

STATE OF MICHIGAN
COURT OF APPEALS

XPLOR INDUSTRIAL COMPLEX, L.L.C.,

Plaintiff-Appellant,

v

SIGNATURE BANK,

Defendant-Appellee.

UNPUBLISHED

May 10, 2012

No. 303174

Lapeer Circuit Court

LC No. 11-043608-CH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Xplor Industrial Complex, LLC, appeals as of right the order granting defendant, Signature Bank's motion to strike plaintiff's complaint and for default judgment. We affirm.

Plaintiff is a limited liability corporation that filed a hand-written complaint in the circuit court seeking declaratory relief in what appears to involve a mortgage foreclosure action. Orville J. Ganstine serves as the registered agent for plaintiff and is asserted to be plaintiff's sole member. Plaintiff's complaint was not signed, in accordance with MCR 2.114(C), but merely read "Xplor Industrial Complex, LLC A Michigan Limited Liability Co." in the area provided for a signature on the preprinted complaint form. Ganstine did execute the proof of service for the complaint.

Defendant filed an answer and a motion to strike the complaint and, alternatively, seeking entry of a default judgment. Defendant based its motion on the failure of the complaint to evidence a signature as required by MCR 2.114(C) and asserted the necessity of having an attorney represent plaintiff, as a requirement of Michigan law. A copy of the motion mailed by defendant to the address listed on the complaint was returned as undeliverable. Additional copies were sent to alternative addresses and these additional copies were not returned by the U.S. Postal Service. Plaintiff failed to file an answer to the motion and did not appear for the scheduled hearing. As a result, on February 28, 2011, the trial court entered an order granting defendant's motion to strike and for default judgment. In its order, the trial court indicated that "Plaintiff's complaint is dismissed in its entirety." This appeal ensued.

Plaintiff contends, on appeal, that the trial court erred in using MCR 2.114(C) to dismiss the complaint and that it is entitled to an opportunity to cure any defect before dismissal of the

lawsuit. “This Court reviews discretionary decisions of the trial court for an abuse of discretion.” *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995).

Motions to strike are governed by MCR 2.115(B), which provides:

On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

See also, *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003), citing MCR 2.115(B). In turn, MCR 2.114(C) requires:

(1) *Requirement*. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.

(2) *Failure to Sign*. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party. [Emphasis in original.]

Plaintiff violated MCR 2.114(C) by failing to provide any signature in filing of the complaint. Hence, in accordance with MCR 2.114(C), the trial court did not abuse its discretion in striking plaintiff's complaint.

Plaintiff further asserts that the trial court erred in dismissing the complaint based on the absence of a signature rather than permitting it to correct the oversight or error by securing a signature “promptly after the omission is called to the attention of the party.” MCR 2.114(C)(2).

First, in reviewing the time frame of the events, we note that plaintiff filed the complaint on January 7, 2011. Defendant's motion and notice of hearing are dated February 18, 2011, with hearing scheduled for February 28, 2011. Plaintiff does not deny receipt of these pleadings or lack of awareness of the scheduled hearing. Yet, there is no indication or evidence that plaintiff sought or attempted to resubmit the complaint with a signature at any subsequent point before dismissal of the action by the trial court.

Because the relevant court rule fails to define the term “promptly,” we turn to a dictionary definition of the term as “[c]ourts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined. . . .” *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). *Random House Webster's College Dictionary* (1997) defines “prompt” as being “done, performed, delivered, etc. at once or without delay” or “quick to act or respond.” Plaintiff's failure to respond, upon receipt of notification of the technical error in failing to secure a signature for the complaint, within the ten-day timeframe from defendant's filing of the motion to the date of hearing, coupled with the failure to respond in any manner or appear for the hearing, is not consistent with “prompt” compliance as

contemplated by the court rule.¹ As such, the trial court did not err in striking plaintiff's complaint in accordance with MCR 2.114(C).

When imposing sanctions, a trial court is mandated to comply with procedures and safeguards delineated in the court rules. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007). Because dismissal is construed to be so severe a sanction, before its imposition there must be evidence or some consideration of previously identified relevant criteria, including but not necessarily limited to:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Woods v SLB Prop Mgmt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008).]

In this instance, the trial court indicated it was dismissing plaintiff's complaint premised on "MCR 2.114 and the case law supporting that" and in conjunction with plaintiff's failure to communicate or appear for the scheduled hearing. Due to plaintiff's failure to procure a signature on the complaint before filing and service, coupled with its lack of effort to correct this error "promptly" upon receipt of notice of the deficiency, there is no question that the trial court did not abuse its discretion in striking the complaint. After striking the complaint, as there existed no pleading on which to premise further proceedings, there was no error in, or alternative to, dismissal of the action.

Second, plaintiff fails to address that defendant sought entry of a default judgment in accordance with MCR 2.603. MCR 2.603(A) provides in relevant part:

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

Use of this court rule in seeking a default was both unnecessary and not proper procedurally. As noted, by striking plaintiff's complaint there was no other option but to dismiss the action due to the absence of an underlying pleading. Entry of a default serves the same purpose to secure a dismissal, which was already obtained through striking of plaintiff's complaint. Further,

¹ We note, application of the term "promptly" is consistent with our Supreme Court's definition of this term in the context of criminal law. Specifically, when addressing the time restrictions on a prosecutor for filing of a supplemental information the Court defined "promptly" as being "filed not more than 14 days. . . ." *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997), quoting *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), superseded in part by statute in *Ellis*, 224 Mich App at 754.

procedurally MCR 2.603(A) is not the correct method for seeking a dismissal in this action as the court rule references “a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend.” Defendant was not seeking a judgment, merely a dismissal premised on a technical error in pleading. There was no argument or assertion of a right to dismissal premised on the merits of plaintiff’s complaint. As such, reliance on MCR 2.603 did not comprise a proper mechanism for seeking a dismissal.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan