STATE OF MICHIGAN

COURT OF APPEALS

GREEN TREE SERVICING, LLC,

Plaintiff/Counter-defendant/Appellant,

v

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK, d/b/a HOLIDAY WOODS MOBILE HOME PARK, d/b/a HOLIDAY SOUTH MOBILE HOME PARK, d/b/a HIGHLAND HILLS MOBILE HOMES PARK, and HOLIDAY ESTATES MOBILE HOME PARK,

Defendants/Counter-plaintiffs/Appellees.

UNPUBLISHED
February 3, 2009

No. 274936
Wayne Circuit Court
LC No. 04-434054-PD

GREEN TREE SERVICING, LLC,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK, d/b/a HOLIDAY WOODS MOBILE HOME PARK, d/b/a HOLIDAY SOUTH MOBILE HOME PARK, d/b/a HIGHLAND HILLS MOBILE HOMES PARK, and HOLIDAY ESTATES MOBILE HOME PARK,

Defendants/Counterplaintiffs-Appellants/Cross-Appellees.

No. 279215
Wayne Circuit Court
LC No. 04-434054-PD

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

In Docket No. 274936, plaintiff Green Tree Servicing, LLC, appeals as of right from an order granting case-evaluation sanctions to defendants. In Docket No. 279215, defendants appeal by delayed leave granted, and plaintiff cross-appeals, from a judgment, entered after a bench trial, that awarded a net amount of damages to defendants. We affirm.

This case involves a dispute over rental and other fees for mobile homes located in mobile home parks. Defendant Sheldon Futernick[1] owns several mobile home parks and alleged that plaintiff, after repossessing numerous mobile homes, improperly failed to pay fees that were due in exchange for having the homes remain in his parks. Plaintiff alleges that it owed no fees and also raises other claims of error.

Plaintiff first argues that the trial court erred in ruling that there was an implied-in-fact contract requiring plaintiff to pay lot rental fees on repossessed homes. This ruling was made in connection with the parties' motions for summary disposition under MCR 2.116(C)(10). We review de novo a trial court's summary-disposition ruling. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, *supra* at 120.]

Plaintiff maintains that there was no implied-in-fact contract because it had made its intention clear that it would *not* pay rental fees. However, in *Daniels v Goodwin Pontiac Co*, 348 Mich 121, 127; 82 NW2d 444 (1957), the Supreme Court noted the following:

> In *Miller v Stevens*, 224 Mich 626[, 632]; 195 NW 481, 482 [1923], this Court stated:
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> "A contract is implied where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction."
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> In *Spence v Sturgis Steel Go-Cart Co*, 217 Mich 147[, 153]; 186 NW 393, 395 [1921], we said:

[1] For ease of reference, this opinion will hereinafter refer to Futernick as a singular defendant.

> "The test of an implied contract for compensation is whether such services were performed under circumstances fairly raising a presumption that the parties understood and intended that they should be paid for, or at least that reasonable men in like situation as those who received and are benefited by the service naturally would and ought to understand and expect compensation was to be paid." [Emphasis added.]

Accordingly, the explicit words of the parties are not dispositive; what is dispositive is the "implication or proper deduction from the conduct of the parties [and] language used or *things done by them*." *Miller*, *supra* at 632 (emphasis added). The proper inquiry in this case is whether "reasonable men in [a] like situation as those who received and are benefited by the service naturally would and ought to understand and expect compensation was to be paid." *Spence*, *supra* at 153. As stated in *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992):

> In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties *and their visible acts*, not their subjective states of mind. [Emphasis added; internal citations and quotation marks omitted.]

"'Meeting of the minds' is a figure of speech for mutual assent." *Kamalnath*, *supra* at 548-549.

Here, there was evidence that most repossessing entities *do* pay lot rent to mobile home communities, and there was also evidence that plaintiff had, in the past, paid lot rent to such communities but at some point stopped doing so. Documentation and testimony were introduced that plaintiff expected purchasers of the repossessed homes to cover accrued lot rent. Evidence also revealed that, if homes were removed from defendant's communities, rent would often have to be paid to have a storage facility store the homes. As noted by the trial court, by leaving a home in a community, plaintiff also avoided the expenses of removal. It is simply not reasonable to conclude that plaintiff expected defendant to store repossessed homes for plaintiff, free of charge. The trial court did not err in concluding that the actions of the parties established an implied-in-fact contract. The fact that plaintiff verbally refused to pay lot rent is not dispositive, because plaintiff nonetheless manifested an asset to do so by leaving the homes in defendant's communities for periods after repossession. See, generally, *Thompson v Sanborn*, 52 Mich App 141; 17 NW 730 (1883). *All* the relevant circumstances must be examined in determining the existence of a contract. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993). Reversal is unwarranted.

Plaintiff next argues that the court improperly found for defendant on the unjust-enrichment theory. Because of our ruling regarding an implied-in-fact contract, we need not address this issue. We also need not address plaintiff's arguments pertaining to "unclean hands,"

assumption of risk, and laches, because those defenses were applicable solely to the unjust-enrichment theory.[2]

Plaintiff next argues that defendant was not entitled to damages, or at least was entitled to a lesser amount of damages, because he failed to mitigate his damages. The trial court, in conjunction with the summary-disposition ruling, rejected this claim.

Plaintiff's claim is without merit. Plaintiff kept homes in defendant's communities and therefore accrued owed lot rent under the implied-in-fact contract theory discussed above. Under these circumstances, defendant was not required to mitigate his damages. See *M & V Barocas v THC, Inc*, 216 Mich App 447, 450-451; 549 NW2d 86 (1996). Plaintiff retained the benefit of leaving the homes in the communities, and therefore defendant is entitled to the lot rent. See, generally, *id*.

Plaintiff next argues that the trial court erred in issuing, in conjunction with the summary-disposition ruling, a declaratory judgment governing the parties' future conduct. Plaintiff contends that declaratory relief is appropriate only where an express contractual relationship exists. Plaintiff provides no authority for this assertion, and we have found none. MCR 2.605(A)(1) states:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

The present case is, in fact, a highly appropriate case for issuing a declaratory judgment. As stated in *Merkel v Long*, 368 Mich 1, 11; 117 NW2d 130 (1962):

> But the rights to be determined by declaratory judgment or decree may be and perhaps usually are rights not *in praesenti*, but rights which are to come into full fruition or which will be fully vested at some future time. If uncertainties and controversies arise between interested parties as to what their respective rights will be when such rights accrue or become vested, and to avoid needless hazards or possible losses, it is necessary presently to have decision of such uncertain or controverted rights, then there is actual need of and justification for declaratory adjudication. [Internal citation and quotation marks omitted.]

The *Merkel* Court additionally stated:

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[2] With regard to unclean hands and laches, plaintiff argued that these defenses barred the unjust-enrichment claim. With regard to assumption of risk, plaintiff stated that "[a] court *of equity* will not relieve a party from the consequences of a risk which he voluntarily assumes" (emphasis added), thus indicating through context that the defense was applicable to the unjust-enrichment claim.

> The remedy by means of declaratory judgments is highly remedial, and the statute and rules should be accorded a liberal construction to carry out the purposes underlying such judgments. One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling, and disturbance of the orderly pursuits of life which are so often the incidents of [lawsuits]. Fully to carry out the purposes intended to be served by such judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening. [*Merkel, supra* at 13 (internal citation and quotation marks omitted).]

Here, similar disputes are likely to arise between the parties as more foreclosures occur, and the declaratory judgment ensures that the parties may "guide their actions accordingly . . . ." *Id.*

Plaintiff also argues that defendant failed to meet his burden of proof for establishing the need for a declaratory judgment. However, as noted by defendant, plaintiff provides no argument for this claim and has therefore abandoned it. See *Moses, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006).

Defendant argues that the trial court erred in ruling, in conjunction with the summary-disposition decision, that plaintiff does not repossess a home simply by changing the locks. We reject this argument because the documentary evidence supported the trial court's ruling. Deposition testimony established that the locks were changed as part of an inspection process, in order to secure the home after the inspection. Only *after* the inventory control manager reviews the inspection report does a determination occur regarding whether a home will be repossessed. This evidence was not contradicted, and the trial court therefore acted properly in determining that the changing of the locks was not dispositive.

Defendant next argues that the trial court erred in finding that plaintiff had filed seven title applications with the State of Michigan *by mistake* and therefore did not repossess those seven homes. The trial court reached this conclusion based on the testimony of Brenda O'Dell, plaintiff's inventory-control manager. Defendant contends that O'Dell's testimony was improperly admitted at the bench trial that occurred after the summary disposition ruling. We review the trial court's admission of testimony for an abuse of discretion. *Michigan Department of Transp v Haggerty Corridor Partners Ltd P'ship*, 473 Mich 124, 133-134; 700 NW2d 380 (2005).

MRE 701 limits lay witness testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Defendant contends that the trial court ignored subsection (a) in admitting O'Dell's testimony. We disagree. O'Dell was plaintiff's inventory-control manager and testified that the seven homes in question were never intended to be repossessed. She stated that her assistant, Katherine Thornton, knew that "we were behind in titling" and "[s]o she took it upon herself to take the incur lists [lists of homes potentially to be repossessed] and start ordering [title] checks right from the incur list." She

stated that the only explanation she could think of for why those titles had been applied for was that Thornton had "jumped the gun" in the manner she had previously identified. O'Dell's testimony in this regard was "rationally based on [her] perception" as the inventory-control manager and the supervisor of Thornton. *Id*. Moreover, even ignoring the title applications, O'Dell unequivocally testified that the homes in question had *not* been repossessed, and this testimony was not contradicted. As noted by the trial court after trial, although titles were applied for, and although the trial court had ruled in conjunction with the summary-disposition motions that applying for title constituted an act of repossession, defendant sufficiently rebutted the existence of repossession with respect to the homes in question.

Defendant next argues that the trial court erred in ruling, after trial, that there was no implied-in-fact contract for plaintiff to pay certain late fees for the delayed payment of lot rent and to pay lawn-cutting and site-maintenance fees of $60 a month for the repossessed homes. We review a trial court's findings of fact after a bench trial for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).[3]

We find no clear error. In contrast to the evidence discussed above in conjunction with the lot-rent issue, there was no evidence that plaintiff communicated to prospective purchasers that they would be responsible for accrued late fees and maintenance fees as separate from fees designated as "lot-rent" fees. This mitigates against a finding of an implied-in-fact contract for late fees and maintenance fees. Moreover, while it is reasonable, as discussed earlier, to assume that plaintiff assented to pay lot rent by leaving repossessed homes in the communities, the trial court did not clearly err in concluding that the same could not be said for late fees and maintenance fees. These are not the types of fees that one would automatically assume would "come with the territory" of leaving a home in a community. Under the circumstances, we are simply not left with a "definite and firm conviction that a mistake has been made" concerning the maintenance and late fees. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).[4]

Plaintiff next makes arguments pertaining to case-evaluation sanctions. We review de novo a trial court's decision regarding case-evaluation sanctions. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006).

Both parties rejected the case evaluation, and after examining the verdict the court awarded $156,812.37 in case-evaluation sanctions to defendant, representing $136,327.88 in attorney fees, $7,934.99 in costs, and $12,549.50 in interest.

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[3] The findings in question were, in actuality, findings of fact, despite the labels that the parties or the court put on them.

[4] Moreover, we are not troubled by the fact that the trial court included a late-fee provision in the declaratory judgment governing the parties' future conduct. The declaratory judgment was an attempt to help the parties' future dealings proceed smoothly; the late-fee provision furthers this goal and does not necessarily reflect the parties' past dealings.

MCR 2.403(O)(1) states:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's *actual costs* unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to *costs* only if the verdict is more favorable to that party than the case evaluation. [Emphasis added.]

According to *Zalut v Andersen & Associates, Inc*, 186 Mich App 229, 232-234; 463 NW2d 236 (1990), the different phrasing – "actual costs" versus "costs" – in this rule is of no import, and a party may be entitled to actual costs – as opposed to merely nominal, "taxable" costs – even if there has been a mutual rejection of the case evaluation.

Plaintiff alleges that *Zalut* was wrongly decided and that, if there has been a mutual rejection of a case evaluation, only taxable costs should be awarded. We are bound to follow *Zalut*, see MCR 7.215(J)(1), and we decline plaintiff's apparent request that we call for a conflict panel.

Plaintiff next argues that defendant's request for attorney fees should have been denied because the fees were not "necessitated by the rejection of the case evaluation." See MCR 2.403(O)(6)(b). Plaintiff contends that its rejection of the case evaluation did not cause defendant to incur attorney fees because defendant also rejected the case evaluation. This argument is without merit. The language of MCR 2.403(O) allows for attorney fees even in cases of mutual rejection. See MCR 2.403(O)(1) and (O)(6); see also *Zalut*, *supra* at 232-234 and *Allard*, *supra* at 402-403. Plaintiff also contends that legal services for the parties were unavoidable and were "not necessitated by the rejection of case evaluation" because future litigation would have been inevitable. However, plaintiff admits that the lawsuit would have been dismissed had the case evaluation been mutually accepted. The speculation, however well-founded, that the legal services used by defendant would have been needed in future litigation is merely that – speculation. The case-evaluation rejection led to the incurring of the legal services in this case, and the trial court did not err in awarding attorney fees to defendant.

Plaintiff next argues that the trial court erred in refusing to apply the "interest-of-justice" exception of MCR 2.403(O)(11). MCR 2.403(O)(11) states that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(2)(c) states that a verdict includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." The court, at the hearing regarding case-evaluation sanctions, stated:

> Green Tree further argues that this [c]ourt has discretion to deny actual costs because, according to Green Tree, the verdict was primarily the result of motions for summary disposition and the interest of justice exception of MCR 2.403(O)(11) is applicable to this case.
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> This [c]ourt rejects Green Tree's arguments that the verdict was primarily the result of motions for summary disposition. There is no question that this

> [c]ourt made some very important rulings in summary disposition that laid down the parameters for when Green Tree's obligation to pay lot rent would accrue. However, a very extensive and time-consuming trial was held on the factual issues in order to apply the law to the facts in this case. Consequently, in this [c]ourt's judgment, the verdict was not primarily the result of a motion for summary disposition. The verdict was primarily the result of a trial in which this [c]ourt heard evidence, addressed legal and factual issues, and ultimately made damage awards for both parties. MCR 2.403(O)(11) is not applicable to this case.
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> This [c]ourt would note parenthetically that it wishes the court rule was applicable to this case. This is because this case presents a perfect situation for applying the interest of justice exception. There were new legal issues that had to be addressed that had not been addressed in Michigan. There was an infinite number of factual issues to resolve. Both parties were making excessive damage requests which were substantially reduced by this [c]ourt after trial. Moreover, the parties needed direction to guide the course of action in the future. And finally, these are two parties that by happenstance must deal with each other in the future notwithstanding their desire to not have any relationship with each other. . .
>
> . So we needed a trial to resolve all those issues and this would be in my judgment a perfect case to say the interest of justice applied and not award any actual costs under the court rule. Unfortunately, that rule only allows me to do it where there was a motion for summary disposition and not a trial.

Plaintiff contends that MCR 2.403(O)(11) does not limit the interest-of-justice exception to those circumstances in which the verdict was the *exclusive* result of motion rulings. Plaintiff also emphasizes that many important rulings were made in the context of the summary-disposition decision. It contends that the verdict was "unmistakably" the result of both the summary-disposition rulings and the trial rulings.

Again, MCR 2.403(O)(11) states that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(2) states:

> For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

In referring only to "subrule (O)(2)(c)," MCR 2.403(O)(11) clearly excludes subrule (O)(2)(b), "a judgment by the court after a nonjury trial," which is what the judgment here was ultimately based on. MCR 2.403(O)(11) does not provide for situations in which the verdict is arguably the

result of both a motion and a nonjury trial. Under these circumstances, we find no basis to reverse the trial court's ruling.

Plaintiff next argues that, under MCR 2.403(O)(5), case-evaluation sanctions should not have been awarded. MCR 2.403(O)(5) states:

> If the verdict awards equitable relief, costs may be awarded if the court determines that
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> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
>
> (b) it is fair to award costs under all of the circumstances.[5]

Plaintiff contends that (1) it cannot be determined whether the verdict is more favorable to one party or the other because the declaratory judgment is so complicated and (2) it was not fair to award costs under all the circumstances.

The trial court stated:

> The declaratory relief is obviously more favorable to Futernick because it now requires Green Tree to pay lot rental fees if certain circumstances occur. Up until this case, Green Tree was refusing to pay lot rental fees when Green Tree exercised possession, control, or ownership over the home. MCR 2.403(O)(5) does not provide a basis for denying actual costs to Futernick.

Plaintiff contends that it, too, obtained favorable holdings by way of the declaratory judgment, such as being able to remove homes without interference from defendant. We note, however, that plaintiff emphasizes whether it obtained greater relief than defendant by way of the declaratory judgment; the pertinent question is whether the relief obtained by plaintiff was more favorable than the case evaluation. Plaintiff does not sufficiently address this issue and therefore has abandoned it. *Moses*, *supra* at 417.

As for MCR 2.403(O)(5)(b), the court did not refer directly to this subrule, but it did state that "MCR 2.403(O)(5) does not provide a basis for denying actual costs to Futernick." Accordingly, we assume that the court considered subrule (b) but concluded that it provided no basis for denying case-evaluation sanctions to defendant. Given that the judgment was for a net amount of $122,414 against plaintiff and the case-evaluation panel assessed $70,000 against

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[5] It is not entirely clear to us that MCR 2.403(O)(5) should apply to this case, where both parties rejected the case evaluation, see *Kusmierz v Schmitt*, 268 Mich App 731, 742; 708 NW2d 151 (2005), rev'd 477 Mich 934 (2006), but neither party argues that it does not apply. Given that fact, and given that there is an argument for applying it, we will apply it to this case.

plaintiff, and given that the declaratory judgment requires plaintiff to pay lot rental fees that it formerly was refusing to pay, we find no basis for reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter