

STATE OF MICHIGAN
COURT OF APPEALS

LEONARD A. THOMAS and CHARLES
NOLTON,

UNPUBLISHED
October 22, 1996

Plaintiffs-Appellees,

v

No. 183642
LC No. 92 427900

RICHARD E. SIKORSKI,

Defendant-Appellant/Third-party Plaintiff,

and

KENNETH WALTER,

Third-party defendant.

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

In this breach of contract action, defendant appeals by right the order denying his motion for mediation sanctions against plaintiffs under MCR 2.403(O). We affirm.

Plaintiffs Leonard Thomas and Charles Nolton, along with three other investors, contributed money toward Charley's Restaurants, Incorporated, which was owned by defendant Richard Sikorski.¹ Thomas contributed \$200,000, and Nolton contributed \$125,000. Charley's Restaurants later declared bankruptcy. The five investors sued defendant to recover their investments. When the case mediated, the evaluators awarded all the investors amounts less than their original contributions. Specifically, the evaluators suggested that Leonard receive \$40,500, and Nolton receive \$24,750. Defendant and the other three investors accepted the evaluation; plaintiffs did not.

Plaintiffs subsequently made offers of judgment to defendant. Thomas offered \$190,000 to settle, and Nolton offered \$112,500. Defendant did not respond to the offers. Defendant moved for

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

summary disposition, which the court granted. Defendant later moved for mediation sanctions against plaintiffs under MCR 2.403(O). The court denied defendant's motion. Defendant appeals.

MCR 2.403 governs mediation and provides in pertinent part:

(O) Rejecting Party's Liability for Costs

(1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For purposes of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion filed after mediation.
[MCR 2.403(O)(1),(2).]

MCR 2.405 controls offers of judgment and 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. [MCR 2.405(D)(1),(2).]

The mediation court rule and the offer of judgment court rule work in tandem, as provided in MCR 2.405:

In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection. [MCR 2.405(E).]

In this case, plaintiffs rejected the mediation award, and defendant later rejected their offers of judgment.² Under the above rule, the offer of judgment rule, MCR 2.405, governs because defendant rejected the offers after plaintiffs rejected the mediation evaluation. Defendant nonetheless argues that plaintiffs are liable for paying his costs and attorney fees because, after plaintiffs rejected the mediation award, he prevailed in this case when the court granted summary disposition. Defendant asserts that only the mediation court rule applies to the instant matter.

Defendant argues that the offer of judgment rule does not apply here because a motion for summary disposition is not a “verdict” within the offer of judgment court rule. MCR 2.405 defines “verdict” as “the award rendered by a jury or by the court sitting without a jury, excluding all costs and interest.” MCR 2.405(A)(4). This Court has held that a verdict under MCR 2.405 does not include a judgment entered as a result of a ruling on a motion under MCR 2.116. *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 364-366; 466 NW2d 404 (1991). As a result, defendant argues that MCR 2.405 should not govern here because the grant of summary disposition in this case was not a verdict.

The analysis does not end there, however. This Court has ruled that courts should follow the offer of judgment rule, when it applies, even though it does not afford a remedy. In *Zantop International Airlines, Inc v Eastern Airlines*, 200 Mich App 344; 503 NW2d 915(1993), the Court succinctly addressed this point:

[T]he offer of judgment rule can apply even if the rule goes on to deny costs. In other words, the fact that the rule grants no costs in a particular circumstances does *not* mean that the rule is to be ignored. When both the offer of judgment rule and the mediation rule are invoked, the later rejection controls which one will provide a remedy – *if any*. [*Id.* at 366.]

Accordingly, the offer of judgment rule prevails here. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 378; 533 NW2d 373 (1995). In following the clear mandate of the offer of judgment rule, the circuit court did not abuse its discretion in denying mediation sanctions. *Michigan Basic Property Ins Ass’n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1992).

Defendant asserts that plaintiffs’ offers of judgment were unrealistic, excessive, and designed to thwart the mediation sanctions rule. Defendant correctly points out that a party may submit an unrealistically high offer of judgment under MCR 2.405 simply to avoid the imposition of mediation sanctions under MCR 2.403. The amendment of court rules is not within the province of this Court. We urge the Supreme Court to amend the offer of judgment rule so that parties may not continue to employ it strategically to avoid mediation sanctions.

Affirmed.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

¹ Third-party defendant Kenneth Walter is not a party to this appeal.

² Defendant did not respond to the offers, which is deemed a rejection under the rule. MCR 2.405(C)(2).