STATE OF MICHIGAN

COURT OF APPEALS

J & N KOETS, INC., d/b/a ADVANCED RESTORATIONS, Plaintiff-Appellee, v ONEMARKET PROPERTIES LAKE POINT, LLC and LAKE POINTE CONDOMINIUMS & TOWNHOMES ASSOCIATION, Defendants-Appellants.	UNPUBLISHED January 12, 2016 No. 324007 Kent Circuit Court LC No. 12-009165-CK

Before: BOONSTRA, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendants appeal by right the judgment entered by the trial court in favor of plaintiffs, following a jury trial, on their breach of contract claim. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendants, the owners and operators of a condominium complex, experienced significant water damage due to a burst pipe in 2007. On the night of the incident, Susan Rudnitzki, at the time the secretary of the condominium association, called Matt Penny, her neighbor, whom she knew to own a restoration company. Penny told Rudnitzki that "he would get someone out there." He called Kenneth Koets, and a crew was sent to the site. Rudnitzki signed a document captioned, "Emergency Work Authorization and Direct Payment Request" ("Authorization"), and plaintiff spent approximately 14 days remediating the damage. After the work was complete, plaintiff sent an invoice for $121,385.35. Rudnitzki thought this price extremely high, and defendants refused to pay. Plaintiff brought suit, alleging breach of contract and unjust enrichment.

The Authorization signed by Rudnitzki was the basis for the breach of contract claim. The Authorization is a form containing blank lines to be completed with the names of the contracting parties. The form designates the contracting parties as "The Company" and "the Client." "The Client" is identified as "Lake Pointe Condos." However, the blank line designating "the Company" was not filled in. The Authorization provides that the Client authorizes the Company "to proceed with its recommended emergency procedures to preserve, protect, and secure from further damage the [] property and its contents." It further provides that

"any and all charges are due upon completion of work." Finally, the Authorization provides that "a service charge of 2% per month . . . will be applied to any unpaid balances after thirty (30) days." The second page lists "customer responsibilities," specifically regarding dehumidifiers or airmovers that the Company might be required to employ.

Plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(10) regarding the validity of the contract underlying its breach of contract claim. The trial court granted the motion, ruling that the Authorization was a valid contract despite its lack of a price term. The court accordingly dismissed the unjust enrichment claim. The parties proceeded to trial on the issue of a reasonable price and whether the 2% monthly service charge was applicable. Plaintiff presented testimony from an expert in water damage restoration, who opined that the price was reasonable for the work performed by plaintiff. Following the close of plaintiff's case, defendants moved for a directed verdict in their favor on the grounds that plaintiff was not the proper party to bring the suit and, therefore, did not have standing. The trial court denied the motion. The trial proceeded, and defendant presented the testimony of two experts on water damage restoration, who opined that the price was unreasonable and that the price for the job should have been approximately $20,000. Defendant later moved for a mistrial on the grounds that plaintiff's counsel's questioning of Rudnitzki prejudiced the jury. The trial court denied the motion. The jury found for plaintiff, finding that the reasonable price for plaintiff's services was $121,385.35 and that the 2% monthly service charge applied. Accordingly, the trial court entered judgment in favor of plaintiff for $340,563.93. This appeal followed.

II. STANDING/REAL PARTY IN INTEREST

Defendants first argue that plaintiff did not have standing to bring this suit, and was not the proper party to bring it, because plaintiff's invoice bore the heading "Advanced Restorations, Inc.," a different corporate entity than "Advanced Restorations" (the name under which plaintiff did business). We disagree.

> [A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. . . . The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. . . . In contract the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. [*In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013).]

"Whether a party has standing is a question of law subject to review de novo." *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011). Whether a party is the real party in interest is also a question of law we review de novo. *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

"[A] litigant has standing whenever there is a legal cause of action." *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Id*. at 355 (quotation marks and citation omitted). In this case, a legal cause of action existed—breach of contract. Moreover, as evidenced by the lengthy and contentious litigation, the purpose of the standing doctrine was fulfilled by plaintiff's sincere and

vigorous advocacy. Accordingly, the trial court did not err in rejecting defendants' claim that plaintiff's lacked standing.[1]

We also reject defendants' argument that plaintiff was not the proper party to bring this suit. "An action must be prosecuted in the name of the real party in interest[.]" MCR 2.201(B). "A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (quotation marks and citations omitted). There was uncontroverted testimony at trial that only plaintiff's employees were involved (from the service provider side) in the formation of the contract and the performance of the water restoration; thus, plaintiff performed under the contract and sought compensation under the contract. Moreover, plaintiff received permission from the trial court to amend its complaint caption from solely "J & N Koets, Inc." to "J & N Koets, Inc. d/b/a Advanced Restorations." Finally, the entity that defendants apparently claim to be the real party in interest, i.e., Koets Restoration, Inc (formerly Advanced Restorations, Inc), assigned any claims it had against defendants to plaintiff. "[A]n assignee of a cause of action becomes the real party in interest with respect to that cause of action, inasmuch as the assignment vests in the assignee all rights previously held by the assignor." *Cannon Twp v Rockford Pub Schs*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 320683, 320940, issued July 14, 2015); slip op at 4. Therefore, even assuming there was initially an issue regarding the real party at interest, any such issue is now moot.

II. VALID CONTRACT

Defendants next argue that the trial court erred in ruling, at summary disposition, that the Authorization was a valid and enforceable contract. We disagree.

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

> There are five elements of a valid contract: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. Most of the elements listed above reflect the fact that the parties to a contract must have a meeting of the minds on all essential terms of a contract. Where mutual assent does not exist, a contract does not exist. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [*Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) (quotation marks and citations omitted).]

[1] We do not consider defendants' argument that plaintiff did not have standing to bring suit because it was not a business in "good standing" with the State of Michigan on the date the suit was initiated. Such an argument was not raised before the trial court and relies on defendants' impermissible attempt to expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

In finding the Authorization to be a valid and enforceable contract, the trial court at least impliedly found these elements to have been satisfied. There is no dispute regarding whether the parties were competent to enter into a contract and that the agreement to pay for water damage restoration work was proper subject matter for a contract.

Further, the trial court did not err in ruling that the Authorization contained adequate legal consideration. "The essence of consideration—whatever form it takes—is that there be a bargained-for exchange between the parties. Typically, consideration will, at least for one side of the contract, take the form of payment of legal tender." *Calhoun Co*, 297 Mich App at 13-14 (citations omitted). This typical consideration is present in the Authorization. Plaintiff agreed to provide water restoration work in exchange for defendants' payment of legal tender for that work upon its completion. Because the authorization contained adequate legal consideration, it also necessarily contained a mutuality of obligation. *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005), lv den 474 Mich 972 (2005).

Finally, the trial court did not err in ruling that mutuality of agreement was present. This essential contractual element requires that, "[b]efore a contract can be completed, there must be an offer and an acceptance." *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited as will conclude it." *Id*. (quotation marks and citations omitted). "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *In re Costs and Attorney Fees*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002) (quotation marks and citations omitted). "Acceptance must be unambiguous and in strict conformance with the offer." *Eerdmans*, 226 Mich App at 364.

The evidence before the trial court at the time it made its ruling objectively evidenced a valid offer and acceptance. Plaintiff's crew arrived at the condominiums willing to perform water remediation work. As provided in the Authorization, they offered to perform that work in exchange for payment of legal tender upon completion of the job. The crew indicated that if Rudnitzki signed the Authorization, they would begin work. These actions evidence a willingness to enter into a bargain that would justify Rudnitzki in understanding that her signing of the Authorization would conclude the bargain; therefore, a valid offer was made. *Id*. Rudnitzki then objectively manifested her intent to be bound by plaintiff's offer by voluntarily signing the Authorization as the "manager" of the condominiums. There is no indication that Rudnitzki attempted to further negotiate, modify the Authorization, or otherwise introduce ambiguity into her acceptance. Rudnitzki's signature on the Authorization demonstrated her acceptance of the terms of plaintiff's offer. Because the evidence demonstrated a valid offer and acceptance, the trial court did not err in ruling that the mutuality of agreement element was satisfied.

Although defendants argue that Rudnitzki was not aware of the precise identity of the entity contracting to perform the work, Rudnitzki's actions objectively evidenced her intention, on behalf of defendants, to enter into a contract with the company employing the individuals who had arrived at the condominiums. *Calhoun Co*, 297 Mich App at 13. This Court has long held that "a contract may be enforced despite some terms being incomplete or indefinite so long as the

parties intended to be bound by the agreement[.]" *Id*. at 15, citing *JW Knapp Co v Sinas*, 19 Mich App 427, 430-431; 172 NW2d 867 (1969). Rudnitzki, according to her own affidavit, requested a company to perform emergency water repair work, and plaintiff's crew arrived willing to perform such a task. Rudnitzki signed the Authorization provided by plaintiff's crew, which provided plaintiff the authorization to perform the work and further provided that plaintiff would be paid for that work upon its completion. The Authorization provides that, "It is fully understood and agreed to by the CLIENT that any and all charges are due upon completion of work." The trial court therefore did not err in ruling that the Authorization was an enforceable contract.[2]

IV. MOTION FOR MISTRIAL

Defendants also argue on appeal that the trial court should have granted their motion for a mistrial due to the prejudicial effect of plaintiff's counsel's questioning of Rudnitzki. We disagree.

"Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion . . . ." *Veltman v Detroit Edison Co*, 261 Mich App 685, 688; 683 NW2d 707 (2004) (quotation marks and citation omitted). "The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes." *Patrick v Shaw*, 275 Mich App 201, 205; 739 NW2d 365 (2007). Improper conduct by counsel that is so prejudicial as to deny a party a fair trial may be grounds for a mistrial. *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 353-354; 273 NW2d 75 (1978).

Here, defendants take issue with plaintiff's counsel's questions to Rudnitzki concerning an alleged estimate of the water restoration job prepared by Penny. Specifically, counsel repeatedly asked Rudnitzki whether Penny had prepared an estimate that agreed with plaintiff's charged price; Rudnitzki denied this assertion each time. Penny did not testify.

We have reviewed the challenged questions, and conclude that any prejudice did not rise to the level necessary to declare a mistrial. Moreover, the trial court repeatedly instructed the jury that the statements and remarks of counsel were not evidence. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). "This admonition is generally sufficient to cure the prejudice arising from improper remarks of counsel[.]" *Id*. Additionally, the trial court specifically informed the jury that no documents in evidence indicated that Penny had prepared a report or estimate suggesting that plaintiff's charged price was reasonable. Because jurors are presumed to follow their instructions, *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013), the trial court's instructions were sufficient to cure any prejudicial

[2] Further, the factual question of whether Rudnitzki knew precisely the identity of the other contracting entity only arose after the trial court had declared the Authorization to be an enforceable contract. Our review is limited to the evidence before the trial court at the time it made its ruling. See *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

effect caused by plaintiff's counsel's questioning. Accordingly, the trial court did not abuse its discretion in denying defendants' motion for a mistrial.

V. LIMITATION OF EXPERT TESTIMONY

Finally, defendants argue that they are entitled to a new trial due to the trial court's erroneous limitation of the testimony of one of their expert witnesses. We disagree.

"A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence." *Albro v Drayer*, 303 Mich App 758, 760; 846 NW2d 70 (2014).

"Admissibility of expert testimony is subject to several limitations," *id*. at 761, including those present in MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) *the witness has applied the principles and methods reliably to the facts of the case*. [Emphasis added.]

Defendants challenge the trial court's ruling that Chad Hobbs could not testify that a much larger water restoration job performed by his company, ServPro, was billed at approximately the same price as that charged by plaintiffs. However, the trial court did not abuse its discretion in so limiting Hobbs's testimony because there was no evidence presented that the price of other jobs was a factor in ServPro's calculation of estimates for water restoration work. Another ServPro employee testified that, to calculate an estimate, he inputs data regarding the job into a computer program which then generates an estimate. There is no indication that the price charged for other previous jobs is part of that estimation process. Accordingly, the prices charged by ServPro for other jobs were not part of the "principles and methods" used in calculating ServPro's estimate for defendants' job and, accordingly, could not be applied reliably to the facts on this case. MRE 702. Therefore, the trial court did not abuse its discretion in exercising its "role as a gatekeeper" with regard to expert testimony. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Joel P. Hoekstra