

STATE OF MICHIGAN
COURT OF APPEALS

TOMMIE DUANE DUNLAP,

Plaintiff-Appellant,

v

ALETHA L. CHAFFEE,

Defendant-Appellee.

UNPUBLISHED

October 23, 2007

No. 271973

Isabella Circuit Court

LC No. 05-004231-CZ

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting, in part, defendant's motion for imposition of costs following plaintiff's rejection of an offer of judgment pursuant to MCR 2.405(D). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed a complaint seeking the specific performance of an alleged promise by defendant to convey a parcel of real property. Defendant filed an answer raising several affirmative defenses, including the applicable statute of limitations and the statute of frauds, and specifically demanding a reply pursuant to MCR 2.110(B)(5). At the same time, defendant filed an offer of judgment pursuant to MCR 2.405, offering to stipulate to the entry of a judgment in plaintiff's favor in the amount of \$1,000. Plaintiff failed to timely respond either to the affirmative defenses or to the offer of judgment.¹ On the day before trial was to begin, the trial court granted defendant's motion to dismiss on the ground that plaintiff did not timely respond to defendant's affirmative defenses, which were therefore deemed admitted pursuant to MCR 2.111(E)(1).

Subsequently, defendant moved for the imposition of actual costs following rejection of her offer of judgment pursuant to MCR 2.405(D), seeking \$5,651.25 for attorney fees and \$130

¹ At some point following the filing of the complaint, plaintiff's attorney died. However, substitute counsel's signature appears in the record on the trial court's October 11, 2005, scheduling order, and answers to defendant's affirmative defenses were not filed until April 28, 2006.

for additional costs. The trial court awarded defendant \$130 in costs, but awarded only \$2,000 in attorney fees, noting that most of the fees were generated in preparation for trial and that the motion to dismiss could have been brought earlier than it was.

On appeal from the order imposing costs and attorney fees,² plaintiff first argues that, pursuant to *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344; 503 NW2d 915 (1993), the order granting defendant's motion to dismiss is not a "verdict" within the meaning of MCR 2.405(A)(4). The interpretation of a court rule is a question of law that this Court reviews de novo. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 598; 552 NW2d 523 (1996).

MCR 2.405 requires trial courts to tax actual costs to the party who refuses to stipulate to a judgment, if the verdict is more favorable to the offeror. MCR 2.405(D)(1). Plaintiff correctly notes that this Court in *Zantop*, *supra*, held that under the then-existing version of MCR 2.405, no "verdict" had been reached in that case because the matter was dismissed on motion. *Zantop*, *supra* at 366; see also *Freeman v Consumers Power Co*, 437 Mich 514, 519; 473 NW2d 63 (1991); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 364-365; 466 NW2d 404 (1991). However, the rule was subsequently amended, effective October 1, 1997, and it now defines the term "verdict" as including "a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment." MCR 2.405(A)(4)(c). Thus, a judgment entered on a motion for dismissal, such as the motion in this case, expressly qualifies as a "verdict" for purposes of the offer of judgment rule.

Alternatively, plaintiff argues that the award of costs and attorney fees was contrary to the interest of justice. A trial court's decision to award or deny costs under MCR 2.405 is reviewed for an abuse of discretion. *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). Likewise, the trial court's application of the "interest of justice" exception of MCR 2.450(D)(3) is reviewed for an abuse of discretion. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004). A trial court will be found to have abused its discretion only if its decision falls outside the range of principled and reasonable outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

A trial court may refuse to award attorney fees under MCR 2.405 if doing so is in the "interest of justice." MCR 2.405(D)(3).³ However, the "interest of justice" exception does not preclude an award of attorney fees under MCR 2.405 in the absence of "unusual circumstances." *Derderian*, *supra* at 390-391, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). "Factors such as the reasonableness of the offeree's refusal of the offer, the

² This Court previously entered an order dismissing, on the ground of untimeliness, plaintiff's claim of appeal as to the trial court's order dismissing the case. *Dunlap v Chaffee*, unpublished order of the Court of Appeals, entered September 8, 2006 (Docket No. 271973).

³ To the extent that plaintiff argues that the \$130.00 that was awarded to defendant as non-attorney-fee costs should not have been awarded pursuant to MCR 2.405(D)(3), this argument lacks merit. The "interest of justice" exception in MCR 2.405(D)(3) applies only to attorney fees and not to other costs incurred during litigation. *Derderian*, *supra* at 390.

party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian, supra* at 391, quoting *Luidens, supra* at 34-35.

The trial court did not abuse its discretion in awarding partial attorney fees under MCR 2.405. Plaintiff's contention that fault lies with his attorney in failing to answer defendant's affirmative defenses does not constitute the type of "unusual circumstance[]" contemplated by the interest of justice exception. Indeed, it may be said that the direct "fault" for a procedural error presumably rests more often than not with a party's attorney rather than with the party himself. Nor does defendant's admittedly tactical decision to delay bringing her motion to dismiss constitute the type of unusual circumstance that would justify the trial court in refusing to award attorney fees. See *Derderian, supra* at 390-391. In short, it cannot be said that the trial court's award of less than one-half of the cost of attorney fees incurred in defending this action fell outside the range of principled outcomes. *Saffian, supra* at 12.

We affirm.

/s/ Donald Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis