

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MICHAEL SALPIETRA and
MARY SALPIETRA,

Plaintiffs-Appellants,

v

KINDER PROPERTY, LLC,

Defendant-Appellee,

and

B & V CONSTRUCTION, INC., a/k/a B & V,

Defendant.

UNPUBLISHED
October 18, 2007

No. 271681
Oakland Circuit Court
LC No. 2002-040563-CZ

JOHN MICHAEL SALPIETRA and
MARY SALPIETRA,

Plaintiffs-Appellants,

v

KINDER PROPERTY, LLC,

Defendant,

and

B & V CONSTRUCTION, INC., a/k/a B & V,

Defendant-Appellee.

No. 273190
Oakland Circuit Court
LC No. 2002-040563-CZ

JOHN SALPIETRA and MARY SALPIETRA,

Plaintiffs-Appellants,

v

KINDER PROPERTY, LLC, and B & V
CONSTRUCTION, INC., a/k/a B & V,

Defendants-Appellees.

No. 273682
Oakland Circuit Court
LC No. 2002-040563-CZ

JOHN SALPIETRA and MARY SALPIETRA,

Plaintiffs-Appellants,

v

KINDER PROPERTY, LLC,

Defendant-Appellee,

and

B & V CONSTRUCTION, INC., a/k/a B & V,

Defendant.

No. 273687
Oakland Circuit Court
LC No. 2002-040563-CZ

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right (1) the judgment in their favor that did not include an award of costs and attorney fees pursuant to the Condominium Act, MCL 559.101 *et seq.*, (2) an order awarding case evaluation sanctions under MCR 2.403(O) in favor of defendant B & V Construction, Inc., and (3) an order granting defendant, Kinder Property, LLC, sanctions under MCR 2.114 following plaintiffs' request for costs and attorney fees under the Condominium Act. We affirm.

This litigation has a protracted history. A brief recitation of the salient facts was provided by this Court in a previous opinion, and included:

Plaintiffs purchased a residential lot of an unimproved building site in a condominium project in Oakland Township. Kinder was the project developer, and B & V was the subcontractor who did the land balancing of the lot. Plaintiffs' builder discovered rotting vegetation and seeping water in the soil, indicating that the lot had been improperly graded and filled. Plaintiffs incurred expenses of \$24,175 to correct the fill problem before construction of their home could be accomplished. Plaintiffs then discovered that erosion controls had not been properly installed or maintained on the lot, thereby allowing water to

damage the basement walls and housing structure. Plaintiffs spent an additional \$40,000 to construct stone fences to correct this washout problem. Plaintiffs filed a complaint against Kinder, in part alleging that Kinder breached its purchase agreement by failing to provide an unimproved building site suitable and ready for construction of a residence. Plaintiffs also filed a breach of contract claim against B & V on the theory that plaintiffs were third-party beneficiaries of the earthwork contract between defendants.

The case was before this Court following the trial court's summary dismissal of plaintiffs' case in favor of both defendants. We reversed and remanded as to plaintiffs' breach of contract claim against defendant Kinder, holding that the purchase agreement was ambiguous as to whether defendant Kinder had a duty to provide unit soils suitable for construction. We affirmed as to plaintiffs' breach of contract claim against defendant B & V, holding that plaintiffs were not third-party beneficiaries of defendants' grading and fill agreement.

Before a trial on the merits, defendant Kinder moved in limine "to limit plaintiffs' proofs on liability and damages." Defendant argued that plaintiffs' only viable theory of liability was a breach of contract claim therefore proofs should be limited to establishing breach of contract damages only, i.e., compensatory, benefit-of-the-bargain, damages. Plaintiffs responded to the motion, arguing that they were entitled to (1) exemplary damages because defendant Kinder's actions were reckless, willful, and malicious, (2) non-compensatory damages under MCL 559.184a(1)(b) of the Condominium Act because the purchase agreement contained an untrue statement of material fact—that a suitable and ready lot would be provided, (3) attorney fees under MCL 559.215(1) of the Condominium Act because defendant Kinder failed to comply with the purchase agreement, and (4) costs under MCL 559.207 of the Condominium Act because this was an action to enforce the terms of the purchase agreement.

At oral argument on the motion in limine, defendant Kinder argued that plaintiffs never pleaded a violation of the Condominium Act therefore they were not entitled to any remedies under that Act. The trial court agreed, holding that plaintiffs were prohibited from adducing proofs in support of purported claims under the Condominium Act because they "had never been pled by Plaintiffs as a cause of action in any of its forms of Complaint."

The case proceeded to trial. The jury returned a verdict in plaintiffs' favor, awarding them \$24,175 on their breach of contract claim against defendant Kinder—the cost of rehabilitating the lot. A judgment was entered in the amount of \$28,962.95, representing the jury award plus statutory interest. Then, plaintiffs moved for costs and attorney fees as the prevailing party under MCR 2.625 and the Condominium Act. Defendant Kinder moved for sanctions under MCR 2.114 on the ground that plaintiffs' motion for costs and attorney fees was neither well-grounded in fact nor warranted by existing law; the trial court had ruled that the Condominium Act did not apply. And, defendant B & V moved for case evaluation sanctions under MCR 2.403(O). Plaintiffs' motion for costs was partially granted, but their request for attorney fees was denied. Defendant Kinder was granted sanctions in the amount of \$2,500 relative to plaintiffs' unsupported request for attorney fees. Defendant B & V's motion for case

evaluation sanctions was also granted. Plaintiffs separately appealed these three orders, as well as the judgment, and these appeals have been consolidated.¹

First, plaintiffs argue that they were entitled to recover their costs and reasonable attorney fees under the Condominium Act as the prevailing party in their breach of contract action against defendant Kinder. We disagree. Generally, a court's decision as to an award of costs or attorney fees is reviewed for an abuse of discretion, but questions of law that affect the determination are reviewed de novo. *Badiee v Brighton Area Schools*, 265 Mich App 343, 377; 695 NW2d 521 (2005); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

Plaintiffs claim that they were entitled to costs and attorney fees under the Condominium Act because (1) condominium sales are governed by the Act, (2) this particular sale was conducted in conformity with the Act, and (3) the terms of the Act were incorporated into the purchase agreement. The provision of the Act that was specifically violated, plaintiffs claim, was that "a developer shall not make an untrue statement of a material fact." MCL 559.184a(5). According to plaintiffs, this provision was violated because a term of the purchase agreement was that defendant Kinder would produce an unimproved building site suitable and ready for construction of a residence but defendant Kinder did not; thus, the purchase agreement contained an untrue statement of a material fact. Because defendant Kinder violated this term, plaintiffs were entitled to damages under MCL 559.215(2). And, because plaintiffs prevailed in this action to enforce the purchase agreement, they claim to be entitled to recover their costs. MCL 559.207, 559.215(1).

But, as the trial court held, plaintiffs never pleaded a cause of action premised on a violation of the Condominium Act. Rather, in their Second Amended Verified Complaint plaintiffs pleaded, and litigated to jury verdict, the following common-law breach of contract claim:

39. On or about November 28, 2000 Plaintiffs JOHN MICHAEL SALPIETRA and MARY SALPIETRA entered into a Purchase Agreement, attached hereto as Exhibit 1, in which Defendant KINDER PROPERTY, LLC, as Developer, of The Heights of Oakland, a condominium, was to develop and produce an unimproved building site suitable and ready for construction of a residence for Unit No. 11.

40. The Purchase Agreement was a valid, enforceable contract, which was mutually accepted Defendant KINDER PROPERTY, LLC with its execution and tender by Plaintiffs of the sum of Fifty-Two Thousand (\$52,000.00) Dollars.

41. Defendant KINDER PROPERTY, LLC breached the Purchase Agreement by failing to develop and make available to Plaintiffs for Unit 11 an unimproved building site suitable and ready of [sic] construction of Plaintiffs' condominium.

¹ Plaintiffs appealed the judgment in docket number 271681, the partial denial of plaintiffs' motion for costs and attorney fees in docket number 273682, the award of case evaluation sanctions to defendant B & V in docket number 273190, and the grant of sanctions to defendant Kinder in docket number 273687.

42. Defendant KINDER PROPERTY, LLC's performance did not conform to the Purchase Agreement.

43. Plaintiffs have incurred damages as the direct, foreseeable and proximate result of Defendant KINDER PROPERTY, LLC's breach of contract and failure to perform in accordance with the Purchase Agreement.

This breach of contract claim was the only claim that was presented to and decided by the jury.

MCR 2.111(B) provides:

A complaint, counter-claim, cross-claim, or thirty-party complaint must contain the following:

- (1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend; and
- (2) A demand for judgment for the relief that the pleader seeks.

And, MCR 2.112, in relevant part, provides:

- (H) In pleading a statute, ordinance or municipal charter, it is sufficient to identify it, without stating its substance.
- (I) When items of special damage are claimed, they must be specifically stated.

The specific allegations pleaded by plaintiffs in this case only reasonably informed defendant Kinder that it would have to defend against a breach of contract claim. Plaintiffs' argument that they are entitled to costs and attorney fees merely because this condominium sale was governed by the Act is unsupported by citation to any supporting legal authority. And, we disagree with that position. The purported fact that defendant Kinder's performance did not conform to the Purchase Agreement would not cause defendant Kinder to be reasonably informed that it would have to defend against a claim that it violated a provision of the Condominium Act—specifically the provision that prohibited a developer from making “an untrue statement of a material fact.” MCL 559.184a(5). That condominium sales are governed by the Act—a fairly extensive body of law—is not sufficiently informative. See MCR 2.112(H). Further, plaintiffs never pleaded the special damages, e.g., costs and attorney fees, resulting from the purported violation of the Act. See MCR 2.112(I).

And, defendant Kinder never consented to litigating this claim. See MCR 2.118(C). When plaintiffs posited the argument that the Condominium Act was violated in response to defendant Kinder's motion in limine to limit proofs on liability and damages, defendant vehemently opposed the argument as not having been properly pleaded. The trial court agreed with defendant Kinder, and plaintiffs do not argue that leave to amend their complaint was erroneously denied. See MCR 2.118(A). Because plaintiffs did not plead a violation of the

Condominium Act and the allegations pleaded did not reasonably inform defendant Kinder that plaintiffs were accusing defendant of violating any duty imposed by the Condominium Act, plaintiffs may not be awarded costs and attorney fees associated with a purported violation of the Act. Therefore, the trial court properly denied plaintiffs' request for such costs and attorney fees and remand for calculation of the same before a different trial judge is unnecessary.

Next, plaintiffs argue that the trial court abused its discretion when it awarded case evaluation sanctions to defendant B & V because, in light of B & V's active negligence, the interest of justice exception applied. See *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). Because the trial court's decision was within the range of reasonable and principled outcomes, we disagree. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

If a party has rejected a case evaluation award and the action proceeds to verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. MCR 2.403(O)(1). This is a mandatory provision. But, in cases where a verdict is entered as a result of a ruling on a motion after rejection of the case evaluation, the trial court may refuse to award costs under MCR 2.403(O)(11), in the interest of justice. "[I]f the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the 'interest of justice' exception found in MCR 2.403(O)(11)." See *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 449; 702 NW2d 637 (2005), quoting *Haliw v Sterling Heights*, 257 Mich App 689, 706-709; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). Interest of justice exceptions have been found, for example, in circumstances where: (1) it is a case of first impression, (2) a party has engaged in misconduct, or (3) the law is unsettled and substantial damages are at issue. *Haliw, supra*, 266 Mich App at 448-449, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996).

In this case, plaintiffs argue that the interest of justice exception should be applied with regard to defendant B & V's claim for case evaluation sanctions because B & V engaged in misconduct. Plaintiffs explain that B & V, "as an active agent of Defendant Kinder, was a culpable party whose negligence in preparing the site for the construction of the [plaintiffs'] home resulted in their breach of contract action against Defendant Kinder." Plaintiffs misapprehend the interest of justice exception. That a defendant may have contributed to a plaintiff's injuries is not the type of "misconduct" to which the interest of justice exception addresses.

As this Court explained in *Haliw*, MCR 2.403(O) serves the purpose of deterring protracted litigation and encouraging settlement. *Haliw, supra*, 266 Mich App at 448, quoting *Haliw, supra*, 257 Mich App at 706. It does this by shifting the financial burden of trial onto the party who rejects the proposed case evaluation award and, thus, demands a trial. See *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006). Therefore, the type of misconduct to which the interest of justice exception applies is misconduct that has the effect of prolonging the litigation or thwarting settlement negotiations. See *Haliw, supra*, 257 Mich App at 706. Gamesmanship is an example of such misconduct. *Id.* at 708. Thus, plaintiffs have failed to present an unusual circumstance, as viewed in light of the purposes of MCR 2.403(O), that would justify denial of an award of case evaluation sanctions in defendant B & V's favor. Accordingly, the trial court did not abuse its discretion when it awarded these sanctions.

Finally, plaintiffs argue that the trial court erroneously awarded defendant Kinder sanctions under MCR 2.114 following plaintiffs' request for costs and attorney fees under the Condominium Act. Because we conclude that the trial court's determination was not clearly erroneous, we disagree. See *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999).

In relevant part, MCR 2.114 imposes sanctions on a party who files a motion that is not well-grounded in fact and is unwarranted by existing law or does not present a good faith argument for the extension, modification, or reversal of existing law. MCR 2.114(A), (D)(2), (E). In this case, defendant Kinder moved for an award of sanctions under MCR 2.114 after plaintiffs filed their post-trial motion requesting an award of costs and attorney fees pursuant to the Condominium Act. Before the trial, with regard to defendant Kinder's motion in limine, the trial court held that the Condominium Act was not applicable to this case because plaintiffs did not plead such a cause of action. Because the trial court had already ruled on this matter, plaintiffs' motion for costs and attorney fees on the basis of the Condominium Act was not well-grounded in fact and was unwarranted by existing law. Therefore, the trial court's decision to award defendant Kinder \$2,500 for having to defend against the motion was not clearly erroneous.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto