STATE OF MICHIGAN

COURT OF APPEALS

CRAIG RICHERT and ANDRE SUYKERBUYK, a/k/a ANDRE SYKES,	UNPUBLISHED August 20, 1996
Plaintiffs/Cross-Defendants-Appellants/Cross-Appellees,	
v	No. 175480, 178599 LC No. 91-413057-CK
G. LYNN POUNDERS,	
Defendant/Cross-Plaintiff-Appellee/Cross-Appellant.	

Before: Taylor, P.J., and Fitzgerald and P.D. Houk,* JJ.

PER CURIAM.

In this shareholder dispute, plaintiffs appeal as of right from a jury verdict in favor of defendant. Plaintiffs also appeal, and defendant cross-appeals, from the trial court's order awarding defendant attorney fees and expert witness fees. We affirm.

Plaintiffs and defendant were shareholders of SRC, Inc., a Michigan corporation that manufactures and sells commercial refrigeration equipment. Beginning in the early 1980s, plaintiffs, in their capacities as operators of SRC, began referring customer request for service to a company owned by defendant. That company was subsequently merged into SRC, and defendant received an ownership interest in SRC. On July 27, 1990, plaintiffs and defendant entered into a cross purchase stock agreement that gave plaintiffs the right to repurchase defendant's stock at a fixed price if defendant's employment was terminated for just cause. Plaintiffs subsequently informed defendant that his employment was being terminated for failure to meet his responsibilities and that they intended to repurchase his stock according to the terms of the cross purchase agreement.

Defendant did not agree to sell the stock, and sought a greater sum than was offered by plaintiffs. Plaintiffs filed the present action, seeking a declaratory judgment of the parties' rights and

---

* Circuit judge, sitting on the Court of Appeals by assignment.

responsibilities under the cross purchase agreement. Plaintiffs also sought a determination that they had just cause to terminate defendant and that they had the right to purchase defendant's stock for $3.25 per share as set forth in the cross purchase agreement. Defendant filed an answer and counterclaim that alleged, in part, that plaintiffs breached the cross purchase agreement by terminating his employment without just cause.

Using a special verdict form, a jury concluded that plaintiffs did not have just cause to terminate defendant and that the value of defendant's stock was $140,000. The trial court entered a judgment on the verdict on April 28, 1994, and awarded defendant attorney fees and expert witness fees.

Plaintiffs first argue that the trial court abused its discretion in denying plaintiffs' motion for entry of judgment and instead entering defendant's proposed judgment because the jury did not decide whether the cross purchase agreement had been breached and, therefore, plaintiffs were entitled to enforcement of the agreement. We disagree. The jury concluded that plaintiffs did not have just cause to terminate defendant's employment. This finding necessarily implies that plaintiffs violated the cross purchase agreement and, therefore, plaintiffs are not entitled to enforce it. See *Bullock v Huster*, 209 Mich App 551, 556; 532 NW2d 202 (1995) vacated on other grounds 451 Mich 884-885 (1996) (an issue is necessarily determined if it was essential to the resulting judgment and was actually litigated); see also MCR 2.514(C)(where an issue is omitted from a special verdict form, the trial court is deemed to have made a finding in accord with the judgment on the special verdict). Consequently, the trial court properly entered a judgment that provided that defendant prevailed on his counterclaim for breach of contract.

Plaintiffs also argue that the trial court erred in granting defendant attorney fees under MCR 2.405. They maintain that the trial court failed to include the value of the non-compete clause and payment terms of the cross purchase agreement when calculating the average offer, and that defendant's counteroffer was not for a sum certain.

The offer of judgment rule, MCR 2.405, provides in pertinent part:

> **(D) Imposition of Costs Following Rejection of Offer.** If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs.

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

The rule defines an "offer" as "a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain." MCR 2.405(A)(1). A "counteroffer" is "a written reply to an offer . . . in which a party rejects an offer of the adverse party and makes his or her own offer." MCR 2.405(A)(2). The rules defines "adjusted verdict" as the award that a jury renders plus interest and costs from the date the complaint is filed through the date of the offer. MCR 2.405(A)(4) and (5). "Actual costs" are the costs and fees that may be taxed in a civil action plus a "reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6).

Defendant was the prevailing party and was entitled to attorney fees under MCR 2.405. Although not explicitly stated by the trial court, it appears that the trial court concluded that the average offer was $135,000.[1]

On appeal, plaintiffs first argue that the verdict does not exceed the average offer because defendant's counteroffer also included waiver of the non-competition and payment provisions of the cross purchase agreement. Plaintiffs, however, fail to provide any record evidence to support their valuations of the non-competition and payment provisions, nor do they offer any proof that defendant intended to assign an additional monetary value to those provisions. The cover letter that accompanied defendant's offer merely establishes that defendant sought to settle the case for $225,000 plus the waiver. We find no error in the trial court's decision to treat defendant's counteroffer as one for $225,000.

Plaintiffs also argue that defendant's counteroffer was not for a sum certain because it also included the demand for a release of the cross purchase agreement. Again, we disagree. Defendant's counteroffer was an offer to resolve the parties' claims for $225,000, and merely included an agreement that this sum would resolve *all* past, present, and future claims between the parties. The counteroffer was a proper counteroffer within the meaning of MCR 2.405.

Finally, plaintiffs contend that the trial court should have denied attorney fees in the interest of justice because plaintiffs acted reasonably and in good faith in rejecting defendant's offer of judgment. MCR 2.405(D)(3). However, a good faith rejection of an offer of judgment is not sufficient reason to deny attorney fees "in the interest of justice." See *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 341-343; 525 NW2d 470 (1994); see also *Butzger v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278-279; 505 NW2d 862 (1993). Accordingly, plaintiff's rejection of defendant's offer of judgment was not sufficient, standing alone, to warrant the conclusion that the trial court abused its discretion in awarding attorney fees. *Wojas v Rosati,* 182 Mich App 477, 480; 452 NW2d 864 (1990).

On cross-appeal, defendant asserts that the trial court abused its discretion with regard to the amount of the award of attorney fees. Specifically, defendant contends that the trial court initially reduced the award to $34,954, and did not have discretion to further reduce the award to $23,954. A review of the record, however, does not indicate that $34,954 was an amount agreed to by the parties or by the trial court. Rather, in the words of defense counsel at the final hearing on the motion for fees and costs:

> When we were before you last Friday, you made certain rulings and certain agreements were placed on the record regarding elements of our requests for fees that – that would be limited or eliminated and you asked us essentially to go back to our office, do the mathematics, and give you a number, and then from that point you would exercise your discretion with respect to nominating an amount.
>
> Mr. Horton and I are in agreement that after these calculations, the correct number, the starting point, is $34,954

Thus, the record does not support defendant's argument that the trial court twice reduced the award of attorney fees. Defendant offers no other argument in support of his contention that the trial court abused its discretion in determining the amount of attorney fees to be awarded. Consequently, we conclude that the award of $23,954 was not an abuse of discretion.

Last, plaintiffs maintain that the trial court abused its discretion in awarding defendant $4,000 in expert witness fees for the services of a Certified Public Accountant because the award included fees for time other than that actually spent preparing for and testifying at trial. See, e.g., *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). We disagree.

With his motion for costs and fees, defendant submitted bills from his expert witness in the total amount of $6,486. Except for the March 14, 1994, bill for preparation for and testimony at a deposition, none of the bills clearly indicate that they were for items other than trial preparation or testimony. Indeed, plaintiffs had the opportunity to take testimony regarding the expert witness bill but chose not to do so. In the absence of evidence that the fees were for services for which a party may not be reimbursed, we cannot conclude that the trial court abused its discretion in its award of expert witness fees. *Herrera v Levine*, 176 Mich App 350, 356; 439 NW2d 378 (1989).

On cross-appeal, defendant argues that the trial court abused its discretion in reducing the amount of expert witness fees from the requested amount of $6,486 to $4,000 without explanation or basis. However, the record reveals that the trial court determined that the number of hours billed by the witness was excessive. The trial court's award of $4,000 in costs was two-thirds of the amount requested by defendant as costs for the preparation fees of his expert witnesses, and we find no abuse of discretion in the award. *Herrera*, *supra* at 357-358.

Affirmed.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk

[1] The average of plaintiffs' offer of $45,000 and defendant's counteroffer of $225,000.