STATE OF MICHIGAN

COURT OF APPEALS

Q NORTH LLC, Plaintiff-Counter Defendant-Appellee,	UNPUBLISHED September 14, 2010
v	No. 291946 Ingham Circuit Court
LAND ONE LLC and DINING ONE LLC, Defendants-Counter Plaintiffs-Appellants.	LC No. 07-001552-CK

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

In this breach of contract action, defendants appeal as of right a judgment for plaintiff in the amount of $203,365.60. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Michael Eyde is the owner and sole member of Land One, LLC, and Dining One, LLC (defendants). In February 2007, defendants purchased Arbor Hills Country Club, a private golf course located in Jackson, Michigan. Q North, LLC (plaintiff), is a company that manages golf courses; Quinn Smith is the owner and sole member. On March 6, 2007, plaintiff and defendants entered into a three-year management agreement, whereby plaintiff agreed to manage defendants' golf course, which defendants intended to make a public course, for an annual base management fee of $50,000, with a possibility to earn an incentive fee in the third year of the contract. Among other things, the management agreement required plaintiff "[t]o develop Annual marketing, and Membership Plans for the Property which are to be approved by LOLLC [defendant Land One LLC] or its designee . . . ." The management agreement also contained a section permitting defendants to terminate the management agreement early under certain circumstances. In relevant part, Section 10(b)(3) allowed defendants to terminate the agreement early upon 10 days written notice to plaintiff if plaintiff "materially violates any term of this Agreement" and Section 10(b)(7) allowed defendants to terminate the agreement early upon 10 days written notice to plaintiff if there was a "filing of a lawsuit related to the Property or the Manager's duties or responsibilities under this Agreement by Owner or any third-party naming the Manager or any of its owners, managers or employees as a defendant, which lawsuit has not been dismissed within 180 days after filing . . . ."

On August 6, 2007, defendants, through their attorney, wrote a letter to plaintiff. In the letter, defendants asserted that plaintiff had materially violated the terms of the management agreement. The letter stated that it was intended to "serve as written notice of Default and Termination under Paragraph 10(b) of the Management Agreement" and specifically cited the early termination provision in Section 10(b)(3) of the management agreement. According to the letter, Smith misrepresented his background and abilities to manage defendants' golf course, plaintiff's budget was off by 50 percent, plaintiff's marketing programs for defendants' golf course were ineffective and plaintiff engaged in unauthorized marketing and made unauthorized expenditures related to advertising and marketing. The letter further stated that because plaintiff had made unauthorized expenditures, defendants were withholding payment of plaintiff's advance monthly base management fee until plaintiff cured its default under the management agreement and repaid monies improperly expended. Defendants' letter further informed plaintiff that unless it cured its default under the management agreement within ten days, the agreement would be terminated effective on August 16, 2007:

> Paragraph 10(b)(3) provides that the Management Agreement may be terminated by the Owner before the end of its term upon ten (10) days written notice that the "Manager materially violate[d] any term of this Agreement . . . and such default is not cured within ten (10) days after notice of such default." As such, QNorth has ten (10) days from the date of this Notice to cure the above defaults. This requires that you provide a meaningful operating budget and provide an individual with the appropriate experience and background to handle the day-today [sic] operations. Further, you must provide marketing and advertising programs that are satisfactory to the Owner.
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> * * *
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> Unless within the ten-day notice period QNorth, LLC has cured its default under the Management Agreement by providing an appropriate operating budget, placing a qualified individual at the Golf Club to manage the location, developing marketing and advertising programs that meet with the Owner's approval, and reimbursing the Owner for the improper and unapproved advertising and marketing expenditures, the Management Agreement will be terminated effective Thursday, August 16, 2007.

Two days later, on August 8, 2007, defendants' attorneys wrote a second letter to plaintiff. In the second letter, defendants asserted that since they sent their August 6, 2007, letter to plaintiff, defendants had learned that plaintiff had taken significant steps to terminate the management agreement and that defendants accepted plaintiff's termination of the management agreement:

> Since that Notice was sent to QNorth, Land One and Dining One have learned that QNorth has taken significant steps to terminate the Management Agreement. These steps included your CPA, Jason M. Harshbarger, sending Midwest Employer Service, Inc. an e-mail indicating that the Management Agreement was terminated and that it would have to communicate directly with Land One and Dining One should it wish to negotiate any agreement with Land

> One and Dining One. QNorth also directed all of its contract employees who had been assigned to Arbor Hills Golf Club to resign immediately.
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> It is clear from these actions that QNorth has elected not to attempt to cure its defaults under the Management Agreement, but has instead elected to terminate the Management Agreement. Through this correspondence, Land One and Dining One accept QNorth's termination of the Management Agreement. Through this acceptance, however, Land One and Dining One do not waive any of their post-termination rights under the Management Agreement.

In response to defendants' August 6, 2007, letter, plaintiff wrote a letter to defendants on August 10, 2007, denying that it breached the management agreement by failing to develop a marketing program that met defendants' approval and denying that it failed to prepare a meaningful operating budget. Plaintiff further informed defendants that their withholding of plaintiff's fee was baseless and a clear violation of the management agreement.

Counsel for defendants wrote a third letter to plaintiff on August 21, 2007. The letter referred to the August 6, 2007, letter, which defendants asserted "gave QNorth, LLC written notice of Default and Termination under Paragraph 10(b) of the Management Agreement" and stated that because plaintiff failed and refused to cure the defaults outlined by defendants in the August 6, 2007, letter, defendants "have elected to terminate the Management Agreement in accordance with Paragraph 10(b)(3). This correspondence shall serve as Notice of Termination."

On November 1, 2007, plaintiff filed a breach of contract complaint against defendants. Defendants filed an answer to the complaint, as well as affirmative defenses and a counterclaim for breach of contract and tortious interference with a business relationship.[1] The parties filed cross motions for summary disposition, each arguing that the other party wrongfully terminated the management agreement. On December 11, 2008, the trial court denied the parties' motions for summary disposition.

On February 16, 2009, defendants wrote plaintiff another letter. In this letter, defendants asserted that they had properly accepted *plaintiff's* termination of the management agreement on August 8, 2007, and that defendants had properly terminated the management agreement under Section 10(b)(3) by their notice of termination dated August 21, 2007. In addition, defendants' letter asserted a new ground for their early termination of the management agreement, arguing that that termination was proper based on Section 10(b)(7) of the management agreement because defendants' counterclaim was filed on November 26, 2007, and it was not dismissed within 180 days after it was filed. Thus, defendants contended that the management agreement was terminated on May 24, 2008 based on Section 10(b)(7).

Trial for this breach of contract case occurred in March 2009. On the second day of trial, defendants attempted to admit into evidence their February 16, 2009, letter, but the trial court refused to admit the letter, observing that defendants had failed to raise the issue of termination

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[1] Defendants voluntarily dismissed their tortious interference counterclaim on the record at trial.

of the management agreement under Section 10(b)(7) in a timely manner. When defendants argued that they could not have terminated the management agreement under Section 10(b)(7) until May 24, 2008, the trial court observed that it had had pretrial conferences and summary disposition hearings, and defendants never brought up termination under Section 10(b)(7). On the record on the third day of trial, defendants moved to amend their answer and defenses to add termination of the management agreement under Section 10(b)(7) as a defense. The trial court denied the motion, stating that the issue should have been raised long before.

At the close of the proofs, plaintiff moved for a directed verdict on plaintiff's breach of contract claim and on defendants' counterclaim for breach of contract. The trial court denied the motion with respect to plaintiff's breach of contract claim, but granted it with respect to defendants' counterclaim. Defendants moved for reconsideration of the trial court's granting of plaintiff's motion for directed verdict on defendants' counterclaim, and the trial court denied the motion.

The jury concluded that defendants improperly breached the management agreement and awarded damages to plaintiff in the amount of $129,166.69. On April 22, 2009, the trial court entered a judgment in favor of plaintiff in the amount of $203,365.60. This amount included the damages awarded by the jury, plus costs, attorney fees and pre-judgment interest.

II. ANALYSIS

A. JUDICIAL MISCONDUCT

Defendants argue that the trial court engaged in judicial misconduct and unduly influenced the jury by being impatient and discourteous to defendants' witnesses and defense counsel and by interfering with defense counsel's examination of William Joseph "Joe" Costello and by making prejudicial comments regarding Costello's credibility. According to defendants, the trial court's conduct violated Canon 3(A) of the Michigan Code of Judicial Conduct, which provides, in relevant part:

> (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
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> (8) A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto.

Defendants did not object to the trial court's conduct at trial. An objection is necessary to preserve a challenge concerning the trial court's conduct. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Because defendants did not object at trial, this issue is

unpreserved and our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There is a strong presumption of judicial impartiality. *B & B Investment Group v Gitler*, 229 Mich App 1, 17; 581 NW2d 17 (1998). A trial court has wide discretion and power in the conduct of trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Portions of the record should not be taken out of context in order to show trial court bias against a party; rather the record should be reviewed as a whole. *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988). Judicial remarks during trial that are critical of, disapproving of, or hostile to counsel, the parties or their cases do not normally establish partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996); *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). Furthermore, impartiality is not established by expressions of impatience, dissatisfaction, annoyance or anger which are within the bounds of what imperfect people would sometimes display. *Cain*, 451 Mich at 497 n 30.

We have reviewed the record in this case and conclude that the trial court's comments to and conduct toward defense counsel during trial and during closing argument were not improper and did not demonstrate partiality. While some of the statements may have demonstrated impatience, annoyance or sarcasm, the trial court made similar comments to plaintiff's counsel, and impartiality is not established by expressions of impatience, dissatisfaction, annoyance or anger which are within the bounds of what imperfect people would sometimes display. *Id*. Our review of the record as a whole reveals that the trial court was even handed in its treatment of the parties, their witnesses and counsel. There were instances when the trial court demonstrated impatience, anger or annoyance toward both parties. However, the trial court treated the parties equally throughout the course of the trial. Defendants have not overcome the presumption of judicial impartiality in this regard.

We further find no impropriety in the trial court's conduct toward and statements to defense witness Costello. Defendants contend that the trial court called Costello's credibility into question by comments that the trial court made on the record, in the jury's presence, when portions of Costello's testimony seemed to contradict his prior testimony. During his testimony on direct examination, Costello stated: "That's what Mr. Eyde wanted, just running ads." Later, on cross-examination, counsel for plaintiff asked Costello: "Was it your testimony that what Mr. Eyde wanted to do was just run ads for the golf course?" When Costello responded in the negative, the trial court addressed Costello, asking: "You didn't testify to that, sir? You didn't say that right here on the stand before lunch that he just wanted to run ads for the golf course? You didn't say that?" After Costello responded, the trial court stated: "We'll be making a transcript here. We'll see what it says."

The trial court's statements to Costello were not improper. A trial court may question a witness in order to clarify testimony or to elicit additional relevant information, but the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). "As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality . . . a trial court is free to ask questions of witnesses that assist in the search for truth." *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996). "The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *Id.* at 50. The test is

whether the judge's questions and comments may have unjustifiably aroused suspicion in the jury's mind concerning a witness' credibility and whether partiality quite possibly could have influenced the jury. *Conyers*, 194 Mich App at 405.

Costello's testimony regarding whether Eyde only wanted to run ads for the golf course was contradictory. Costello first testified that Eyde only wanted to run ads for the golf course and then denied that he gave such testimony. By asking Costello about his testimony, the trial court was attempting to clarify Costello's testimony in this regard, which the trial court had authority to do. *Id.* at 404. The trial court's statements were not intimidating, argumentative, prejudicial, unfair, or partial. Any suspicion in the jury's mind regarding Costello's credibility was the result of Costello's contradictory testimony, not the trial court's attempt to clarify that testimony. The trial court's statements to Costello did not pierce the veil of judicial impartiality. Furthermore, the trial court instructed the jury that it was its duty to determine the facts from the evidence and that it if it believed that the trial court had an opinion about the facts, it must disregard that opinion. The trial court also instructed the jury that as the judge of the facts, it had to decide what witnesses to believe and what weight to give their testimony. Under these circumstances, there was no plain error affecting defendants' substantial rights.

B. TRIAL COURT'S RULINGS REGARDING WHETHER TERMINATION OF THE MANAGEMENT AGREEMENT WAS PROPER UNDER SECTION 10(b)(7)

Defendants argue that the trial court erred in denying their motion to amend their pleadings to assert that termination of the management agreement was proper under the early termination provision in Section 10(b)(7) and in precluding defendants from admitting evidence, in the form of their February 16, 2009, letter to plaintiff, regarding termination of the management agreement under Section 10(b)(7). We review a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Similarly, we review the trial court's evidentiary rulings for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). The abuse of discretion standard recognizes "'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Section 10 of the management agreement provides, in relevant part:

> 10. Effective Dates and Cancellation.
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> * * *
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> (b) This Agreement may be sooner terminated by Owner upon ten (10) days prior written notice to Manager upon the occurrence of any of the following: . . . (7) the filing of a lawsuit related to the Property or the Manager's duties or responsibilities under this Agreement by Owner or any third-party naming the Manager or any of its owners, managers or employees as a defendant, which lawsuit has not been dismissed within 180 days after filing . . . .

Leave to amend pleadings "shall be freely given when justice so requires." MCR 2.118(A)(2). Therefore, a motion to amend pleadings should ordinarily be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

In this case, the management agreement provided for numerous grounds for early termination. Until February 16, 2009, defendants argued that early termination of the management agreement was proper under Section 10(b)(3). However, as noted above, on February 16, 2009, defendants wrote a letter to plaintiff, arguing that an additional early termination provision in the management agreement, Section 10(b)(7), also supported early termination of the agreement because defendants' counterclaim against plaintiff, which was filed on November 26, 2007, had not been dismissed by May 24, 2008. Accordingly, defendants contended in the letter that the management agreement was terminated on May 24, 2008. On February 24, 2009, approximately three weeks before trial occurred, defendants filed an amended statement of issues to be resolved at trial, which added the issue whether termination was proper under Section 10(b)(7). However, defendants did not file a motion before trial to amend their pleadings, and they did not argue in their motion for summary disposition or on the record at the summary disposition hearing that termination was proper under Section 10(b)(7). On the record at trial, defendants moved to amend their pleading to add the defense of termination under Section 10(b)(7), but the trial court denied the motion on the record, stating that the issue "should have been raised long before now."

Even if the trial court abused its discretion in denying defendants' motion to amend, which we do not think it did based on defendants' delay in making the motion, any error in this ruling would be harmless under MCR 2.613(A) in light of the jury's verdict in this case. The jury found that defendants improperly breached the management agreement by wrongly terminating it under Section 10(b)(3). Defendants' wrongful breach of the management agreement under Section 10(b)(3) occurred in August 2007. Even if defendants could have properly terminated the agreement under Section 10(b)(7) on May 24, 2008, they had already breached the management agreement by improperly terminating it about nine months earlier under Section 10(b)(3). At the time of defendants' improper breach of the management agreement in August 2007, they could not have validly terminated it under Section 10(b)(7) because 180 days since the filing of defendants' counter complaint had not elapsed. Thus, even if defendants could have properly relied on Section 10(b)(7) as of May 24, 2008, to terminate the contract, the provision did not apply at the time defendants breached the agreement, and even if termination would have ultimately been proper under Section 10(b)(7), it would not have retroactively validated defendants' improper breach that occurred in August 2007.

The trial court also did not abuse its discretion in precluding the admission of defendants' February 16, 2009, letter at trial. Whether termination of the management agreement was proper under Section 10(b)(7) was not at issue at trial. Therefore, any evidence regarding termination under that section was irrelevant and not admissible. MRE 402.

C. MERGER/INTEGRATION CLAUSE

Defendants argue that the trial court abused its discretion in admitting evidence, including conversations and e-mail communications, relating to the negotiations that ultimately

led to the execution of the management agreement. According to defendants, the management agreement contained an express merger or integration clause, and the admission of such evidence was therefore barred by the parol evidence rule.

Under the parol evidence rule, evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary a written contract, are not admissible to vary or contradict the terms of a contract that is clear and unambiguous. *Hamade v Sunoco, Inc*, 271 Mich App 145, 166-167; 721 NW2d 233 (2006). A prerequisite to applying this rule is that the parties intended the written contract to be a complete expression of their agreement of the matters covered. *Id.* at 167. Parties include merger clauses in contracts "to establish a written agreement as the exclusive basis for determining their intentions concerning the subject matter of the contract." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 497; 579 NW2d 411 (1998). Thus, the existence of a merger clause establishes the applicability of the parol evidence rule to a contract.

In this case, the management agreement contained an express merger clause, which stated: "This Agreement represents the entire agreement between the parties and supersedes all prior oral and written proposals, communications and agreements. This Agreement may be modified only by a written instrument signed by the parties hereto."

Defendants contend that portions of Smith's testimony regarding conversations that he had during pre-contract meetings with Costello violate the parol evidence rule. According to defendants, testimony elicited by plaintiff from Smith during such a meeting regarding "the owner's desires and input" was improperly admitted. However, defendants do not assert what term or terms in the management agreement that this testimony varies or contradicts. It is not enough for defendants to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or rejection their position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In any event, our review of the management agreement does not reveal that Smith's testimony varies or contradicts any terms of the management agreement. Thus, such testimony would not violate the parol evidence rule.

Defendants also contend that testimony elicited by plaintiff regarding who would be the main contact for the owner under the management agreement violated the parol evidence rule.[2]

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[2] Defendants also assert that the trial court improperly admitted e-mail communications in violation of the parol evidence rule. However, defendants do not identify what e-mail communications the trial court admitted or cite to the trial transcript where such e-mails were admitted into evidence. Furthermore, defendants do not cite what portion of the management agreement such e-mail communications vary or contradict. It is not the function of this Court to discover and rationalize the basis for a party's claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Defendants have failed to preserve for appeal any argument regarding the trial court's admission of e-mails in violation of the parol evidence rule.

Plaintiff elicited testimony from Smith that Michael Eyde was in Florida and would not be back until late April and that Costello would be the main contact person and that he would forward any information on to Eyde. The management agreement specifically provided that "Owner hereby designates Michael Eyde and William Joseph Costello as Owner's contact with Manager . . . ." The testimony elicited from Smith regarding Costello being the contact person was consistent with the language in the management agreement and did not vary or contradict it. Such evidence did not violate the parol evidence rule.

D. PLAINTIFF'S MOTION FOR DIRECTED VERDICT AND RECONSIDERATION

Defendants argue that the trial court erred in granting plaintiff's motion for directed verdict of defendants' counterclaim for breach of contract and in denying defendants' motion for reconsideration of its ruling on the motion.

We review de novo a trial court's decision with regard to a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We must view the evidence and all legitimate inference in the light most favorable to the nonmoving party. *Id.* "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008).

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Defendants' breach of contract counterclaim alleged that plaintiff breached the management agreement by failing to develop an annual marketing plan that was approved by defendants and by making significant unauthorized expenditures. Regarding an approved marketing plan, Smith testified that he prepared and submitted a marketing plan to Costello and that the marketing plan contained specific ways that he intended to market the golf course. As noted above, the management agreement specifically designated Costello as a contact person for plaintiff, and Smith testified that Costello told him that he was his contact person and that if things were going well he probably would not hear from them. Smith testified that defendants did not specifically approve the marketing plan verbally or in writing, but that they approved the marketing plan through their actions and other verbal means. According to Smith, time was of the essence, and he began marketing the golf course in April, May and June 2007. Smith asserted that he kept Costello informed about the marketing activities, and Costello would inquire how such activities were going. Smith stated that expenditures for the marketing would appear in financial reports that were submitted to defendants. According to Smith, neither Eyde nor Costello ever informed him that they had not approved the marketing plan. Eyde testified that he did not ever contact plaintiff to say that Smith did not have the authority to market the

golf course because he (Eyde) had not approved the marketing plan. In addition, Eyde testified that he knew that marketing was one aspect of the management agreement and that he would have expected plaintiff to be marketing the property in April, May and June 2007.

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). In this case, the plain language of the management agreement did not require defendants' approval of plaintiff's marketing plan to be in writing, and it did not otherwise specify the manner of defendants' approval of the plan. Even if defendants did not give specific verbal or written approval of the marketing agreement, they approved the marketing agreement by their conduct. In light of the absence of language specifying or restricting the manner of defendants' approval of the marketing plan, the evidence, even viewing it in a light most favorable to defendants, supports the conclusion that defendants approved the marketing plan.

Furthermore, Eyde's own trial testimony refutes defendants' claim that plaintiff made unauthorized marketing expenditures. Eyde testified that early spring and spring are the prime times to market golf courses, particularly for this golf course, because it was going from a private golf course to a public golf course. Eyde further testified that marketing was one aspect of the management agreement and that he would have expected plaintiff to be marketing the golf course in April, May and June. He stated that he instructed plaintiff to conduct such marketing and that plaintiff had his specific authority to conduct marketing in April, May and June. In light of Eyde's testimony, the trial court did not err in granting plaintiff's motion for directed verdict of defendants' claim that plaintiff made unauthorized marketing expenditures.[3]

Furthermore, the trial court did not abuse its discretion in denying defendants' motion for reconsideration. Defendants moved for reconsideration on the record on the last day of trial, but they merely presented the same issues ruled on by the court in granting plaintiff's motion for directed verdict of defendants' counterclaim. "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3).

E. VERDICT

Defendants argue that the jury's verdict in favor of plaintiff is against the clear weight of the evidence. According to defendants, the evidence showed that plaintiff, not defendants, terminated the management agreement and that defendants accepted plaintiff's termination of the management agreement. Defendants also argue that the clear weight of the evidence shows that plaintiff failed to make reasonable efforts to mitigate its damages.

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[3] Further, the jury apparently rejected allegations similar to those raised in defendant's counterclaim, when it found in favor of plaintiff's claim. Thus, even if it was error to dismiss the counterclaim, that error would not be sufficiently "inconsistent with substantial justice" to warrant setting aside the jury verdict. MCR 2.613(A).

"When a party claims that a jury verdict is against the great weight of the evidence, this Court may overturn the verdict only when it is manifestly against the clear weight of the evidence." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003); see also MCR 2.611(A)(1)(e). A jury's verdict should not be set aside if there is competent evidence to support it. *Wiley*, 257 Mich App at 498. Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). If there is conflicting evidence, credibility questions should ordinarily be left for the fact finder to decide. *Schuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004). Conflicting testimony, even if it is impeached, is an insufficient ground for granting a new trial. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003).

Defendants did not preserve this issue by raising it in a motion for a new trial. *Id.* at 218. Therefore, our review of this issue is for plain error affecting defendants' substantial rights. *Carines*, 460 Mich at 763-764.

Viewing the whole body of proofs, the verdict is not against the great weight of the evidence. The evidence showed that defendants, not plaintiff, breached the management agreement. On August 6, 2007, Eyde called Smith on the telephone and told Smith that he was terminating the management agreement and that he was sending Smith a letter. In the August 6, 2007, letter to plaintiff, defendants asserted that plaintiff had materially violated the terms of the management agreement and purported to terminate the management agreement under the early termination provision in Section 10(b)(3). However, the evidence at trial did not support defendants' assertions that early termination of the agreement was proper. Specifically, the evidence did not show that plaintiff made unauthorized marketing expenditures or that plaintiff failed to get defendants' approval for the marketing plan. Furthermore, defendants informed plaintiff in the letter that they were withholding payment of plaintiff's advance monthly base management fee because plaintiff had made unauthorized expenditures. Thus, defendants, not plaintiffs, breached the management agreement by wrongfully terminating the agreement under the early termination provision in Section 10(b)(3) and then stopping payment to plaintiff under the contract. To the extent that plaintiff ceased to perform its duties under the management agreement, such conduct was not itself a breach of the management agreement, but a response to defendants' wrongful termination of the management agreement and refusal to pay plaintiff for performing under the agreement.

Furthermore, the clear weight of the evidence does not support defendants' contention that plaintiff failed to make reasonable efforts to mitigate its damages. In order to mitigate damages, the plaintiff must make efforts that are reasonable under the circumstances to minimize the economic harm caused by the wrongdoer. *Morris v Clawson Tank Co*, 459 Mich 256, 265; 587 NW2d 253 (1998). The plaintiff's burden is not onerous and does not require mitigation to be successful. *Id.* at 264. The defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages. *Id.* at 266. Whether a plaintiff is reasonable in not seeking particular employment is a question for the trier of fact. *Id*.

Smith testified that he tried to replace plaintiff's contract with defendants with another golf course, but was unable to do so. He testified that any contract would have to be with a golf course with a similar price structure to that of defendants' golf course to fit plaintiff's business

model and that the only golf course that plaintiff was seeking to gain management control of was the Grand because it had a similar pricing structure to defendants' golf course. According to Smith, he made numerous communications, including e-mails, letters and phone calls, to the Grand. Smith's testimony indicates that he had trouble communicating with anyone from the Grand, but he believed that the Grand was managed by another management company anyway. Plaintiff's burden to mitigate damages did not require mitigation to be successful. *Id.* at 264. Smith's testimony indicates that it would have been difficult to find another golf course for plaintiff to manage that would be similar in price structure to defendants' golf course and fit into plaintiff's business model. The evidence shows that plaintiff did make efforts to mitigate. The fact that the mitigation was unsuccessful does not render plaintiff's efforts unreasonable.

Affirmed. Plaintiff, being the prevailing party, may tax costs under MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra