

STATE OF MICHIGAN
COURT OF APPEALS

LOFGREN CONSTRUCTION,

Plaintiff/Counterdefendant-
Appellee,

v

GARY E. ISON and SHERYL A. ISON,

Defendants/Counterplaintiffs-
Appellants.

UNPUBLISHED

January 27, 1998

No. 195076

Cheboygan Circuit Court

LC No. 93-003652 CK

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

This is a breach of contract action. Following a bench trial, the court entered a judgment in favor of plaintiff and an order requiring defendants to pay plaintiff \$37,600 in damages. Defendants appeal as of right. We affirm.

The case arises out of defendants' purchase of a modular home from plaintiff pursuant to a \$67,400 contract. Defendants made a \$7,400 down payment on the contract. They subsequently stopped making payments on the contract, however, claiming that the basement plaintiff built for the home did not conform to specifications and that the modular home had been delivered with extensive water damage. Plaintiff sued for the remainder due on the contract and defendants countersued for breach of contract. Before trial, plaintiff made a \$40,000 offer of judgment to defendants; defendants made a counteroffer of \$37,000. No settlement was reached and the case proceeded to trial.

The court found that plaintiff's work was defective, but that defendants impermissibly prevented plaintiff from curing the defects by excluding Lofgren from the job site. Accordingly, the court awarded plaintiff \$39,909: the \$60,000 remainder owed on the contract, less the damages reasonably incurred by defendants (\$14,173) and one-half of defendants' attorney fees (\$5,918). The partial award of attorney fees was included as consequential damages caused by plaintiff's breach of its implied warranty of fitness for a particular purpose under the Michigan Uniform Commercial Code, MCL 440.2714; MSA 19.2714 and MCL 440.2715; MSA 19.2715. After considering defendants' motion for a new

trial, the court concluded that defendants were entitled to a further setoff for repairs and reduced plaintiff's award to \$37,600. The court left the prior determination concerning attorney fees undisturbed. The court later denied both parties' requests for attorney fees made under the offer of judgment rule, MCR 2.405.

On appeal, defendants first contend that they should have been awarded all of their attorney fees under § 11(2) of the Michigan Consumer Protection Act (MCPA), MCL 445.911(2); MSA 19.418(11)(2), rather than a partial award under the UCC. Although this Court has held that a breach of an implied warranty under the UCC can also be a violation of the MCPA, *Mikos v Chrysler Corp*, 158 Mich App 781, 782-783; 404 NW2d 783 (1987), the trial court did not abuse its discretion in this case when it awarded defendants one-half their attorney fees. Regardless of whether the court awarded the fees under the MCPA or the UCC, defendants were only entitled to one award of reasonable attorney fees. In awarding reasonable attorney fees under either the UCC or the MCPA, a trial court may consider the professional standing of the attorney, the skill, time and labor involved, the amount in question and the results achieved, the complexity of the case, the expenses incurred and the nature of the professional relationship with the client. *Smolen v Dahlmann Apartments Ltd*, 186 Mich App 292, 295; 463 NW2d 261 (1990). In this case, the trial court properly noted that while plaintiff was partially at fault for delivering a water-damaged modular home, defendants impermissibly complicated the matter by denying Lofgren the opportunity to perform the contract. The trial court's award also mirrors the final judgment, as plaintiff was awarded approximately one-half of the contract price. Accordingly, the award reflected the result achieved and the trial court did not abuse its discretion.

Defendants also claim that they were entitled to attorney fees under the offer of judgment rule, MCR 2.405, which entitles a party to recover its actual costs and reasonable attorney fees if the adjusted verdict is more favorable to it than the average offer of judgment. MCR 2.405(D)(1), (2), and (3). According to defendants, the final judgment of \$37,600 failed to account for the value of the modular home's "furnace package," and that, once the final judgment is adjusted downward for this value, the average offer of \$37,500 was more favorable to defendants. The record indicates, however, that the trial court did not clearly err in determining that the value of the furnace package was included in the adjusted verdict. Accordingly, we find no abuse of discretion in the court's decision to deny attorney fees under MCR 2.405.

Finally, defendants claim that their act of excluding plaintiff from the property was not a material breach of contract; rather, plaintiff materially breached by failing to properly construct the basement and by delivering a modular home with significant water damage. Because a modular home is a movable and identifiable type of goods at the time of the sale, the sale in this case was predominantly a sale of goods over \$500, governed by the UCC. See *Neibarger v Universal Cooperatives*, 439 Mich 512, 534; 486 NW2d 612 (1992). Under the UCC, buyers must pay at the contract rate for any goods they accept from a seller, and if a buyer accepts nonconforming goods with knowledge of the nonconformity the acceptance cannot be revoked. See MCL 440.2607; MSA 19.2607. Here, defendants accepted the home with knowledge of its nonconformity and demanded that plaintiff cure by repairing the water-damaged interior, but subsequently excluded plaintiff from the property to perform the required repairs. A party to a contract cannot prevent, or render impossible, performance by the

other party and still recover damages for nonperformance. *Kiff Contractors, Inc v Beeman*, 10 Mich App 207, 210; 159 NW2d 144 (1968). Accordingly, the trial court properly concluded that defendants materially breached the contract by accepting the house and then effectively interfering with plaintiff's ability to perform the contract by preventing Lofgren from curing the defects.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad