

STATE OF MICHIGAN
COURT OF APPEALS

BFC MANAGEMENT COMPANY, d/b/a
CHEETAHS ON THE STRIP,

UNPUBLISHED
March 20, 2012

Plaintiff-Appellant,

v

JANI-KING OF MICHIGAN, INC., JANI-KING
LEASING, INC., and JANI-KING
FRANCHISING, INC.,

No. 301862
Wayne Circuit Court
LC No. 06-618130-NO

Defendants-Appellees.

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant Jani-King of Michigan, Inc.'s motion for entry of a revised judgment and awarding defendant¹ case evaluation sanctions of \$83,180.59. We affirm.

Defendant entered into a contract with plaintiff to provide cleaning services for plaintiff's adult entertainment facility, Cheetahs on the Strip. Defendant assigned the job to one of its franchisees, who hired Terry Crooks to do the work. In March 2005, Cheetahs was damaged by a fire. It was later determined that Crooks started the fire. Plaintiff filed this action against defendant, alleging claims for negligence and fraudulent inducement. The matter went to case evaluation and plaintiff obtained an award against defendant for \$225,000. Both parties rejected the award. The case then proceeded to trial and a jury returned a verdict of no cause of action.

Defendant filed a motion for entry of judgment. The motion requested costs and attorney fees under two theories: (1) that they were recoverable pursuant to a provision in the parties' contract, and (2) that they were recoverable as case evaluation sanctions under MCR 2.403(O). Plaintiff conceded that defendant was entitled to case evaluation sanctions, but disputed the amount requested by defendant. The trial court determined that defendant was entitled to costs

¹ Because the other Jani-King defendants were dismissed from the case before trial, the term "defendant" refers to Jani-King of Michigan, Inc.

and attorney fees under the parties' contract and entered a judgment that included an award of costs and attorney fees in defendant's favor in the amount of \$117,000 "pursuant to § 5.1 of the Maintenance Agreement."

In a prior appeal, this Court affirmed the judgment of no cause of action, but reversed the award for costs and attorney fees, finding that the contractual provision was not applicable to this case, and remanded for further proceedings. *BFC Mgt Co v Jani-King of Mich, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2010 (Docket No. 290043). On remand, defendant filed a motion for entry of a revised judgment, claiming that because its claim for costs and attorney fees under the contract had failed, it should be awarded case evaluation sanctions. The trial court agreed and entered a revised judgment awarding defendant case evaluation sanctions of \$83,180.59.

Plaintiff's sole claim on appeal is that the trial court erred in granting defendant's motion because the request for case evaluation sanctions was untimely. The trial court's determination whether a party is entitled to case evaluation sanctions is a question of law that is reviewed de novo on appeal. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The construction, interpretation, and application of the court rules is also a question of law that is reviewed de novo on appeal. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003); *Kernan v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

MCR 2.403(O)(8) plainly states that a motion for case evaluation sanctions "must be filed and served within 28 days after the entry of the judgment" at issue or after entry of an order denying a timely motion for postjudgment relief. The word "must" is mandatory. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009). Defendant timely filed its initial request for case evaluation sanctions before entry of the original judgment. *Mahrle v Danke*, 216 Mich App 343, 349; 549 NW2d 56 (1996). Although plaintiff did not dispute that defendant was entitled to case evaluation sanctions, they were not awarded initially because defendant was found to be entitled to costs and attorney fees under the parties' contract.² When this Court reversed the award for costs and attorney fees under the contract, defendant simply brought before the trial court an issue raised in its previous, timely filed motion but not decided by the court. While a claim for case evaluation sanctions might be untimely if first filed after the judgment had been appealed, that is not what happened here. Because the initial request for case evaluation sanctions was timely filed under MCR 2.403(O)(8) but was never decided,

² The record does not support plaintiff's argument that defendant deliberately chose to accept costs and attorney fees under the contractual provision to the exclusion of its right to case evaluation sanctions. Defendant's motion requested costs and attorney fees under both theories, and plaintiff has not identified any record evidence indicating that defendant later decided not to seek case evaluation sanctions. The most that can be said is that once it was determined that defendant was entitled to costs and attorney fees under the contractual provision, its alternate request for case evaluation sanctions became moot because a party cannot obtain attorney fees under MCR 2.403 if it has been fully reimbursed for reasonable fees on alternate grounds. *Rafferty v Markovitz*, 461 Mich 265, 271; 602 NW2d 367 (1999).

defendant's renewed request filed after the award of contractual attorney fees was vacated did not preclude an award of case evaluation sanctions.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Michael J. Talbot