

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v

Case No. 16-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING
OF MICHIGAN, INC.,

Defendant,

and

LAMAR ADVERTISING OF MICHIGAN,
INC., d/b/a THE LAMAR COMPANIES and
SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

v

Case No. 16-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

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MOTION FOR PARTIAL RECONSIDERATION OF DECEMBER 19, 2019 ORDER

Plaintiff moves for reconsideration of that portion of the Court's December 19, 2019 Order that set further proceedings in this case to occur in March, 2020. Because the Court of Appeals' Remand Order limited the issues to be addressed on remand, and because the Court of Appeals retained jurisdiction to review this Court's Order Granting Relief from Judgment, this Court currently lacks jurisdiction, and further proceedings should be suspended pending a review of the case by the Court of Appeals.

In further support of its Motion, Plaintiff relies on the attached Brief.

OTTENWESS, TAWHEEL & SCHENK PLC

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Dated: January 9, 2020

BRIEF IN SUPPORT

This Motion for partial reconsideration is limited to a procedural and jurisdictional issue in the Court's December 19, 2019 Order regarding the setting of further trial court proceeding in the case.

The Court of Appeals remanded this case to this Court for a narrow purpose: to "hear and decide" Defendants' Motion for Relief from Judgment. The Court of Appeals retained jurisdiction to review this Court's decision on the Motion.

This Court granted the Motion for Relief by Order dated December 19, 2019, but, instead of deferring for further proceedings in the Court of Appeals, set the matter for a settlement and pretrial conference and for a new jury trial on March 30, 2020. Because that portion of the

Court's December 19, 2019 Order conflicts with the Remand Order of the Court of Appeals, and because this Court no longer has jurisdiction over the case, those dates should be suspended pending the Court of Appeals review.¹

* * *

The unanimous jury verdict in this case in favor of the Plaintiff-Appellee, International Outdoor, Inc., ("International Outdoor") was appealed by Defendant-Appellant Lamar Advertising of Michigan ("Lamar"). While this matter remained on appeal, the Defendants jointly filed a Motion for Relief from Judgment in this Court, asserting fraud. The Defendants did not seek leave from the Court of Appeals or move to remand the case prior to filing their Motion.

This Court scheduled the Motion for an evidentiary hearing and allowed limited discovery. Both sides filed proceedings in the Court of Appeals. The Court of Appeals agreed that this Court lacked jurisdiction, *Ex. A*, but agreed to remand the matter the limited purpose of "an evidentiary hearing for the parties to develop a record and trial court to consider additional testimony as it deems necessary." *Ex. B*. The trial court was directed to "hear and decide the matter." *Id.* The Court of Appeals retained jurisdiction over the matter, and allowed the parties to file supplemental appeal briefs following the trial court's decision. *Id.*

This Court held the evidentiary hearing and issued an Order granting the Motion for Relief from Judgment on December 19, 2019. *Ex. C*. In addition, although the Court of Appeals retained jurisdiction over this matter to review the trial court's decision on the Motion for Relief from Judgment, this Court's Order also set the matter for a settlement/final pretrial conference on

¹ International Outdoor has also filed a Motion in the Court of Appeals on this subject, asking it to confirm its jurisdiction over the matter and to enforce its Remand Order. Obviously, a Court of Appeals ruling on that Motion may render the instant Motion moot.

March 5, 2020 and for a new jury trial to occur on March 30, 2020. *Id.* The trial court’s Order stressed that “THIS IS A FIRM TRIAL DATE.” (Emphasis in original). *Id.*

But the Remand Order did not provide for proceedings after the hearing on Defendants’ Motion for Relief. The matter remains in the Court of Appeals. Under MCR 7.208(A), “[f]iling of a claim of appeal divests the circuit court of its jurisdiction...” While the Court of Appeals remanded the matter to this Court, it did so for the limited purpose to “hear and decide” the Motion for Relief from Judgment. “It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.” *Rodriguez v General Motors, (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). *See, also, Augustine v Allstate Ins Co*, 292 Mich App 408, 413, 807 NW2d 77, 82 (2011) (vacating trial court decision because it “failed to follow the directive of this Court.”)

Generally, a Motion for Reconsideration must demonstrate a “palpable error” by which the Court and the parties have been misled. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605, 450 NW2d 6, 8 (1989). A palpable error exists here.

The Court of Appeals had jurisdiction over this case by virtue of Lamar’s original appeal. While the Court of Appeals had jurisdiction, this Court could not act in the case. “When a court is without jurisdiction of the subject matter, any action with respect to such a cause, except to dismiss it, is absolutely void.” *Fox v Board of Regents of Univ of Michigan*, 375 Mich 238, 242 (1965). “[H]aving determined that it has no jurisdiction, a court should proceed no further except to dismiss the action.” *Electronic Data Sys Corp v Flint*, 253 Mich App 538, 544 (2002). *See, also, Moffit v Sederlund*, 145 Mich App 1, 7 (1985) (“After defendants filed a claim of appeal, jurisdiction over this case vested in this Court [and] [t]he trial court had no jurisdiction to conduct proceedings in the case.”); *People v George*, 399 Mich 638, 640, 250 NW2d 491, 492

(1977) (“jurisdiction of this case was vested in the Court of Appeals, and thus removed from the circuit court, when the defendant's claim of appeal was filed.... Until the pending application for leave to appeal is resolved, jurisdiction is not re-vested in the circuit court.”).

The Court of Appeals agreed to remand the case to this Court, restoring this Court’s jurisdiction – but only for a limited purpose. The Remand Order directed this Court to hold the evidentiary hearing and “hear and decide” the motion for relief. The Court of Appeals retained jurisdiction over the case and allowed the parties to file supplemental briefs concerning the Motion for Relief from Judgment.

This Court made its ruling on the Motion. The matter is now back in the hands of the Court of Appeals and this Court has again been divested of jurisdiction. Therefore, the Motion should be granted, and the dates for the settlement/pretrial conference and pretrial conference should be suspended pending further order of the Court of Appeals.

OTTENWESS, TAWEEL & SCHENK PLC

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Dated: January 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile system which will send notification of such filing to the attorneys of record.

By: /s/Diane Sutherland
OTTENWESS, TAWEEL & SCHENK, PLC

Dated: January 9, 2020

EXHIBIT A

Court of Appeals, State of Michigan

ORDER

International Outdoor Inc v SS Mitx LLC

Docket No. 350180

LC No. 2016-155472-CB

Mark J. Cavanagh
Presiding Judge

Colleen A. O'Brien

Jonathan Tukel
Judges

The Court orders that the motion for immediate consideration is GRANTED.

In lieu of granting the application for leave to appeal, the Court orders, pursuant to MCR 7.205(E)(2), that the August 7, 2019 order of the Oakland Circuit Court denying plaintiff's motion to dismiss postjudgment proceedings hereby is REVERSED. Generally, once an appeal is filed, the trial court does not have jurisdiction to amend its final orders or judgments. *Lemmen v Lemmen*, 481 Mich 164, 165–166; 749 NW2d 255 (2008); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 542; 730 NW2d 481 (2007). This Court, however, may remand to allow additional evidence to be taken. MCR 7.216(A)(5). In light of the pending appeal, the proper procedure to obtain the development of a factual record is by a motion for remand pursuant to MCR 7.211(C)(1) in the pending claim of appeal, *International Outdoor Inc v SS Mitx LLC*, Docket No. 345784.

This order is to have immediate effect, MCR 7.215(F)(2).

The Court retains no further jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 14 2019

Date

Jerome W. Zimmer Jr.
Chief Clerk

EXHIBIT B

Court of Appeals, State of Michigan

ORDER

International Outdoor Inc v SS Mitx LLC

Mark J. Cavanagh
Presiding Judge

Docket No. 345784

Colleen A. O'Brien

LC No. 2016-155472-CB

Jonathan Tugel
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion for remand is GRANTED. Pursuant to the authority granted in MCR 7.216(A)(5), the case is REMANDED for an evidentiary hearing for the parties to develop a record and trial court to consider additional relevant evidence. The trial court may take further testimony as it deems necessary. After considering the additional evidence, the trial court shall decide the pending motion for relief from judgment. MCR 7.208(A)(1). Where appellant already has initiated proceedings, the trial court's orders related to the motion for relief from judgment shall be given full force and retroactive effect. MCR 7.216(A)(7).

Appellant shall file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry. The trial court shall hear and decide the matter within 56 days of the Clerk's certification of this order. The trial court shall make findings of fact and a determination on the record. Appellant shall cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings. Appellant may file a supplemental brief pertaining to the issues raised on remand within 21 days after entry of the trial court's order deciding the matter or 21 days after the transcript of the hearing is filed, whichever is later. Appellee may file a supplemental brief in response.

This order is to have immediate effect, MCR 7.215(F)(2).

The Court retains jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 15 2019

Date

Jerome W. Zimmer Jr.
Chief Clerk

EXHIBIT C

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR INC
V
SS MITX

Plaintiff,
Defendant,

NO: 2016-155472-CB
HON. MARTHA D. ANDERSON

In the matter of:

ORDER REGARDING MOTION

Motion Title: Defendants SS MITX, LLC and Lamar Advertising of Michigan, Inc.'s Motion for Relief from Judgment, pursuant to MCR 2.612(C)(1)(c)

The above named motion is:

- granted.
- granted in part, denied in part.
- denied.
- for the reasons stated on the record.

In addition:

- * The Court orders that the Judgment dated June 7, 2018 is SET ASIDE, and a New Trial shall proceed in this matter according to the following schedule:
- * The Settlement/Final Pretrial Conference is scheduled for Thursday, March 5, 2020 at 1:30 p.m.
- * The Jury Trial is scheduled for Monday, March 30, 2020 at 8:30 a.m. THIS IS A FIRM TRIAL DATE

DATED: 12/19/2019



HON. MARTHA D. ANDERSON
Circuit Court Judge

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STATE OF MICHIGAN

6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v

File No.: 2016-155472-CB

SS MITX and LAMAR ADVERTISING
OF MICHIGAN,

Defendants.

MOTIONS

BEFORE THE HONORABLE MARTHA D. ANDERSON, CIRCUIT COURT JUDGE

Pontiac, Michigan - Wednesday, January 15, 2020

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WITNESSES: PLAINTIFF PAGE

None

WITNESSES: DEFENDANT

None

OTHER MATERIAL IN TRANSCRIPT

None

EXHIBITS: INTRODUCED ADMITTED

None

1 Pontiac, Michigan

2 Wednesday, January 15, 2020 - 9:38:02 a.m.

3 THE CLERK: Your Honor, calling number 2 on
4 the call (ph), International Outdoor versus SS MITX, case
5 number 2016-155472-CB.

6 MR. BRUETSCH: Good morning, your Honor.
7 Thomas Bruetsch appearing on behalf of the plaintiff,
8 International Outdoor.

9 MR. NEUMAN: Good morning, your Honor. Ken
10 Neuman for Lamar Advertising.

11 MR. LEVASSEUR: Christopher LeVasseur on
12 behalf of SS MITX.

13 THE COURT: Good morning.

14 MR. BRUETSCH: Good morning, your Honor.
15 There's three motions and we have agreed to withdraw on of
16 them, based on conversations --

17 THE COURT: Which one?

18 MR. BRUETSCH: The motion on the data -- on
19 copying the data.

20 THE COURT: Oh, okay.

21 MR. BRUETSCH: So we're gonna -- we'll submit
22 an order to you. We haven't completed outlining what's
23 gonna be in it, but we'll submit an order to that one and we
24 won't argue that today.

25 THE COURT: (Undecipherable).

1 MR. BRUETSCH: Otherwise, I've got one and
2 they've got one.

3 THE COURT: Fine.

4 MR. BRUETSCH: Our motion, your Honor, is for
5 two things. You've set the matter for trial March 30th and
6 we've asked for discovery until about March 15th and for the
7 sides to be able to submit supplemental witness lists for
8 trial. There was new evidence offered at the recent
9 evidentiary hearing, new testimony taken at trial, and also
10 the defendant's were allowed to present expert testimony for
11 the Court. The plaintiff was not allowed to present expert
12 testimony over my objection. So we do wanna amend the
13 witness list to add the individuals we had testifying at the
14 evidentiary hearing. One of those individuals, Mr. White,
15 was on our original witness list but we'd like to add Mr.
16 Faycurry and the others who testified on the plaintiff's
17 behalf and also to be allowed to add an expert witness to
18 rebut the expert witness who I assume they will be
19 attempting to add and have present at the new trial.

20 And we'd also like to have discovery as I
21 said. Limited discovery only was available to the -- to the
22 parties during the motion for relief proceedings. We had
23 attempted to -- for example -- serve a duces tecum on Mr.
24 Depa, which he ignored, and they took the position that was
25 not allowed under your order. So we would like to complete

1 our discovery on the new matters that are before -- that
2 were brought before the Court.

3 THE COURT: What exactly were the new matters
4 that were brought forth?

5 MR. BRUETSCH: Well, your Honor, they --
6 there were many new matters. I mean Mr. Depa's affidavit
7 was a revelation to everyone. The subjects of the affidavit
8 were previously not known certainly to anyone on my side of
9 the table --

10 THE COURT: But you -- I allowed you to
11 depose him.

12 MR. BRUETSCH: And we did depose him.

13 THE COURT: Okay, so what -- what more
14 discovery do you need?

15 MR. BRUETSCH: We asked for documents from
16 Mr. Depa, for example. We asked for -- we served a duces
17 tecum on him that he didn't --

18 THE COURT: But I granted --

19 MR. BRUETSCH: -- comply with --

20 THE COURT: -- I granted you discovery before
21 we had the hearing.

22 MR. BRUETSCH: Limited discovery.

23 THE COURT: Yes, but limited to what was
24 being raised. What else is there to talk about?

25 MR. BRUETSCH: I'd like the records I

1 received from Mr. Depa and I'd also like to be able to
2 present an expert witness which we had not had the
3 opportunity to do.

4 THE COURT: I -- I never prevented you from -
5 - from presenting an expert witness. You make it sound like
6 the Court said you couldn't present an expert witness.

7 MR. BRUETSCH: Well we actually did ask -- as
8 your Honor would recall, the expert that was --

9 THE COURT: You had your expert there when --
10 when -- I can't remember his name now off the top of my head
11 from Spectrum --

12 MR. NEUMAN: Mr. Matthews --

13 THE COURT: -- thank you -- was whatever they
14 do to get the information -- to retrieve the information
15 from the server and the -- and the laptop -- the computer.

16 MR. BRUETSCH: Yeah, we had Mr. Albin testify
17 at the hearing. He was not allowed to testify as an expert
18 and we were not allowed to present our own expert testimony.
19 In fact, we had a lengthy discourse on whether Mr. Matthews
20 could testify as an expert because that was not provided for
21 in the protective order. He was allowed to testify as an
22 expert and you expressly (ph) said that we could not present
23 Mr. Albin as an expert --

24 THE COURT: Well he wasn't an expert in what
25 you wanted him to testify in. Had you presented -- was it

1 Mr. Dalman that was present? Okay -- had you presented Mr.
2 Dalman to testify, I would have allowed him to testify. I
3 don't have a problem with that.

4 MR. BRUETSCH: And that's all we're asking
5 for at the trial. We would like to present Mr. Dalman.

6 THE COURT: That's fine. You can have Mr.
7 Dalman testify.

8 MR. BRUETSCH: Thank you.

9 MR. NEUMAN: Well -- and if that's your
10 ruling, so be it. But your Honor, we need at least for them
11 to supplement their discovery responses. They've never
12 named an expert witness up until now and we've asked for
13 expert reports so we don't want to be blindsided at the new
14 trial. If -- if Mr. Dalman is now their new expert, then we
15 ask that they be required to produce some sort of an expert
16 report in advance of the trial. But -- but we agree with
17 you. There should be no additional witnesses other than the
18 individuals that showed up at the evidentiary hearing. No
19 need for any other quote, unquote discovery. Other than
20 that, I have nothing -- nothing further.

21 THE COURT: I'm not gonna extend discovery or
22 grant discovery in this matter. I think -- I think pretty
23 much the issues for the retrial are the same issues that
24 were present in the original trial and as I said, I -- I
25 gave you discovery for the period before the evidentiary

1 hearing. What you did or didn't do, you know, that's not my
2 concern. And you were allowed to take Mr. Depa's
3 deposition. You know exactly what he's going to testify to
4 as he testified here -- I hope the same in the evidentiary
5 hearing that he will testify to at the trial. And it will
6 be up to a jury to determine who they believe. That's
7 basically it. But I don't have a problem with any of the
8 witnesses that testified during the evidentiary hearing to
9 testify at trial. They'll be allowed. But I'm not gonna
10 have you add anybody else. With respect to your request for
11 the expert, I'm not going to deprive you of having an
12 expert. You know, fair is fair. But you have to supplement
13 --

14 MR. BRUETSCH: Of course.

15 MR. NEUMAN: May we ask for a date certain
16 (ph)? End of February would be fine with us. Is that
17 reasonable?

18 MR. BRUETSCH: We're gonna get into -- with
19 respect to the data -- when that data's gonna be copied --
20 end of February is fine with us, so long as -- you know --
21 we're gonna get a prompt copy of the data done. If that
22 data takes three weeks, then obviously that's gonna be a
23 problem.

24 MR. NEUMAN: The data is in their
25 professional's control right now. We have a whole separate

1 order where we turned it over to the Rehmann (ph) Accounting
2 Firm, so it's outside of our control.

3 MR. BRUETSCH: Yeah, I just -- if Rehmann
4 says it's gonna take three weeks to copy the data, that's
5 something we'll have to -- but we can cross that bridge
6 later. Otherwise, I'm fine with --

7 THE COURT: All right, by the end of
8 February. If there's a problem, you know where I'm at.

9 MR. BRUETSCH: Yes.

10 MR. NEUMAN: So the only other matter, your
11 Honor, is we want the -- the -- the surety bond cancelled.
12 The -- the jury's verdict in the judgement upon which the
13 appeal was brought and the stay bond was petitioned has now
14 been vacated by your Honor's ruling. Therefore, the appeal
15 is moot and we want the stay bond cancelled. Their position
16 is your Honor doesn't -- your Honor doesn't have
17 jurisdiction to make that ruling until the Court of Appeals
18 relinquishes jurisdiction over the matter. We expect that
19 ruling to -- to happen any moment now because the basis upon
20 which the Court of Appeals had jurisdiction was our appeal,
21 which is now mooted by -- by the ruling following the
22 evidentiary hearing.

23 You know, the purpose for a surety bond is to
24 provide the prevailing party with collateral while they're
25 stayed from execution. Since the judgement has been

1 vacated, there's not basis for the collateral and if -- and
2 my client is prepared to take the risk that without the
3 surety bond if they wanna attempt to execute on a judgement
4 that's been set aside, we're prepared to take that risk and
5 come back to your Honor. So for all those reasons, we think
6 under -- under the applicable court rule that we stated, the
7 bond should be -- should be set aside. Thank you.

8 MR. BRUETSCH: The motion is premature at
9 this point. I think when filed, everybody's kind of
10 forgetting that the matter is still on appeal. The appeal
11 is still open. They haven't withdrawn their appeal. We
12 both filed pleadings in the Court of Appeals. We've asked
13 the courts since it retained jurisdiction and it's remand
14 was for a limited purpose, to conduct the evidentiary
15 hearing and make a ruling. The matter's back on appeal as
16 far as the Remand Order says. If the court agrees with them
17 -- Court of Appeals -- agrees with them and says give them
18 this court's ruling that the appeal is now moot, that's
19 fine. But only the Court of Appeals can make that decision.
20 Only the Court of Appeals can tell us. If Court of Appeals
21 says it's moot, then we'll stick to --(undecipherable)--
22 order on the bond. But it's just not time for that yet.

23 MR. NEUMAN: Whether the Court of Appeals
24 rule -- if I may -- whether the Court of Appeals rules or
25 not, the request for the stay was ours to ask. We could

1 have -- we could have paid the judgement and then sought to
2 get it recovered, you know, if the -- if the Court of
3 Appeals had reversed the jury's verdict. We're prepared to
4 take that risk, irrespective of what the Court of Appeals
5 rules on whether or not it has jurisdiction. We're -- we're
6 highly confident that the Court's going to allow the retrial
7 to occur and to find that jurisdiction is fully re-vested in
8 this court. We think you're -- as you were with your
9 rulings on the expert witness issue and going forth with the
10 trial, we think you have the authority to release the bond
11 at this time. Thank you.

12 THE COURT: All right. Thank you. The Court
13 will at this time release the -- the bond -- the stay bond.

14 MR. NEUMAN: Thank you.

15 THE COURT: Thank you.

16 MR. NEUMAN: Thank you, your Honor.

17 MR. BRUETSCH: Thank you, your Honor.

18 (AT 9:48:12 a.m., hearing concluded)

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22
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24
25

CERTIFICATION

This is to certify that the attached electronically recorded proceeding, consisting of thirteen (13) pages, before the 6th Judicial Circuit Court, Oakland County, Michigan:

INTERNATIONAL OUTDOOR, INC.

v

SS MITX and LAMAR ADVERTISING
OF MICHIGAN

_____ /

Location: Pontiac, Michigan

Date: Wednesday, January 15, 2020

was held as herein appeared and that this is testimony from the original transcript of the electronic recording thereof, to the best of my ability.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the electronic recording of the proceedings.

/s/ Kristin Novello
Kristin Novello, CER #9570
Certified Electronic Recorder

Dated: November 23, 2021

Theresa's Transcription Service, P.O. Box 21067
Lansing, Michigan 48909-1067 - 517-882-0060