

STATE OF MICHIGAN
COURT OF APPEALS

MARK DABISH, INC.,

Plaintiff-Appellee,

v

MUTUAL DEVELOPMENT CORPORATION,
INC., and OASIS PROPERTIES,

Defendants-Appellants.

UNPUBLISHED

May 29, 2001

No. 222215

Oakland Circuit Court

LC No. 98-007558-CH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff commenced this action to determine the amount it was required to pay to redeem certain property that defendants had purchased following a foreclosure sale. The trial court determined that the amount necessary to redeem the property was \$133,715.39. Defendants appeal by right. We affirm.

Defendants first argue that the trial court exceeded its authority when it extended the statutory redemption period. We disagree. We agree that the facts presented constitute unusual circumstances warranting the court's exercise of its limited equitable powers to extend the statutory redemption period. *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996); see, also, *Palmer v Palmer*, 194 Mich 79, 81; 160 NW 404 (1916). Fraud is not the only unusual circumstance warranting the exercise of this equitable power, nor was this a case involving only an ordinary impasse in negotiations. *Flynn, supra* at 199 n 25, 201-202. Rather, defendants were demanding a redemption amount that was much higher than what plaintiff actually owed and that included items that they were not legally entitled to collect. See *Marble v Butler*, 249 Mich 276; 228 NW 677 (1930). Under the circumstances, the trial court properly stayed the redemption period until plaintiff's claims could be resolved.

Next, defendants argue that the trial court erred in ruling that a \$450 contractual late fee was an unenforceable penalty. We disagree. Courts will not permit parties to stipulate unreasonable sums as damages, and, where such an attempt is made, will treat those sums as penalties that are void and unenforceable. *Curran v Williams*, 352 Mich 278, 283; 89 NW2d 602 (1958); see, also, *Watson v Harrison*, 324 Mich 16, 19-20; 36 NW2d 295 (1949). Here, the

record does not reveal any competent evidence explaining how the disputed late fee was reasonably related to actual or anticipated damages.¹ Indeed, the late fee was never enforced by defendants' predecessors, who, according to evidence presented below, believed that the fee was unenforceable. Also, the evidence does not indicate that damages would have been difficult or impossible to ascertain in advance. Accordingly, we conclude that the trial court did not err in determining that the disputed late fee was an unenforceable penalty.

Defendants further argue that the trial court erred in refusing to award them attorney fees. We disagree. An award of attorney fees is intended to be compensatory. *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282 (1998), overruled in part on other grds *Rafferty v Markovitz*, 461 Mich 265, 273 n 6; 602 NW2d 367 (1999). Therefore, defendants cannot recover attorney fees that they did not incur and that accrued before the attorney in question became their lawyer. See *Rafferty, supra* at 271; *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Schls*, 455 Mich 1, 12; 564 NW2d 457 (1997). Further, because "the results achieved" may be considered in determining the reasonableness of the fees requested, an award properly excludes "legal expenditures attributable to [defendants'] unsuccessful claim[s]." *McAuley, supra* at 525. Because defendants did not prevail on any claims below, they were not entitled to an award of attorney fees.

Defendants next argue that they were entitled to recover for the amount of taxes and insurance premiums expended in connection with the property. Although these are expenses for which reimbursement is permitted, because defendants did not make a prima facie showing of compliance with the filing requirements of the redemption statute, which is a prerequisite to reimbursement for these items, see MCL 600.3240(4); MSA 27A.3240(4), we conclude that the trial court did not err in failing to award the amount of taxes and insurance premiums.

Lastly, defendants argue that the trial court erred in allowing plaintiff to present proofs regarding the issues of waiver, whether the late fee was an unenforceable penalty, and whether defendants' bad faith precluded recovery of attorney fees. We disagree. Contrary to what defendants argue, we find that these issues were not new claims, but rather, defenses to defendants' attempts to collect excessive amounts under the promissory notes and mortgage. The waiver and penalty issues were raised in the parties' motions for summary disposition. We find no merit to defendants' claim that they were either surprised or prejudiced at trial as a result of plaintiff's pursuit of these issues. Thus, the trial court did not abuse its discretion in allowing plaintiff to present proofs on these issues. *Dacon v Transue*, 441 Mich 315, 328-329; 490 NW2d 369 (1992).

We decline to consider the merits of defendants' waiver/estoppel argument because it

¹ We note that Mr. Dunn's affidavit was admitted at trial only because it had already been attached to defendants' pleadings. It was not admitted for the truth of the matter stated. In fact, the trial court explicitly stated that admitting the affidavit "d[id] not mean that it proves that those figures are correct."

requires resolution of issues of fact that were not decided by the trial court below and, in light of our disposition of the preceding issues, further consideration of these issues is unnecessary.

We affirm.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey