

STATE OF MICHIGAN
COURT OF APPEALS

MEGA DYNAMICS, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

HANDLEMAN COMPANY,

Defendant-Appellee/Cross-
Appellant,

and

TELXON CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 6, 2002

No. 211967
Oakland Circuit Court
LC No. 91-414593-CZ

ON REMAND

Before: Holbrook, Jr., P.J., and Meter and Owens, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court. Cross-appellant Handleman Company's application for leave to appeal was held in abeyance by the Supreme Court pending its decision in *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002). Following issuance of the *CAM Constr* decision, the Supreme Court remanded the case to us "[f]or reconsideration in light of the fact that *CAM Constr* expressly overruled the rationale of *Reddam v Consumer Mortgage Corp*, 182 Mich App 754; 452 NW2d 908] (1990), and its progeny that was relied on by the Court of Appeals in this case." *Mega Dynamics, Inc v Handleman Co*, ___ Mich ___; 645 NW2d 667 (2002). We affirm in part, reverse in part, and remand for further proceedings.

The underlying facts of the case were set forth in our prior opinion:

Mega Dynamics, Inc. (Mega), filed this action against Handleman Company (Handleman), for breach of an alleged contract to purchase hand-held, computerized scanners. Mega also brought a claim against Telxon Corporation (Telxon) for tortious interference with contract or business relationship. The circuit court granted summary disposition to both defendants and Mega appealed. This Court held that the circuit court erred in ruling that Handleman was not a merchant for purposes of the Uniform Commercial Code (UCC) statute of frauds

confirmatory memorandum provision and, therefore, dismissing Mega's breach of contract claim on the basis that it was barred by the UCC statute of frauds. This Court also found that the circuit court erred in dismissing, pursuant to MCR 2.116(C)(8), Mega's claim of tortious interference on the basis that it had dismissed Mega's breach of contract claim and that plaintiff failed to plead improper conduct on the part of Telxon.

On remand, the circuit court granted summary disposition for both defendants pursuant to MCR 2.116(C)(10). Mega appeals as of right. Handleman appeals the trial court's denial of mediation sanctions. [*Mega Dynamics v Handleman Co*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2000 (Docket No. 211967) [hereinafter *Mega Dynamics I*.]

The Supreme Court's remand order does not affect our prior resolution of the issues raised on appeal to this Court by Mega Dynamics. We now reaffirm our earlier holding rejecting Mega Dynamics' claims that the trial court had erred in granting summary disposition to Handleman and Telxon. *Id.* at slip op 2-4.

In our prior opinion we rejected Handleman's claim that the trial court erred in denying its motion for mediation sanctions pursuant to MCR 2.403. *Mega Dynamics I, supra* at slip op 4-5. In our analysis, we cited *Reddam* and *Joan Automotive Industries, Inc v Check*, 214 Mich App 383; 543 NW2d 15 (1995). Subsequently, however, our Supreme Court held in *CAM Constr* that "[t]o the extent that *Reddam* and its progeny¹ have been read to suggest that parties may except claims from case evaluation under the current rule, these cases are overruled." *CAM Constr, supra* at 557.

The plaintiff in *CAM Constr* had filed a four-count complaint against the defendant "for damages stemming from defendant's failure to pay plaintiff for services rendered and breach of contract." *Id.* at 550-551. Prior to case evaluation, the defendant was granted summary disposition on count IV of the complaint. *Id.* at 551. Subsequently, both parties accepted the case evaluation. *Id.* at 552. The plaintiff objected to the defendant's proposed order dismissing the entire case, arguing "that it had reserved its right to appeal the summary disposition on count IV." *Id.* The circuit court agreed and ordered that a judgment be crafted that dismisses the case except for count IV. *Id.* This Court then dismissed the plaintiff's appeal of the summary disposition on count IV because the plaintiff was not an aggrieved party. *Id.* at 553. Thereafter, the plaintiff applied to the Supreme Court for leave to appeal.

At issue in *CAM Constr* was whether the plaintiff could "appeal an earlier partial summary disposition ruling where the parties have subsequently accepted a case evaluation award." *Id.* *CAM Constr* rejected this argument "because it was contrary to the plain language of MCR 2.403(M)(1)." *CAM Constr, supra* at 554. "The language of MCR 2.403(M)(1) could not be more clear," the Court observed, "that accepting a case evaluation means that *all claims* in the *action*, even those summarily disposed, are dismissed. . . . [A]llowing bifurcation of the

¹ *Joan Automotive* was identified as having followed the principles of law established in *Reddam*. *CAM Constr, supra* at 556.

claims within such actions . . . would be directly contrary to the language of the rule.” *CAM Constr, supra* at 555 (footnote omitted; emphasis in original).

The case at bar, however, does not involve the acceptance of an evaluation.² Rather, at issue is plaintiff’s rejection of a 1992 evaluation award of \$25,000.³ Rejection of an evaluation is governed by MCR 2.403(N)(1), which reads: “If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.” Unlike MCR 2.403(M)(1), MCR 2.403(N)(1) specifically recognizes in clear language that an evaluation is bifurcated to the extent that individual separate awards within the evaluation may be rejected while others are accepted. The question then becomes whether this recognition of a bifurcated process means that when an evaluation is rejected, a party can successfully argue that a part of his claim against a given defendant may be considered to have been excepted from case evaluation because that part was previously dismissed by motion.

To understand MCR 2.403(N)(1), we look to MCR 2.403(K)(2) and (O)(4)(a). Subrule (K)(2) reads as follows:

The evaluation must include a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

Subrule (O)(4)(a) reads as follows:

Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

Read together, these two subrules clearly indicate that when more than one defendant is involved, the claims against each defendant are considered and dealt with separately within the case evaluation process. See *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 553; ___ NW2d ___ (2002). In other words, the partial rejection spoken of in subrule (N)(1) is not a partial rejection of an amount awarded on a particular count within a claim against a given defendant, but the rejection of an amount awarded on a claim against one defendant in a multi-defendant action, or the amount awarded on “each cross-claim, counterclaim, or third-party claim that has been filed in the action.” As subrule (K)(2) plainly states, because “all . . . claims

² At all times relevant, the process involved in the case at bar was termed “mediation” by MCR 2.403. Effective August 1, 2000, MCR 2.403 was amended, and the term “mediation” was replaced with “case evaluation.”

³ In February 1998, the action was reevaluated on order of the court. Because summary disposition was granted to Handleman before the expiration of the parties’ time to accept or reject the award, the 1998 evaluation cannot serve as a basis for sanctions. MCR 2.403(L).

filed by any one party against any other party shall be treated as a single claim,” the amount awarded separately “as to the plaintiff’s claim against each defendant,” addresses all claims brought against the other party.

Therefore, the 1992 evaluation rejected by Mega Dynamics encompassed all of its claims against Handleman, including the breach of contract claim that was summarily dismissed by the court prior to the case evaluation. Following Mega Dynamics’ rejection of the 1992 evaluation, the action proceeded to verdict, i.e., judgment was entered on Handleman’s motion for summary disposition of Mega Dynamics promissory estoppel claim. MCR 2.403(O)(1) & (O)(2). Because the verdict was more favorable to Handleman than the evaluation, Handleman is due its actual costs. MCR 2.403(O)(1).

On remand, the trial court shall determine Handleman’s actual costs. We remind the trial court that while for purposes of MCR 2.403(N) all of Mega Dynamic’s claims against Handleman were submitted for case evaluation, Handleman is only due a reasonable attorney fee “necessitated by the rejection of the case evaluation.” MCR 2.403(O)(6)(b). Further, because this case was decided on motion for summary disposition, the court retains all of its discretionary authority under MCR 2.403(11).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Patrick M. Meter

/s/ Donald S. Owens