

STATE OF MICHIGAN
COURT OF APPEALS

MERCANTILE BANK MORTGAGE
COMPANY, LLC,

Plaintiff/Counter-Defendant-
Appellee,

v

NGPCP/BRYS CENTRE, LLC and NGP
CAPITAL PARTNERS, LLC,

Defendants/Counter-Plaintiffs-
Appellants,

&

FORD A. GRIFO, DANIEL J. NEMES, and
MARK S. PROVENZANO,

Defendants.

FOR PUBLICATION
May 13, 2014
9:05 a.m.

Nos. 311326 & 313276
Wayne Circuit Court
LC No. 09-030278-CK

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

These consolidated cases involve extensive, contentious proceedings surrounding the judicial foreclosure of a mortgage securing a commercial loan. In Docket No. 311326, defendants, NGPCP/BRYS Centre, LLC (the Centre) and NGP Capital Partners, LLC, appeal as of right the trial court's order granting summary disposition and judgment of foreclosure in favor of plaintiff, Mercantile Mortgage Bank Company, LLC. Because the trial court properly granted summary disposition after it determined that case evaluation did not resolve the claims against the Centre and Capital Partners by Mercantile Bank, but incorrectly determined the amount of the judgment for foreclosure, we affirm in part, reverse in part, and remand.

In Docket No. 313276, the Centre and Capital Partners appeal as of right the trial court's order determining the reasonableness of Mercantile Bank's attorney fees. We affirm.

I. FACTS

A. BACKGROUND FACTS

On July 23, 2007, Mercantile Bank agreed to loan the Centre \$744,000 as a business loan. Ford A. Grifo, Daniel J. Nemes, and Mark S. Provenzano (collectively, the personal guarantors) provided personal guaranties of up to 100% of the indebtedness, and Capital Partners provided an “unlimited” corporate guaranty. The Centre also provided an assignment of rents and a mortgage on property at 21139 Mack Ave, Grosse Point Woods as security for the loan.

B. THE COMPLAINT AND COUNTER-COMPLAINT

On December 09, 2009, Mercantile Bank filed a complaint against the individual guarantors, Capital Partners, and the Centre. Mercantile Bank alleged that the Centre breached the parties’ contract by defaulting on the promissory note and business loan agreement. Mercantile Bank alleged breach of guaranty against the individual guarantors and Capital Partners, asserting that they had failed to pay the Centre’s past due amounts. Mercantile Bank sought damages and a judgment of foreclosure on the basis of the Centre’s default.

The Centre, Capital Partners, and the personal guarantors filed a counter-complaint, alleging promissory estoppel, breach of contract, interference with business opportunities, fraudulent misrepresentation, and negligent misrepresentation. Contentious discovery proceedings followed.

C. THE CASE EVALUATION AWARD

On March 22, 2011, the parties attended a case evaluation. The case evaluation panel checked the boxes “award” and “unanimous,” and hand-wrote 750,000 in the box labeled “amount.” In the box labeled “For Party,” the evaluation panel hand-wrote “1” (Mercantile Bank), and in the box labeled “Against Party,” the evaluation panel hand-wrote “2, 3, 4, 5, 6, 7, 8, & 9” (respectively: Nemes, Capital Partners, Provenzano, Grifo, the Centre, Nemes, Provenzano, and Grifo). The award sheet also contains the evaluators’ signatures, but is otherwise blank.

On April 20, 2011, the awards result summary form indicated in all capital letters that Mercantile Bank “rejected award #1,” stating beneath it that Mercantile Bank accepted the award against the personal guarantors, but rejected the award against the Centre and Capital Partners. The summary form also indicated that each defendant accepted the award. The summary form indicates the case evaluation as “[r]ejected.”

D. THE MOTION FOR SUMMARY DISPOSITION

Before case evaluation, Mercantile Bank had filed a motion for summary disposition under MCR 2.116(C)(8) and (10), to which the Centre, Capital Partners, and personal guarantors had responded with general denials. On May 20, 2011, Mercantile Bank updated their motion for summary disposition, asserting that case evaluation had resolved its claims against the personal guarantors but not against the Centre and Capital Partners.

At the hearing on the motion, Mercantile Bank contended that it could accept the case evaluation award to some defendants but not others, and therefore it could accept the award against the personal guarantors but not against the Centre and Capital Partners. The defendants asserted that Mercantile Bank could not partially accept the award and, therefore, had accepted the award in full against all the defendants.

The trial court ruled that the case evaluation did not resolve Mercantile Bank's claims against the Centre and Capital Partners, but did resolve Mercantile Bank's claims against the personal guarantors. The trial court granted Mercantile Bank's motion for summary disposition, and ordered judicial foreclosure.

E. THE CENTRE'S MOTION FOR ATTORNEY FEES AND APPLICATION OF PAYMENTS

Following summary disposition, Mercantile Bank filed a proposed order granting summary disposition and ordering judicial foreclosure in the amount of \$979,777.05. The Centre and Capital Partners challenged the proposed order, and filed a motion for a determination of attorney fees and "proper application of payments received." In their motion, the Centre and Capital Partners asserted that Mercantile Bank had not credited them for a \$46,000 principal payment or for the rents that Mercantile Bank had received under an assignment of rents.

At the May 25, 2011 hearing on the motion, the trial court orally granted the Centre and Capital Partners' motion and ordered Mercantile Bank to furnish a bill of particulars. More contentious proceedings followed the trial court's oral ruling, including several competing motions. In the midst of the proceedings, the personal guarantors paid Mercantile Bank \$760,109.62 on June 30, 2011, and the parties dismissed them from the case.

During the proceedings, the Centre and Capital Partners opposed Mercantile Bank's bill of particulars because it included fees that related to case evaluation and fees related to the personal guarantors. The Centre and Capital Partners also asserted that Mercantile Bank's bill of particulars regarding payments received was inadequate because Mercantile Bank had omitted the payment from the personal guarantors. The Centre and Capital Partners attached documentation, including the Nemes's affidavit, in which he stated that Mercantile Bank had not applied the following payments to the debt: (1) \$760,109.62 on June 30, 2011, (2) \$62,100 under the assignment of rents, and (3) \$42,000 paid in December 2009.

The trial court clarified that it had only meant to grant the Centre and Capital Partners' motion for a bill of particulars related to attorney fees, not to payments received. The trial court clarified that it was granting attorney fees under the parties' contract, not as a case evaluation sanction. The trial court ordered Mercantile Bank to exclude from its bill of particulars attorney fees related to the personal guarantors. In March 2012 and April 2012, the trial court held hearings on the reasonableness of attorney fees, ruled on the Centre and Capital Partners' objections to Mercantile Bank's bill of particulars, and eventually awarded Mercantile Bank attorney fees of \$90,191.95.

F. THE TRIAL COURT’S ORDERS

On September 23, 2011, the trial court entered its order granting Mercantile Bank’s motion for summary disposition, ruling that the Centre and Capital Partners were jointly and severally liable for \$979,777.05. The trial court’s order also contained a judgment of foreclosure, ordering a foreclosure sale of the mortgaged property unless the Centre and Capital Partners paid “[t]he entire unpaid balance of the Mortgage debt . . . in the amount of \$979,777.05 as of the date of this Order, plus interests, costs, attorney fees, and other amounts due and owing under the loan documents.”

On October 22, 2012, the trial court entered its order awarding Mercantile Bank \$90,191.95 in attorney fees.

II. CASE EVALUATION

A. STANDARD OF REVIEW

This Court reviews de novo the interpretation and application of our Court Rules.¹ This Court also reviews de novo the trial court’s determination on a motion for summary disposition.² When a party moves the trial court for summary disposition under MCR 2.116(C)(8) and (10) and the trial court considered documents outside of the pleadings when deciding the motion, we review the trial court’s decision under MCR 2.116(C)(10).³ A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.”

B. LEGAL STANDARDS

Case evaluation is a mediation proceeding. During case evaluation, the parties submit and argue a concise summary of their factual and legal positions to a panel of three independent evaluators.⁴ The case evaluators must “include a separate award as to each plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action.”⁵ “[A]ll claims filed by any one party against any other party shall be treated as a single claim.”⁶

¹ *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

³ *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

⁴ MCR 2.403(D)(1), (I)(3), and (J)(3); MCR 2.404.

⁵ MCR 2.403(K)(2).

⁶ MCR 2.403(K)(2).

A party must file an acceptance or rejection to the panel's evaluation within 28 days.⁷ MCR 2.403(L)(3)(a) provides that, in cases involving multiple parties, a party may accept awards against some opposing parties while rejecting awards against other opposing parties:

[e]ach party has the option of accepting all of the awards covering the claims by or against the party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

“If all parties accept the panel's evaluation, the case is over.”⁸ “If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.”⁹ A party's failure to file an acceptance or rejection constitutes a rejection.¹⁰ When a party's response does not conform to the court rules, the trial court should deem it a rejection.¹¹

C. APPLYING THE STANDARDS

The Centre and Capital Partners contend that the trial court erred by awarding additional judgments against them because it should have determined that the case evaluation resolved the case. Mercantile Bank responds that the trial court properly determined that the case evaluation did not resolve the case because it accepted the award against the personal guarantors, but rejected it against the Centre and Capital Partners. We disagree with both positions.

In cases involving multiple parties, MCR 2.403(L) gives a party two options: “accepting all of the awards covering the claims by or against the party” or “accepting some and rejecting others.” The grammar of this rule indicates that the word “some” in the phrase “accepting some and rejecting others” refers to the *awards*, not the *parties*. Because MCL 2.403(K)(3) requires the case evaluation panel to issue a separate awards from each plaintiff to each defendant, if the case evaluation panel follows MCL 2.403(K)(3), a plaintiff will be able to accept awards against some defendants while rejecting awards against other defendants.

Here, the case evaluation panel did *not* follow MCL 2.403(K)(3), but instead issued a single award. Mercantile Bank attempted to partially accept and partially reject the single award. The court rules do not allow a party to partially accept and partially reject a single award.¹²

⁷ MCR 2.403(L)(1).

⁸ *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002). See MCR 2.403(M)(1).

⁹ MCR 2.403(N)(1).

¹⁰ MCR 2.403(L)(1).

¹¹ *Bush v Mobil Oil Corp*, 223 Mich App 222, 227; 565 NW2d 921 (1997), overruled in part on other grounds in *CAM Constr*, 465 Mich 549.

¹² See *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 667; 440 NW2d 629 (1989) (construing a similar phrase under a previous version of the court rule).

Because Mercantile Bank's response was an improper response, the case evaluation panel stated that Mercantile Bank rejected the award. Further, because a party may not partially accept and partially reject a single award, the trial court erred when it determined that Mercantile Bank could partially accept the award.

However, the trial court did *not* err when it determined that case evaluation had not resolved the claims between the parties now on appeal. Mercantile Bank's improper response constituted a rejection of the case evaluation, so case evaluation did not resolve the parties' claims. We conclude that the trial court did not err when it granted Mercantile Bank's motion for summary disposition, because case evaluation had not resolved the claims between Mercantile Bank, the Centre, and Capital Partners.

III. JUDGMENT OF FORECLOSURE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo issues of law.¹³ "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law."¹⁴

B. LEGAL STANDARDS

When a plaintiff files a complaint to foreclose on a mortgage, the trial court may order foreclosure "sufficient to discharge the amount due on the mortgage on real estate . . . plus costs."¹⁵ "[T]he amount to be calculated in the judgment of foreclosure is that which is owed *under the written instrument*."¹⁶ The mortgagor is entitled to credits on the indebtedness for partial payments made before the judgment of foreclosure.¹⁷

C. APPLYING THE STANDARDS

The Centre and Capital Partners contend that the trial court erred when it stated in its order that the amount due was "\$979,777.05 as of the date of this Order . . ." because its judgment failed to reflect payments that they made on the note. We agree.

In *Dusseau v Roscommon State Bank*, the plaintiff sought to prevent the defendant from foreclosing on a mortgage until it credited the plaintiff for "the value of a portion of the mortgaged property released by the mortgagee[.]"¹⁸ The parties disputed the value of the amount

¹³ *Singer v American States Ins*, 245 Mich App 370, 373-374; 631 NW2d 34 (2001).

¹⁴ *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008).

¹⁵ MCL 600.3115. See *Stewart v Isbell*, 155 Mich App 65, 81; 399 NW2d 440 (1989).

¹⁶ *Stewart*, 155 Mich App at 81 (emphasis in original).

¹⁷ *Dusseau v Roscommon State Bank*, 80 Mich App 531, 549; 264 NW2d 350 (1978).

¹⁸ *Id.* at 532.

for which the defendant should have credited the plaintiff.¹⁹ This Court ordered the trial court to correct the judgment of foreclosure to reflect the fair market value of the property that the trial court should have credited against the mortgage.²⁰

Here, Mercantile Bank asserts that the trial court's order accurately reflected its oral ruling on May 24, 2011. Mercantile Bank confuses the trial court's ruling on its motion for summary disposition with the trial court's judgment of foreclosure. On May 24, 2011, the trial court granted its motion for summary disposition under MCR 2.116(C)(10). Because the Centre and Capital Partners failed to prove an issue of fact regarding damages, the trial court's September 23, 2011 order correctly reflects that summary disposition was granted for \$979,777.05 in damages.

However, the trial court's September 23, 2011 order does not only contain a ruling on the motion for summary disposition. It also contains a judgment of foreclosure. As in *Dusseau*, here, the Centre and Capital Partners disputed the amount that it owed Mercantile Bank on the underlying debt in their motion to determine an application of payments. However, unlike in *Dusseau*, the trial court did not award the Centre and Capital Partners a lower amount than the amount to which they were entitled to. Instead, the trial court failed to make any determination.

We conclude that the trial court erred when it failed to rule on, or denied, the Centre and Capital Partners' motion for application of payments. On the judgment of foreclosure, the Centre and Capital Partners were entitled to credits for their partial payments on the debt. As a result of its failure to determine whether and in what amount partial payments were made on the debt, the trial court's order did not accurately state the amount owed under the written instrument in the judgment of foreclosure.

However, unlike in *Dusseau*, we cannot simply remand for a correction of the judgment. Though it is clear from the record that the Centre and Capital Partners are entitled to some credit, it is unclear whether that credit should include an amount under the assignment of rents and the alleged December 2009 payment. We thus remand for the trial court to (1) determine what credits are due the Centre and Capital Partners, and (2) order judgment in the amount sufficient to discharge the debt, plus costs.

IV. ATTORNEY FEES

The Centre and Capital Partners contend that, because the case evaluation award included attorney fees, the trial court's attorney fee award requires them to pay some attorney fees twice. The Centre and Capital Partners premise their argument on the existence of an accepted case evaluation award. However, for the reasons stated above, there was no accepted case evaluation in this case. And, in any event, judgment was never entered on the case evaluation. The parties

¹⁹ *Id.*

²⁰ *Id.* at 549.

instead dismissed personal guarantors from the case. We conclude that the Centre and Capital Partners' argument lacks merit.

V. CONCLUSIONS

We conclude that the trial court properly determined that case evaluation did not resolve Mercantile Bank's claims against the Centre and Capital Partners, but also conclude that it did not properly determine the amount of the judgment of foreclosure. We conclude that the Centre and Capital Partners' challenge to the trial court's award of attorney fees lacks merit.

In Docket No. 311326, we affirm in part, reverse in part, and remand. In Docket No. 313276, we affirm. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs.²¹

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

²¹ MCR 7.219(A).