STATE OF MICHIGAN

COURT OF APPEALS

WORKING, INC., Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,	UNPUBLISHED December 28, 2006
v	No. 264356 Oakland Circuit Court
ELAINE D. HEITSCH, Personal Representative of the Estate of AGNES DARDEN, Deceased, Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.	LC No. 2004-058369-CB

Before: Borrello, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant/counter-plaintiff-appellant/cross-appellee, Elaine Heitsch, as personal representative of the Estate of Agnes Darden, deceased, ("Darden"), appeals and plaintiff/counter-defendant-appellee/cross-appellant, Working, Inc. ("Working"),[1] cross-appeals as of right from an order entering judgment in favor of Working in this breach of contract action. We affirm.

The background of this dispute can be found in this Court's opinion in the prior appeal involving this litigation. See *Estate of Darden v Working, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 231606).

I

Darden argues that the circuit court erred by denying its motion for summary disposition and instead granting summary disposition in favor of Working. This Court reviews a trial court's order on a motion for summary disposition de novo. *Veenstra Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

[1] Because of the tortured procedural history of this case, the Court refers to the parties as "Darden" and "Working" to avoid confusion. References to Agnes Darden, individually, will be made as "Agnes."

The circuit court ruled that "the issue of whether Darden made misrepresentations or material omissions about the condition of the property was decided against Darden in the 1998 Action" and that "Working's claims to recover damages for the adjudicated fraud and misrepresentation were expressly preserved by the 2000 settlement agreement and the Court's 2000 order."

Working's complaint alleges that Darden breached its agreement to discharge its mortgage in exchange for $150,000. Working requested that the circuit court enter a declaratory judgment that Darden was bound by the May 15, 2000, settlement agreement and the circuit court's December 7, 2000, order in the 1998 Action. Working also sought money damages allegedly caused by Darden's breach of the agreement to arbitrate, the settlement agreement and the circuit court order. Darden's reliance on the doctrine of res judicata to bar Working's claims is without merit.

The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata will only apply if: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

Here, the circuit court correctly observed that res judicata was not a bar to Working's claim because the May 15, 2000, settlement agreement and the circuit court's December 7, 2000, order preserved Working's right to later adjudicate its claims against Darden for fraud and misrepresentation. In this regard, Working's prior claims were not litigated on the merits nor to a final adjudication. Without these essential elements, res judicata cannot operate to bar Working's claim.

The circuit court then granted Working summary disposition under MCR 2.116(I)(2), dismissing Darden's counterclaims because "this Court has already effectively adjudicated in 2004 in the 1998 Action [sic] that the 1994 land contract ceased to exist in 2000 when Darden conveyed all of the subject land by warranty deed to Working." Indeed, according to the December 17, 2000, stipulated order between the parties, which apparently embodies the May 15, 2000, settlement agreement, Darden "expressly waived any statute of limitations or other defense to liability that it ever can, could or might assert against said remaining counterclaims if there is future litigation between the parties." Darden does not challenge the rationale behind the circuit court's ruling. Further, Darden does not dispute that Working's claims in the instant matter are the same as those in Workings counterclaim – to the contrary, Darden claims on appeal that Working's claims are barred by res judicata. Therefore, it is clear that Darden, as a result of the circuit court's December 17, 2000, order, is precluded from disputing liability. Summary disposition with regard to Darden's liability in Working's favor was proper as a matter of law under MCR 2.116(I)(2).

Darden also challenges the circuit court's order denying its motion for reconsideration. Because this issue was not adequately briefed, we conclude that Darden has abandoned it on appeal. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

II

Darden argues that the circuit court erred by granting Working's motion for partial summary disposition under MCR 2.116(C)(9) and (10). The tenor of Darden's argument is that there is no evidence to support the circuit court's order. We disagree. The decision to grant or deny summary disposition presents a question of law that this Court reviews de novo. *Veenstra, supra* at 159.

Working's November 17, 2004, motion for summary disposition sought partial summary disposition under MCR 2.116(C)(9), seeking an order in its favor with regard to Count I of its complaint (declaratory relief) and liability only with respect to Count II of its complaint (breach of contract/fraud or misrepresentation). With regard to Count I, Working argued that Darden could not offer a defense, because Working's maximum liability was $150,000 (according to the promissory note it had signed in favor of Darden), subject only to those amounts Working was entitled to deduct as recovery under Count II. Count II sought money damages for the counterclaims that were dismissed without prejudice in the 1998 action, based on Darden's failure to abide by the terms of the agreement to arbitrate and subsequent May 15, 2000, settlement agreement and December 7, 2000, circuit court order. Working argues that because of the December 7, 2000, order entered by the circuit court, the circuit court correctly ruled that Darden is precluded from asserting defenses to Working's claims.

The circuit court correctly granted summary disposition to Working under MCR 2.116(C)(9) because Darden could not challenge anything beyond the amount of damages for its breach of the agreement to arbitrate, the May 15, 2000, settlement agreement and the December 7, 2000, circuit court order. Section 1(b) of the settlement agreement expressly provides that Darden will provide Working a warranty deed in return for a promissory note of $150,000, which was done. Under Section 2 of the settlement agreement, the only circumstance in which Working would owe Darden more than $150,000 for the property would be if Darden prevailed on appeal, which it failed to do. Further, Section 1(a) of the May 15, 2000, settlement agreement expressly provides that Darden waived any right to defend against liability for Working's counterclaims, which are restated in Count II of Working's complaint in the instant action. The circuit court's December 7, 2000, order embodied this agreement with regard to Darden's waiver of the right to challenge Working's counterclaims. Thus, the circuit court did not err by granting summary disposition in favor of Working.

With regard to Count I, the circuit court correctly ruled that Working is entitled to a judgment that the $150,000 promissory note and mortgage are cancelled and discharged and that Working has no liability in excess of $150,000 minus the damages Working recovered from Darden on its counterclaim. Further, the circuit court correctly held that liability regarding Count II of Working's complaint had already been determined as evidenced by the settlement agreement and circuit court's December 7, 2000, order, leaving only the damages portion for trial. The settlement agreement and order expressly provide that Darden waived its rights to raise a defense to Working's counterclaims in future litigation. The circuit court correctly granted summary disposition in favor of Working on December 15, 2004.

III

Next, Darden claims that the trial court erred in granting Working's motion to require Darden to show cause why it should not be held in contempt of court. The decision whether to issue an order of contempt is left to the sound discretion of the trial court and is reviewed for an abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998). An abuse of discretion occurs when the decision results in an outcome that is outside the principled range of outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Darden argues that the circuit court erred by entering an order requiring Darden to appear at a hearing to show cause why it had not discharged its mortgage as required by the circuit court's order. Working's show cause motion alleged that Darden had violated the circuit court's order requiring Darden to discharge its $150,000 mortgage.

MCR 3.606 governs the initiation of contempt proceedings for occurrences outside the immediate presence of the court and provides that proceedings can only be initiated "on a proper showing on ex parte motion supported by affidavits." MCR 3.606. Darden does not argue that the materials submitted by Working were insufficient to secure the order, nor does Darden contend that it complied with the circuit court's order. Rather, Darden generally argues that "there could be no legitimate or legal purpose" for Working to seek the order. Darden, without more, fails to set forth any legal or empirical basis to support its argument. Incidentally, the circuit court did not hold Darden in contempt. Therefore, Darden has failed to show that the trial court abused its discretion with regard to the initiation of contempt proceedings. See *Schoensee, supra* at 316.

IV

Darden argues that the circuit court erred by denying its motion to add William Garratt and Similes, a partnership, as parties to the instant action. We disagree.

Darden first argues that Working is not the real party in interest, i.e., Working does not have standing to sue. The issue of whether a party has standing to enter the courts presents a question of law subject to de novo review. *Lee v Macomb Co Bd of Commissioners*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Here, it cannot seriously be disputed that Working has standing and is the real party in interest. Working's complaint seeks a declaratory judgment that Darden is obligated to abide by a settlement agreement and stipulated order entered into or agreed upon by Working and Darden, not Similes. Working's complaint also seeks money damages it, not Similes, incurred, for Darden's breach of the arbitration agreement and settlement agreement to which Working and Darden were signatories, not Similes. Darden's argument that Similes, as owner of the property, is the only party permitted to bring an action under MCL 600.3175, governing discharge of a mortgage on real property, fails because Working's action is not based on MCL 600.3175.

Darden also argues that Similes and Garratt are necessary parties required to be joined under MCR 2.205. This Court reviews a trial court's rulings on joinder for an abuse of discretion. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). An

abuse of discretion occurs when the decision results in an outcome that is outside the principled range of outcomes. *Radeljak, supra* at 603. MCR 2.205(A) governs necessary joinder of parties and provides:

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

As stated, the issues in this case arise out of Darden's alleged breaches of various agreements or court orders concerning only Working and Darden. Similes, albeit the owner of the property, and Garratt, as guarantor of Working's promissory, are not "essential" parties to the instant declaratory and breach of contract action as required by MCR 2.205(A). The circuit court did not abuse its discretion in denying Darden's motion to add Similes or Garratt as a party to this action.

V

Darden also challenges numerous evidentiary rulings made by the circuit court during the bench trial. To preserve a claim of error regarding the admissibility of evidence for appellate review, a party must timely and specifically object below. MRE 103(a)(1); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). Generally, to be timely, an objection should be interposed between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Because Darden's counsel failed to timely object to the multitude of evidence that Darden now claims was erroneously allowed into evidence, these issues are unpreserved. Without a timely objection to the admission of evidence, our review is limited to plain error affecting respondent's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). This Court reviews an unpreserved challenge to the admission of evidence for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our review of the record convinces us that Darden's evidentiary challenges are without merit. The challenged testimony was relevant and therefore admissible, *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995), and otherwise goes to the weight, not admissibility, of the evidence. *Lopez v General Motors Corp*, 224 Mich App 618, 632 n 20; 569 NW2d 861 (1997).

Moreover, a trial court has broad discretion to control the conduct of a trial, including the mode, order, and manner of the examination and cross-examination of witness. MRE 611; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994). The trial court controls the scope and order of the interrogation of witnesses within its sound discretion; nothing in the rules specifically precludes testimony because of its narrative form. MRE 611(a); *People v Wilson*, 119 Mich App 606, 617; 326 NW2d 576 (1982).

Darden's argument that Garratt was not permitted to testify with regard to the damages suffered by Working, including the value of the property, is without merit. Lay opinion testimony is admissible if it is "rationally based on the perception of the witness" and helpful to

"the determination of a fact in issue." MRE 701. A lay witness will be permitted to testify as to the value of the property if he is familiar with it and if he has some knowledge of the value of other property in the immediate area. *Equitable Building Co v City of Royal Oak*, 67 Mich App 223, 226-227; 240 NW2d 489 (1976).

Finally, because the circuit court correctly granted summary disposition with respect to Darden's liability under Count II of Working's complaint, it follows that the circuit court did not abuse its discretion by refusing to allow Darden to ask questions designed to attack the liability issue at trial.

VI

Both parties challenge specific portions of the trial court's ruling, apparently arguing that the verdict is against the great weight of the evidence. In a bench trial, this Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C). When reviewing an equitable determination reached by a trial court, this Court reviews the trial court's conclusion de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). The trial court's determination of damages following a bench trial is also reviewed for clear error. *Alan Custom Homes, supra* at 513. In general, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The parties' respective challenges to specific portions of the circuit court's verdict are without merit. When sitting without a jury, the trial court must make specific findings of fact, state its conclusions of law separately, and enter a judgment accordingly. MCR 2.517(A)(1). To meet the requirements of MCR 2.517(A)(1), the findings need only be brief, definite, and pertinent, and the trial court must be aware of the issues and correctly apply the law. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). Here, the circuit court issued a detailed opinion and order, sufficiently stating its findings of fact and conclusions of law under MCR 2.517(A)(1).

Darden, however, challenges the circuit court's award of $75,000 to Working under Count II of Working's complaint, seeking money damages. The circuit court correctly noted that liability had previously been adjudicated so that the only issue that remained for trial was the amount of damages Working suffered as a result of Darden's refusal to be bound by the arbitration award, "as preserved by certain orders in 2000, and now embodied within Count II of the instant Complaint."

The circuit court awarded Working $75,000, for Darden's breach of the agreement to arbitrate, correctly observing that "[d]amages in a breach of contract action are limited to those naturally arising from the breach of those contemplated by the parties entering into the contract." The circuit court ruled that the $90,717.70 damages represented that:

> attorneys fees incurred in defending the instant case as well as the 1998 case on [sic] subsequent litigation. The Court heard testimony from attorney Garratt in regard to the attorney fees being sought and the Court found this witness to be credible.

Garratt testified at length about the costs and attorney fees incurred by Working as a result of Darden's refusal to abide by the terms of the arbitration award and provided documentary evidence to support his testimony. The circuit court did not clearly err in awarding Working damages under Count II of Working's complaint.

With regard to Working's challenge on cross-appeal to the portion of the trial court's verdict for Darden's fraud and misrepresentation relating to the property value, the circuit court found that Garratt provided testimony regarding the proper value of the property, but did not corroborate his testimony with any other evidence. The circuit court thus found that Garratt's opinion, standing alone was too "speculative" to justify recovery. Working claims this is clear error. We disagree.

In *Hofmann, supra* at 108, this Court stated:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

Working argues that under *Hoffman* and similar case law, Michigan law establishes that it is preferable for a trial court to err on the side of awarding more damages because where damages cannot be measured with certainty, the risk of uncertainty is cast upon the wrongdoer, here, Darden. Even assuming *arguendo* that Working is correct, the circuit court did not refuse to award damages because the value of the land was not incapable of being measured with certainty, but because Working made no attempt to substantiate Garratt's testimony with other evidence. The record is devoid of any indication that the value of the land could not have been substantiated by other evidence. Finally, when considering this fact in light of the rule that this Court is required to defer to the circuit court's evaluation of Garratt's credibility,[2] this Court concludes that the circuit court did not clearly err in refusing to award Working damages.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly

[2] MCR 2.613(C).