STATE OF MICHIGAN

COURT OF APPEALS

ECHELON HOMES, L.L.C.,

Plaintiff/Counter-Defendant-Appellant,

v

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 14, 2008

No. 277471
Oakland Circuit Court
LC No. 2001-029345-CZ

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiff Echelon Homes, L.L.C., appeals as of right the trial court's order dismissing this case for failure to post a bond as security for a potential award of case evaluation sanctions in favor of defendant Carter Lumber Company. We affirm in part, reverse in part, and remand.

This case is before this Court for the third time. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424; 683 NW2d 171 (2004) ("*Echelon I*"), reversed in part by *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192; 694 NW2d 544 (2005) ("*Echelon II*"), and *Echelon Homes, LLC v Carter Lumber Co*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2006 (Docket No. 267233) ("*Echelon III*").

Plaintiff argues that the trial court erred by requiring it to post a bond as security for a potential award of case evaluation sanctions. We disagree.

We review for an abuse of discretion the trial court's decision whether to require a security bond. *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). We review for clear error the trial court's factual assessments of the legitimacy of the claims and a party's financial ability to post a bond. *Id*, 333. Security bonds generally must be warranted by a "substantial reason," meaning "there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *Id*, 331-332. "The plaintiff's poverty alone is not substantial reason to grant a motion for security." *Wells v Fruehauf Corp*, 170 Mich App 326, 335; 428 NW2d 1 (1988). Rather, under MCR 2.109(B)(1), a balance between the plaintiff's interest in free access to the court and the defendant's need for security should be based on the legitimacy of an indigent plaintiff's theory of liability. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 271-272; 463 NW2d 254 (1990). The trial

court may consider not only the plaintiff's legal theory, but also the likelihood of success thereon. *In re Surety Bond*, *supra* at 333. The construction and application of a court rule is a question of law that is reviewed de novo. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000).

Plaintiff correctly observes that the case evaluation panel did not make a finding that its claims were frivolous. Thus, a bond was not authorized under MCR 2.403(N)(3). However, plaintiff does not dispute that if it failed to prevail at trial (or failed to sufficiently improve its position), thereby subjecting it to case evaluation sanctions under MCR 2.403(O)(1), it would not be able to pay. Significantly, the plain language of MCR 2.109(A) permits a court to require a bond sufficient "to cover *all* costs and other recoverable expenses that may be awarded by the trial court." (Emphasis added.) There is no exception for case evaluation sanctions. The trial court did not explicitly cite MCR 2.109, but this did not preclude it from ordering a bond where it was authorized to do so by that rule. See *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993). Although the court rule allows a bond to be required on motion of a party, it does not prohibit a trial court from requiring a bond sua sponte, as happened in this case. See *Zapalski v Benton*, 178 Mich App 398, 404; 444 NW2d 171 (1989).

We agree with plaintiff that a motion for security for costs should be made as soon as possible, ideally with a defendant's answer. See *Hall*, *supra* at 269. However, the bond here was imposed by the trial court sua sponte. More importantly, the reason for the imposition of the bond was the trial court's concern over plaintiff's corporate dissolution, which did not take place until September 2006. The bond issue was addressed as soon as plaintiff's dissolution came to the court's attention.

Plaintiff also argues that a bond was unwarranted because this Court had previously determined that its claims were meritorious and because the trial court failed to consider its poor financial condition. We disagree. "An order to post security for costs can also be appropriate where there is good reason to believe that a party's allegations, although they cannot be summarily dismissed under MCR 2.116, are nonetheless groundless and unwarranted." *Wells*, *supra* at 335.

The trial court had the benefit of considering not only the evidence submitted in conjunction with defendant's motion for summary disposition, but also the evidence presented at an evidentiary hearing, in evaluating the likelihood of plaintiff's success. After reviewing the record, we find no clear error in the trial court's determination that plaintiff was unlikely to prevail at trial, and again, it is undisputed that plaintiff lacked the resources to pay an award of case evaluation sanctions. Therefore, the trial court did not abuse its discretion in ordering plaintiff to post a bond as security for costs.

We do agree that the trial court erred to the extent it held that plaintiff's members could be held personally liable for the payment of any sanctions. Plaintiff is a limited liability company (LLC), and neither defendant nor the trial court cited any authority under which its members could be held so liable. To the contrary, MCL 450.4805(1) and (3) provide that members who have not wrongfully dissolved an LLC can wind down its affairs, and they will not be held liable to any greater extent than before dissolution. MCL 450.4503(3) provides that, unless otherwise provided by law or an operating agreement, members are not personally liable for an LLC's debts. The record contains no evidence that plaintiff was wrongfully dissolved.

Under MCL 450.4806 and MCL 450.4807, notice to creditors is not required, except to cut off existing claims. Moreover, there is no evidence in the record that plaintiff had assets that were not distributed to creditors as required by MCL 450.4808. Therefore, it appears that plaintiff's members continue to be protected from personal liability for the LLC's debts, including any potential award of case evaluation sanctions. Nevertheless, because plaintiff has been dissolved and is impecunious, and its members are immune from personal liability, there is even more reason to require plaintiff to post a bond to ensure that a potential award of case evaluation sanctions will be paid. Thus, any error was harmless and is not a ground for reversal. See MCR 2.613(A).

Plaintiff next argues that, even if a bond was warranted in this case, the amount of the bond ordered by the trial court was unreasonably high. We disagree. The amount of a bond imposed as security for costs is reviewed for abuse of discretion. See *In re Surety Bond*, *supra* at 332; *Zapalski*, *supra* at 405. Defense counsel indicated that defendant had incurred approximately $50,000 in attorney fees since the case evaluation, not including costs, and reasonably expected to incur an additional $15,000 in attorney fees at a trial. Although plaintiff correctly observes that appellate attorney fees are not recoverable as part of an award of case evaluation sanctions, *Haliw v City of Sterling Hts*, 471 Mich 700, 706-711; 691 NW2d 753 (2005), no evidence was presented concerning the amount of defendant's attorney fees attributable to prior appeals. More importantly, the trial court did not order plaintiff to pay case evaluation sanctions, but rather relied on counsel's estimate of defendant's attorney's fees as a guide in setting the proper amount of the bond. This was a reasonable and principled basis for determining the amount of a security bond and, therefore, was not an abuse of discretion.

Lastly, plaintiff argues that the trial court erred by not granting its request for sanctions in connection with defendant's motion to dismiss and with defendant's arguments concerning the bond. We agree in part.

MCR 2.114(D)(2) provides that "[t]he signature of an attorney or party . . . constitutes a certification by the signer that . . . to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law . . . ." MCR 2.114(E) states that "[i]f a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." The rule applies to "all pleadings, motions, affidavits, and other papers provided for by these rules." MCR 2.114(A).

In this case, defendant's motion to dismiss was based on plaintiff's allegedly improper dissolution, without notice to creditors or a proper distribution of plaintiff's assets. Defendant also argued that plaintiff had been mismanaged, and that its creditors, and perhaps its members, were the proper plaintiffs.

However, plaintiff had filed its back reports and was reinstated, in good standing, before the time of dissolution. As discussed previously, an LLC is not required to give notice of dissolution to creditors (except to cut off existing claims). There also was no evidence that plaintiff had any assets that were not distributed to creditors. Moreover, MCL 450.4805(1) only

allows the *members* of a dissolved LLC to petition a court to wind up its affairs. Defendant is not a member and, therefore, is not granted a remedy by § 805.

Defendant's motion to dismiss was also based on MCL 450.4404(1), which provides:

> A manager shall discharge his or her duties as a manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the limited liability company.

Defendant did not produce any evidence to support its allegation that plaintiff's members were not discharging their duties in good faith, contrary to MCL 450.4404(1). Even if their failure to file annual reports could be considered mismanagement, that omission was corrected before plaintiff's dissolution. Defendant also failed to support its claim that plaintiff was inactive, or that plaintiff's alleged inactivity was a ground to dismiss a pending lawsuit that plaintiff was continuing to prosecute.

More importantly, defendant's motion to dismiss ignored the clear language of § 805(3), which states that, after dissolution,

> [t]he limited liability company may sue and be sued in its name and process may issue by and against the company in the same manner as if dissolution had not occurred. An action brought by or against the company before its dissolution does not abate because of the dissolution.

Neither § 805(1) nor § 404(1) provide a basis for dismissing a pending action. Rather, they impose duties on an LLC that are enforceable by its members – not by defendant. Thus, we conclude that defendant's motion to dismiss was clearly devoid of any factual or legal merit. Therefore, the trial court clearly erred by not granting plaintiff's request for sanctions for defendant's violation of MCR 2.114(D)(2).

With respect to plaintiff's claim that sanctions were also warranted based on defendant's arguments concerning the bond, because defendant did not move to require plaintiff to post a bond, there was no motion or pleading governed by MCR 2.114. Further, as discussed previously, defendant's position concerning the bond (and related issues) was not frivolous. Therefore, plaintiff is not entitled to sanctions in connection with defendant's response to plaintiff's motion for reconsideration.

In sum, we remand for a determination of sanctions in connection with defendant's motion to dismiss, but only up to the moment when the trial court sua sponte raised the bond issue. We affirm in all other respects.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello