STATE OF MICHIGAN

COURT OF APPEALS

MARK FISH,

Plaintiff-Appellee,

v

NELSON SUITES, INC.,

Defendant-Appellant.

UNPUBLISHED
December 28, 2004

No. 246568
Jackson Circuit Court
LC No. 00-005911-CZ

TOM D. JOHNSON,

Plaintiff-Appellant,

v

MATTHEW D. FISH,

Defendant-Appellee.

No. 246569
Jackson Circuit Court
LC No. 00-002358-CK

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In Docket No. 246568, defendant-appellant Nelson Suites, Inc. appeals as of right from the trial court's order denying costs and interest on a judgment on a mortgage granted in its favor against Mark Fish. We affirm the trial court's denial of attorney's fees under MCR 2.625(A)(2), but vacate its order denying all costs and interest. Further, we remand for entry of an order assessing costs in favor of defendant pursuant to MCR 2.625(A)(1) and awarding defendant the interest due under the terms of the mortgage since the initiation of the instant litigation.

In Docket No. 246569, plaintiff-appellant Tom Johnson, the sole owner of Nelson Suites[1], appeals as of right from a finding of no cause of action against Matthew Fish. We affirm.

The instant cases arose from a series of financial transactions entered by a pair of brothers, Mark and Matthew Fish, with Johnson, their mother's former boyfriend. Litigation commenced on May 2, 2000, when Johnson filed suit seeking payment on a promissory note signed by Matthew. Mark then filed suit seeking to reform a mortgage on his home in Jackson that was payable to Nelson Suites. The trial court consolidated the actions and ruled in favor of Matthew regarding the promissory note and Johnson regarding the mortgage.

I. Docket No. 246568

Johnson first asserts that the trial court erred in failing to award him costs as the prevailing party in the action regarding the mortgage. "Taxation of costs under MCR 2.625(A) is within the discretion of the trial court." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp,* 221 Mich App 301, 308; 561 NW2d 488 (1997). The rule provides as follows:

> (1) *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
>
> (2) *Frivolous Claims and Defenses.* In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

In his answer to Mark's complaint, Johnson requested that the trial court award him "attorney fees and costs for defense of this frivolous action." Although he failed to explicitly cite the rule, it is evident that Johnson made this request pursuant to MCR 2.625(A)(2). The trial court entered a judgment denying costs or attorney's fees to either party. Upon a request for clarification, the court stated that it denied the request because it found that Mark's claim had some merit. Upon review of the record, we find that the trial court did not abuse its discretion in denying Johnson costs and attorney's fees under MCR 2.625(A)(2).

However, on appeal, Johnson asserts that trial court erred in failing to award him costs as the prevailing party. Because Johnson clearly prevailed in the action regarding the mortgage, he was entitled to the general costs allowed under MCR 2.625(A)(1).

Johnson further asserts that the trial court erred in failing to award interest on his money judgment pursuant to MCL 600.6013. Whether the statute mandates an award of interest in the instant case constitutes a question of law that we review de novo. *In re Forfeiture of $176,598,*

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[1] Because Nelson Suites is wholly owned and controlled by Johnson, we refer to the appellant in both cases as Johnson.

465 Mich 382, 385; 633 NW2d 367 (2001); *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). The purpose of MCL 600.6013 is to compensate the prevailing party for loss of use of the funds awarded as a money judgment and to offset the costs of litigation. *Farmers, supra*. "[A]n award of interest is mandatory in all cases to which the statute applies." *Id.*, quoting *Everett v Nickola*, 234 Mich App 632, 639; 599 NW2d 732 (1999). But in *Amerisure Ins Co v Graff Chevrolet, Inc*, 469 Mich 996; 674 NW2d 379 (2004), our Supreme Court, in lieu of granting leave to appeal, reversed a judgment of this Court awarding interest to a prevailing defendant. The Court stated, "[p]rejudgment interest accrues from the date that the complaint is filed against the party upon whom prejudgment interest is being taxed" and held that, because it had not filed a timely counterclaim, the defendant was not entitled to prejudgment interest. In the instant case, Johnson similarly failed to file a counterclaim against Mark and thus is not entitled to interest on the judgment pursuant to MCL 600.6013.

Nevertheless, despite the fact that he did not file a counterclaim, the trial court awarded Johnson a judgment for the entire balance due on the mortgage, to be paid from funds being held in escrow. The trial court stated that these funds "belong to Mr. Johnson without any additional interest against Mark Fish while this litigation has been pending." Johnson correctly asserts that this denied him the benefit of the mortgage. The litigation commenced when Mark filed his complaint on November 15, 2000 and the trial court entered its final judgment on January 23, 2003. By not awarding the interest that accrued during the litigation, the trial court denied Johnson the benefit of a mortgage it found "binding and valid." We find that this constituted error and conclude that Johnson is entitled to payment of mortgage interest up to the date of entry of the original judgment.

In sum, we affirm the trial court's denial of attorney fees and costs under MCR 2.625(A)(2) and judgment interest under MCR 600.6013. But we conclude that the trial court erred in failing to award costs under MCR 2.626(A)(1) and mortgage interest while the litigation was pending. The portion of the judgment denying all costs and interest is vacated, and we remand for further proceedings consistent with this opinion.

II. Docket No. 246569

As part of the numerous dealings between Johnson and the Fish brothers, Matthew signed a promissory note in May of 1997 stating that he agreed to pay Johnson $35,000. Johnson filed suit to collect on the note and the trial court entered a judgment of no cause of action. On appeal Johnson contends that the trial court committed clear error in finding the note unenforceable. We disagree.

Factual determinations made by a trial court sitting without a jury are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002). Such findings, even when supported by some evidence, are clearly erroneous when, upon review of the entire record, "the appellate court is left with a definite and firm conviction that a mistake was made." *Westlake Transp, Inc v Public Service Com'n*, 255 Mich App 589, 611; 662 NW2d 784 (2003). In applying the clearly erroneous standard, regard is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C); *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995).

Johnson argues that the trial court was required to enforce the note as written and that it erred in rescinding the contract in the absence of any evidence of mutual mistake or fraud. However, the formation of a contract requires legal consideration. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). And "[w]hether there was consideration for a promise is a question for the trier of fact. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992). At trial, Matthew testified that there was never an agreement for him to pay the amount shown on the note and that Johnson told him that he only needed the document for his personal records. In its written opinion, the trial court held that it was inclined to believe Mathew's testimony that Johnson provided no consideration in return for his signature on the note. We defer to the trial court's assessment of Matthew's credibility and find no clear error in its determination that the note was unenforceable for lack of consideration.

III. Conclusion

In Docket No. 246568, we affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. In Docket No. 246569, we affirm.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra