

STATE OF MICHIGAN
COURT OF APPEALS

C. A. MUER CORPORATION,

Plaintiff-Appellee,

v

DORETHA ZIMMER,

Defendant-Appellant.

UNPUBLISHED

July 15, 1997

No. 187134

St. Clair Circuit

LC No. 93-001737-CZ

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying her motion for reconsideration of judgment in which monetary damages, costs, attorney fees, and a permanent injunction were granted to plaintiff. In a combined jury and bench trial, the jury awarded plaintiff \$2,500, finding that defendant tortiously interfered with plaintiff's outside deck restaurant business by hiring a disc jockey to play amplified music in her back yard, which was adjacent to plaintiff's restaurant, at volumes exceeding one hundred decibels. The trial court adjudged defendant's actions a nuisance per se and a nuisance in fact, and granted plaintiff's request for a permanent injunction. We affirm.

Defendant first claims that the trial court erred when it submitted this case to mediation, arguing that plaintiff's original complaint was "purely equitable" in that it sought injunctive relief only and that it was only after defendant counterclaimed for damages that plaintiff amended its complaint to allege defamation and tortious interference with business. However, plaintiff's initial complaint did contain an action for tortious interference with advantageous business relationships, and, although it did not specifically request monetary damages, it did request "[w]hatever other relief in favor of plaintiff . . . the Court deems appropriate."

MCR 2.403(A)(1) provides that "[a] court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property." The court rule further states that "[i]f all the parties accept the panel's evaluation, judgment will be entered in that amount. The judgment shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment."

MCR 2.403(M)(1). . . . Thus, entire actions are submitted to mediation, MCR 2.403(A)(1), which, if the mediation award is accepted by both parties, disposes of all claims in the actions. MCR 2.403(M)(1). [*Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 387-388; 543 NW2d 15 (1995) (emphasis deleted).]

It is clear that a mediation panel may not include equitable relief in the mediation award. *R N West Construction Co v Barra Corp of America Inc*, 148 Mich App 115, 118; 384 NW2d 96 (1986). However, it follows from the language contained in *Joan Automotive, supra*, and MCR 2.403(A)(1) that a mediation panel may mediate a claim where equitable relief is requested, so long as equitable relief is not the relief primarily sought. Because the determination as to whether the relief sought is “primarily money damages” involves a finding of fact, we review for clear error. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996).

Whether the action was primarily for money damages presents a close question. However, plaintiff did amend its complaint to add a damages action and to specify that it was seeking “damages in excess of \$10,000, including costs and attorney fees.” Also, plaintiff’s original and amended complaints both make allegations of lost revenues and expenses, “both present and future.” Moreover, in its mediation summary, plaintiff requested \$10,080 in lost revenues because of defendant’s actions and \$50,000 in damages for defendant’s alleged libelous statements that were made to a local newspaper. Furthermore, if plaintiff’s action was not for “primarily money damages,” plaintiff would likely have never conceded to the submission of its claims to mediation because the mediation panel, being unable to award equitable relief, *R N West Construction Co, supra*, would have disposed of all plaintiff’s claims in its decision, including plaintiff’s request for equitable relief. Evidence that plaintiff’s claims were for “primarily money damages” can also be found in plaintiff’s emphasis on its monetary claims at trial. Plaintiff’s trial counsel elicited testimony at trial from its restaurant manager, detailing the amount of lost revenues that was caused by defendant’s actions. Moreover, although the trial court granted defendant’s motion for a directed verdict as to plaintiff’s defamation claims, plaintiff did bring such an action to seek reimbursement for the amount of damage incurred by the restaurant because of bad publicity from newspaper coverage of defendant’s actions. Thus, we conclude that the trial court properly submitted this case to mediation because plaintiff’s claims were primarily for money damages.

