

STATE OF MICHIGAN
COURT OF APPEALS

KHODOR EL-SAYED, MOHAMMED EL-SAYED, and JIHAD EL-SAYED,

UNPUBLISHED
October 25, 2012

Plaintiffs/Counterdefendants-
Appellees,

v

No. 304454
Wayne Circuit Court
LC No. 09-002559-CK

MEHSEN GARMO, ROYSE, INC., and
COUSINS & ASSOCIATES, L.L.C.,

Defendants/Counterplaintiffs/Cross
plaintiffs-Appellants,

and

RAFAT KUZA a/k/a ROY KUZA,

Defendant/Crossdefendant.

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order regarding the release of escrowed funds following the parties' acceptance of the case evaluation awards. We affirm.

I. INTERPRETATION OF CASE EVALUATION AWARD

First, defendants contend that the trial court erred in finding that the case evaluation award resolved the issue regarding the escrowed funds, exceeded its jurisdiction, and, alternatively, erred in failing to find that the escrowed funds belonged to Royse, Inc. (Royse). We disagree.

“[We] review de novo as a question of law issues involving a trial court's interpretation and application of court rules or statutes.” *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012). “[J]udgments entered pursuant to the agreement of parties are in the nature of a contract” and subject to de novo review. *Id.*

This issue centers on the disposition of the escrowed funds in Case No. 09-009747-CZ. Specifically, defendants disagree with the trial court's interpretation of the case evaluation award as resolving the issue of the escrowed funds and the release of the escrowed funds to plaintiff Mohammed.

The version of MCR 2.403(M)(1)¹ in effect at the time of the trial court's decisions provided:

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered.

In *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 555; 640 NW2d 256 (2002) (emphasis in original), our Supreme Court found that "accepting a case evaluation means that *all claims* in the *action*, even those summarily disposed, are dismissed," and that, under the "unambiguous language" of the court rule, "upon the parties' acceptance of a case evaluation all claims in the action be disposed." A party is not permitted to show that "'less than all issues were submitted' to case evaluation." *Id.* at 556.

In its complaint in Case No. 09-009747-CZ, defendant Royse sought judgment against plaintiff Mohammed in the amount of \$29,687.60, and also sought to enjoin Comerica Bank from turning over that amount to plaintiff Mohammed. Subsequently, these two parties agreed to place those funds in escrow pending resolution of the case. After the cases were consolidated, defendants sought to have Case No. 09-009747-CZ evaluated despite an earlier case evaluation of the initial case only. Plaintiffs argued that both cases should be evaluated. The trial court ordered that case evaluation "encompass all of the remaining claims and defenses in this matter." The case was resubmitted to case evaluation, resulting in acceptance of the awards. In award one, party one (Mohammed) was awarded \$45,000 against parties four (Garmo), six (Royse), and seven (Cousins). In award two, parties four (Garmo), six (Royse), and seven (Cousins) were awarded \$29,000 against party one (Mohammed). In award three, party three (Jihad El-Sayed) was awarded \$17,000 against parties four (Garmo), six (Royse), and seven (Cousins).

The trial court did not err in finding that the escrowed funds were evaluated, that the \$29,000 award was for the escrowed funds, and by ordering the escrowed funds be paid to plaintiff Mohammed. Given that the trial court's order provided that all claims were to be submitted to case evaluation, and that all claims are dismissed by acceptance of case evaluation, *CAM Constr*, 465 Mich at 555, the claim for the escrowed funds was submitted to and resolved

¹ A new version of MCR 2.403 became effective May 1, 2012. Subsequent references to MCR 2.403 will also be to the earlier version.

by case evaluation. Moreover, the award of \$29,000 is almost exactly the amount sought by Royse in Case No. 09-009747-CZ. Also, the only possible basis for the award to defendants in Case No. 09-009747-CZ, is the escrowed funds because all the counter claims were dismissed in Case No. 09-002559-CK.

Each of defendants' arguments on appeal fails. Defendants rely on the fact that the acceptance/rejection forms state, "ALL PARTIES NOT MENTIONED IN THE ABOVE AWARD(S) WERE NOT EVALUATED," in support of their argument that the escrowed funds were not evaluated because of the failure to name the escrow agent and Comerica Bank. However, the escrow agent and Comerica Bank were not listed as parties at all in the case evaluation award.² Contrarily, Khodor El-Sayed and Rafat Kuza (Kuza) were listed as parties and the award specifically provided that they were not evaluated. Because the escrow agent and Comerica Bank were not parties, the above provision does not resolve whether the escrowed funds were evaluated.

Defendants claim the trial court did not have jurisdiction over the escrowed funds because no complaint mentioned the escrowed funds, and, therefore, the trial court could not grant relief. Although the complaint in Case No. 09-009747-CZ did not mention the escrowed funds, the \$29,670.60 sought in that case were the same funds that were later put in escrow pending the resolution of the case. Thus, the complaint "reasonably" informed Mohammed "of the nature of the claims." MCR 2.111(B)(1). Because the claim was pleaded, the trial court had authority to grant relief. See *Reid v State of Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

In addition, the case evaluators had authority to decide the issue regarding the escrowed funds. Under MCR 2.403(A)(1), the trial court "may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property." Although defendant Royse sought declaratory and injunctive relief, it also sought judgment in the amount of \$29,687.60 based on its claim of fraud and false pretenses. These were the funds placed in escrow.

The trial court did not decide whether the award was ambiguous, although it recognized the dispute between the parties in its April 5, 2011, judgment and its decision to hold a hearing suggests that it believed there was an issue to resolve. After hearing the parties' arguments, it ruled that the \$29,000 award was for the escrowed funds. Contrary to defendants' assertion, the trial court's ruling did not change the substantive rights of the parties, but merely interpreted and clarified what the parties agreed to. See *Neville*, 295 Mich App at 469.

Alternatively, defendants argue that the trial court erred in failing to find that defendant Royse had title to the escrowed funds because plaintiff Mohammed admitted that Kuza properly came into possession of the checks, plaintiff Mohammed waived his claim, and any loss would fall on the drawee bank or the depository bank. However, as discussed above, all claims were

² In fact, the escrow agent was never a party. While Comerica Bank was originally a defendant, according to defendants, it was later dismissed.

dismissed by acceptance of the case evaluation award. See *CAM Constr*, 465 Mich at 555. After the parties accepted the case evaluation award, the trial court was not permitted to independently resolve the issue of title to the escrowed funds. Thus, the trial court did not err in failing to find that defendant Royse had title to the funds. Instead, it properly found that such claim was resolved by case evaluation.

II. JUDGMENT ENTERED AFTER ACCEPTANCE OF CASE EVALUATION AWARD

Next, defendants contend that the trial court erred in entering judgment prematurely on April 5, 2011, and separately, rather than in a net amount, and in refusing to set aside that judgment.

“[We] review de novo as a question of law issues involving a trial court’s interpretation and application of court rules or statutes.” *Neville*, 295 Mich App at 466. MCR 2.403(K)(2) provides that “[t]he evaluation must include a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action,” and that “all such claims filed by any one party against any other party shall be treated as a single claim.” However, under MCR 2.403(L)(1), “[e]ven if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party.” This Court has stated that, “because mediation evaluations on a claim and counterclaim are to be treated as a whole for purposes of acceptance or rejection, MCR 2.403(L)(1), it necessarily follows that the evaluations be treated as a whole when calculating and entering the judgment.” *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 94; 649 NW2d 397 (2002).

In *Minority Earth Movers, Inc*, 251 Mich App at 96, the issue was “whether there should have been one judgment for the net difference of the mediation evaluations or separate judgments on the separate evaluations for the claim and counterclaim arising in the same action.” This case is distinguishable because it involved the consolidation of two separate actions, not claims and counter claims arising from the same action. Moreover, the trial court did not enter two separate judgments. It entered one judgment, without indicating a net amount. Additionally, it was not possible to net the awards because they applied to different parties. Award one was in favor of plaintiff Mohammed against defendants, award three was in favor of Jihad El-Sayed against defendants, and award three was in favor of defendants against plaintiff Mohammed only. With regard to awards one and three, the judgment was stated as a net amount of \$16,000.

Even if the trial court erred in failing to enter judgment in a net amount, the error was harmless. Defendants fail to explain how the outcome would have differed had the trial court stated the judgment as a net amount of \$33,000. As entered, defendants were required to pay \$17,000 to Jihad and \$16,000 to Mohammed, for a total of \$33,000. Therefore, we will not disturb the judgment. See MCR 2.613(A)(1) (“An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.”).

Defendants also claim that the trial court erred in entering the judgment prematurely on April 5, 2011. Defendants argue that the parties needed the trial court to resolve the dispute regarding the escrowed funds before the 28 day period could begin to run.

Under MCR 2.403(M)(1), “[i]f all the parties accept the panel’s evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice.” The parties agree that they were notified of acceptance of the case evaluation award on March 23, 2011. The judgment was entered on April 5, 2011. Therefore, defendants were not given 28 days to pay the award before judgment was entered. See MCR 2.403(M)(1). The trial court should have waited until the expiration of 28 days to enter the judgment. See MCR 2.403(M)(1).³

However, a settlement conference was held on April 5, 2011, and defendants’ attorney signed the judgment. Therefore, it appears that defendants did not object to the entry of the judgment at the time it was entered. “It is settled that error requiring reversal may only be predicated on the trial court’s actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.” *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Accordingly, defendants are not entitled to relief. See *id.*

Further, the error was harmless because the judgment itself provided it would be set aside if the awards were paid on or before April 19, 2011, but defendants failed to pay.⁴ After the trial court resolved the issue regarding the escrowed funds, it offered to set aside the judgment if defendants paid. However, defendants refused to pay. Therefore, the trial court refused to set the judgment aside. For this reason as well, entry of the judgment on April 5, 2011, and the trial court’s refusal to set the judgment aside were harmless error. Therefore, we will not disturb the judgment. See MCR 2.613(A)(1).

III. CONSIDERATION OF CASE EVALUATION SUMMARIES

Finally, defendants contend that the trial court erred in considering the parties’ case evaluation summaries in order to determine the intent of the case evaluators and that such error was not harmless. We disagree.

A review of the lower court record reveals that plaintiffs attached the case evaluation summaries to their brief in support of their motion regarding the escrowed funds. Defendants did not object to the attachments to plaintiffs’ brief and mentioned the summaries in their brief as well as at the hearing. A party may not claim error requiring reversal premised upon alleged error to which it contributed by plan or negligence. *Lewis*, 258 Mich App at 210. Because

³ The trial court recognized that it entered judgment prematurely and calculated the interest from April 20, 2011.

⁴ Even if the correct date would have been April 20, 2011, the error was still harmless because defendants failed to pay.

defendants contributed to any error in the trial court relying on such summaries, they are not entitled to appellate relief. See *id.*

Nonetheless, there was no error. MCR 2.403(J)(4) provides that “summaries are not admissible in any court or evidentiary proceeding.” However, the submission of the case evaluation summaries did not serve as substantive evidence in violation of MCR 2.403(J)(4). Rather, the submission established the issues presented to the panel included the escrow account. A court may consider what was discussed in case evaluation to determine whether an issue was decided on the merits. See *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999).⁵

Affirmed.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray

⁵ Defendants contend that the *Amburgey* decision was overruled in *CAM Constr*, 465 Mich at 555-557. However, the *CAM Constr* decision involved the issue of the submission of all claims to case evaluation, not the use of case evaluation summaries. Accordingly, there is no support for this claim of error.