STATE OF MICHIGAN

COURT OF APPEALS

DR. KENNETH BROWN and KATHERINE ANNE THOMPSON,

Plaintiffs-Appellants,

v

DR. KAREN MILNER,

Defendant,

and

DR. DAN ANDREWS and UNIVERSITY HEALTH SERVICES,

Defendants-Appellees.

UNPUBLISHED
July 3, 2007

No. 274490
Washtenaw Circuit Court
LC No. 06-000142-CH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right the summary dismissal of their medical malpractice case pursuant to MCR 2.116(I)(1) on the ground that the statute of limitations barred their claims.[1] We reverse and remand for further proceedings.

Plaintiff filed his complaint on February 3, 2006, alleging that defendants failed to properly diagnose and treat his bipolar disorder. The complaint averred that plaintiff was treated by Dr. Karen Milner at University Health Services "between 1993 and 1995" for depression—a misdiagnosis. On April 23, 1996, plaintiff "began to talk to" Dr. Dan Andrews at University Health Services "about his recurring depression." Plaintiff averred that "over the next four years," he "was switched on and off different antidepressant medications six times." In "early 2005" plaintiff averred, he was diagnosed by a psychologist as suffering from bipolar disorder. This diagnosis was subsequently confirmed by a psychiatrist. Plaintiff alleged that defendants' professional negligence—including misdiagnosis, failure to confer on his treatment, and prescribing medications without proper evaluations—resulted in him changing jobs multiple

[1] We refer to Dr. Kenneth Brown as "plaintiff" in the remainder of this opinion because Katherine Anne Thompson's loss of consortium claim is derivative.

times, failing in business, going bankrupt three times, getting divorced twice, committing a felony sex crime, and other consequences and damages.

On August 4, 2006, defendant Dr. Karen Milner filed her motion for summary disposition pursuant to MCR 2.116(C)(8). Defendant Milner argued that the claim against her was barred by the statute of limitations, MCL 600.5838a(2), because the alleged malpractice occurred more than six years before the action was commenced. Without holding oral arguments, on September 21, 2006, the court issued its opinion and "order granting defendant's motion for summary disposition." The court noted that plaintiff failed to file a response to the motion. It then held that

> [h]aving reviewed Plaintiff's complaint in its entirety and Defendant's motion, this Court finds that even drawing all reasonable inferences from the complaint, this claim was filed more than six years after the allegedly incorrect diagnosis that is the basis of Plaintiff's claim. Pursuant to MCLA 600.5838a(2), therefore, Plaintiff's claim is barred by the applicable statute of limitations and summary disposition pursuant to MCR 2.116(C)(7) is appropriate.

The court then noted that "[t]his is a final order of the Court which resolves all claims between the parties and closes this case."

On October 10, 2006, plaintiff filed a motion pursuant to "MCR 2.612(A)(1) and (C)(1)(a)(f)," arguing that although the claim against defendant Dr. Milner was barred by the statute of repose, MCL 600.5838a(2), the claims against defendants Dr. Andrews and University Health Services were timely because they were filed within six months of actual or constructive discovery of the malpractice. Plaintiff admitted that the complaint may have been misleading as to the dates of treatment, but implied that amendment to his complaint to reflect that he had continued to see Dr. Andrews through September 8, 2004, was the proper remedy. Plaintiff attached medical records in support of his claim, which referenced his depression, medication, and thoughts of suicide on that date. Plaintiff indicated that discovery was in its earliest stages at the time of the dismissal and that he had never been notified that dismissal of his case in its entirety was a possibility. Plaintiff argued that he could not have anticipated dismissal because defendants Dr. Andrews and University Health Services never filed a motion for summary dismissal. Thus, plaintiff argued, his due process rights to notice and a hearing were denied entitling him to relief from judgment under MCR 2.612.

Defendants filed a response to plaintiff's motion and argued that plaintiff filed his notice of intent on August 8, 2005, thus, any alleged malpractice had to have occurred within two years of that date. Because plaintiff only alleged malpractice purportedly occurring between 1996 and 2000, the claim was barred by the two-year statute of limitation. Further, defendants argued, plaintiff failed to allege that his claims fell within the discovery rule exception to the two-year limitation but even if he had, plaintiff "must have known that he suffered from a bi-polar disorder during the entire time he was treated by Dr. Andrews" and "that a diagnosis of ordinary depression could not explain his symptoms." Defendants also argued that plaintiff was seeking damages resulting from his conviction of criminal sexual conduct but he committed that crime in July of 2004, before he even discussed his alleged depression with Dr. Andrews. And, in any case, the wrongful conduct rule barred plaintiff's claims because plaintiff was attempting to

recover damages incurred as a result of his criminal sexual conduct conviction which is prohibited.

On October 20, 2006, oral arguments were held on the motion for reconsideration. Plaintiff's counsel reiterated that plaintiff did not have the opportunity to argue against the dismissal of the case against Dr. Andrews because dismissal was never requested. Therefore, plaintiff requested that the court reverse its dismissal of the claims against Dr. Andrews. Defendants argued that even if the court reversed that decision, the complaint still did not state a cause of action against Dr. Andrews. However, even if the complaint was amended, defense counsel argued, because plaintiff was seeking damages that resulted from his commission of criminal sexual conduct, the wrongful conduct rule precluded recovery. Plaintiff's counsel requested that he be allowed to amend the complaint. And, plaintiff's counsel argued, the wrongful conduct rule was not the basis for the court's dismissal; thus, it should not be the basis for the denial of plaintiff's request to reinstate the case. After hearing the arguments, the court held that the court rules allow it to sua sponte dismiss an action on the pleadings and any amendment to the complaint would be futile. The court then held that it was adopting defendants' "brief as findings of fact or conclusions of law" and plaintiff's motion was denied. This appeal followed.

Plaintiff argues that his case should not have been dismissed in its entirety because defendants Dr. Andrews and University Health Services did not even request dismissal. We review de novo the grant of summary disposition. See *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004).

This case was dismissed in its entirety pursuant to MCR 2.116(C)(7) on the ground that it "was filed more than six years after the allegedly incorrect diagnosis that is the basis of Plaintiff's claim." But, as to defendants Dr. Andrews and University Health Services, it was dismissed on the court's own motion under MCR 2.116(I)(1).[2] Plaintiff first claims that because Dr. Andrews and University Health Services did not file a motion for summary disposition, the case against them should not have been dismissed. However, as we held in *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006), no such motion is necessary under MCR 2.116(I)(1).

Plaintiff next claims that the sua sponte dismissal constituted a denial of due process because "[i]n civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker." Plaintiff relies on *Cummings v Wayne Co*, 210 Mich App 249; 533 NW2d 13 (1995) in support of his argument but that reliance is misplaced because, in *Cummings*, the plaintiff's case was dismissed as a sanction for misconduct—not on the ground that a party was entitled to judgment as a matter of law. *Id*. at 253-254.

[2] The order of dismissal stated that the case was dismissed under MCR 2.116(C)(7), but at the hearing on plaintiff's motion for relief from judgment the trial court held that it dismissed the claims at issue under MCR 2.116(I)(1) ("the court rules do allow on a motion for the Court on its' own motion in looking at the pleadings and what is before it, to rule under I2 [sic]").

Under MCR 2.116(I)(1), "[i]f the pleadings show that a party is entitled to judgment as a matter of law . . . the court shall render judgment without delay." Notice and a hearing related to an impending judgment is not required by the rule. And, neither is necessary to protect the due process rights of the party who will be offended by the impending judgment because parties are expected to submit and rely on pleadings that support their legal positions; in a plaintiff's case, a complaint must state a viable cause of action. See MCR 2.110(A). Thus, if it can be gleaned from the pleadings that a statue of limitations bars an action, the court must render judgment without delay. See *Hover v Chrysler Corp*, 209 Mich App 314, 317; 530 NW2d 96 (1994).

In this case, however, it appears that the trial court may have dismissed the case in its entirety by mistake. Only Dr. Milner filed a motion for summary disposition. The trial court's order granting the motion refers repeatedly only to "defendant," in the singular. The order never made reference to the fact that there was more than one defendant. The only way that one could surmise that the other defendants were beneficiaries of the dismissal was through the final sentence of the order indicating that it was a final order "which resolves all claims between the parties and closes this case." There is no other indication that defendants Dr. Andrews and University Health Center were summarily dismissed.

Nevertheless, the trial court affirmed its decision to dismiss defendants Dr. Andrews and University Health Center when it denied plaintiff's request to amend his complaint and his motion for relief from judgment. We conclude that the trial court abused its discretion. See *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999); *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996).

In his motion for relief from judgment, plaintiff presented evidence which tended to establish that he sought care and treatment from Dr. Andrews at University Health Center for a misdiagnosed condition through September 8, 2004. He purportedly learned of the misdiagnosis in "early 2005." Plaintiff filed his notice of intent on August 8, 2005. During the hearing on the motion plaintiff requested to amend his complaint to include that the alleged negligent treatment occurred within two years of the filing of his notice of intent and that he discovered his claims within six months of the filing of the action. Without explanation, the trial court held that amendment would be futile.

Under MCL 600.5805(6), a medical malpractice plaintiff has two years from the date the cause of action accrued in which to file an action. A cause of action "accrues at the time of the act or omission that is the basis for the claim of medical malpractice." MCL 600.5838a(1). But, under MCL 600.5838a(2), an action can be filed within six months after the plaintiff discovered or should have discovered the existence of the claim, as long as it is within six years of its accrual.

Under MCR 2.118(A)(2), leave to amend a pleading "shall be freely given when justice so requires." A motion to amend "ordinarily should be granted," absent "particularized reasons," including futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). In this case, it is unclear why the trial court held that any amendment to the complaint would be futile; therefore, we remand this matter to the trial court for reconsideration of plaintiff's request to amend his complaint.

In addition, the trial court indicated that it was adopting defendants' "brief as findings of fact or conclusions of law" as sole support for its decision to deny plaintiff's motion for relief from judgment. But, most of defendants' suggested justifications for denying plaintiff relief turned on factual determinations, not legal determinations. For example, that plaintiff "must have known that he suffered from a bi-polar disorder" is not dispositive of plaintiff's claim that he discovered the malpractice within six months of filing his case. And, defendants appear to have mischaracterized plaintiff's claim for damages as resulting solely from his criminal sexual misconduct conviction—a conviction which defendants repeatedly and gratuitously interjected into their arguments. Thus, it appears that the trial court's decision to deny plaintiff's motion for relief from judgment was not justified and that decision is reversed. See MCR 2.612(C)(1)(f); *Heugel*, *supra* at 478-479.

In sum, it appears from the trial court's order of dismissal that it only intended to summarily dismiss plaintiff's claims against defendant Dr. Milner but, instead, the entire case was dismissed. Plaintiff subsequently sought relief from that judgment and leave to amend his complaint, but such relief was denied. Because it is unclear that amendment to plaintiff's complaint would be futile, we remand that matter to the trial court for reconsideration of plaintiff's request. And, under the circumstances, we conclude that plaintiff was entitled to relief from judgment under MCR 2.612(C)(1)(f) with regard to his claims against defendants Dr. Andrews and University Health Center.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter