MCR 2.116(C)(6) does not apply because the two suits request different relief. Plaintiff is correct that *Frohiop* states that as a general rule, the same relief must be sought in each action. *Id.* at 465. However, whether the same relief is sought is only one consideration. And although the second action added claims for monetary damages, it also sought declaratory relief like the first action. Further, with the exception of a

few, the claims seeking monetary damages in the present action were almost identical to the Webber Entities' claims in their counterclaim and third-party complaint which also sought monetary damages against Biber and Osprey S.A.. Although the Webber Entities and Osprey East are two distinct entities, it is clear that in the present case the Webber Entities were using Osprey East as a vehicle to advance claims against parties that the trial court had dismissed in the first action.

Plaintiff also argues that MCR 2.203(E) required the trial court to specify in its order dismissing the Webber Entities' motion to amend its counterclaim that litigation of those claims in another action is precluded, and its failure to do so permits plaintiff to bring the claims in the present action. However, Osprey East never filed a counterclaim in the first action, only the Webber Entities did, and these are two distinct parties.

Further, at least with respect to Osprey S.A., the present cause of action was precluded by the compulsory-joinder rule, MCR 2.203(A), which provides,

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the 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.

Thus, the claims asserted by Osprey East against Osprey S.A. in the present action were required to have been brought in the first action because, as discussed, they arise out of the same transaction or occurrence. However, MCR 2.203(A) would not apply to the claims asserted against the secondary investors because in the first action, Osprey East never filed a pleading against the secondary investors. The language of the rule is clear that the pleader must join every claim it has against *that* opposing party. Nevertheless, summary disposition for the secondary investors was still appropriate under MCR 2.116(C)(6).

Accordingly, the trial court did not err in granting summary disposition to all defendants pursuant to MCR 2.116(C)(6).

Additionally, plaintiff has failed to show how the trial court abused its discretion in dismissing the case with prejudice as a sanction for failure to comply with its order. "Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Maldonado*, 476 Mich at 388. "The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process." *Cummings v Wayne Co*, 210 Mich App 249, 252; 533 NW2d 13 (1995). "[T]he Michigan Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *Maldonado*, 476 Mich at 389. Additionally, both statute and court rule confer express authority on the trial court to dismiss a complaint. *Id.* at 391. MCL 600.611 provides, "Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." And MCR 2.504(B)(1) provides, "If a party fails to comply with [the court] rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims."

Here, the trial court entered an order in the first action that the parties stipulated to, that provided that “no additional parties shall be added to this litigation except by consent order filed *prior to* February 29, 2012 or upon leave of court after granting a motion filed prior to the same date.” (Emphasis added). Nevertheless, the Webber Entities sought to amend their counter-complaint in the first action on February 29, 2012, to add the secondary investors as parties, knowing that the motion was filed in violation of the stipulated order. At the same time, the Webber Entities filed the present action on behalf of Osprey East to assert the claims against the secondary investors. It is clear that the Webber Entities used Osprey East as a vehicle to circumvent the trial court’s order—an order that they themselves stipulated to. “The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants.” *Maldonado*, 476 Mich at 392.

Plaintiff argues that the trial court should have considered less-severe sanctions, but fails to identify those sanctions. Plaintiff further argues that the trial court was required to consider a list of factors in determining an appropriate sanction, but the authority plaintiff cites to support this assertion relates to violations of discovery requests, not all court orders. Regardless of how harsh the sanction was, the trial court made it clear that it was exercising its power to dismiss the case to effectuate its order in the first action, which was entered to control the litigation before it. Thus, the trial court was acting within its inherent power.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens

/s/ Stephen L. Borrello