

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HOWARD LOSS

Plaintiff,

File No. 95-13075-AZ
HON. THOMAS G. POWER

CATHERINE D. JASINSKI and RICHARD
I. COOPER,

Defendants.

Plaintiff in Pro Per #A2 1615 A-2-07

Timothy Young (P22657)
Attorney for Defendant Jasinski

DECISION AND ORDER

Plaintiff Howard Loss has filed numerous motions with the Court. The Court has reviewed those motions and, pursuant to MCR 2.119(E)(3), dispenses with oral arguments and enters the following orders:

Plaintiff filed a motion entitled, "Motion for Additional Defendants Under MCR 2.207 Proper Party Added." This motion seeks to add attorney Timothy Young as a party defendant. The Court finds, upon review of this motion, that Plaintiff has failed to present any reasonable proposed claim against Timothy Young. The naming of Timothy Young for the reasons stated by Plaintiff would be a futile gesture. Plaintiff's motion is denied.

IT IS SO ORDERED.

Plaintiff filed a motion entitled, "Motion to Disallow Legal Work of Timothy Young (P-22657) For Failing To Report That Attorney Catherine D. Jasinski Had Knowledge Of Other Attorneys Violating Bar Rules This Violated Bar Rule 8.3, Michigan Constitution Art 11 § 1 and Michigan Law 15.151 Now Attorney Timothy Young (P-22657)

Has Now Violated the Same Rules."

The "motion" might be considered as a motion to disqualify Attorney Young from representing Defendant Jasinski. This Court finds that the "motion" is without merit. No authority has been presented which supports the "motion". The "motion" is denied.

IT IS SO ORDERED .

Plaintiff has filed a motion entitled, "Motion to Enter Evidence." The Court finds upon review of this motion that it is without supporting authority and is, accordingly, denied.

IT IS SO ORDERED.

Plaintiff filed a form, "Motion to Disqualify a Judge." The "motion" seeks the disqualification of Hon. Thomas G. Power for the reasons that:

Mich Cannon 3 Last part Judge Disqualify
himself Mich Court Rule 2.003 in part That
Judge has intrest (sic) for a party this being
Attorney C. D. Jasinski That works in his
Court.

Upon review of the motion, it is the finding of this Court that the motion is totally without merit. Defendant Jasinski is an attorney known to the Court who has a practice in Traverse City. Although Defendant Jasinski represents clients before the Court, she is not now or, upon information and belief, has she ever been, an employee of the Court. The Court finds no grounds for disqualification pursuant to MCR 2.003(B).

The Motion is denied.

IT IS SO ORDERED.

Finally, Plaintiff has filed defaults as to Defendant Richard I. Cooper and Timothy Young. Pursuant to MCR 2.603(A)(1),

Plaintiff contends Defendant Cooper and Young have failed to plead or otherwise defend as provided by the rules. Plaintiff seeks entry of default judgments pursuant to MCR 2.603(B).

The Court initially finds that Timothy Young is not a party defendant in this case. Pursuant to MCR 2.115(B), the Court, on

its own initiative, strikes the default for the reason that it is not drawn in conformity with the rules.

Plaintiff attempted service of process on Defendant Richard I. Cooper pursuant to MCR 2.105(A)(2) which provides that:

(2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).
(Emphasis added)

Plaintiff filed a certified mail return receipt with the Court which was addressed to Hon. Richard Cooper. However, the certified mail was not "restricted delivery" and the signature on the receipt is not that of Richard I. Cooper. The Court finds that proper proof of service of process upon Defendant Cooper is a prerequisite to the entry of a default for failure to plead or otherwise defend. Plaintiff has not provided the Court with proof of service of the summons and complaint upon Defendant Cooper. The default was filed contrary to the rules and, on the Court's own initiative, is stricken. The Court further finds that the summons issued January 11, 1995 expired April 12, 1995 pursuant to MCR 2.102(D). Pursuant to MCR 2.102(E), the action against Defendant Richard I. Cooper is dismissed for the reason that the summons has expired and the Court record does not evidence a proper proof of service or that Defendant Cooper has submitted to the Court's jurisdiction. The action against Defendant Cooper is, accordingly, dismissed pursuant to rule.

IT IS SO ORDERED.

Pursuant to MCR 2.002(D), the Court conditionally waived the payment of fees and costs by the endorsement upon an order of waiver as follows:

This issue must be raised again and ruled on by the Court before the case is dismissed or a judgment entered.

Upon entry of the order granting Defendant Jasinski's summary disposition and the above dismissal as to Defendant Cooper, this

case has been brought to a conclusion. The Court, on its own initiative, finds that the reason for the waiver, that being to allow Plaintiff access to the Court, no longer exists. Wherefore, the requirement for payment of fees and costs pursuant to court rule is reinstated. All further filings by Plaintiff must be accompanied by the appropriate fee.

IT IS SO ORDERED. ,

HONORABLE THOMAS G. POWER
Circuit Court Judge
Dated: 9/30/95

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HOWARD LOSS

Plaintiff,

v

File No. 95-13075-AZ
HON. THOMAS G. POWER

CATHERINE D. JASINSKI and RICHARD

I. COOPER,

Defendants.

Plaintiff in Pro Per #A2~ 1615 A-2-07
Timothy Young (P22657)
Attorney for Defendant Jasinski

DECISION AND ORDER

Defendant Catherine Jasinski filed a Motion for Summary Disposition. The Court issued a Pre-hearing Order directing the filing of a response and a reply. Plaintiff filed a response.

Pursuant to MCR 2.119(E)(3), the Court, in the exercise of its discretion, dispenses with oral arguments.

Defendant Jasinski's motion is brought pursuant to MCR

2.116(C)(8).

The standard of review for a (C)(8) motion is set forth in *Mitchell v General Motors Acceptance Corp.* 176 Mich App 23 (1989). A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Beaudin v Michigan Bell Telephone Co.*, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [*Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The Court, upon review of Plaintiff's complaint, finds that Plaintiff has failed to state a cause of action upon which relief can be granted. Defendant Jasinski, as an attorney representing Defendants in a separate action brought by Plaintiff, owed no legal duty to Plaintiff. See, *Friedman v Dozor*, 412 Mich 1; 312 NW2d 585 (1981). Defendant Jasinski's Motion for Summary Disposition is granted..

Defendant Jasinski's motion further asserts that Plaintiff's action violates MCR 2.114. This Court agrees. The Court finds that the filings of Plaintiff can only be intended to harass the Defendants and are clearly frivolous. Pursuant to MCR 2.114(E); MCR 2.114(F); MCR 2.625(A)(2) and MCL 600.2591; MSA 27A2591, the Court awards Defendant Jasinski \$500.00 as a sanction including reasonable attorney fees necessitated by Plaintiff's complaint and in bringing this motion.

Until such time as Plaintiff pays those sanctions, the Court will not consider any further matters filed by Plaintiff. Pleadings, motions, and papers received by the Clerk from Plaintiff will be filed, but not considered by the Court or counsel until the sanctions are paid and proof of such payment has been submitted by

Defendant.

IT IS SO ORDERED.

HONORABLE THOMAS G. POWER
Circuit Court Judge
Dated 5/30/95

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff.

File No. 76-3094-FY

76-3094-FY
HONORABLE THOMAS G. POWER

JACK EUGENE LOWN,

Defendant.

Dennis M. LaBelle (P2409 1)

Attorney for Plaintiff

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JON 6 1995

Defendant in Pro Per

DECISION AND ORDER

Defendant has filed a Motion for Relief from Judgment. Pursuant to a Pre-hearing Order, the People have filed an answer to the Defendant's motion and the Defendant has filed a response. The Court dispenses with oral argument pursuant to MCR 6.508(B).

On July 27, 1976, the Defendant was found guilty of armed robbery in File No. 76-3094-FY and was sentenced to life in prison on August 10, 1976. In File No. 76-3095-FY, the Defendant was found guilty of armed robbery on October 27, 1976 and, on November 5, 1976, was, again, sentenced to life. Because the Defendant was on escape status at the time these crimes were committed, the two life sentences were consecutive to the 25- to 50-year sentence he was serving for second-degree murder at the time of the escape. The two life sentences were concurrent with one another.

The Defendant's conviction and sentence in File No. 76-3094-FY was affirmed by the Court of Appeals April 24, 1978. The Supreme Court denied leave to appeal in December, 1978. The Defendant's conviction and sentence in File No. 76-3095-FY was affirmed by the Court of Appeals on September 6, 1978 and the Supreme Court denied leave to appeal in March, 1979. On December 10, 1980, in File No.

76-3095-FY, Defendant's delayed motion for new trial was denied in the Circuit Court. A delayed appeal was denied by the Court of Appeals on May 6, 1981 and the Supreme Court denied review in August, 1982.

A review of this Court's records reflects two separate habeas corpus proceedings in the United States District Court, one in 1982 and one in 1989. There is indication that the 1989 habeas corpus proceeding concerned Defendant's objections to the handling of his case by the parole board, rather than a review of the conviction and sentence in these cases. The 1982 habeas corpus action, however, appears to be a review of the Defendant's conviction and sentence in these matters.

In January, 1991, a motion for relief from judgment was filed in these cases, which motion was denied by the Circuit Court on March 1, 1991. Reconsideration was denied in this Court on May 3, 1991. The Court of Appeals denied leave to appeal on November 13, 1991 and the Michigan Supreme Court denied review in May, 1992. The instant motion for relief from judgment was filed February 16 1995.

A review of the issues raised in this motion for relief from judgment shows a striking similarity to the issues raised in the 1991 motion for relief from judgment. The difference is largely that the grounds raised in the 1995 motion are recast as "ineffective assistance of counsel" claims. But the underlying allegations of defect or error are essentially the same.

MCR 6.508(D) governs the disposition of motions for relief from judgment. It states:

The defendant has the burden of establishing entitlement to the relief requested. The

court may not grant relief to the defendant if
that motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

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(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. (Emphasis added)

To the extent the grounds raised in this motion were decided against the Defendant when the 1991 motion was resolved, this Court is explicitly instructed by court rule that it may not grant relief to the Defendant. MCR 6.508(D)(2).

To the extent that recasting these grounds as ineffective assistance of counsel makes them different than the grounds raised in the 1991 motion, MCR 6.508(D)(3)(a) precludes relief because the grounds could have been raised on appeal or in the 1991 motion for relief from judgment and no good cause for failure to raise these issues in the prior appeal or motion has been presented.

It is important to note that in both of these files, there have been multiple attorneys involved reviewing the case and representing the Defendant in post-conviction reviews of his case. In File No. 76-3094-FY, Defendant was represented in the trial court by attorney Robert Brott. In his appeal from his conviction and sentence, he was represented by the State Appellate Defenders Office which also apparently represented him in connection with his habeas corpus proceeding in the United State District Court. In File No. 76-3095-FY, Defendant was represented in the trial court by attorney Robert Brott who also represented him in connection with his appeal of his conviction and his sentence. The 1991 motions for relief from judgment filed in each of these two cases were filed on the Defendant's behalf by attorney Daniel A. Hubbell. This Court's denial of that motion was the subject of an application for leave to appeal to the Court of Appeals and also a request for a review by the Supreme Court.

In short, the Defendant has had opportunities to review his convictions and his sentences with the assistance of two or three different attorneys. This Court cannot conceive of any good reason why the issues raised in connection with the present motion for relief from judgment could not have been raised in one of the prior proceedings. Indeed, the issues raised in the prior proceedings are so closely related to the issues raised in the motion that, except for being recast as "ineffective assistance of counsel," they are substantively the same.

The Court further notes, after a review of the court file and the papers that have been filed in connection with this motion, that it does not appear there is a significant possibility that the Defendant is innocent of the crime. The Court, therefore, declines

to waive the "good cause" requirement of MCR 6.508(D)(3)(a). Indeed, virtually all of the issues raised by the Defendant in his motion relate to sentencing and to the sentencing process. There appears to be little, if any, objection to the Defendant's actual convictions as distinguished from his sentence. The Defendant's Motion for Relief from Judgment is denied.

IT IS SO ORDERED.

HONORABLE THOMAS G. POWER

Circuit Cou:

Dated:

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,t Judge