

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

DR. YASSER HAMMOUD

Plaintiff,

vs.

Case No. 2016-2260-CB

LOUIS LAPIANA, TONY
LAPIANA, and DANIEL
GORCZYCA,

Defendants.

CARMELLA S. VON JON
MACOMB COUNTY CLERK
MT. CLEMENS, MI 48033

2016 AUG 10 AM 10:56

FILED

OPINION AND ORDER

This matter is before the Court on plaintiff Dr. Yasser Hammoud’s “motion to set aside miscellaneous order and to reopen case.”

I. Background

On January 7, 2016, plaintiff Dr. Yasser Hammoud filed a complaint in the Wayne County Circuit Court (“Wayne County”) alleging that defendants Louis Lapiana, Tony Lapiana, and Daniel Gorczyca (collectively “defendants”) fraudulently induced him to enter into an operating agreement concerning the governance of ACO Administrators, LLC (“ACOA”). On April 15, 2016, the Honorable Maria L. Oxholm granted defendants’ motion for change of venue and entered an order transferring the matter to the Macomb County Circuit Court (“Macomb County”). On April 22, 2016, plaintiff filed a motion for reconsideration in Wayne County. On June 10, 2016, Judge Oxholm denied plaintiff’s motion for reconsideration pursuant to MCR 2.119(F)(3).

On June 22, 2016, plaintiff filed an application for leave to appeal Judge Oxholm's order granting defendants' motion for change of venue. Plaintiff also filed a concurrent motion in Wayne County to stay proceedings pending the Michigan Court of Appeals' decision on plaintiff's application.

On June 29, 2016, this Court entered an order dismissing plaintiff's case "due to the plaintiff failing to pay the required filing fee within 56 days of the date of" Wayne County's order granting defendants' motion for change of venue pursuant to MCR 2.223(B)(2). Thereafter, on July 13, 2016, plaintiff filed the instant motion to set aside the June 29, 2016 order. On July 21, 2016, defendants filed a response in opposition to plaintiff's motion to set aside the dismissal and reopen the case. On August 1, 2016, the Court heard the parties' arguments and took the matter under advisement.

II. Arguments of the Parties

Plaintiff argues the Court should set aside the order dismissing the case due to failure to timely pay the required filing fee because "he did not believe this action gets transferred until Wayne County ruled on the stay request." Plaintiff also claims his failure to pay the required filing fee within 56 days of Judge Oxholm's April 15, 2016 order, which transferred the case to Macomb County, is not grounds for dismissal because Wayne County retained jurisdiction over the case until it ruled on his motion for reconsideration. Accordingly, plaintiff asserts that he had 56 days from June 10, 2016 – the date Judge Oxholm denied his motion for reconsideration – to pay the filing fee in Macomb County. Alternatively, plaintiff contends the Court should grant relief from the order of dismissal pursuant to MCR 2.612(C)(1)(a) and (f) because his failure to timely pay the filing fee was attributable to "mistake, inadvertence, surprise, or excusable neglect" and circumstances justify relief from the order of dismissal.

Defendants aver that plaintiff's argument – that the 56 day time limit to pay the required filing fees under MCR 2.223(B)(2) was tolled until Wayne County ruled on plaintiff's motion for reconsideration – is contrary to the Michigan Court Rules and established case law governing the change of venue and jurisdiction. Defendants contend that because Wayne County was divested of its jurisdiction at the moment the order transferring venue to Macomb County was issued, plaintiff was required to pay the required filing fees within 56 days of April 15, 2016. According to defendants, Judge Oxholm lacked jurisdiction to even consider plaintiff's motion for reconsideration. Additionally, defendants argue that plaintiff is not entitled to relief under MCR 2.612(C)(1)(a) or (f) because plaintiff's "mistaken belief and ignorance of the law" is not a "mistake" or "excusable neglect."

IV. Law & Analysis

Plaintiff's case was dismissed on June 29, 2016 pursuant to MCR 2.223(B), which provides in pertinent part:

(1) The court shall order the change at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.

(2) After transfer, no further proceedings may be had in the action until the costs and expenses allowed under this rule have been paid. **If they are not paid within 56 days from the date of the order changing venue, the action must be dismissed by the court to which it was transferred.**

(Emphasis added).

The plain language of MCR 2.223(B)(2) mandates that the plaintiff pay the statutory filing fee to the court to which the action is transferred "within 56 days from the date of the order changing venue." MCR 2.223(B)(2) explicitly provides that if a plaintiff fails to comply with this requirement, the Court "must" dismiss the action. Here, the Court entered an order dismissing

plaintiff's case on June 29, 2016 – 75 days after Judge Oxholm granted Defendants' motion for change of venue on April 15, 2016. Nonetheless, plaintiff argues that Wayne County retained jurisdiction over the matter until it ruled on his motion for reconsideration and/or motion for a stay of proceedings, and thus, the 56 day time period did not begin to run until at least June 10, 2016. However, plaintiff's argument has been considered and rejected by the Michigan Court of Appeals.

In *Frankfurth v Detroit Med Ctr*, 297 Mich App 654; 825 NW2d 353 (2012), the Court held that “after the change of venue becomes effective, the transferee court has full jurisdiction of the action; consequently, the transferor court has none.” *Id.* at 658. The *Frankfurth* Court further stated that “the change of venue had immediate effect” and “the trial court was therefore immediately divested of any jurisdiction to entertain the motion for reconsideration or any other substantive issue other than the costs and expenses relative to the transfer.” *Id.* at 662.

Thus, despite plaintiff's beliefs to the contrary, when the order granting defendants' motion for change of venue was entered by Judge Oxholm, Wayne County was immediately divested of jurisdiction to entertain plaintiff's motion for reconsideration. Consequently, plaintiff was required to pay the statutory filing fee in this Court within 56 days of April 15, 2016 – the date the order transferring venue to Macomb County was entered. Because plaintiff failed to timely file the required filing fee, the Court's June 29, 2016 order dismissing plaintiff's case for failure to comply with MCR 2.223(B)(2) was properly entered.

Plaintiff alternatively argues that, even if the order of dismissal was properly entered, the Court should grant him relief from judgment under MCR 2.612(C)(1)(a) and (f). MCR 2.612 governs how a party may obtain relief from a judgment or order.

MCR 2.612(C)(1)(a) and (f) provide:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

* * *

(f) Any other reason justifying relief from the operation of the judgment.

“Mistake” for purposes of MCR 2.612(C)(1)(a) has been interpreted to mean “mutual mistake.” See *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984). Indeed, a claim of “mistake” should not be used as a means to “relieve counsel of ill-advised or careless decisions.” *Lark v Detroit Edison Co*, 99 Mich.App 280, 283; 297 NW2d 653 (1980).

MCR 2.612(C)(1)(f) “indisputably widens the potential avenues for granting relief from a judgment.” *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010). “But the competing concerns of finality and fairness counsel a cautious, balanced approach to subrule (f), lest the scale tip too far in either direction.” *Id.* “Thus, while permitting relief under this subrule for “any other reason” justifying it, our courts have long required the presence of both extraordinary circumstances and a demonstration that setting aside the judgment will not detrimentally affect the substantial rights of the opposing party.” *Id.*

In this case, plaintiff’s sole ground for seeking relief from judgment is his mistaken belief that the 56 day time period did not begin running until Wayne County ruled on his motion for reconsideration and/or motion for stay of proceedings. However, plaintiff’s failure to thoroughly research or understand the Michigan Court Rules and case law governing the change of venue is not a mutual “mistake” or “excusable neglect” that can be a basis for relief under MCR 2.612(C)(1)(a) or MCR 2.612(C)(1)(f). Indeed, plaintiff’s misapprehension of the law is not an

extraordinary circumstance under MCR 2.612. While the Court recognizes this is a harsh result and sympathizes with plaintiff's plight, "[p]laintiff had access to all the necessary information, and [plaintiff's counsel's] error is not excused by [his] own carelessness or lack of due diligence." *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 471 Mich 940; 690 NW2d 93 (2004).

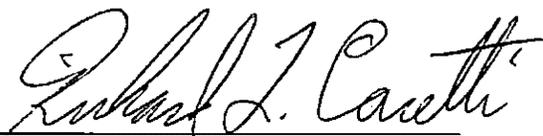
Therefore, because plaintiff has failed to show mutual "mistake" or "excusable neglect" or present any "other reason justifying relief" other than his counsel's own mistake, plaintiff's motion is properly denied.¹

V. Conclusion

For the reasons set forth above, plaintiff Dr. Yasser Hammoud's "motion to set aside miscellaneous order and to reopen case" is DENIED. Pursuant to MCR 2.602(A)(3), the case remains closed.

IT IS SO ORDERED.

DATED: AUG 10 2016



Hon. Richard L. Caretti
Circuit Judge

cc: Roger Canzano
Michael Wais

¹ Given the Court's conclusion, plaintiff's motion for a stay of proceedings is moot and need not be addressed.