

STATE OF MICHIGAN
COURT OF APPEALS

MIKULAS KUZDAK and CHRISTY P.
KUZDAK,

UNPUBLISHED
May 11, 2010

Plaintiffs/Counter-Defendants-
Appellees,

v

FRANK ELLERO and CYNTHIA ELLERO,

No. 287742
Macomb Circuit Court
LC No. 2004-002611-CZ

Defendant/Counter-Plaintiffs-
Appellants.

Before: TALBOT, P.J., and FITZGERALD and M.J. KELLY, JJ.

PER CURIAM.

This case is before this Court for the second time. In a prior appeal, this Court refused to disturb the trial court's equitable ruling requiring defendants Frank and Cynthia Ellero to deed a portion of disputed property to their neighbors, plaintiffs Mikulas and Christy Kuzdak, in exchange for payment, but remanded for a determination of the property's value. *Kuzdak v Ellero*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2008 (Docket No. 269777). On remand, the trial court valued the disputed property at \$42,640 and required plaintiffs to remit that amount to defendants within 90 days in consideration of defendants deeding the property to plaintiffs. If payment was not made within 90 days, plaintiffs' claim to the property would be deemed abandoned. Defendants appeal as of right. We affirm.

Defendants argue that the trial court exceeded the scope of this Court's remand order when, after determining that the disputed property was valued at \$42,640, it further held:

Accordingly, plaintiffs within 90 days of the date of this order, shall remit \$42,640.00 to defendants in consideration of defendants deeding the contested property to plaintiffs in conformance with the Court's order of October 27, 2005. At the expiration of the 90 day period, if plaintiffs have not paid \$42,640.00 to defendants in conformance with this order, plaintiff's (sic) claim to the contested property shall be considered abandoned, and defendants shall retain all rights of ownership thereto.

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources (After Remand)*,

275 Mich App 121, 127; 737 NW2d 782 (2007). “The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.” *K & K Constr, Inc v Dep’t of Environmental Quality (After Remand)*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (citations omitted). The lower court is free “on remand to consider and decide any matters left open by [the appellate] mandate.” *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000). “However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order.” *K & K Constr, Inc*, 267 Mich App at 544.

Likewise, under the law of the case doctrine, “this Court’s ruling on an issue in a case will bind a trial court on remand and the appellate court in subsequent appeals.” *Schumacher (After Remand)*, 275 Mich App at 127. “However, the law of the case doctrine applies only to issues implicitly or explicitly decided in the previous appeal.” *Id.* at 128.

Initially, to the extent that defendants rely on the law of the case doctrine, that doctrine did not prevent the trial court from imposing the condition that plaintiffs’ claim to the disputed property would be deemed abandoned if payment was not made within 90 days. That condition relates to the trial court’s original equitable ruling requiring defendants to deed the property to plaintiffs in exchange for payment. In the previous appeal, this Court’s majority opinion specifically declined to address the propriety of that remedy. Rather, this Court noted that the parties had not challenged the trial court’s authority to enter such an order and, for that reason, it would not be disturbed. *Kuzdak*, unpub op at 4. Thus, there was no ruling by this Court concerning the propriety of the trial court’s original equitable remedy that the trial court was bound to follow under the law of the case doctrine.

We also conclude that the trial court’s order on remand did not violate the scope of this Court’s remand order. This Court’s opinion in the prior appeal states:

[A]lthough the trial court viewed the property at issue in this case, neither party testified regarding its value, and nothing in the record supports that the court was able to determine its value from the view. Without any evidence indicating the value of the property, we are unable to determine whether the assessment of \$100 a square foot is clearly erroneous. *We therefore vacate that portion of the trial court’s order requiring plaintiffs to pay defendants \$100 a square foot for the property and remand this case for a determination regarding the property’s value.* [*Kuzdak*, unpub op at 4 (emphasis added).]

This instruction is clear and the trial court was required to comply with its mandate, which it did when it determined on remand that the value of the disputed property was \$42,640.

On appeal, defendants challenge the trial court’s decision to add an additional term providing that plaintiffs’ claim to the property would be deemed abandoned if payment was not made within 90 days. Because this Court’s remand order did not address other aspects of the trial court’s equitable ruling, we believe this was a matter “left open” by this Court. On remand, the trial court was free to consider and decide any matters left open by this Court’s mandate. *Grievance Administrator*, 462 Mich at 261. As previously indicated, this Court’s majority opinion explicitly declined to address whether the trial court’s initial equitable ruling concerning the sale of the property was correct, because the trial court’s authority to enter such an order had

not been challenged. *Kuzdak*, unpub op at 4. Thus, defendants cannot show a clear intent by this Court that the trial court's original equitable remedy was to be left inviolate on remand. Further, this Court's opinion remanding the case for the limited purpose of determining the property's value did not provide any other clear restrictions on the trial court's authority to impose reasonably necessary conditions on the transfer of the property, i.e., that the property be transferred only upon payment within a reasonable period. Thus, the trial court's order is not clearly inconsistent with the remand language in this Court's previous opinion.

Nor is the trial court's order inconsistent with its original finding that plaintiffs failed to demonstrate that they acquired the property through acquiescence, or with this Court's affirmance of that decision. Plaintiffs will not obtain title to the property if their claim is deemed abandoned for nonpayment.

With respect to the requirement that the trial court may take such action "as justice may require," the trial court's order does not appear unreasonable. Because this Court found that the trial court properly rejected plaintiffs' acquiescence claim, plaintiffs are not entitled to the property outright. Further, defendants never challenged the trial court's authority to enter an order awarding the property to plaintiffs in exchange for payment. The conditional transfer language was intended to protect defendants from a forced divestiture of their property without receiving compensation.

For these reasons, we conclude that the trial court did not violate this Court's remand order by imposing the condition that plaintiffs' failure to pay the determined value of the disputed property within 90 days would be deemed an abandonment of plaintiffs' claim to the property.

Defendants next argue that the trial court erred by denying their requests for costs and attorney fees. We disagree.

"Taxation of costs under MCR 2.625(A) is within the discretion of the trial court." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). But "[t]he determination whether a party is a 'prevailing party' under MCR 2.625 is a question of law," which is reviewed de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996).

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." Here, the trial court determined that an award of costs was inappropriate because the case was equitable in nature and the two sides both benefited in part and were damaged in part, depending on their perspectives. "[M]ere recovery of some damages is not enough; in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998). Although defendants argue that they were the prevailing parties, plaintiffs prevailed in the sense that they obtained a judgment allowing them to obtain the disputed property, albeit at a cost. While plaintiffs apparently do not want to purchase the property, the order directs them to do so, with a consequence if they do not. If plaintiffs exercise their right to purchase the property, defendants will be a position of either losing property involuntarily, or presumably receiving an equitable

trade of property for money. However, if plaintiffs do not tender the money, defendants will be in a better position than when they started, because they will be entitled to the disputed property free from any claim by plaintiffs. As the trial court observed, the degree to which each side benefited largely depends on the parties' perspectives. But given that the trial court's judgment recognizes plaintiffs' right to obtain the disputed property, we do not believe that the trial court erred when it found that defendants were not prevailing parties under MCR 2.625(A)(1).

However, even if defendants were considered to be the prevailing parties the trial court did not abuse its discretion by declining to award costs. The trial court's determination that its decision could be viewed as either a loss or a gain for either side is justification for its refusal to award costs, and that decision is within the range of reasonable and principled outcomes given the facts of this case.

Defendants also argue that the trial court erred by failing to award them attorney fees. We disagree. "Michigan follows the 'American rule' with respect to the payment of attorney fees and costs Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v City of Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). Defendant's reliance on MCR 2.625(A)(1) as authorizing an award of attorney fees is misplaced. Although MCR 2.625(A)(1) authorizes an award of costs to the prevailing party, it does not authorize an award of attorney fees as an element of costs. Further, while MCR 2.504(A)(2) authorizes an award of attorney fees where a court dismisses an action at a plaintiff's request, the trial court here did not allow plaintiffs to withdraw their claim or dismiss plaintiffs' cause of action. Instead, it continued its initial order requiring plaintiffs to purchase the property, subject to the condition that their property claim would be deemed abandoned if payment was not made within 90 days. Therefore, MCR 2.504(A)(2) is inapplicable.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly