

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET MOSSING,

Plaintiff/Counter Defendant-
Appellant/Cross-Appellee,

v

DEMLOW PRODUCTS, INC.,

Defendant/Counter Plaintiff-
Appellee/Cross-Appellant,

and

JAMES DEMLOW,

Defendant-Appellee/Cross-
Appellant.

FOR PUBLICATION

January 7, 2010

9:05 a.m.

No. 287643

Lenawee Circuit Court

LC No. 07-002620-CK

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Although the primary issue raised in this appeal is a rather straight-forward application of the principle of accord and satisfaction, the cross appeal raises an interesting jurisdictional question regarding whether a challenge to a post-judgment order denying attorney fees may be raised as part of a cross appeal from the original judgment itself. We hold that where the cross appeal from the original judgment was filed in this Court before the trial court has entered the order denying an award of attorney fees and costs, a separate appeal must be taken from the post-judgment order denying fees and costs.

Plaintiff is an independent manufacturer representative for suppliers of automobile parts. Defendant Demlow Products is a manufacturer of wire forms that are used to build seats for automobiles. Plaintiff and defendants entered into a business relationship in 1991 and continued until June 2006. On June 21, 2006, defendants sent plaintiff a correspondence informing plaintiff that they were terminating their contract and stated that plaintiff would receive her commissions through June 30, 2006. Included with the correspondence was a check for \$7364.94, and on the comment line was written, "JUNE 2006 FINAL PMT." Plaintiff's attorney responded and explained that plaintiff would be cashing the check for \$7364.94 with the understanding that the future commissions were still in dispute, and therefore the check would not be considered as a final payment.

When further payments were not forthcoming, plaintiff filed the instant action alleging breach of contract, conversion and a violation of MCL 600.2961. Defendants filed a counterclaim, as well as raised various affirmative defenses, including accord and satisfaction. Ultimately, the trial court concluded that there was no genuine issue of material fact on the issue of accord and satisfaction and that this issue disposed of all of the claims and counterclaims. The trial court, however, separately considered the issue of defendants' request for an award of attorney fees and costs. Plaintiff filed a claim of appeal, and defendants filed a claim of cross appeal, from the order granting summary disposition. Thereafter, the trial court entered its post-judgment order denying defendants' request for attorney fees and costs. Although this is considered a final order under MCR 7.202(6)(iv) and may be appealed by right, defendants did not file a separate appeal and merely raised their challenge to the denial of fees and costs as part of their cross appeal.

We turn first to plaintiff's argument on appeal that there has been no accord and satisfaction of her claims because the notation on the check sent to plaintiff was insufficient to put her on notice that defendants intended a discharge of any and all claims. We disagree.

The trial court granted defendants' motion for summary disposition as to plaintiff's complaint based on MCR 2.116(C)(10), no genuine issue as to any material fact. This Court reviews the granting of such a motion under a de novo standard.¹

In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party.² Where proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.³ A litigant's mere pledge to establish at trial that a genuine issue of material fact exists is not sufficient to overcome summary disposition.⁴

MCL 440.3311, not the common law, applies to an accord and satisfaction involving a negotiable instrument such as a check.⁵ MCL 440.3311(4) states:

A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

¹ *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

² *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), reh den 461 Mich 1206 (1999).

³ *Id.* at 120.

⁴ *Id.*

⁵ *Hoerstman General Contracting, Inc v Hahn*, 474 Mich 66, 75-76; 711 NW2d 340 (2006).

Not only did defendants send a check containing the words “JUNE 2006 FINAL PMT.” on the memo line, but it also was sent with a correspondence containing defendants’ intention to terminate the contract. Upon receiving this check and correspondence, plaintiff’s attorney sent a responding correspondence stating:

My client . . . received a check of \$7364.94, representing a payment for June. The memo on the check also indicated that it was a final payment. As you know, the issue of future payment is in dispute in this matter and therefore, the check is being cashed with the understanding that it is not, in fact, a final payment

Plaintiff fully understood that the check was tendered for final payment. Not only did plaintiff acknowledge it was for final payment in this correspondence, she cashed the check knowing that the check was intended to be for final payment. This was proper accord and satisfaction according to MCL 600.3311(4), and the trial court did not err in granting summary judgment on this issue.

Our resolution of the accord and satisfaction issue renders plaintiff’s second issue on appeal and defendants’ first and second issue on cross appeal moot.

But defendants also argue on their cross appeal a third and final issue concerning attorney’s costs and fees, which is not resolved by the accord and satisfaction issue. Defendants argue that the trial court erred in denying attorney’s costs and fees to defendants. Plaintiff responds that this Court lacks jurisdiction to consider this issue because defendants did not claim an appeal from the order denying fees and costs. We agree.

A post-judgment order awarding or denying attorney’s fees and costs is a “final order” under MCR 7.202(6)(iv) that may be appealed by right. But it is less than clear that such an order must be separately appealed, or whether an issue involving the awarding or denying of fees and costs that is covered in a post-judgment order may be raised as part of the appeal, or in this case, cross appeal, from the actual final judgment itself.

Plaintiff does not refer us to any controlling precedent on this issue, nor were we able to find any. The closest case on point, *Costa v Community Emergency Medical Services, Inc.*,⁶ is not directly relevant. In *Costa*, the defendants appealed by right from an order denying their motion for summary disposition based upon governmental immunity. MCR 7.202(6)(v) provides that an order denying summary disposition based upon governmental immunity is a final order and therefore immediately appealable by right. The plaintiffs claimed a cross appeal, challenging the circuit court’s denial of their motion for summary disposition based upon an argument that two of the defendants had failed to file an affidavit of meritorious defense as required by statute. Those defendants argued that this Court lacked jurisdiction to consider the cross appeal because it went outside the limited scope of the appeal itself. This Court disagreed.

⁶ 263 Mich App 572; 689 NW2d 712 (2004).

This Court acknowledged that the scope of an appeal of right under MCR 7.202(6)(v) is limited to issues related to the denial of summary disposition based upon governmental immunity.⁷ But, this Court went on to conclude that a cross appeal is not so limited. Citing MCR 7.207(A)(1), the *Costa* Court concluded that there is a general right to claim a cross appeal and that the court rules do not limit the scope of that cross appeal.⁸ Indeed, the Court⁹ noted that “MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties during the trial court proceedings.” The Court went on to note that, even if the initial appeal is abandoned, the cross appeal continues.

But *Costa* is hardly controlling on the issue before us. Not only does it deal with a different sub-rule of MCR 7.202(6), it also involved an order (denial of summary disposition) that is inherently interlocutory other than the fact that the court rule defines it as being a final order, while our case involves a post-judgment order. This leads to another difference in that the case at bar involves an order denying fees and costs that had not even been entered in the trial court until after the claims of appeal and cross appeal were filed in this case. That is, defendants challenge on their cross appeal an order that did not even exist at the time they claimed the cross appeal. Although the time line in *Costa* is unclear, presumably the order challenged in the cross appeal had been entered (or certainly could have been entered) before the appeal and cross appeal were claimed.

The broad language in *Costa* might support the proposition that a post-judgment order denying fees and costs can be challenged as part of the appeal from the final judgment itself because it is part of “whatever legal rulings or other perceived improprieties occurred during the trial court proceedings.”¹⁰ But we conclude that it would be reading *Costa* and the court rules too broadly to conclude that a claim of cross appeal invokes this Court’s jurisdiction to challenge an order entered in the trial court after the claim of cross appeal was filed with this Court.

Because we need not decide in this case whether a post-judgment order granting or denying an award of attorney fees and costs that is entered before a claim of cross appeal is filed in this Court must nevertheless be separately appealed, we decline to do so. Rather, we only hold in this case that a separate appeal from such a post-judgment order must be filed when that order is entered in the trial court after the claim of cross appeal is filed in this Court.

We recognize that failing to address the merits of this issue does a certain injustice in this case because defendants would very likely prevail on the merits given the mandatory, rather than discretionary, nature of the award of attorney fees and costs under MCL 600.2961(6) and that the trial court most likely erred in denying an award as to the claim raised under that statute. Nonetheless, we believe that we have no choice but to conclude that this Court’s jurisdiction has

⁷ *Costa, supra* at 583.

⁸ *Costa, supra* at 583-584.

⁹ *Id.* at 584.

¹⁰ *Costa, supra* at 584.

not been properly invoked to allow us to review that order. Defendants had to have filed a claim of appeal from the order denying the award of fees and costs or, having failed to do that in a timely manner, filed an application for leave to appeal from that order.

Affirmed. No costs, neither party having prevailed in full.

/s/ Pat M. Donofrio

/s/ David H. Sawyer

/s/ Donald S. Owens