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STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF ERIC FRENCH, by AMANDA ANKENY, Personal Representative, Plaintiff-Appellant,	UNPUBLISHED January 13, 2022
v	No. 355419 Livingston Circuit Court LC No. 20-030819-NI
LIFE CHRISTIAN CHURCH INTERNATIONAL INC., Defendant-Appellee.	

Before: GLEICHER, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

When plaintiff's counsel discovered the existence of a second possible defendant in an ongoing wrongful death suit, he filed a second lawsuit instead of moving to amend the original complaint. The questions presented here are whether the circuit court properly dismissed the second case, and whether counsel's conduct was sanctionable. We need not spend much time on the first question as the original complaint was subsequently amended to add the new defendant. In retrospect, counsel's explanation for his decision to file a second case was somewhat questionable. But contrary to the circuit court's ruling, the filing did not contravene the court rules. We affirm the dismissal of the second case and reverse the award of sanctions.

I. BACKGROUND

On August 27, 2017, Eric French, an unlicensed apprentice electrician, was fatally electrocuted while performing electrical repairs at Life Christian Church of Howell (LCC Howell). On December 2, 2019, French's estate filed suit in Livingston Circuit Court Docket No. 19-030583-NO against LCC Howell, "John Does 1-5," "Church Leader," and Sarah Gardner, LCC Howell's president. The estate alleged that French's death resulted from defendants' negligence. The complaint raised four counts: (1) violations of state and federal workplace safety laws and the Michigan electrical code, (2) res ipsa loquitor, (3) premises liability with an unreasonably dangerous special aspect in avoidance of the open and obvious doctrine, and (4) general negligence.

In March 2020, during discovery, defendants produced LCC Howell's insurance declarations page, identifying Life Christian Church International, Inc. (LCC International) as the named insured. The estate did not immediately act on this information. Indeed, at a May 14, 2020 hearing on defendants' motion for summary disposition under MCR 2.116(C)(8), the estate's counsel suggested amending the complaint to reflect that Count I was based in negligence rather than on a private cause of action for the cited statutory violations, but did not mention amending the complaint to add LCC International as a defendant.[1]

On June 29, counsel for the estate sought defense counsel's consent to the addition of LCC International as a named defendant, asserting that "it appears that [LCC International] and Defendant, [LCC Howell], are one and the same or alter ego of the other." Defense counsel refused because the estate had "not articulated the alleged theory of liability against [LCC International], nor provided a proposed draft Amended Complaint outlining [the estate's] theory against it . . . ." Rather than filing a motion to amend the complaint, the estate filed the current lawsuit in Livingston Circuit Court Docket No. 20-030819-NI. The 2020 complaint named as defendants LCC International, "John Does 1-5," "Church Leaders," and "Ministers." The complaint described LCC Howell as "a subsidiary, agent, managing agent, representative, and/or alter ego of" LCC International, and alleged that either LCC Howell or LCC International "is the parent, subsidiary of the other and/or are sister corporations," such that their "relationship renders vicarious liability for each other." The complaint raised two counts: (1) "premises liability special aspects 'unreasonably dangerous', violation of statutes and safety regulations, res ipsa loquitor," and (2) "general negligence, violations of statutes, safety rules, res ipsa loquitor."

In the 2020 action, defendants moved for summary disposition pursuant to MCR 2.116(C)(6), arguing that the 2020 action involved the same claims as the 2019 action and, at least according to the estate, the same parties. They also requested sanctions under MCR 1.109(E). Defendants argued that the estate's proper recourse after defense counsel denied its request to add LCC International as a party in the 2019 action was to file a motion to amend with the court. Instead, the estate "sidestepp[ed] the procedural requirements of the Court Rules" by filing a new action. Defendants further complained that the estate used the new complaint to repackage and revive the first two negligence counts that had been summarily dismissed in the 2019 case. In answers to interrogatories submitted a short time later, defendants conceded that "[LCC Howell] and [LCC International] are separate non-profit entities with separate tax identification numbers and back accounts."

In response to defendants' summary disposition motion in the 2020 case, the estate contended that neither summary disposition nor sanctions were appropriate. Although the estate initially believed LCC Howell and LCC International were essentially the same party, those entities denied such a relationship and, in fact, the entities are different corporations. Moreover, the speed of discovery and the court proceedings had been slowed by the COVID pandemic. As a result, the estate's attorney feared that a motion to amend the complaint in the 2019 action would not be resolved before the statute of limitations expired. To avoid this difficulty, counsel decided to file a new action against LCC International and then move to join the two.

[1] At this hearing the court dismissed the first two counts raised in the estate's 2019 complaint.

At the hearing this motion, defense counsel reiterated her position that LCC Howell and LCC International "are separate legal entities." But defendants also argued that the estate had the necessary information and could have acted sooner in the 2019 action to move to add LCC International as a named defendant. The court asked the estate why it had not sought an amendment and the estate reiterated its concern regarding the statute of limitations.

The court ultimately agreed with defendants and dismissed the 2020 action in its entirety and imposed sanctions against it totaling $3,254.50. The estate subsequently filed a motion to amend the complaint in the 2019 action, which was granted.

The estate now appeals the dismissal of the 2020 action and the imposition of sanctions.

II. SUMMARY DISPOSITION

The estate challenges the summary dismissal of the 2020 complaint under MCR 2.116(C)(6) as LCC International and LCC Howell correctly argued that the two entities are not the same party.

Summary disposition is appropriate under MCR 2.116(C)(6) when "[a]nother action has been initiated between *the same parties* involving the same claim." (Emphasis added.) The circuit court determined that the 2020 action involved the same parties and same claims as the 2019 action and therefore dismissed the 2020 action in its entirety. This ruling was clearly erroneous. The two parties were not the same, as defendant readily conceded (and strenuously argued in the circuit court). But shortly after committing this error, the circuit court allowed the estate to amend the complaint in the 2019 action to name LCC International as a defendant and to raise the same claims against LCC International as against LCC Howell. The court's order in the 2019 action rendered the estate's current argument regarding its ability to file and pursue the 2020 complaint moot.

"An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144, 147; 799 NW2d 579 (2010). "An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). We have a duty "to consider and decide actual cases and controversies," and so "generally do not address moot questions or declare legal principles that have no practical effect in a case." *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) (quotation marks and citations omitted).

When the court permitted the estate to amend the complaint in the 2019 action, the estate got the relief it sought—the ability to file the same claims against LCC International as against LCC Howell. Even if the summary dismissal of the 2020 action was improper at the time, it certainly would now be warranted because LCC International is a named defendant in the 2019 action and the 2019 complaint raises the same claims as the 2020 complaint. And even if reinstated, the 2020 action would simply be joined with the 2019 action, which now includes all the same parties and all the same claims. See MCR 2.205(A). Because there is no remedy we could fashion that would have any practical effect on an existing controversy, this issue is moot and we need not address it further.

III. SANCTIONS

The estate further challenges the imposition of sanctions against it under MCR 1.109(E)(5) and (6). As a general rule, we review for an abuse of discretion a trial court's decision to impose sanctions against a party in a lawsuit. *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 76; 903 NW2d 197 (2017). We review for clear error a trial court's underlying determination that sanctions are warranted because a pleading filed by a party is frivolous. *Id*. at 75. "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id*. at 75-76 (quotation marks and citation omitted).

This Court has held that sanctions are appropriate "where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose." *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 707; 950 NW2d 502 (2019) (quotation marks and citation omitted). The court awarded sanctions in this case under MCR 1.109(E), which provides in relevant part:

> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
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> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact *and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law*; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages. [Emphasis added.]

The record reflects that before filing the second case, plaintiff's counsel sought defense counsel's concurrence to an amendment of the complaint adding LCC International. Defense counsel refused, claiming that counsel "had not articulated the alleged theory of liability . . . nor provided a proposed draft" of the amended complaint. While in hindsight plaintiff's counsel's choice to file a second action could be characterized as ill-advised, the second case was not frivolous, and defense counsel's reflexive (and ultimately meritless) refusal to stipulate to an amendment should not result in a reward of sanctions.

As discussed above, MCR 2.116(C)(6) did not preclude the estate from filing a second case involving a different defendant. MCR 2.203(A) requires a party to "join every claim the pleader has against [an] 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." MCR 2.205(A) similarly requires all necessary parties to be joined in one action: "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests." The estate asserts that it intended to join the two cases consistent with these rules.

To the extent that the circuit court ruled that the estate's action violated the joinder rules, the court again erred. Joinder rules control the administration of cases that have already been filed; they do not preclude filing a second claim involving the same parties or issues as a pending action. Indeed, these rules contemplate that separately filed cases may involve the same parties and allegations and therefore require post-filing joinder. And the sanction for a party's failure to join cases falling within the joinder rules is baked into the law through the doctrine of res judicata.

With 20/20 hindsight, we agree that the preferable method for bringing LCC International into the action was to seek an amendment of the 2019 complaint. When defense counsel denied consent to an amendment, the estate probably should have sought leave of the court to file an amended complaint. MCR 2.118(A)(2). Plaintiff's statute of limitations concerns regarding any COVID-related or other delays in having its motion to amend timely heard and decided by the circuit court were groundless. The statute of limitations is tolled during the time a motion to amend the complaint to add parties is pending as long as the moving party is reasonably diligent in seeking amendment. See *Charpentier v Young*, 403 Mich 851; 291 NW2d 926 (1978), *McNeil v Quines*, 195 Mich App 199, 203; 489 NW2d 180 (1992); and *Fagerberg v LeBlanc*, 164 Mich App 349, 354; 416 NW2d 438 (1987).

Nevertheless, MCR 1.109(E)(5)(b), the court rule relied upon by the circuit court when assessing sanctions, does not provide a vehicle for penalizing the estate or counsel. Counsel did not violate the court rules or existing law by filing the second case, contrary to the circuit court's ruling. Accordingly, MCR 1.109(E)(5)(b) is simply inapposite. Less than optimal litigation choices that are neither frivolous nor rise to the level of court rule violations are simply not sanctionable under MCR 1.109(E)(5)(b).

We affirm the dismissal of this action and reverse the award of sanctions.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause