STATE OF MICHIGAN

COURT OF APPEALS

MOONTRAP LIMITED PARTNERSHIP,

Plaintiff/Counter Defendant-Appellant/Cross Appellee,

v

SGE ENTERTAINMENT,

Defendant/Counter Plaintiff-Appellee/Cross Appellant,

and

MAGIC LANTERN PRODUCTIONS,

Third Party Defendant-Cross Appellee.

UNPUBLISHED
December 18, 1998

No. 185564
Oakland Circuit Court
LC No. 91-419947 CK

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Plaintiff appeals by right the judgment for it on its claim for breach of contract and for defendant on defendant's counterclaim for fraudulent inducement. Defendant cross appeals. We affirm in part and remand for further proceedings consistent with this opinion.

I. Factual Background & Procedural Posture

Plaintiff contracted with defendant for the distribution of a film produced by plaintiff's general partner, Magic Lantern Productions. Under the contract, plaintiff would receive sixty percent of the net profits after specified payments and defendant would receive the remaining forty percent. Defendant paid approximately $625,000 to plaintiff before halting further payments because it believed that plaintiff had improperly distributed to its principals funds that were designated for the payment of production expenses.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Plaintiff subsequently initiated this action for breach of contract, and also requested a declaratory judgment canceling the contract. Defendant thereafter filed a counterclaim for fraudulent inducement. Defendant then began charging the attorney fees incurred in the defense of plaintiff's claim against the proceeds of the film. In response, plaintiff sought a share (sixty percent) of these expenses in addition to the sums allegedly due under the contract. The jury ultimately found for plaintiff and defendant on their respective claims. It awarded plaintiff $80,088.21 and defendant $6,042.13. The jury further specifically found in an advisory capacity that defendant did not materially breach the contract. The trial court, however, rejected the jury's finding and granted plaintiff's request for cancellation of the contract because defendant's failure to distribute plaintiff's share of the profits was a material breach. The court explained that the jury's finding that defendant's breach was not material was "against the great weight of the evidence." The trial court denied plaintiff's motion for costs and sanctions.

II. Evidentiary Error

Plaintiff first argues that the trial court abused its discretion by admitting evidence regarding the attorney fees defendant incurred in defending against plaintiff's claims. Plaintiff, however, did not preserve this issue by timely objecting below.[1] *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Therefore, we will review it only if a party's substantial rights were affected. *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995); *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997). Here, plaintiff's substantial rights were not affected by the admission of the evidence because plaintiff sought to recover a portion of the attorney fees as part of its damages on its breach of contract claim. A party cannot complain of error to which it contributed by plan or negligence. See *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996).

III. Sanctions & Costs

Plaintiff next argues that the trial court erred in denying its request for taxable costs under MCR 2.625 and costs and attorney fees under the mediation court rule, MCR 2.403, and the offer of judgment court rule, MCR 2.405. We remand for reconsideration of the trial court's decision denying plaintiff costs and attorney fees under MCR 2.405.

Under the version of MCR 2.405(E) in effect during these proceedings, the offer of judgment rule, not the mediation rule, controls in this case because defendant rejected plaintiff's offer of judgment after it rejected the mediation evaluation. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 446 (1996). This Court reviews a decision to award offer of judgment sanctions under MCR 2.405 for an abuse of discretion. *Id.*

In this case, plaintiff is entitled to an award of "actual costs" under MCR 2.405(D)(1) because the adjusted verdict ($80,088.21 + interest & costs) was more favorable to plaintiff than the average offer of judgment ($60,000). "Actual costs" consist of "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). Under the version of MCR 2.405(E) applicable to this case, plaintiff may recover

costs from the date of defendant's rejection of the mediation evaluation even though defendant rejected the offer of judgment on a later date. *Luidens v 63rd Dist Court*, 219 Mich App 24, 29; 555 NW2d 709 (1996).

Plaintiff first contends that the trial court abused its discretion in declining to award it attorney fees under MCR 2.405. Under MCR 2.405(D)(3), the trial court "may, in the interest of justice, refuse to award an attorney fee." Absent unusual circumstances, however, the interest of justice does not preclude an award of attorney fees. *Id.* at 32. A trial court that refuses to award attorney fees "must articulate why the 'interest of justice' will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules." *Id.*, quoting *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). In this case, we remand for reconsideration of the decision not to award attorney fees because the trial court failed to articulate its reasons for refusing plaintiff's request. On remand, the trial court shall look to *Luidens*, *supra* at 33-36, for guidance regarding the factors that will justify a decision not to award fees. If the trial court determines that an award is not warranted, it shall articulate its reasons for concluding that its decision serves the "interest of justice."

Plaintiff next argues that the trial court abused its discretion in denying its motion to tax costs, including expert witness expenses, under MCR 2.625(A). The decision whether to allow costs under MCR 2.625(A) is ordinarily within the trial court's discretion. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). In this case, however, plaintiff is entitled to "legitimate and reasonable" costs under MCR 2.405, *Luidens*, *supra* at 30, including "the costs and fees taxable in a civil action." MCR 2.405(A)(6). The MCR 2.625 procedures do not govern an award of costs under MCR 2.405.[2] *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 67; 454 NW2d 188 (1990). Under MCR 2.405, the trial court may not refuse to award costs, other than attorney fees, that a party could normally tax. *Luidens*, *supra* at 30. Accordingly, the trial court may not decline to award taxable costs in this case.

Finally, the trial court erred in denying plaintiff costs for its expert witness expenses. Expert witness fees are taxable under MCL 600.2405(1); MSA 27A.2405(1), and MCL 600.2164; MSA 27A.2164. On remand, the trial court shall award plaintiff all reasonable and legitimate taxable costs.

IV. Cancellation of the Contract

In its cross appeal, defendant first argues that the trial court erred in ordering cancellation of the distribution agreement. We disagree. Plaintiff's request for a declaratory judgment canceling the contract lay in equity. *First Baptist Church of Dearborn v Solner*, 341 Mich 209, 217; 67 NW2d 252 (1954); *Holcomb v Noble*, 69 Mich 396, 397; 37 NW 497 (1888); see *Slaggert v Case*, 319 Mich 200, 203; 29 NW2d 280 (1947). Although this Court reviews the trial court's decision to grant equitable relief de novo, we review the court's findings of fact in support of the decision for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998); *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

The parties contractually agreed that California law would govern their contract. Under California law, a party may unilaterally rescind a contract when the other party commits a material breach. Cal Code § 1689(b)(2); *Pennel v Pond Union School Dist*, 29 Cal App 3d 832; 105 Cal Rptr 817, 821 (1973). The Ninth Circuit Court of Appeals, interpreting California law, explained this principle in *Fantasy, Inc v Fogerty*, 984 F2d 1524, 1529-1530 (CA 9, 1993), rev'd in part on other grounds 510 US 517; 114 S Ct 1023; 127 L Ed 2d 455 (1994):

> The materiality of a partial breach of contract is determined by the importance or seriousness of the breach and the likelihood that the injured party will receive substantial performance. 1 B.E. Witkin, *Summary of California Law* § 795, at 718 (9th ed. 1987). A material breach is one that "is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the undertaking." *Medico-Dental Bldg Co v Horton & Converse*, 21 Cal 2d 411; 132 P2d 457, 470 (1942). If a breach does not go "to the root of the matter" and "can be readily compensated in damages," a party may not rescind. *Integrated, Inc v Alec Fergusson Elec Contractors*, 250 Cal App 2d 287; 58 Cal Rptr 503, 509 (1967) (quoting *Fountain v Semi-Tropic Land & Water Co*, 99 Cal 677; 34 P 497, 498 (1893)). The Restatement (Second) of Contracts lists five circumstances as "significant" in determining whether a breach is material:
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> > (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> > (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> >
> > (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> >
> > (d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> >
> > (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
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> Restatement (Second) of Contracts § 241 (1981).

The determination regarding the materiality of a breach is ordinarily a question for the trier of fact. *Whitney Investment Co v Westview Development Co*, 273 Cal App 2d 594; 78 Cal Rptr 302, 307 (1969).

We reject defendant's initial argument that the trial court should have deferred to the jury's finding that the breach was not material. The trial court properly elected under MCR 2.509(D)(1) to try

the issue of the materiality of the breach with an advisory jury.[3] Thus, contrary to defendant's contention, the court was not bound by the advisory jury's finding of fact.[4] *Kar v Hogan*, 54 Mich App 664, 666; 221 NW2d 417 (1974), aff'd 399 Mich 529 (1976).

We likewise reject defendant's contention that *Fogerty* is controlling. In *Fogerty*, *supra* at 1529-1531, the plaintiff regularly deposited all royalties due the defendant in an irrevocable interest-bearing escrow account after commencing the copyright infringement action. The defendant filed a counterclaim for rescission. Applying the five Restatement factors, the Ninth Circuit Court of Appeals held that no genuine issue of fact existed whether the breach, *i.e.*, the plaintiff's failure to pay royalties, was material. The court reasoned that although the defendant was deprived of royalties for the duration of the litigation, the record did not reflect that the plaintiff failed to keep accurate records or deposit the royalties in the escrow account. The court emphasized that the plaintiff was always likely to cure the breach, and that the defendant, in fact, received the royalties and interest at the conclusion of the litigation. In this case, by contrast, defendant did not deposit plaintiff's share of the net profits in an irrevocable escrow account. Thus, unlike *Fogerty*, the record in this case does not reflect that defendant was at all times likely to cure the breach at the conclusion of the litigation.

Applying the Restatement factors, we conclude the trial court did not clearly err in finding that defendant's breach was material. The record reflects that defendant has deprived plaintiff of its expected benefit of the contract, *i.e.*, its share of the film proceeds, for at least four years. Defendant ceased paying plaintiff in March 1991, and withheld plaintiff's share of proceeds throughout this litigation, which concluded at the trial level in April 1995. Defendant did not deposit the amounts owed in an irrevocable interest-bearing escrow account. Moreover, the judgment resolved only the issue of monies owed as of September 30, 1993. Thus, although plaintiff may be able to collect on the judgment, the judgment will not fully compensate plaintiff for amounts owed under the contract. Accordingly, it is questionable whether defendant will fully cure the breach. We note, however, that defendant has continued to market the film throughout this litigation, and, on cancellation, will lose the benefits of an agreement to distribute the film in perpetuity. We further recognize that defendant was apparently motivated by a desire to ensure fair dealings with independent film labs when it ceased payments under the contract. Nevertheless, under these circumstances, we cannot conclude that the trial court clearly erred in finding that the breach was material because plaintiff was deprived of its sole benefit under the contract for at least four years and the record does not reflect that plaintiff will be fully compensated at the conclusion of this litigation.

We further conclude that the trial court properly canceled the contract. The record does not reflect such overreaching or unfairness on plaintiff's part to bar it from obtaining equitable relief. *Royce v Duthler*, 209 Mich App 682, 689; 531 NW2d 817 (1995); *Isbell v Brighton Area Schools*, 199 Mich App 188, 189-190; 500 NW2d 748 (1993). Further, that plaintiff has a remedy at law does not preclude equitable relief because that remedy is inadequate under the circumstances of this case. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 561; 492 NW2d 246 (1992). In light of the unlimited duration of the distribution contract, the remedy of multiple actions for breach of contract does not provide full and ample relief because it is not as effective as the equitable remedy. *Id.* The trial court properly canceled the contract to put an end to the parties' acrimonious relationship.

V. Damage Award

Finally, defendant argues that the jury verdict was against the great weight of the evidence. We disagree. This Court reviews the trial court's decision on a motion for new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *Phinney*, *supra* at 525. In ruling on the motion, the trial court must "determine whether the overwhelming weight of the evidence favors the losing party." *Id.* This Court gives substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence. *Id.*

In this case, the trial court properly denied defendant's motion because the jury's verdict was not against the great weight of the evidence. Although the jury's determination of damages cannot be easily explained, the overwhelming weight of the evidence did not favor defendant. Further, defendant's argument that the award was contrary to law is without merit because the trial court properly instructed the jury regarding plaintiff's duty to mitigate damages under California law. *Thrifty-Tel, Inc v Bezenek*, 46 Cal App 4th 1559; 54 Cal Rptr 2d 468, 474 (1996). The jury's verdict does not reflect the misapplication of this principle. Finally, we decline to consider defendant's argument that the jury erred in finding that a contract between the parties existed because defendant has abandoned this argument by failing to support it with citation to legal authority.[5] *Mitchell v Dahlberg*, 215 Mich App 718, 728; 547 NW2d 74 (1996).

Affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs under MCR 7.219.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

[1] Contrary to plaintiff's argument, it did not preserve this issue by moving for partial summary disposition on the ground that defendant had no legal right to charge attorney fees against earnings. The motion for summary disposition was not a motion in limine and did not constitute a timely objection to the admission of evidence. See *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Although plaintiff would normally have preserved its entitlement to summary disposition on this ground by raising the issue below, *Adam v Sylvan Glenn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992), it has failed to identify the issue in the statement of questions presented. Plaintiff has likewise failed to identify its challenge to the trial court's denial of its motion for judgment notwithstanding the verdict. As such, we decline to review the trial court's rulings on the motions for summary disposition and judgment notwithstanding the verdict. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

[2] Plaintiff need not file a bill of costs or comply with the other procedural requirements of MCR 2.625 to recover costs under MCR 2.405. See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 67; 454 NW2d 188 (1990). MCR 2.405(D) merely requires that a party move to recover costs within 28 days of entry of the judgment.

[3] Although Michigan courts generally enforce choice of law provisions in contracts, *Chrysler Corp v SkyLine Industrial Services, Inc*, 448 Mich 113, 126; 528 NW2d 698 (1995), procedural matters are governed by Michigan law. *Petrushka v Korinek*, 237 Mich 583, 589; 213 NW 188 (1927); see generally 17 CJS, Contracts, § 21, pp 623-626. Accordingly, Michigan law determines whether the parties were entitled to a jury trial in this case. Restatement Conflicts of Law, 2d, § 129; see *Vanier v Ponsoldt*, 251 Kan 88, 102-104; 833 P2d 949 (1992). Under Michigan law, the parties did not have a right to a jury trial on the claim for equitable relief. *Gelman Sciences, Inc v Fireman's Fund Ins Co*, 183 Mich App 445, 450; 455 NW2d 328 (1990). Therefore, although the jury properly decided factual questions relating to legal issues, the trial court retained the authority to determine the facts as they related to the equitable remedy. *ECCO, Ltd v Balimoy Mfg Co*, 179 Mich App 748, 751; 446 NW2d 546 (1989).

[4] Contrary to defendant's argument, the trial court did not adopt the jury's finding in its December 7, 1994, judgment. The judgment merely recites the jury's answers to the specific questions presented. It did not resolve plaintiff's claim for declaratory relief. The trial court first addressed plaintiff's request for equitable relief at the February 8, 1995, hearing.

[5] Moreover, the United States District Court for the Eastern District of Michigan determined that plaintiff was the real party in interest when it remanded this case to the Oakland Circuit Court.