STATE OF MICHIGAN

COURT OF APPEALS

FRANK S. MIKICIUK, d/b/a FRANK S. MIKICIUK CUSTOM HOMES,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

JEFFREY VERHINES and KIMBERLY VERHINES,

Defendants/Counterplaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
August 25, 2000

No. 217865
Washtenaw Circuit Court
LC No. 96-007672-CK

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Both parties appeal by right from the trial court's order indicating that neither party was entitled to costs and attorney fees in this breach-of-contract action. We reverse the trial court's decision and remand for an award of defendants' reasonable costs and attorney fees.

This lawsuit arose out of a contract to build a house. Plaintiff Frank Mikiciuk, doing business as Frank S. Mikiciuk Custom Homes, agreed to build a home for defendants Jeffrey and Kimberly Verhines. Defendants objected to the work done by plaintiff and refused to pay the last $37,418.23 owed under the contract. In an attempt to settle the dispute, the $37,418.23 was placed in an escrow account, and an escrow agreement was signed. The agreement provided that the money would be "held to guarantee completion of the work." Money would be released to plaintiff when he requested it in writing, specifying what work was done. If plaintiff did not complete the work within a specified time, the money would be returned to defendants, absent written objection.

The escrow agreement also contained the following provision:

> If any party brings an action in any court to enforce the foregoing Agreement, the parties agree that the party which substantially prevails shall be entitled to recovery of its reasonable costs, including attorney fees, from the other party.

Because plaintiff did not submit a request for any of the money for work completed within the time period specified in the agreement, the escrow agent notified the parties of his intent to release the $37,418.23 to defendants pursuant to the escrow agreement. Plaintiff objected to the release of the funds to defendants and subsequently filed suit, alleging breach of the building contract and of the escrow agreement by defendants in not paying plaintiff for the work he completed and in preventing him from completing the remaining work. Defendants filed a counterclaim, alleging breach of the two agreements, professional malpractice, and breach of warranty.

The matter was eventually arbitrated. The arbitrator released the $37,418.23 in the escrow account to plaintiff and required plaintiff to pay defendants $22,810 in damages for failing to meet certain terms of the construction contract. The arbitrator referred the determination of costs and attorney fees to the trial court.

The trial court entered a judgment releasing the escrow account and awarded $22,810 to defendants, with the remaining $14,608.23 in the account going to plaintiff. The trial court declined to award costs or attorney fees, indicating that neither party "substantially prevailed." Each party now seeks costs and attorney fees.

This case involves the interpretation of the parties' contract term regarding costs and attorney fees. Parties may include in their contract a provision for the payment of these expenses, and such a provision is judicially enforceable. *Zeeland Farm Services, Inc v JBL Enterprises, Inc,* 219 Mich App 190, 195; 555 NW2d 733 (1996).

The basic rule in interpreting contracts is to ascertain the intent of the parties. *Amtower v William C Rooney & Co (On Remand),* 232 Mich App 226, 234; 590 NW2d 580 (1998). A clear and unambiguous contract must be construed according to its plain meaning. *Id*. Moreover, the plain meaning of an unambiguous contract may not be impeached with extrinsic evidence. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). If, however, contractual language is ambiguous, then extrinsic evidence may be used to ascertain the intent of the contracting parties. *Id.* at 607; *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher, supra* at 722.

Here, the contractual language at issue indicated that the party that "substantially prevail[ed]" in an action to enforce the escrow agreement would be entitled to costs and attorney fees. We hold that this phrase was ambiguous as a matter of law,[1] since it was subject to more than one interpretation. Indeed, it was unclear how much greater a party's award must have been as compared to the other party's award in order to deem the first party the "substantially prevailing" party; the contract simply did not make clear how the phrase "substantially prevails" should be defined. See *Brucker v McKinlay*

[1] See *Brucker v McKinlay Transport (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997) (indicating that whether contractual language is ambiguous is a question of law that is reviewed de novo on appeal).

Transport (On Remand), 225 Mich App 442, 449; 571 NW2d 548 (1997) (indicating that the phrase "any other benefits" was "subject to interpretation because the phrase is somewhat ambiguous and broad"). Accordingly, extrinsic evidence was usable in order to ascertain the parties' intent.

The trial court evidently concluded that because each party received a sizable percentage of the escrow agreement, neither party had substantially prevailed. We hold that in doing so, the court clearly erred. See *Brucker, supra* at 448 (indicating that factual findings regarding the proper interpretation of a contract are reviewed for clear error). Indeed, the relevant hearing transcript makes clear that the parties' intent in drafting the fee agreement was one of the following: (1) to award fees to the party that received fifty-one percent or more of the escrow amount, or (2) to award fees to the party that received a greater percentage of its claim in a suit to enforce both the original building contract and the escrow agreement.[2] Option 2, however, did not make sense in light of the fee agreement's language, since the fee agreement related solely to the enforcement *of the escrow agreement*. In other words, the fee provision did not apply to any claims exceeding the amount of the escrow agreement. Accordingly, the proper interpretation of the contract, in light of the express contractual language and the available extrinsic evidence, was option 1: the party who received fifty-one percent or more of the escrow agreement was entitled to costs and fees. Since defendants received roughly sixty-one percent of the escrow amount, while plaintiff received roughly forty percent of the escrow amount, defendants were entitled to costs and fees. The trial court abused its discretion in declining to make this award.[3] See *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996), and *First Security v Aitken*, 226 Mich App 291, 319; 573 NW2d 307 (1997), overruled on other grounds sub nom *Smith v Globe Life Ins Co*, 460 Mich 446 (1999) (providing that a trial court's award of attorney fees, even if based on contractual language, is reviewed for an abuse of discretion).

Plaintiff contends that he actually received one-hundred percent of the escrow amount because the arbitrator stated that plaintiff was "entitled to $37,418.23." This contention is disingenuous, since the arbitrator went on to reduce this award by $22,810. Despite the wording of the arbitration award, the ultimate result was that plaintiff received only $14,608.23 out of the escrow funds, while defendants received $22,810, thereby becoming the "substantially prevailing" party under the fee agreement.[4]

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[2] Neither party claims any other interpretation on appeal.

[3] We note that even under the interpretation of the contract urged on appeal by plaintiff (that costs and fees should go to the party that received a greater percentage of its claim in a suit to enforce both the original building contract and the escrow agreement), defendants were still entitled to the award, since they received a slightly greater percentage of their purportedly claimed amount than plaintiff received of his claimed amount. As noted *infra*, plaintiff did not receive the entire amount in the escrow account (which he sought) but merely received $14,608.23.

[4] We note that plaintiff cites authorities indicating that a party is not a "prevailing party" for purposes of a fee agreement unless the party prevails in full, to the exclusion of any award to the opposing party. These authorities do not control the instant case, however, because (1) the instant case involved a "substantially prevailing," not merely a "prevailing" party, and (2) the instant case involved a contractual

Plaintiff additionally argues that the issue of attorney fees and costs should have been decided by the arbitrator and not the trial court. Plaintiff, however, did not object below to the trial court deciding the costs and fees issue, and therefore plaintiff's argument is not preserved for appeal. *Alford v Pollution Control Industries*, 222 Mich App 693, 699; 565 NW2d 9 (1997). Because no manifest injustice is apparent, we decline to review this issue. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998); *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

We reverse the trial court's decision regarding costs and attorney fees and remand for an assessment of defendants' reasonable costs and attorney fees. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

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provision given a precise meaning by the parties, i.e., that the party who received more than fifty-one percent of the escrow agreement would be entitled to costs and fees.