Next, defendant argues that the trial court abused its discretion in awarding attorney fees. First, defendant claims that the amount of attorney fees awarded was not reasonable for pursuing such a small claim. Second, defendant cites *Maple Hill Apartment Co v Stine (On Remand)*, 147 Mich App 687; 382 NW2d 849 (1985), to support the claim that the act of awarding attorney fees without segregating the time devoted to pursuing the equitable claim from the time spent on the damages claim was unreasonable. We find sufficient evidence in the record to determine that the trial court did not abuse its discretion. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990).

There is no precise formula for computing the reasonableness of an attorney’s fee. . . . However, the factors to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor

involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430; 552 NW2d 466 (1996) (citation omitted).]

Although a trial court should consider the guidelines set forth above, it is not limited to those factors in making its determination. *Maple Hill, supra* at 692. Our review of the lower court record indicates that the trial court thoughtfully considered various factors listed above.

Although the fees awarded were \$15,617 and the amount of damages plaintiff's attorney requested in his closing argument was "approximately \$5,000," the "amount requested and the results achieved" is only one of the factors to be considered when determining the reasonableness of attorney fees. The trial court was given substantial records of the expenses involved in this action, including records indicating the expenses incurred from the mediation date to the verdict date, and records establishing that plaintiff's counsel prepared and presented eight witnesses, including three expert witnesses, and that he introduced many exhibits and prepared a trial brief, proposed findings of fact, and proposed jury instructions. Furthermore, plaintiff's counsel filed an affidavit stating that he had over fifteen years' experience in trial practice and that, based upon his knowledge, "the hourly rate for attorney employment [of] \$150 [to] \$200 is common for employment of senior attorneys" with similar experience. Finally, it is important to note that plaintiff's counsel submitted proof of and requested an additional \$51,000 for the corporation counsel's parallel fee, in addition to his own fees. However, the trial court did not include this amount in the award. Based on the record and the fact that the trial court would have been justified in awarding a higher amount for attorney fees, we find no abuse of discretion.

Defendant also claims that the trial court abused its discretion because it did not segregate the time devoted to pursuing the equitable claim from the time spent on the money damages claim. To support this argument, plaintiff cites *Maple Hill, supra*, for the proposition that attorney fees are only allowed for services necessitated by the rejection of the mediation evaluation. Defendant's reliance on *Maple Hill, supra*, is misplaced. Defendant accepted a \$1,000 mediation recommendation for her counterclaim but rejected the \$3,000 recommendation for settlement of plaintiff's claims against her. By rejecting this mediation recommendation, defendant undertook the risk posed by MCR 2.403(O), which reads:

- (1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. . . .

* * *

- (3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the

evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation.

The jury awarded plaintiff \$2,500 in damages, and the trial court granted plaintiff a permanent injunction that enjoined defendant from playing loud music on her lawn. The adjusted jury verdict was \$5,509.88. Because \$5,509.88 is more than ten percent above the mediation evaluation of \$3,000, plaintiff was entitled to costs under the rule. Furthermore, MCR 2.403(O)(5) does take into consideration whether equitable relief was granted in the verdict. It provides:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief [adjusted as provided in subrule (O)(3)] and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

If defendant had accepted the mediation evaluation, then the judgment would have been “deemed to dispose of all claims in the action and [would have] include[d] all fees, costs, and interest to the date of judgment.” MCR 2.403(M)(1). Thus, defendant’s rejection of the mediation recommendation made her susceptible to the liability of incurring costs, including the costs necessary to obtain plaintiff’s equitable relief. MCR 2.403O(5). The Court in *Maple Hill*, *supra* at 691, noted:

[A]ttorney fees are recoverable only for services which are made necessary or unavoidable by the rejection [of the mediation recommendation]. Attorney fees are not always recoverable for all services rendered. Causation principles require an inquiry into which consequences would not have occurred but for the rejection and an inquiry into which consequences are reasonably foreseeable.

We conclude that it was reasonably foreseeable that, because defendant rejected the mediation recommendation, plaintiff would seek a permanent injunction to enjoin defendant from playing loud music because plaintiff’s original complaint specifically requested an injunction from the playing of loud music.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra