

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDE McMANUS,

Plaintiff-Appellant,

and

VALERIE McMANUS-ZOERHOF,

Plaintiff,

v

KEVIN M. TOLER,

Defendant-Appellee.

FOR PUBLICATION

July 27, 2010

9:00 a.m.

No. 290249

Kent Circuit Court

LC No. 05-002677-CK

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff McManus¹ appeals as of right from the circuit court's final judgment entered on September 22, 2008. We affirm.

The facts of the case have been summarized in *McManus v Toler*, unpublished opinion per curiam of the Court of the Appeals, issued July 1, 2008 (Docket No. 274407). Plaintiff worked as a financial advisor for American Express Financial Advisors, Inc. (AEFA) franchise. He employed his daughter and defendant. In 2002, AEFA offered plaintiff a position as field vice-president, but under AEFA rules he would have to divest himself of any ownership interest in the franchise. Plaintiff decided to sell the franchise to his daughter and defendant if his daughter acquired her licenses. This was written in a memorandum. His daughter was not able to obtain her licenses within the agreed upon time, even though defendant had given her deadline extensions.

¹ Plaintiff Claude McManus is appealing. His daughter Valerie McManus-Zoerhof was a plaintiff during the lower court proceeding and was a listed party on the final order assessing attorney fees and costs, but she is not a party to this appeal. Therefore, when "plaintiffs" are mentioned with regard to the lower court proceedings the reference is to both parties, but when referring to this appeal, "plaintiff" only refers to Claude McManus.

The parties ended up in court to determine if the memorandum was an intent to contract or a legally enforceable contract. The trial court found that there was a valid contract between the parties and that defendant did not breach the contract. On appeal, this Court affirmed the trial court's findings. Plaintiff accepts the facts in the July 1, 2008, opinion, although he does not agree with them.

On June 23, 2006, defendant submitted an Offer of Judgment to plaintiffs. Plaintiffs never responded to the offer. On August 15, 2006, the circuit court entered a verdict of no cause of action against plaintiffs and in favor of defendant. On November 29, 2006, the circuit court awarded defendant attorney fees in the amount of \$50,559.80. On November 10, 2006, plaintiffs filed a Response in Opposition to defendant's motion stating that the offer of judgment did not comply with the requirements of MCR 2.405.

On November 13, 2006, the circuit court held a hearing on defendant's Motion for Assessment of Costs. The court granted defendant's motion and gave plaintiffs an opportunity to file a motion regarding the reasonableness of the fees. Plaintiffs did not file a motion. On September 11, 2008, defendant served plaintiffs with a Notice of Presentment. Plaintiffs did not object. On September 22, 2008, the circuit court entered an order assessing costs under MCR 2.405 and ordered plaintiffs to pay defendant's attorney fees in the amount of \$50,559.80. On September 25, 2008, plaintiffs filed a Motion for Reconsideration. On January 15, 2009, the circuit court denied plaintiffs' motion. The court ordered plaintiffs to pay defendant's attorney fees. Plaintiff is appealing the order awarding costs and attorney fees.

Plaintiff first argues that defendant's offer of judgment was not for a sum certain and, therefore, did not comply with the requirements of MCR 2.405. Defendant relies on *Knue v Smith*, 478 Mich 88; 731 NW2d 686 (2007) as analogous. We disagree.

We review de novo both the trial court's interpretation of a court rule and its decision to award sanctions. *Ayre v Outlaw Decoys, Inc.*, 256 Mich App 517, 520; 664 NW2d 263 (2003). Generally, the rules governing statutory interpretation apply equally to the interpretation of court rules. *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). If the plain meaning of the language of the court rule is clear, "then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002).

MCR 2.405(A) states:

(1) "offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.

Few cases have addressed the question of what constitutes a "sum certain" for purposes of MCR 2.405. In *Knue*, 478 Mich at 90, the Michigan Supreme Court held that an offer in a quiet title action where the plaintiffs offered \$3,000 to the defendants in return for a quitclaim deed was not an offer of a "sum certain." The plaintiffs filed an action to quiet title, stating that

they had acquired a strip of land through adverse possession. The plaintiffs' attorney sent the defendants an offer for settlement under MCR 2.405. The plaintiffs offered to pay the defendants \$3,000 for a quitclaim deed and that the parties would stipulate to a dismissal of all claims "with prejudice and without costs." *Knue*, 478 Mich at 90. The defendants replied that the offer did not qualify as an offer of judgment under MCR 2.405 and they did not accept it. The trial court and the Court of Appeals determined that the offer was for a sum certain under MCR 2.405. *Knue*, 478 Mich at 91-92.

On appeal, the Michigan Supreme Court reversed. The Court found that the plaintiffs' offer fell outside the scope of MCR 2.405(A)(1), and no costs or attorney fees were awarded. The Court determined that the offer of judgment rule does not apply to lawsuits where the offer would not result in a judgment for a sum certain. In his lead opinion, then Chief Justice TAYLOR stated:

[T]o be an "offer" the offer must propose to stipulate the entry of a *judgment in a sum certain*. There is no latitude given in this rule for offers of judgment that culminate in something other than a "judgment for a sum certain." That is, it is nonconforming for the offer to require a reciprocal exchange of cash for the execution of a recordable real estate document culminating in a judgment of dismissal with prejudice and without costs. For such an offer, the offer of judgment rule is simply inapplicable and no consideration of the distinctions between equity and law is required to resolve this matter. [*Knue*, 478 Mich at 93 (emphasis in original).]

The Court determined that the plaintiffs' offer of a quitclaim deed in exchange for \$3,000 and a judgment of dismissal was not for a sum certain because it fell outside the scope of MCR 2.405(A)(1). The Court stated that the offer of judgment rule does not apply to offers that are not for a sum certain. Because the plaintiffs' offer did not meet the requirements of the rule, they were not entitled to sanctions under the rule. *Knue*, 478 Mich at 93-94.

Justices CAVANAGH and CORRIGAN concurred with Justice TAYLOR. Justices YOUNG, WEAVER, and KELLY concurred in result with Justice YOUNG stating that because "plaintiffs' offer required a quit claim deed in addition to the transfer of \$3,000, the offer could not be for a sum certain. Therefore, MCR 2.405 does not apply to this case." *Id.* at 97 (YOUNG, J., concurring).

Knue is distinguishable from the present case because this case does not involve a reciprocal exchange or a condition. In this case, defendant served plaintiff with a document titled "Offer of Judgment." The footnote in defendant's offer stated:

As a point of clarification, the \$25,000.00 offer of judgment represents an amount to be paid to the Plaintiffs in addition to the original \$300,000.00 purchase price for acquiring certain clients from Mr. McManus. The amount currently owing on the original purchase price is \$200,617.04 and requires monthly payments bearing interest at the fixed rate of 7% amortized over a ten year period commencing January 1, 2003 as set forth on the attached amortization schedule.

Plaintiff argues that this footnote made the offer “conditional” and not for a sum certain. We disagree. It is clear from the language of defendant’s offer that the offer was not conditional but for a sum certain of \$25,000. The footnote merely acknowledged the outstanding balance on the business purchase and that the offer of judgment did not affect the outstanding obligation under that agreement. We conclude that it is very clear from the language of defendant’s offer that it was an offer for a sum certain.

Additionally, both parties cite *Hessel v Hessel*, 168 Mich App 390, 395; 424 NW2d 59 (1988) in their briefs. *Hessel* is also distinguishable from this case. In *Hessel*, 168 Mich App at 395, this Court held that, in a divorce proceeding, a proposed property settlement was not a “sum certain.” The defendant offered the plaintiff real estate, a car, household furnishings, and certificates of deposit, all of which varied in value. The [d]efendant valued the property he offered [the] plaintiff at \$143,200. The trial court valued the same property at \$108,000. The Court held that a proposed property settlement does not offer a sum certain; it offers a division of marital property. *Id.* at 396. The Court reasoned that there was no way that the defendant’s offer of the items could be equated with a “sum certain.” *Id.* at 395. The Court noted that even if the worth of the property were considered a “sum” for purposes of MCR 2.405, it is still not “certain.” *Hessel*, 168 Mich App at 395.

In the case at bar, defendant’s offer was for a sum certain. Therefore, it complied with the requirements of MCR 2.405.

Plaintiff next argues that the circuit court should have determined whether MCR 2.405 applies to actions in equity. Plaintiff claims that in examining the rule, it is clear that the intent of the rule does not apply in equitable actions and because plaintiff’s claim was wholly in equity, defendant cannot recover. We disagree.

There is nothing in MCR 2.405 that states that the offer of judgment rule does not apply to equitable actions. In *Knue*, the Court did not touch on the issue whether MCR 2.405 applied to equitable relief. However, in her concurring opinion, Justice KELLY stated, “I would hold that the offer of judgment rule, MCR 2.405, is inapplicable when equitable relief is sought.” *Knue*, 478 Mich at 94. To the contrary, in his dissent, Justice MARKMAN stated that “[t]he language of MCR 2.405 does not differentiate between legal and equitable claims.” *Knue*, 478 Mich at 97.

In this case, plaintiff claims that the case was wholly in equity. We disagree. Plaintiff’s First Amended Complaint is for a breach of contract, which states:

WHEREFORE, Plaintiffs respectfully request entry of a judgment in their favor and against the Defendant that grants to Plaintiffs damages to be determined by the Court caused by Defendant’s breach of contract along with applicable costs, interest, and attorney fees.

It is clear from the language of plaintiff’s First Amended Complaint that plaintiff’s claim was not wholly based in equity. Plaintiff’s complaint asked for monetary damages. The offer of judgment only offered money damages. Even if the offer of judgment rule does not apply to purely equitable actions, we conclude that, at the minimum, it does apply to mixed law and

equity actions where the offer of judgment only offers monetary damages and the equitable claims are to be dismissed.

Affirmed.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ William C. Whitbeck