STATE OF MICHIGAN

COURT OF APPEALS

TRINGA GOJCAJ, Personal Representative of the Estate of GJON GOJCAJ, Deceased,

Plaintiff-Appellee,

v

JENKINS CONSTRUCTION, INC., and APOSTOLOS GROUP, INC., d/b/a THOMARIOS,

Defendant,

and

HUBER HUNT & NICHOLS, INC.,

Defendant/Cross-Defendant-Appellant,

and

BROCKMAN E. LEASING, INC.,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
May 8, 2007

No. 267929
Wayne Circuit Court
LC No. 02-231976-NO

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Cross-defendant Huber, Hunt & Nichols ("Huber Hunt") appeals as of right from an order granting cross-plaintiff Brockman Leasing, Inc.'s motion for voluntary dismissal without prejudice, under MCR 2.540(A)(2). We affirm.

Huber Hunt contends initially that remand is necessary because the trial court failed to make necessary findings of fact or failed to balance the competing interests of the parties. We disagree.

"In actions *tried* on the facts without a jury . . . the court shall find the facts specially, [and] state separately its conclusions of law . . . ." MCR 2.517(A)(1) (emphasis added).

However, "[f]indings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4). The court rule governing voluntary dismissals, MCR 2.504(A)(2), provides:

> Except as provided in subrule (A)(1),[1] an action may not be dismissed at the plaintiff's request except by order of the court on the terms and conditions the court deems proper.[2]

The court rule does not require the court to make any findings. Therefore, the trial court's decision satisfies the court rule, and remand for specific findings is unwarranted. See *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). Additionally, because the trial court expressly adopted Brockman Leasing's arguments as the reasons for its decision, appellate review is not impeded.

We further disagree with Huber Hunt's contention that the trial court erred in granting Brockman Leasing's motion for involuntary dismissal without prejudice.

"The grant or denial of voluntary dismissal is within the discretion of the trial court." *McKelvie v City of Mount Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Thus, "[t]his Court will not set aside the grant or denial of a voluntary dismissal unless the circuit court's action was without justification." *McKelvie, supra* at 86.

In deciding whether to grant a request for voluntary dismissal, "the trial judge is to weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays." *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). "Normally, such a motion should be granted unless the defendant will be legally prejudiced by the result." *Id*. "However, plain legal prejudice does not result merely because defendant will be inconvenienced by having to defend in another forum."[3] *Burnette v Godshall*, 828 F Supp 1439, 1443 (ND Cal, 1993), aff'd 72 F3d 766 (CA 9, 1995). Similarly, in *McKelvie, supra* at 83, 86, this Court held that the trial court did not abuse its discretion in granting the plaintiffs' motion for voluntary dismissal, without prejudice, to allow the plaintiffs to pursue a parallel claim already pending in federal court. See also *Hamilton v Firestone Tire & Rubber Co*, 679 F2d 143, 145-146 (CA 9, 1982) (trial court did not abuse its discretion in

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[1] Subrule (A)(1) governs voluntary dismissals before the first responsive pleading is filed, or by stipulation of the parties, and does not apply to this case.

[2] MCR 2.504(A)(2) also applies to dismissals of cross-claims, such as the one at issue here. See MCR 2.504(C).

[3] Because the Michigan court rule is based on the nearly identical federal rule, and because there are few published Michigan cases on the question of voluntary dismissal, it is appropriate to look to federal cases for guidance. See *Bruce v Grace Hosp*, 96 Mich App 627, 630; 293 NW2d 654 (1980); see also *African Methodist Episcopal Church, supra* at 212 n 1.

granting the plaintiff's motion to dismiss his federal claim, without prejudice, to allow the plaintiff to pursue parallel claim pending in state court). Merely beginning trial preparations is not sufficient to show legal prejudice, and neither is the inconvenience of defending another lawsuit. *McKelvie*, *supra* at 86; *Hamilton*, *supra* at 145-146.

We agree that a motion for voluntary dismissal should not be granted where an adverse determination has been rendered, or to avoid an impending adverse determination. See *McLean v McElhaney*, 269 Mich App 196, 202-203; 711 NW2d 775 (2005), and *Rosselott v Co of Muskegon*, 123 Mich App 361, 375-376; 333 NW2d 282 (1983). But contrary to what Huber Hunt argues, the trial court's denial of Brockman Leasing's earlier motion for summary disposition was not an adverse determination of the merits of Brockman Leasing's indemnification claim. Rather, the trial court merely decided that summary disposition was inappropriate because there were questions of material fact that were necessary to resolve. The trial court's decision did not bar Brockman Leasing from pursuing their claim. Similarly, this Court's denial of Brockman Leasing's application for leave to appeal the earlier denial of summary disposition was not an adverse determination of the merits of Brockman Leasing's claim. Rather than addressing the merits of the claim, this Court denied the application "for failure to persuade the Court of the need for immediate appellate review." *Gojcaj v Jenkins Constr Co*, unpublished order of the Court of Appeals, entered April 13, 2005 (Docket No. 261252). Such a denial is not a determination of the merits. See, e.g., *Gross v Gen Motors Corp*, 199 Mich App 620, 625; 502 NW2d 365 (1993), rev'd on other grounds 448 Mich 147 (1995), and *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Whether a trial court abuses its discretion in granting a motion for voluntary dismissal depends heavily on the facts of the case. For example, in *Rosselott*, *supra*, the plaintiffs apparently realized, shortly before trial, that the theories pleaded in their complaint were meritless, and that other theories would need to be raised and researched. The plaintiffs then moved for voluntary dismissal, and informed the court that they were not prepared for trial and did not intend to appear for trial. *Rosselott*, *supra* at 374-375. The plaintiffs refused the trial court's offer to dismiss the arguably meritorious theories without prejudice, and dismiss the rest of the complaint with prejudice. *Id*. at 374-376. On appeal, this Court found that, having rejected the trial court's offer to preserve their arguably meritorious claims, and having informed the court that they would not appear for trial, the plaintiffs left the trial court with no alternative but to dismiss the entire action with prejudice. *Id*. at 375-376. This Court added that the defendants—who were prepared to go to trial—had spent considerable time and money defending the case, and would have to incur additional costs to defend a new action asserting new theories. *Id*. at 376. Thus, the defendants would be prejudiced by a dismissal without prejudice. *Id*. This Court concluded that the trial court had balanced the competing interests of the parties, and had not abused its discretion in dismissing the case, with prejudice. *Id*.

In *African Methodist Episcopal Church*, the defendants terminated their church memberships pursuant to a court order obtained by the plaintiffs. *African Methodist Episcopal Church*, *supra* at 212. In a prior appeal, this Court had found that the defendants had a meritorious defense to the plaintiffs' complaint. *Id*. On remand, the plaintiffs moved for voluntary dismissal without prejudice, and the trial court granted the motion. *Id*. at 211-212. On the defendants' appeal, this Court found that, if the plaintiffs chose not to pursue their complaint, the defendants should be returned to the position they occupied before the inception of the

lawsuit, and "should not be forced to bear the expense of a new lawsuit in which they would be plaintiffs," in order to regain their church membership. *Id*. at 212-213. Thus, the trial court abused its discretion in granting the plaintiffs' motion for voluntary dismissal without prejudice. *Id*. at 213. This Court held that, on remand for reconsideration, the plaintiffs' motion "shall be granted *only* upon such terms and conditions as will place the parties in the same positions they occupied prior to the inception of this suit." *Id*. (emphasis added).

In *Pear v Graham*, 258 Mich 161, 162; 241 NW 865 (1932), the plaintiff alleged unlawful interference with a contract between himself and Ralph Powers. Powers was in California, so the trial court agreed to postpone the scheduled trial date, to allow the plaintiff to depose him. *Id*. at 162-163. However, when Powers returned, the plaintiff failed to depose him, and moved for voluntary dismissal without prejudice, two days before trial. *Id*. at 163. The trial court denied the motion, and the case proceeded to trial, without any active participation by the plaintiff, where the defendant prevailed. *Id*. at 163-164. On appeal, the Supreme Court noted that the trial court was required to exercise its discretion to grant or deny the motion "with reference to the rights of both parties." *Id*. at 166. The Court found that, given the plaintiff's lack of diligence, the trial court did not abuse its discretion in denying the plaintiff's motion for voluntary dismissal. *Id*. at 166.

In the present case, at the time of dismissal, Brockman Leasing's cross-claim had been pending for approximately 18 months. While Huber Hunt had spent time and effort to defend Brockman Leasing's motion for summary disposition and motion for voluntary dismissal, it does not appear that any other proceedings took place in the trial court. Further, Brockman Leasing represented that any discovery obtained by the parties could be used in federal court—so that such efforts would not be wasted. While Brockman Leasing lost its motion for summary disposition, and this Court denied Brockman Leasing's application for leave to appeal, those decisions are not adverse determinations concerning the merits of Brockman Leasing's indemnification claim. There was also no impending adverse determination, such as a trial or a pending motion for summary disposition, that Brockman Leasing was attempting to evade.

We conclude that Huber Hunt failed to show that it was legally prejudiced by the voluntary dismissal of Brockman Leasing's claim, without prejudice. Brockman Leasing's desire to gain a tactical advantage was not grounds for denying its motion. The fact that Brockman Leasing will likely move for summary judgment in federal court is also not grounds for denying voluntary dismissal, given that Brockman Leasing could have renewed its motion in the circuit court. While Huber Hunt clearly spent some time and effort on this action, all discovery gathered in circuit court would be usable in federal court. Thus, even if the trial court could have denied the motion (without abusing its discretion), its decision to grant the motion was not outside the range of reasonable and principled outcomes.[4] The trial court did not abuse its discretion in granting Brockman Leasing's motion for voluntary dismissal without prejudice.

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[4] This standard implies that there may be more than one correct outcome. For example, in *McKelvie*, *supra* at 83, 86, this Court held that the trial court did not abuse its discretion in granting a voluntary dismissal *without* prejudice to allow the plaintiffs to pursue a parallel claim
(continued…)

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

(…continued)

already pending in federal court. Conversely, in *Padgitt v Lapeer Co Gen Hosp*, 166 Mich App 574, 246-247; 421 NW2d 245 (1988), this Court held that the trial court did not err in dismissing the plaintiff's claim *with* prejudice, where a parallel action was already pending in federal court (after giving plaintiff the choice of proceeding with the claim instead of accepting the dismissal with prejudice).