

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS A. ANDERSON,

Plaintiff-Appellant/
Cross Appellee,

v

BASSAM M. ELIAS,

Defendant-Appellee/
Cross Appellant.

UNPUBLISHED
October 24, 1997

Nos. 194836; 197810
Oakland Circuit Court
LC No. 94-476326-CK

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

In Docket No. 194836, plaintiff appeals as of right from the trial court judgment that awarded him \$15,000 upon delivery of a warranty deed within thirty days. On April 30, 1996, the court entered an order denying plaintiff's motion for new trial or additur pursuant to MCR 2.611(A) and (E), and motion for new trial or to amend judgment in additur pursuant to MCR 2.611(A)(1)(d), (e), (f) and (g). Defendant has filed a cross-appeal from the trial court's denial of his motion for involuntary dismissal based on plaintiff's failure to file a reply to defendant's affirmative defenses. In Docket No. 197810, plaintiff appeals by leave granted from the trial court's post-judgment order which awarded to defendant, pursuant to MCR 2.403, attorney fees of \$15,000.00, plus interest, for a total amount of \$16,245.00. We affirm, but remand for proceedings consistent with this opinion.

As to the issues raised in Docket No. 194836, we hold that the trial court did not clearly err or abuse its discretion when it denied plaintiff's motions for summary disposition and motions for new trial based, in part, on the conduct of the parties. The trial court based its decision on all the facts and circumstances and the evidence and arguments presented by the parties. The trial court did not base its decision on the doctrines of promissory estoppel or part performance. The decision was not against the great weight of the evidence or contrary to law. *Severn v Sperry Corp*, 212 Mich App 406, 412-413; 538 NW2d 50 (1995).

The trial court did not improperly place the burden of proof on plaintiff. Each party was required to support its position. Where there is a dispute, the parties' intent must be ascertained

and the agreement enforced according to that intent. *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). The credibility of the witnesses is for the trial court to decide. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995).

Plaintiff has failed to support his contention that the trial court should have disqualified defense counsel sua sponte. The trial court properly ruled that if plaintiff intended to use defense counsel as a witness, he should have petitioned the court to remove defense counsel. Plaintiff does not cite any authority for his contrary position. Where a party fails to cite to any supporting legal authority for its position, the issue is effectively abandoned. *Mallard v Hoffinger Industries, Inc.*, 210 Mich App 282, 286; 533 NW2d 1 (1995), vacated in part on other grounds, 451 Mich 884 (1996).

With regard to defendant's cross-appeal, we find no error in the trial court's determination that defendant did not plead sufficient facts in his affirmative defenses. Accordingly, plaintiff's failure to reply to the affirmative defenses did not require involuntary dismissal of the complaint. MCR 2.111(A)(1); MCR 2.111(D); MCR 2.111(F)(3).

However, the trial court may have abused its discretion when it summarily denied plaintiff's motion for additur. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). The record shows that defendant testified concerning a check for \$4,437, which he sent to plaintiff on January 28, 1994. On the check, defendant wrote "final payment." Plaintiff testified he did not cash the check at the time because the matter was in dispute. At the hearing on the motion for additur, plaintiff represented when he attempted to cash the check after the judgment was entered, it was refused by the bank on defendant's instructions. Plaintiff argued that the court should add that amount to the judgment because the court must have taken into consideration that defendant had "received" that amount when the court fashioned its remedy. There was no evidence to indicate that defendant would not permit payment of the check made to plaintiff after the judgment or that plaintiff did not intend to cash the check once the judgment was entered.

The trial court summarily denied the motion for additur having earlier stated that it could not rule without evidence to support counsel's allegations. Accordingly, this Court remands the matter for a determination whether the trial court, when it fashioned its remedy, included the amount of the check in its computation of the amounts already received by plaintiff prior to the judgment, and whether the amount of the check is owed to plaintiff. If the court did not take into account the amount of the check in its judgment, the court shall conduct an evidentiary hearing to permit the parties to present evidence concerning the issue.

In Docket No. 197810, we find the fact that the trial court granted the motion for sanctions pursuant to MCR 2.403 instead of MCR 2.405 to be harmless error because defendant was entitled to attorney fees and costs under either rule and because those costs may be recovered from the date of the "earlier rejection." MCR 2.405(E); *Luidens v 63rd Dist Ct*, 219 Mich App 24, 28-29; 555 NW2d 709 (1996). Plaintiff has not demonstrated that the "adjusted verdict" was or could be more favorable to him under either MCR 2.403 or MCR 2.405.

Plaintiff has failed to articulate any compelling reason as to why the interest of justice would be served by denying defendant's request for attorney fees pursuant to MCR 2.405(D)(3). There were not unusual circumstances sufficient to preclude an award of attorney fees. Under the facts and circumstances presented in this case, the award was fair, and the trial court did not abuse its discretion in granting defendant's motion for sanctions. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428; 552 NW2d 466 (1996).

Finally, we find that plaintiff received a full and fair evidentiary hearing on this issue and had the opportunity to question the reasonableness of the fees and costs sought. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996).

Affirmed, but remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra