

STATE OF MICHIGAN
COURT OF APPEALS

KEEFERS BLUE LINE SALOON, INC.,

Plaintiff/Counter-Defendant-
Appellant,

and

KEITH WEYCKER,

Plaintiff,

v

WALTER MARTIN and LOUISE MARTIN,

Defendants/Counter-Plaintiffs-
Appellees,

and

LUIGI PECCI,

Defendant-Appellee.

UNPUBLISHED

August 13, 2009

No. 282952

Wayne Circuit Court

LC No. 04-428123-CH

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff Keefers Blue Line Saloon, Inc., appeals as of right, challenging a judgment of no cause of action in favor of defendants following a jury trial, and the trial court's award of attorney fees and costs to defendants Louise Martin and Luigi Pecci. We affirm and remand for a determination of appellate attorney fees.

This action arises from plaintiff's purchase of a bar from Walter Martin in 2002. Plaintiff purchased all of the business's assets, except the real estate on which the business was operated. Walter and Louise Martin owned the property as tenants by the entireties. Plaintiff and Mr. Martin entered into a separate lease agreement for the real estate. Mrs. Martin was not a party to the lease, but she was involved in the negotiations and subsequently accepted payments under the lease. The lease agreement included an option to purchase the property for \$350,000 and a

separate right of first refusal to purchase the property in accordance with the terms of a bona fide offer from a third party.

On March 18, 2004, Mr. Martin notified plaintiff that defendant Luigi Pecci had tendered an offer to purchase the property for \$400,000. Plaintiff maintained that its option to purchase the property for \$350,000 remained valid despite this offer, and asserted its intent to exercise this option. Mr. Martin agreed to sell the property to plaintiff for \$350,000 if he could obtain financing within the 30-day period prescribed by the right-of-first-refusal provision. Plaintiff applied for a commercial loan, but did not obtain financing by May 14, 2004. On that date, the Martin defendants sold the property to Pecci for \$400,000. Plaintiff continued to seek financing, contending that the sale was subject to the option provision in the lease agreement. Plaintiff received a non-binding commitment from a lender, BGL Consulting Group, on May 26, 2004, but did not thereafter continue with the loan application process, allegedly because Pecci denied that the option agreement remained valid.

Plaintiff disputed Pecci's right to receive rent payments under the lease agreement. Pecci brought an action against plaintiff in district court, which was resolved by a consent order whereby plaintiff and Pecci agreed that plaintiff would deposit the rent payments with the district court and plaintiff could pursue its breach of contract action in circuit court.

The trial court thereafter granted summary disposition in favor of the Martin defendants, concluding that plaintiff's option to purchase expired when Pecci made his bona fide offer, thereby restricting plaintiff's right to purchase the property to the terms set forth in the right-of-first-refusal provision. In a prior appeal, this Court reversed that decision, holding that the Martin defendants waived their right to require that plaintiff's offer match Pecci's offer when they agreed to accept his purchase offer of \$350,000. *Weycker v Martin*, unpublished opinion per curiam opinion of the Court of Appeals, issued July 11, 2006 (Docket No. 264401), slip op at 3. This Court also held:

Paragraph 45 of the lease agreement unambiguously grants Keefers 30 "business" days to exercise its rights under that paragraph "by *agreeing* to purchase the property." That provision does not require Keefers to obtain financing within 30 days, or that the closing take place within 30 days. [*Id.*, slip op at 3 (emphasis in the original).]

In addition, this Court concluded:

Review of the provisions of the lease agreement at issue reveal that it provided that the tenant had thirty business days to exercise its right of acceptance. However, the lease agreement did not specify the time for completion of the sale. That is, it did not specify the type of financing required for the purchase, the date by which financing had to be obtained, and the date of closing. Consequently, it is presumed that a reasonable time for performance is allowed, and the reasonableness of plaintiffs' actions based on the circumstances of this case present an issue for the trier of fact. [*Id.*, slip op at 4.]

At oral arguments in this Court, counsel for the Martin defendants, in the presence of plaintiff's counsel, informed this Court that Mr. Martin had died on May 4, 2006. After the case was

remanded, plaintiff attempted to substitute Walter Martin's estate as a party defendant. Plaintiff petitioned the probate court to open an estate and appoint a personal representative, Walter Sakowski. On the first day of trial, the trial court denied plaintiff's motion to substitute the estate as a party. The court explained that the estate was not represented, which could enable plaintiff to obtain a default judgment against it.

At trial, the jury received a special verdict form. The first question asked the jury to determine whether plaintiff obtained financing to purchase the property. The jury unanimously answered this question "no," and the trial court entered a judgment of no cause for action in favor of defendants. The trial court subsequently denied plaintiff's motion for judgment notwithstanding the verdict ("JNOV") or a new trial. The court also granted Mrs. Martin's and Luigi Pecci's motions for attorney fees and costs pursuant to both the lease agreement and the case evaluation rule, MCR 2.403(O).

I. Substitution

Plaintiff first argues that the trial court erred in denying his motion to substitute Mr. Martin's estate as a party defendant. A trial court has discretion to grant or deny a party's motion to substitute a deceased party's estate for that party. *Mather Investors, LLC v Larson*, 271 Mich App 254, 260; 720 NW2d 575 (2006). Thus, we review the trial court's decision for an abuse of discretion. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCL 600.2921 provides that "[a]ll actions and claims survive death." MCR 2.201(1) provides the following procedure for substituting a deceased party's estate as a party:

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

(a) A motion for substitution may be made by a party, or by the successor or representative of the deceased party.

(b) Unless a motion for substitution is made within 91 days after filing and service of a statement of the fact of the death, the action must be dismissed as to the deceased party, unless the party seeking substitution shows that there would be no prejudice to any other party from allowing later substitution.

(c) Service of the statement or motion must be made on the parties as provided in MCR 2.107, and on persons not parties as provided in MCR 2.105.

(2) If one or more of the plaintiffs or one or more of the defendants in an action dies, and the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. A party or attorney who learns that a party has died must promptly file a notice of the death.

MCR 2.202(A)(1)(b) provides that the 91-day period for filing a motion for substitution begins to run when the statement of the fact of death is filed and served. MCR 2.202(A)(2) provides that a party or attorney who learns that a party has died must promptly file a notice of the death. Counsel for defendants Walter and Louise Martin failed to file a notice of Mr. Martin's death and, therefore, did not comply with this rule. Accordingly, they failed to commence the running of the 91-day period. No notice of death was filed and served until plaintiff filed its suggestion of death in the trial court on September 28, 2006, approximately four months after defendants' counsel reported Mr. Martin's death on May 18, 2006, at oral arguments in this Court. Plaintiff moved for substitution of Mr. Martin's estate on the same day it filed its suggestion of death, but no estate was opened for Mr. Martin at that time. No hearing was held on that motion. Plaintiff filed a Motion to Compel to support its efforts to open an estate. Plaintiff later brought a second motion for substitution on July 16, 2007, ten days after the probate court granted plaintiff's motion to open an estate and appoint a personal representative, but only one day before trial began. Under these circumstances, plaintiff's motion was not untimely under MCR 2.202(1)(b). Because defendants failed to file a notice of death and open an estate for Mr. Martin, the court rule requiring the court to dismiss the action unless plaintiff could show that no other party would be prejudiced by the substitution did not apply.

The trial court did not abuse its discretion in denying plaintiff's motion. The motion itself was defective. The record reveals that plaintiff did not serve the personal representative of the estate with a copy of its motion for substitution as required. Plaintiff served the parties to the case with both of its motions. However, plaintiff, despite his knowledge of the name and law office of the personal representative, did not serve him with the Notice of Hearing on the motion and, perhaps, any notice of the trial date. This is contrary to the letter and intent of the rule and this defect alone would have justified the court's denial of the motion.

The trial court's primary concern was that substituting the estate at the start of trial, when the estate was not represented by counsel, would enable plaintiff to obtain a default judgment against the estate. Although the estate had no assets, plaintiff might have used its judgment to collect the business payments that Mr. Martin had assigned to Mrs. Martin before his death. Although plaintiff indicated that it would not "go after" the estate, it disregarded Mrs. Martin's statement that she would agree to substitution of the estate on the condition that plaintiff stipulate that it would not attempt to obtain a judgment against the estate, or use it as a collusive mechanism. The peculiar circumstances of this case place denial of the substitution motion within the range of reasonable and principled outcomes. *Maldonado, supra* at 388.

In any event, even if the trial court's decision can be characterized as an abuse of discretion, plaintiff ultimately failed to prevail for reasons unrelated to the substitution issue. The jury found that plaintiff could not establish its breach of contract claim because it failed to obtain financing. This finding would necessarily defeat any claim against Walter Martin or his estate. An error in the trial court proceedings does not require reversal unless a substantial right of the party is affected. MCR 2.613(A); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Plaintiff's substantial rights were not affected, so any error was harmless.

II. Jury Instructions and Verdict Form

Plaintiff argues that the trial court gave improper special instructions, and used an improper verdict form. Initially, although plaintiff stated on the record that it had previously objected to the court's jury instructions and verdict form off the record, counsel did not specify the grounds for his objections on the record, even though the court provided him with an opportunity to do so. MCR 2.516(C) provides that "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects *on the record* before the jury retires to consider the verdict . . . stating specifically the matter to which the party objects and the grounds for the objection." Because the court rule clearly states that an objecting party must state specifically the matter to which the party objects and the grounds for the objection on the record, we conclude that this issue is not preserved. Without a record of plaintiff's objections, this Court cannot evaluate the substance or merit of any such objections. Accordingly, we review this issue for plain error affecting plaintiff's substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Plaintiff argues that the trial court's instruction explaining the meaning of "breach" was erroneous because it "impermissibly modified standard jury instruction 140.041." When a standard jury instruction does not adequately cover an area of the law, the trial court may provide a supplemental instruction upon request, as long as the instruction properly informs the jury of the applicable law. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001). Here, plaintiff maintains that its own proposed jury instruction "was a more accurate and proper charge inasmuch as it set forth both the burden of proof and the elements necessary to prove a breach of contract claim," but it does not specify how the instructions that were given were erroneous, nor does it identify any respect in which the instructions given were unsuitable for the factual and legal issues of the case. Plaintiff asserts that the instructions impermissibly deviated from the standard instructions, but it fails to identify the erroneous deviation. A party "may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *American Transmission v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000).

While the text of the briefs cite M Civ II 140.041, we believe appellant was referring to M Civ II 142.20, which provides a general instruction on breach of contract, but it does not address the specific nature of the breach of contract issue in this case. Here, plaintiff could not establish that the Martin defendants breached the lease agreement simply by selling the property to Pecci. Rather, it was incumbent on plaintiff to prove that he properly exercised his rights to purchase the property by becoming able to perform within a reasonable time. *Weycker, supra*, slip op at 4. Thus, the question whether plaintiff obtained financing was material to whether the lease agreement was breached. Because a general instruction on breach would not have adequately covered this issue, a supplemental instruction was warranted. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001). Again, although plaintiff asserts that its proposed instruction would have been appropriate, it has not demonstrated that the instruction given was improper. Therefore, plaintiff has failed to establish a plain instructional error.

Likewise, plaintiff argues that the trial court used an improper verdict form, but again does not specify the alleged error. It merely asserts that the verdict form "was not modeled after any of the standard verdict forms," but does not explain how the form was legally erroneous. Thus, no plain error has been shown.

III. Motion for JNOV or a New Trial

Plaintiff argues that the trial court erred in denying its motion for JNOV or a new trial. This Court reviews de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when there was insufficient evidence to create an issue for the jury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). “This Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law.” *Id.* “If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper.” *Id.*

This Court reviews for an abuse of discretion a trial court’s decision to grant or deny a motion for a new trial pursuant to MCR 2.111. *Hilgendorf, supra* at 682. When a party challenges a jury’s verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). If there is any competent evidence to support the jury’s verdict, this Court must defer its judgment regarding the credibility of the witnesses. *Id.* at 406-407.

The trial court properly denied plaintiff’s motion for JNOV because the jury’s verdict was not contrary to the evidence presented. This Court previously recognized that the question whether plaintiff performed (i.e., became able to complete the sale) within a reasonable time was an issue for the trier of fact. *Weycker, supra*, slip op at 3. The evidence at trial showed that plaintiff obtained only a non-binding commitment from a lender on or around May 26, 2004. Plaintiff maintains that there was an 85 to 90 percent likelihood of approval, but the only data supporting this statistic was Orow’s testimony, which was based on his general experience in practicing real estate law. Regardless, the alleged 10 to 15 percent failure rate at this stage of the loan process was not numerically insignificant. A reasonable trier of fact could conclude from the evidence that plaintiff’s ability to obtain the necessary financing to purchase the property remained speculative, despite a reasonable time to perform. Accordingly, the trial court properly denied plaintiff’s motion for JNOV.

Similarly, the evidence did not preponderate heavily against the jury’s verdict. Therefore, the trial court did not abuse its discretion in denying plaintiff’s motion for a new trial. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

IV. Attorney Fees and Costs

Finally, plaintiff challenges the trial court’s award of attorney fees and costs to defendants Louise Martin and Pecci. The trial court’s award of attorney fees and costs is reviewed for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *Id.* Findings of fact on which a trial court bases its award of attorney fees are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 ((2007)). Questions of law relating to an award of attorney fees are reviewed de novo. *Id.*

Under the “American Rule,” attorney fees are generally not recoverable as an element of costs or damages unless expressly provided for by statute, court rule, or by contract. *Fleet*

Business Credit, LLC v Krapohl Ford Mercury Co, 274 Mich App 584, 589; 735 NW2d 644 (2007). Here, defendants sought attorney fees pursuant to a provision in the lease agreement and as case evaluation sanctions under MCR 2.403. We conclude that attorney fees were properly awarded pursuant to the lease agreement.

The lease agreement provides, in pertinent part:

In any legal action taken by either Landlord or Tenant, the prevailing party of said legal action shall be entitled to receive, from the other party, reasonable costs and attorney fees that are incurred as a result of said legal action.

We disagree with plaintiff's argument that neither Louise Martin nor Pecci were entitled to invoke this provision of the lease because they were not parties to the lease agreement. Plaintiff asserted below that Mrs. Martin ratified the lease agreement by acquiescing to Mr. Martin's execution of the lease and accepting rental payments that Mr. Martin assigned to her. This assertion is consistent with *Duke v Miller*, 355 Mich 540, 544; 94 NW2d 819 (1959), and *Michigan Trust Co v Herpolsheimer*, 256 Mich 589, 598; 240 NW 6 (1932), which recognize that a spouse is estopped from denying the other spouse's conveyance of property pursuant to an agreement where the nonparty spouse has accepted benefits under the agreement or acted in a manner signifying his or her adoption of the agreement. Here, plaintiff's principal, Keith Weycker, testified that Mrs. Martin participated in Mr. Martin and Weycker's negotiations for the sale of the business and the real property. Mrs. Martin also helped him run the bar after the sale, and she accepted cash and check payments for both the lease and the sale of the business assets. At her request, Weycker made Mrs. Martin the payee on the check payments. This evidence demonstrates that Mrs. Martin ratified the lease agreement, and was therefore bound by its terms, and accordingly, was entitled to enforce the attorney fee provision.

With regard to Pecci, plaintiff denies that Pecci was a party to the lease, contrary to plaintiff's prior assertion that Pecci purchased the real property subject to the lease. But as this Court held in *Plaza Investment Co v Abel*, 8 Mich App 19, 25; 153 NW2d 379 (1967), "a transfer of the landlord's interest in a lease does impose and confer on the transferee duties and rights formerly those of the transferor." See also 49 Am Jur 2d, Landlord and Tenant, § 232, p 256-257. Thus, Pecci was also entitled to invoke the attorney fee provision of the lease agreement.

Plaintiff argues that the trial court erred in denying his request for an evidentiary hearing regarding the amount of defendants' requested costs and attorney fees. In *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002), this Court stated:

Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). However, if the parties created a sufficient record to review the issue, an evidentiary hearing is not required. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999); *Giannetti Bros Constr Co, Inc v City of Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989). A trial court's decision that an evidentiary hearing is not warranted is reviewed for an abuse of discretion. *Bielawski v Bielawski*, 137 Mich App 587, 593; 358 NW2d 383 (1984).

Here, plaintiff did not challenge the reasonableness of either defendant's claimed attorney fees. Plaintiff did not request an evidentiary hearing in either of his briefs opposing defendants' motions, and first raised the issue at the hearing on defendants' motions. Even then, plaintiff's counsel only requested either an evidentiary hearing or "alternatively a chance to fully examine them" (i.e., the billing statements). Because the billing statements were submitted with defendants' motions and plaintiff failed to raise any specific challenge to those statements, the trial court did not abuse its discretion in denying plaintiff's request for an evidentiary hearing.

Defendants request that this Court remand for determination of additional attorney fees incurred on appeal. In *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548-549; 362 NW2d 823 (1984), this Court held that "[a] contractual provision for reasonable attorney fees in enforcing provisions of the contract may validly include allowance for services rendered upon appeal," and remanded the case to the trial court to determine whether the parties' contractual attorney fee provision extended to appellate fees, and to calculate those fees if applicable. In the instant case, the attorney fee provision in the lease agreement broadly provides for "reasonable costs and attorney fees" without limiting costs and attorney fees to trial court proceedings. We therefore remand this case to the trial court for a determination of defendants' costs and attorney fees incurred on appeal.

Affirmed and remanded for a determination of appellate attorney fees consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder