STATE OF MICHIGAN

COURT OF APPEALS

TACCO FALCON POINT, INC.,

Plaintiff-Appellant,

v

DAVID M. CLAPPER,

Defendant/Third-Party Plaintiff-Appellee,

and

AMERICAN REALTY TRUST, INC., ART MIDWEST, L.P., and AMERICAN REALTY INVESTORS, INC.,

Third-Party Defendants.

UNPUBLISHED
October 23, 2008

No. 273635
Oakland Circuit Court
LC No. 2002-042917-CZ

TACCO FALCON POINT, INC.,

Plaintiff-Appellee,

v

DAVID M. CLAPPER,

Defendant/Third-Party Plaintiff-Appellant,

and

AMERICAN REALTY TRUST, INC., ART MIDWEST, L.P., and AMERICAN REALTY INVESTORS, INC.,

Third-Party Defendants.

No. 273636
Oakland Circuit Court
LC No. 2002-042917-CZ

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In these consolidated appeals, defendant David M. Clapper challenges the trial court's order awarding plaintiff TacCo Falcon Point, Inc. (TacCo), costs of $1,973.90, pursuant to MCR 2.625. TacCo challenges the trial court's order denying its motion for attorney fees. We affirm.

In Docket No. 273636, defendant Clapper argues that TacCo was not a prevailing party entitled to costs under MCR 2.625. The sole basis for this argument is that the trial court erred in granting TacCo's motion for summary disposition. However, because Clapper's appeal is from a postjudgment order awarding costs under MCR 2.625, see MCR 7.202(6)(iv), and because the scope of such an appeal is limited to the portion of the order with respect to which there is an appeal of right, MCR 7.203(A)(1), Clapper may not attack the underlying summary disposition order as part of this appeal. This Court previously affirmed the trial court's summary disposition decision in *TacCo Falcon Point, Inc v Clapper*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2007 (Docket Nos. 271525 and 271552). Because Clapper does not present any other argument against the trial court's award of costs, his appeal of that award is now moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("[a]n issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief").

Turning to TacCo's appeal in Docket No. 273635, from the trial court's denial of its motion for attorney fees, we find no basis for disturbing the trial court's determination that the Indiana "consent judgment and decree of foreclosure" did not obligate Clapper to pay for TacCo's attorney fees incurred in this enforcement action. Because TacCo's argument requires that we construe a foreign judgment, we shall first consider the appropriate state law applicable to this issue.

As a judgment creditor seeking to enforce a money judgment against Clapper, TacCo is subject to the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 *et seq*. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 152-158; 677 NW2d 874 (2003). Although TacCo brought an action to enforce the Indiana judgment, as permitted by MCL 691.1177, rather than proceeding by filing a copy of the Indiana judgment with the court clerk, as permitted by MCL 691.1173, the enforcement action itself is subject to the law of this state. See, generally, MCL 691.1173; see also *Baker v Gen Motors Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998) (under Full Faith and Credit Clause, judgment is enforced according to forum's law).

Nonetheless, the particular matter before us does not involve any procedures regarding or defenses to enforcement, but rather the substantive rights created by the Indiana judgment itself and, in particular, whether the judgment creates a contractual entitlement to attorney fees as part of a consent judgment. Under Michigan law, the expectations of the parties and interests of both Michigan and Indiana should be balanced by a court in determining which state law to apply to contract issues. See *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 124-125; 528 NW2d 698 (1995), and *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 45; 742 NW2d 624 (2007).

We note that TacCo's argument on appeal is based on Michigan law. However, *regardless* of which state law is considered, TacCo's argument that it is contractually entitled to recover attorney fees from Clapper fails as a matter of law.

A consent judgment, by definition, is not the product of litigation carried forward to a judicial decision, but rather a matter of voluntary agreement. *Young v Robin*, 146 Mich App 552, 556; 382 NW2d 182 (1985). "Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party." *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994); see also *State v Huebner*, 230 Ind 461, 467; 104 NE2d 385 (1952) (consent decree does not represent judicial determination of parties' rights, but merely records parties' agreement with respect to matters in litigation). A judgment incorporating the parties' stipulation is generally interpreted in the same manner as a contract. See, generally, *Beason v Beason*, 435 Mich 791, 798 n 3; 460 NW2d 207 (1990). The interpretation of a contract is a question of law, which is reviewed de novo on appeal. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184; 678 NW2d 647 (2003). The primary goal in interpreting a contract is to honor the parties' intent. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491, 579 NW2d 411 (1998); see also *City of Portage v South Haven Sewer Works, Inc*, 880 NE2d 706, 709-710 (Ind App, 2008) (when construing consent judgment, a court determines the parties' intent pursuant to contract rules). Contractual provisions for the payment of attorney fees are generally enforceable, although the award is considered an element of damages, not costs. See *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007); see also *Dempsey v Carter*, 797 NE2d 268, 275 (Ind App, 2003).

The interpretation of a court's judgment also presents a question of law. See *Moasser v Becker*, 107 Conn App 130, 135; 946 A2d 230 (2008). We review questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

> As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used. The unambiguous terms of a judgment, like the terms in a written contract, are to be given their usual and ordinary meaning. The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself. When construing written judgments, courts consider the circumstances present at the time of entry and do not consider the meaning of particular provisions of the judgment in isolation but in the context of the whole judgment. . . . [46 Am Jur 2d, Judgments, § 74.]

Here, it is apparent from the face of the Indiana judgment that it is not entirely a consent judgment. The Indiana court did not merely perform the ministerial task of entering a judgment negotiated by TacCo's assignor (Inland Mortgage Corporation), Clapper, and the other defendants in that action, but rather made its own findings of fact, reached conclusions of law, and provided relief in various forms, including an order for a foreclosure sale. The only agreements reached by the parties to that action that were incorporated into the Indiana judgment were for the Indiana court to make findings of fact and conclusions of law, based on an examination of the pleadings and papers on file in the case, and the following agreement stated

by the Indiana court as a finding of fact: "The parties have agreed to set the amount of this judgment at Three Million Two Hundred Thousand Dollars ($3,200,000.00), to bear interest at the rate of Eight Percent (8%) from and after the date hereof."

Among the Indiana court's other findings were that Inland Mortgage Corporation was owed $3,393,309.31 as of February 18, 2002, plus prejudgment interest. With regard to attorney fees, the Indiana court found that "Loan Documents, Modifications, and Guaranties provide for the payment of attorneys' fees to Inland in any action to enforce the Loan Documents, and in any legal actions involving Inland's rights under those documents." It also found that Inland Mortgage Corporation incurred attorney fees of $202,226.38 for one law firm and $14,515.51 for another law firm. The attorney fees were found to be reasonable and the loan unpaid. Clapper was found liable to Inland Mortgage Corporation based on his guaranty. The Indiana court ordered a foreclosure sale of the real property underlying the loan and other collateral, as well as a money judgment that incorporated the parties' agreement regarding the amount of the judgment as follows:

> Inland is hereby granted a judgment in the sum of Three Million Two Hundred Thousand Dollars ($3,200,000.00), against the Defendants, Art Country Squire, Atlantic Limited, Atlantic, ART and Mr. Clapper, jointly and severally, with post-judgment interest thereon at the rate of Eight Percent (8%) per annum after February 19, 2002, and post-judgment interest thereon until paid at the applicable rate, in addition to any further expenses advanced by Inland to cover any additional taxes, Receiver's fees and costs, insurance, security and maintenance necessary to preserve the Real Estate to the date of sale, *plus any additional attorneys' fees which may be approved by the Court upon request*, all without relief from valuation and appraisement laws, together with the costs of this action and sale. [Emphasis added.]

The Indiana court also established the order of priority for applying proceeds from the foreclosure sale. The fourth priority was the agreed-to judgment, as well as additional sums ordered by the Indiana court up to the date of the sale, including "any additional attorneys' fees approved by the Court."

While the parties signed the Indiana judgment as "agreed to," under Michigan law a party's mere signature approval of a judgment, even if accompanied by such language as "approved as to form and content," does not transform a judgment into a consent judgment. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 71-73; 737 NW2d 332 (2007). Similarly, under Indiana law, the mere signature of a party on a judgment does not transform the judgment into a consent judgment. See *Henderson v Henderson*, 381 NE2d 451, 451 (Ind, 1978) (decree signed as "approved" by parties' attorneys operated as approval of form, but not content), and *State v Heslar*, 257 Ind 625, 626-627; 277 NE2d 796 (1972) (signing judgment to approve it did not waive errors, where party did not intend to waive right to appeal and the signature was not the result of an agreement between the parties).

Examined as whole, we find it apparent that the Indiana judgment does not contain a negotiated agreement between Inland Mortgage Corporation, Clapper, and the other defendants concerning liability for attorney fees related to the potential enforcement of the Indiana judgment itself. A valid contract requires a meeting of the minds on all essential terms. *Kamalnath v*

Mercy Mem Hosp Corp, 194 Mich App 543, 548; 487 NW2d 499 (1992); *Carr v Hoosier Photo Supplies, Inc*, 441 NE2d 450, 455-456 (Ind, 1982). TacCo's reliance on the underlying loan documents as authorizing its assignor, Inland Mortgage Corporation, to recover attorney fees is misplaced, because the entry of the Indiana judgment extinguished the underlying obligation. See *Peters Production, Inc v Desnick Broadcasting Co,* 171 Mich App 283, 286; 429 NW2d 654 (1988).

Further, the Indiana judgment does not incorporate the underlying loan documents or, more importantly, their terms. Although the loan documents were considered in the Indiana court's findings, Inland Mortgage Corporation was awarded a money judgment that included some unspecified sums because they were either dependent on future events or had not yet been reduced to a specific amount. With respect to attorney fees, the Indiana judgment simply recognized that the court would entertain a request for attorney fees. It provided for "any additional attorneys' fees which may be approved by the Court upon request." Neither the procedure for making the request nor the grounds that would be considered were specified, except that the judgment granted was to be "without relief from valuation and appraisement laws."

The trial court in this case entertained a request for attorney fees. Because the Indiana judgment cannot be construed as incorporating any agreement by Clapper to pay for the attorney fees incurred to enforce the Indiana judgment itself and the Indiana court did not order the payment, we reject TacCo's claim of entitlement to attorney fees based on the terms of the Indiana judgment as a matter of law. This result does not leave TacCo without a remedy because, as a noncontractual expense of enforcement, an award for attorney fees is governed by Michigan law. MCL 691.1173; see also Restatement Conflict of Law, 2d, § 101, comment a ("[c]osts and other expenses of litigation incurred in the suit brought to enforce the original judgment in a second state are allowed in accordance with the local law of the second state"). Therefore, TacCo was free to pursue attorney fees to the extent permitted by Michigan law.[1]

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[1] We note that TacCo did move for attorney fees under MCR 2.625(A)(2) and MCL 600.2591, on the ground that Clapper's defenses were frivolous. The trial court denied TacCo's motion in this regard, finding that Clapper's defenses were not frivolous. On appeal, TacCo does not make any reasoned argument indicating that the trial court erred in failing to award attorney fees on this basis but instead focuses on the language of the judgment.