

STATE OF MICHIGAN  
COURT OF APPEALS

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MTGLQ INVESTORS, L.P., Successor in Interest  
to GREEN TREE FINANCIAL SERVICING,  
L.L.C.,

UNPUBLISHED  
October 20, 2009

Plaintiff-Appellant,

v

LEON LONDON, d/b/a NEW ENGLAND  
RESIDENTIAL LENDING COMPANY,  
ADAM S. KULINSKI, KORINN K. TOMONIS  
and ABN AMRO MORTGAGE GROUP, INC.,

No. 285977  
Wayne Circuit Court  
LC No. 05-519359-CH

Defendant-Appellee.

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Before: Saad, C.J., and O’Connell, and Zahra, JJ.

PER CURIAM.

The trial court issued an order quieting title in property located at 27629 Windsor, Garden City, Michigan. On appeal, plaintiff challenges an order that granted defendant Leon London’s motion to set aside a case evaluation against him, and an order that denied plaintiff’s motion for costs and attorney fees. For the reasons set forth in this opinion, we affirm.

A. Case Evaluation

Plaintiff claims that the trial court abused its discretion when it set aside the case evaluation award of \$40,000.

We review a trial court’s decision to set aside an acceptance of a case evaluation for an abuse of discretion. *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 510; 448 NW2d 493 (1989). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

A case evaluation may be set aside even when both parties accept the case evaluation. *Goch Properties, LLC v C Van Boxell Transp, Inc*, 477 Mich 871, 871; 721 NW2d 581 (2006). Generally, a court should set aside an acceptance of a case evaluation only if failure to do so would result in “substantial injustice.” *State Farm Mut Auto Ins Co v Galen*, 199 Mich App 274, 277; 500 NW2d 769 (1993); see also *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379,

403; 651 NW2d 756 (2002). Here, the trial court set aside the \$40,000 case evaluation award based on the unfairness it imposed on London. The trial court accepted London's claim that his acceptance of the evaluation was premised on plaintiff transferring its interest in the property to London in exchange for the \$40,000. The trial court also found that plaintiff had no viable claim against London because plaintiff had absolutely no property interest at the time London conveyed title to Adam Kulinski and Korinn Tomonis, which was the act that allegedly slandered the title. The reason the court set aside the evaluation was London's unilateral misunderstanding, coupled with the fact that there was no viable claim against London:

I don't think Mr. London should pay you \$40,000 for nota [sic]. Essentially that's what he is getting, nothing. I don't see any claim that you have against him for anything in terms of it based on the [fact] that at the time he did whatever he did[,] you didn't have any interest in this property . . . . The most that you had and would have had would have been a lien consistent with your mortgage. But that lien even had been extinguished simply because a superior mortgage had foreclosed it . . . .

Though the trial court never used the words "substantial injustice," allowing an innocent party to pay \$40,000 in damages would constitute substantial injustice. Furthermore, when the innocent party does not even receive a deed in exchange for the \$40,000, the injustice is magnified. Therefore, the trial court's decision to set aside the evaluation falls within the principled range of outcomes, and the trial court did not abuse its discretion.

Plaintiff complains that unilateral mistakes are insufficient to set aside a case evaluation. Plaintiff notes that the Supreme Court, in *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002), declared that an "entry of a judgment pursuant to the acceptance of a mediation evaluation is, in essence, a consent judgment." Plaintiff then relies on *Kline v Kline*, 92 Mich App 62; 284 NW2d 488 (1979), asserting that consent judgments can only be disturbed with the presence of fraud or mutual mistake. However, subsequent cases have added "unconscionable advantage" as an additional means of overturning a consent judgment. E.g., *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008); *Walker v Walker*, 155 Mich App 405, 407; 399 NW2d 541 (1986). Therefore, a unilateral mistake that would result in an "unconscionable advantage" or "substantial injustice" is sufficient to set aside a case evaluation.

Plaintiff contends that the trial judge had no authority to evaluate the efficacy of plaintiff's claims against London. Specifically, plaintiff asserts that it was improper for the trial judge to "go behind the case evaluation" and nullify the result simply because the trial court believed that the underlying claims lacked merit. Plaintiff offers no authority to support such an assertion. A trial court has the authority to set aside a case evaluation if not doing so would result in substantial injustice. *Galen, supra* at 277. To determine the presence of substantial injustice, a trial court could properly look at the merits of the case.

#### B. Attorney Fees

Plaintiff claims that the trial judge erred when he denied plaintiff's request for attorney fees and costs.

We review for an abuse of discretion a trial court's decision regarding the award of attorney fees. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). In the context of a case evaluation, MCR 2.403(O) governs an award of attorney fees:

(1) 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. . . .

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(6) For the purposes of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

Thus, this rule addresses an award of attorney fees if a party *rejects* an evaluation and does not obtain a more favorable verdict. Here, London did not reject the evaluation – he initially accepted. Furthermore, were we to conclude that London “rejected” the evaluation because he successfully had the evaluation set aside, plaintiff cannot be said to have obtained a more favorable verdict under MCR 2.403(O). It was London who obtained a more favorable outcome because he was dismissed as a party and had to pay nothing as opposed to the \$40,000 evaluation. Further, MCR 2.403(O) requires a “verdict,” which requires a judgment.<sup>1</sup> No judgment was issued because London was simply dismissed from the action. Thus, MCR 2.403(O) does not allow for plaintiff to recover attorney fees from London.

To support its arguments, plaintiff relies on *Muntean v City of Detroit*, 143 Mich App 500; 372 NW2d 348 (1985), and MCR 2.603(D)(4). To the extent that *Muntean* stands for the mandatory imposition of attorney fees, it is confined to situations of neglect. In *Muntean*, defendant's counsel misplaced a file and let it “escape his attention.” This is not comparable to the actions of London in this case. London thought that by accepting the \$40,000 award he would receive the outstanding one-half interest in the property. It turns out that this was a mistake, but this mistake is distinguishable from the conduct in *Muntean* because London did not neglect the matter.

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<sup>1</sup> MCR 2.403(O)(2) defines a “verdict” as (a) a jury verdict, (b) a judgment by the court after a nonjury trial, and (c) a *judgment* entered as a result of a ruling on a motion after rejection of the case evaluation. Since there was no trial, (c) is the only applicable prong of the definition in this case.

Furthermore, plaintiff's reliance on MCR 2.603(D)(4) is unavailing. MCR 2.603(D)(4) addresses the setting aside of defaults and default judgments. If this case were analogous to a default judgment, as plaintiff urges, the court rule clearly states that the imposition of attorney fees is discretionary: "An order setting aside the default or default judgment . . . *may* also impose other conditions the court deems proper, including a reasonable attorney fee." MCR 2.603(D)(4) (emphasis added). The trial judge described at length how unfair it would be to make London pay attorney fees to plaintiff when London was essentially free of any liability to plaintiff. The judge went so far as to suggest, perhaps in jest, that if anyone should have sought been seeking attorney fees, it should have been London. The court rule vests the trial judge with complete discretion under these circumstances, and the trial judge did not abuse his discretion by choosing not to award attorney fees.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Brian K. Zahra