STATE OF MICHIGAN

COURT OF APPEALS

RICHARD FARNSWORTH d/b/a
RICK FARNSWORTH FLOORS,

Plaintiff/Counterdefendant-Appellant,

v

MARYSVILLE MASONIC TEMPLE
ASSOCIATION,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
January 14, 2000

No. 211536
St. Clair Circuit Court
LC No. K 96-001832 CH

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff appeals by right from an order of judgment directing a verdict of no cause of action in favor of defendant and awarding offer of judgment sanctions to defendant pursuant to MCR 2.405. We affirm the order of judgment but reverse the sanctions order.

I. FACTS AND PROCEEDINGS

This lawsuit arose from a contract in which defendant agreed to pay plaintiff to install a tile floor on defendant's premises. Defendant was dissatisfied with plaintiff's work because there were large gaps between the tiles and plaintiff did not properly fix the gaps. Defendant refused to pay plaintiff unless he did the work over, but plaintiff would not redo the job. Defendant hired another contractor to finish the project. Plaintiff sued defendant for breach of contract claim and lien foreclosure. Defendant filed a countersuit for breach of contract, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.*, slander of title from the claim of lien, and negligence.

Pursuant to MCR 2.403, in June of 1997, the parties argued their cases to a mediation panel prior to trial. The panel unanimously awarded plaintiff $2,000 on June 13, 1997. On June 30, 1997, plaintiff accepted the award, but defendant rejected it. On the same day that defendant filed its rejection of the mediation award, defendant made an offer of judgment (MCR 2.405) for $2,000. Plaintiff failed to make a timely response to the offer of judgment as required by the court rule, so the

offer was deemed rejected. MCR 2.405(c)(2)(B). All of these events took place before October 1, 1997, when amendments to the offer of judgment rule became effective.

In November, 1997, the case proceeded to a bench trial. Because plaintiff's counsel had withdrawn before trial, plaintiff acted as his own trial counsel. Plaintiff presented no proofs in support of his own claim. Consequently, the trial court granted defendant's motion for directed verdict on plaintiff's complaint. The trial continued with both parties presenting proofs on defendant's countersuit.

After the trial court awarded defendants damages for breach of contract and no cause of action for plaintiff, defendant requested sanctions under the offer of judgment rule. Plaintiff argued that under the amended court rules, defendant was not entitled to offer of judgment sanctions because it had rejected a mediation award for the same amount as its offer of judgment. The trial court rejected this argument, and awarded offer of judgment sanctions to defendant.

II. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant's motion for offer of judgment sanctions pursuant to MCR 2.405(E). Plaintiff contends that the trial court should have applied the amended version of MCR 2.405, which would have precluded sanctions against plaintiff. We agree.

A

The Supreme Court amended MCR 2.405 on May 8, 1997, and the amendments became effective on October 1, 1997. Prior to the effective date of the amendment, the portion of the rule relating to mediation and offer of judgment sanctions read as follows:

> **Relationship to Mediation.** 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).]

Under the amended court rule, subsection (E) now reads:

> **Relationship to Mediation.** Costs may not be awarded under this rule in a case *that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous*. [MCR 2.405(E) (emphasis added).]

By abolishing offer of judgment sanctions where the offer of judgment comes after a unanimous mediation award, the Supreme Court "was attempting to eliminate the gamesmanship of using the offer of judgment rule as a way to avoid mediation sanctions while opening the possibility for offer of judgment sanctions, without having a good faith intent to settle the case." *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 342; 602 NW2d 596 (1999).

Here, the parties dispute which version of MCR 2.405(E) should have governed defendant's motion for sanctions. The chronology of pertinent events is as follows:

6/13/97	Mediation was conducted. The mediation panel unanimously awarded plaintiff $2,000 from defendant.
6/30/97	Plaintiff accepted mediation award. Defendant rejected mediation award, but submitted an offer of judgment for $2,000.
7/21/97	Plaintiff effectively rejected defendant's offer of judgment by failing to notify defendant of acceptance within 21 days. MCR 2.405(C)(2).
10/1/97	**Amended version of MCR 2.405(E) became effective.**
11/20/97	Defendant prevailed at bench trial on both plaintiff's complaint and defendant's counterclaim.
12/29/97	Trial court ruled on motion for entry of judgment and awarded defendant $3,906.25 in attorney fees pursuant to MCR 2.405.
3/11/98	Trial court entered order of judgment granting defendant $3,906.25 in attorney fees.

Plaintiff argued to the trial court that it should apply the amended version of MCR 2.405(E) and deny offer of judgment sanctions because the offer of judgment came after a unanimous mediation award. The trial court did not address this argument when it awarded sanctions. On appeal, plaintiff reiterates his argument that the amended subsection (E) should have governed the motion for sanctions.

Both parties offer vigorous arguments regarding retroactive and prospective application of statutes and court rules. They also debate which event is most significant for purposes of determining which subsection (E) governs. However, the answer to this controversy lies in MCR 1.102. In our recent decision in *Reitmeyer, supra*, another case involving the application of the MCR 2.405 amendments under a similar chronology, we concluded that MCR 1.102 provides the guidelines for the application of new and amended court rules. MCR 1.102 says that: (emphasis added):

> These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. *A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice*.

A party is not entitled to application of the pre-amended version of the rule merely because he relied on it in deciding a course of conduct. In deciding whether to apply the amended MCR 2.405(E)

to a pending action, a trial court must not only determine the presence of any "injustice" but also consider the purpose of the amendment. *Reitmeyer*, *supra* at 337-338. In keeping with the overall purpose of MCR 2.405 (to "encourage settlement and to deter protracted litigation"), the Michigan Supreme Court amended this rule because the Court determined that the offer of judgment rule was undermining the mediation process under MCR 2.403. *Id*., 341. The Supreme Court intended to eliminate the gamesmanship of using the offer of judgment rule as a way to avoid mediation sanctions while opening the possibility for offer of judgment sanctions, without having a good-faith intent to settle the case. *Id*. However, our Supreme Court also cautioned against reading the injustice exception under MCR 1.102 "so broadly that it effectively nullifies the general rule that new court rules be applied to pending cases." *Id.*, 340. Accordingly, the court must take into consideration both the parties' interest in relying on court rules in effect at the time of their decisions and the public policy interest in discouraging gamesmanship under those rules.

In *Reitmeyer*, the Court was unable to determine whether the plaintiff who rejected unanimous mediation before making an offer of judgment was making a good faith effort to reach a just settlement (which would warrant application of the "injustice" exception) or merely trying to manipulate the then-existing rules (which would justify application of the amendment). The plaintiff there rejected the mediation award, and then made an offer of judgment significantly higher than the mediation award. The Court noted that plaintiff might have acted in a good faith belief that the mediation award was unrealistically low. *Id.*,342-343. Accordingly, the *Reitmeyer* Court remanded for a determination of "whether such 'injustice' would result from the application of the amended version of MCR 2.405(E)." The Court stated:

> This determination should be based on the substance of the rule involved and the timing of plaintiff's actions, plaintiff's obvious gamesmanship or lack thereof, and thus plaintiff's reliance or lack of reliance on the rules as they existed at the time he made the pertinent decisions in this case, and any other pertinent factors in the individual case. We emphasize that while the results may be different between the old and new rule, as may ordinarily be expected, this is not the dispositive factor in the analysis. Rather, we believe that several factors must be considered when determining the "injustice" in a particular case and whether a party "relied" on a court rule to the extent that it would be "unjust" to alter the rule in midstream. While relatively few cases will qualify for the MCR 1.102 "injustice" exception, this is a case that requires further analysis to determine whether application of the amended court rule will "work injustice." [*Id.*, 345.]

We infer that *Reitmeyer* Court believed that this issue should usually be resolved on a remand to the trial court to consider the circumstances surrounding the parties' actions toward mediation and the offer of judgment to determine whether these actions appear to implicate the purpose behind the amendment of MCR 2.405. However, we do not believe that remand is necessary here because the "injustice" exception clearly does not apply. On the same day that defendant rejected a $2,000 mediation award, it made a $2,000 offer of judgment. Consequently, defendant's offer of judgment could not have been made in a good faith belief that the mediation award was unreasonable. The only

ostensible rationale for defendant's actions is that defendant intended to shield itself from mediation sanctions while putting plaintiff in peril of sanctions under the offer of judgment rule. Defendant has not offered any other explanation for its "reliance" on the pre-amended version of subsection (E). Because this is exactly the sort of conduct that the amendment to subsection (E) was intended to discourage, we find that the "injustice" exception of MCR 1.102 does not apply. The trial court should have applied the amended version and denied sanctions to defendant. We therefore reverse the sanctions award.

B

Plaintiff contends that the trial court erred in allowing his attorney to withdraw ten days before the start of trial. We disagree. We review a trial court's decision regarding the adjournment of a proceeding for abuse of discretion. *Zerillo v Dyksterhouse*, 191 Mich App 228, 231; 477 NW2d 117 (1991). We review a trial court's decision to allow the withdrawal of an attorney under the same standard. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999); *Wykoff v Winisky*, 9 Mich App 662, 668; 158 NW2d 55 (1968). Michigan's Rules of Professional Responsibility (MPRC) provide, in part, as follows:

> (b) [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
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> * * *
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> (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer'' services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
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> (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client, or
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> (6) other good cause for withdrawal exists.
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> * * *
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> (d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. [MPRC 1.16 (b), (d).]

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs. See Comment, MPRC 1.16. Regardless of whether an attorney's withdrawal is justified, his client is entitled to notice of that withdrawal. *Bye v Ferguson*, 138 Mich App 196, 206; 360 NW2d 175 (1984). However, withdrawal of counsel does not give a litigant an absolute right to a continuance. *Id.* at 207. It is neither

an abuse of discretion nor a denial of due process to refuse a continuance on the eve of trial to one who has not been reasonably diligent in obtaining counsel. See, e.g., *Wykoff*, *supra*; *Ungar v Sarafite*, 376 US 575; 84 S Ct 841; 11 L Ed 2d 921 (1964).

Here, counsel had proper grounds for seeking to withdraw, counsel provided plaintiff with sufficient notice that he intended to withdraw, and plaintiff was provided with sufficient notice that trial would proceed though he had not retained another attorney. As in *Wykoff*, *supra*, had plaintiff "acted with reasonable diligence in obtaining [new] counsel, [he] could have properly filed whatever motions might have appeared to be in [his] best interest." *Id.* at 669. Thus, the trial court did not err in denying a continuance.

C

Plaintiff argues that it was inappropriate and premature for the trial court to grant defendant's request for a directed verdict. Because this was a bench trial, we treat defendant's "directed verdict motion" as a motion for involuntary dismissal under MCR 2.504(B)(2). *Samuel d Begola Service, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), *Armoudlian v Zadeh*, 116 Mich App 659, 671; 323 NW2d 502 (1982). Because plaintiff fails to cite any supporting legal authority for his position, the issue is effectively abandoned. *Schellenberg v Rochester Michigan Lodge No 2225, of Benev & Protective Order of Elks of USA*, 228 Mich App 20, 49; 577 NW2d 163 (1998). Furthermore, "involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." *Begola*, 639 (internal quotes omitted); MCR 2.504(B)(2). Here, when given the opportunity to call witnesses or testify on his own behalf, plaintiff declined to do so. Involuntary dismissal was therefore appropriate.

We reverse the order of sanctions against plaintiff. We affirm judgment for defendant.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad