STATE OF MICHIGAN

COURT OF APPEALS

SHERYL GALE JONES-COLLIER, Personal Representative of the Estate of MADELLE L. JONES, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

LOUIS CUNNINGHAM,

Defendant-Appellee/Cross-Appellant,

and

CUNNINGHAM ADVISORY SERVICES, INC., LOUIS CUNNINGHAM TRUST, LEC PROPERTIES, a/k/a LEC PROPERTIES LTD., LEC PROPERTIES LTD. PARTNERSHIP, and LEC PROPERTIES PARTNERSHIP,

Defendants.

UNPUBLISHED
April 22, 2010

No. 289915
LC No. 04-427696-CH

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff, Sheryl Gayle Jones-Collier, as personal representative of the Estate of Madelle L. Jones, deceased, appeals as of right the trial court's order for partition of property. Plaintiff challenges the trial court's earlier orders regarding the parties' requests for case evaluation sanctions. On cross-appeal, defendant, Louis Cunningham, challenges the trial court's order for partition. We affirm in part, reverse in part, and remand for further proceedings.

I.

In 1988, Cunningham purchased a commercial building in Detroit, known as Monica Primary School, from the Detroit Board of Education for $120,000. Cunningham was Jones's financial advisor and, in exchange for $70,000, he conveyed an undivided 15 percent interest in the property to Jones by quit claim deed. In 1989, the parties entered into a written agreement restating that Jones owned an undivided 15 percent interest in the property. The agreement

further provided that Jones was a passive investor entitled to 15 percent of all gross rent received for the property from the current tenant, who held a triple net lease. At the time of the contract, 15 percent of the gross rent received from the tenant, Open Arms Shelter, was $1,575. The contract further provided:

> Cunningham will be responsible for the renovation and negotiation of all lessee contracts and ongoing management.
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> Jones is a passive investor and to be held harmless of any damages, lawsuits, or litigation.
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> Cunningham agrees at the end of the lease period Jones is to participate in any proceeds derived through the sale of this building should the lessee or any potential buyer purchase this building. Should this building be re-leased Jones will participate in the renewed lease with an undivided interest of 15%.

The initial lease with Open Arms Shelter was cancelled prior to its seven-year term, but the property was subsequently released and Jones continued to receive rent payments. When Jones died in 2003, and Cunningham advised plaintiff that the agreement did not speak to the effect of Jones's death on the investment, plaintiff filed a complaint to quiet title on Jones's 15 percent interest in the property and to partition and sell the property.[1] Among other claims, plaintiff alleged that Cunningham only paid Jones, and later plaintiff, $1,575 per month instead of 15 percent of the gross rent from the property. When Cunningham stopped paying plaintiff any rent following the complaint, the trial court ordered Cunningham to deposit $1,575 per month into an escrow account during the proceedings.

Prior to trial, plaintiff rejected a case evaluation award against Cunningham and LEC Properties Partnership for $120,000, and against the remaining defendants for zero damages. Cunningham and LEC Properties Partnership tendered a limited acceptance under MCR 2.403(L)(3)(b), and the remaining defendants accepted the evaluation.

At trial, the court granted a motion for a directed verdict of the claims against all defendants except Cunningham ("dismissed defendants"). The jury was presented with the limited questions regarding: 1) whether plaintiff was entitled to gross rent or net rent for leases subsequent to the Open Arms Shelter lease, and 2) the value of the property. The jury found that plaintiff was entitled to receive 15 percent of the gross rent from the property and it found that the value of the property was $900,000.

The trial court thereafter entered a partial judgment in favor of plaintiff and against Cunningham in an amount equal to 15 percent of the gross rent from the property between

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[1] Plaintiff also named as defendants entities related to Cunningham, including Cunningham Advisory Services, Inc., Louis Cunningham Trust, LEC Properties, a/k/a LEC Properties Ltd., LEC Properties Ltd. Partnership, and LEC Properties Partnership.

September 3, 1998 and March 1, 2007.[2] The trial court ordered that Cunningham be credited for any amounts paid to the escrow account, Jones, or plaintiff during that period of time. However, the court also ordered Cunningham to release the funds in the escrow account to plaintiff. Finally, the trial court ordered Cunningham to pay plaintiff 15 percent of the gross rent from the property from March 2, 2007, until the partition of the property.

At a subsequent hearing, the trial court awarded case evaluation sanctions to Cunningham and the dismissed defendants under MCR 2.403(O). In partitioning the property, the trial court ordered Cunningham to pay plaintiff $135,000, 15 percent of the jury's $900,000 valuation. However, the trial court then credited Cunningham for 15 percent of the value of the capital improvements he had made to the property, which served as bases for the jury's valuation.

II.

On appeal, plaintiff argues that the trial court erred by failing to include proceeds of the jury verdict and assessable costs in the adjusted verdict before comparing it to the case evaluation award for purposes of determining case evaluation sanctions. Plaintiff argues that if the adjusted verdict had been properly calculated, it would have exceeded the case evaluation award against Cunningham and plaintiff would have been entitled to case evaluation sanctions. We agree that the trial court miscalculated the adjusted verdict and we reverse the order awarding case evaluation sanctions to Cunningham based on the court's finding that the adjusted verdict was less than 10 percent below the $120,000 case evaluation award (below $108,000). However, the record is insufficient for this Court to determine whether the recalculated adjusted verdict would have exceeded the case evaluation award against Cunningham. Therefore, as we discuss further below, we remand to the trial court for further proceedings regarding the parties' claims for case evaluation sanctions.

A trial court's decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

The purpose of the case evaluation sanction rule is to encourage settlement and deter protracted litigation by shifting the financial burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award. *Allard v State Farm Ins Co*, 271 Mich App 394, 398-399; 722 NW2d 268 (2006); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 484; 633 NW2d 440 (2001). Pursuant to MCR 2.403(O)(1), case evaluation sanctions are required:

> 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.

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[2] The trial court had previously found that plaintiff's claim for back rent was limited by a six-year statute of limitations dating back from the 2003 complaint.

For the purposes of determining whether a verdict is more favorable to a moving party, MCR 2.403(O)(3) requires that the verdict be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. The rule further provides, in part:

> After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant. [MCR 2.403(O)(3).]

Here, the case evaluation award to Cunningham and LEC Properties Partnership was $120,000. The trial court concluded that the adjusted verdict was between $90,000 and $96,000, but declined to include the portion of gross rent paid by Cunningham into the escrow account. Because the trial court's adjusted verdict was less than 10 percent below the $120,000 case evaluation award (below $108,000), the trial court awarded case evaluation sanctions to Cunningham.

Plaintiff argues that the adjusted verdict should have included the $1,575 paid monthly into the escrow account throughout the proceedings, plus the unpaid portion of the 15 percent of the gross monthly rent exceeding the amount paid to Jones, plaintiff or the escrow account. We agree. MCR 2.403(O)(2) provides:

> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict,
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> (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.

According to the jury verdict, plaintiff was entitled to 15 percent of the gross rent from the property. An example of the amount owing to plaintiff pursuant to this verdict is instructive. In 2005, 15 percent of the gross monthly rent was approximately $2,831.56. Cunningham paid $1,575 of this $2,831.56 into the escrow account each month. However, he still owed the remaining portion of this $2,831.56, namely 1,256.56 each month.

We conclude that the amount Cunningham paid into the escrow account should have been included in the adjusted verdict because it was a portion of the 15 percent of the gross monthly rent, plaintiff had no control over the escrow account, and plaintiff was not entitled to the proceeds in the escrow account until the jury verdict and accompanying partial judgment. According to plaintiff, Cunningham's monthly payments into the escrow account totaled $45,675. However, on remand, the court should also include MCR 2.403(O)(3) interest on the amounts Cunningham paid into the escrow account from the filing of the complaint to the date of the case evaluation.

We further conclude that the unpaid portion of rent exceeding that previously paid to Jones, plaintiff, or the escrow account should be included in the adjusted verdict. Over defendant's objection, plaintiff argued to the trial court that the parties agreed that this portion of unpaid rent totaled $93,139.01. On appeal, plaintiff now claims this rent plus applicable interest totals $86,190.77, whereas defendant claims this rent plus applicable interest totals $76,180.49. On remand, the trial court should conduct additional fact-finding regarding the amount of the unpaid portion of rent exceeding that previously paid to Jones, plaintiff or the escrow account, and the court should include MCR 2.403(O)(3) interest on this amount in the adjusted verdict.

Plaintiff also argues that the adjusted verdict should have included assessable costs pursuant to MCR 2.403(O)(3). Relying on plaintiff's bill of costs, the trial court awarded $7,820 in costs to plaintiff, as the prevailing party, under MCR 2.625(A)(1). In *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004), the Michigan Supreme Court concluded that, for purposes of adjusting a verdict, costs are limited to those incurred between the filing of the complaint and the date of the mediation evaluation or case evaluation. Because the record is unclear regarding which of plaintiff's $7,820 in costs were incurred between the filing of the complaint and the case evaluation award, the trial court should also conduct additional fact-finding on this matter on remand.

Next, plaintiff argues that the adjusted verdict should have included the amount of rent paid to plaintiff after the verdict, but before Cunningham purchased plaintiff's interest. Plaintiff failed to preserve this argument below and we decline to consider it. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). Further, plaintiff is not entitled to seek this unpreserved relief on remand.

Finally, plaintiff argues that the adjusted verdict should have included the equitable order made pursuant to the partition claim, requiring Cunningham to purchase plaintiff's 15 percent interest in the property for $135,000. We disagree. To the extent that the trial court's decision was discretionary, review is for an abuse of discretion. See *Harbour v Correctional Medical Services*, Inc, 266 Mich App 452, 465; 702 NW2d 671 (2005). "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).

MCR 2.403(O)(5) provides:

> 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
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> (b) it is fair to award costs under all of the circumstances.

In this case, the trial court found that the case evaluation panel did not consider plaintiff's equitable claim for the partition of property. The case evaluation award specifically noted the award was for "accrued rents only." The trial court found that the case evaluation award was artificially low without plaintiff's equitable claim for the partition of property. It declined to

include the value of the equitable claim in the verdict because the difference between the artificially low case evaluation award and the all-encompassing verdict would result in unfairness. In light of the trial court's consideration of fairness under MCR 2.403(O)(5)(b), we conclude that the exclusion of the equitable order from the adjusted verdict did not fall outside the range of reasonable and principled outcomes. See *Kusmierz v Schmitt*, 268 Mich App 731, 734; 708 NW2d 151 (2005), rev'd on other grounds 477 Mich 934; 723 NW2d 833 (2006).

In sum, the trial court should conduct additional fact-finding on remand to determine the MCR 2.403(O)(3) interest on the amounts Cunningham paid into the escrow account, the amount of the unpaid portion of rent exceeding that previously paid to Jones, plaintiff or the escrow account, the MCR 2.403(O)(3) interest on that unpaid portion of rent, and the costs incurred between the filing of the complaint and the case evaluation award. Thereafter, consistent with this opinion, the trial court should recalculate the adjusted verdict, compare it to the case evaluation award against Cunningham, and award case evaluation sanctions if appropriate pursuant to MCR 2.403(O)(3).

Plaintiff next argues that the trial court erred in awarding case evaluation sanctions to the dismissed defendants because the aggregate adjusted verdict was more favorable to plaintiff than the aggregate case evaluation award. MCR 2.403(O)(4)(a) provides:

> (4) In cases involving multiple parties, the following rules apply:
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> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. *However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.*

"Aggregate" is not defined in the court rule, but according to *Random House Webster's College Dictionary* (2000), it means "a sum, mass, or assemblage of particulars; a total or gross amount." Absent further fact-finding by the trial court, as discussed above, this Court cannot determine the aggregate adjusted verdict for purposes of comparison to the aggregate case evaluation award. Therefore, we reverse the trial court's award of case evaluation sanctions to the dismissed defendants, and on remand following additional fact-finding, the trial court should recalculate the aggregate adjusted verdict, compare it to the case aggregate evaluation award, and award case evaluation sanctions to the dismissed defendants only if appropriate pursuant to MCR 2.403(O)(3) and MCR 2.403(O)(4)(a).

Plaintiff last argues that the trial court should have refused to award case evaluation sanctions by applying the "interest of justice" exception in MCR 2.403(O)(11). Plaintiff failed to preserve this argument below and we decline to consider it. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). Plaintiff is not entitled to seek this unpreserved relief on remand.

III.

On cross-appeal, Cunningham argues that, when the trial court partitioned the property, he was entitled to credit for real estate taxes, legal fees, and real property insurance. We disagree.

An action to partition land is equitable in nature. MCL 600.3301. A trial court's dispositional ruling on equitable matters is reviewed de novo and the court's findings of fact are reviewed for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). However, '"[i]n an equitable action, a trial court looks at the entire matter and grants or denies relief as dictated by good conscience.'" *In re Estate of Temple*, 278 Mich App 122, 142; 748 NW2d 265 (2008), quoting *In re Moukalled Estate*, 269 Mich App 708, 719; 714 NW2d 400 (2006). "'Broadly speaking the sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity."' *Id.*, quoting *Van Etten v Manufacturers Nat'l Bank of Detroit*, 119 Mich App 277, 286; 326 NW2d 479 (1982).

"Every partition action includes a final accounting for both charges and credits upon each cotenant's interest." 7 Powell on Real Property, Partition, § 50.07[6]. Pursuant to MCL 600.3336(1):

> When it appears to the court ordering partition that partition cannot be made equally between the parties without prejudice to the rights and interests of some of the parties the court may adjudge that 1 party compensate another in such a way as to equalize the partition according to the equities of the case.

Charges include rent, profits, and waste, which were greater than the cotenant's fractional share. 7 Powell on Real Property, Partition, § 50.07[6]. Credits include expenditures for necessary repairs, improvements to enhance property value, taxes, and insurance for the common benefit, which were greater than the cotenant's fractional share. *Id.;* see also *Walton v Walton*, 287 Mich 557; 283 NW 687 (1939) (credit for half of the inventory of assets of a business, but charge for half of the expenses for coal, water, gas and insurance), *Frenzel v Hayes*, 242 Mich 631; 219 NW 740 (1928) (charge for exclusive use and occupation of the property, but credit for payment of taxes on the property), *Moreland v Strong*, 115 Mich 211, 218-219; 73 NW 140 (1897) (credit for expenses in raising the crops), and *Falkner v Falkner*, 58 Mich App 558, 562 n 3; 228 NW2d 461 (1975) ("The generally accepted rule seems to be that where a cotenant must account for rents, profits or the value of occupancy and use, he is entitled to a credit with respect to reasonable expenditures incurred incident to protection or maintenance of the property.").

Cunningham correctly argues that, under common law and MCL 600.3336(1), a trial court ordering partition may also order one party to compensate another to equalize the partition and achieve equity. Cunningham also correctly argues that the compensation or credit may be in the form of reimbursement for past tax, insurance, or legal expenditures. Cunningham's argument fails, however, because it assumes that reimbursement for past tax, insurance, or legal expenditures should be automatic or mandatory. Instead, such compensation is only necessary to equalize a partition or achieve equity. Adopting the jury's interpretation of the contract between Cunningham and Jones, the trial court stated that Jones, and later plaintiff, had been entitled to gross rent. The trial court declined to charge plaintiff for unpaid taxes, insurance, or legal

expenditures where the parties had contracted for Jones to enjoy rents without the burden of these operating costs. We find no error in the trial court's exercise of discretion because the equities were reasonably balanced. *In re Estate of Temple*, 278 Mich App at 142.

Next, Cunningham challenges the trial court's factual findings with respect to the credits it awarded to Cunningham for capital improvements to the property. Again, the trial court's dispositional ruling on equitable matters is reviewed de novo and the court's findings of fact are reviewed for clear error. *Blackhawk*, 473 Mich at 40. Under the clear error standard of review, "the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006).

Cunningham claims that the trial court clearly erred because it found that Cunningham's expenditures for paint and carpet did not constitute capital improvements. The trial court concluded the paint and carpet expenditures were aesthetic updates, which did not affect the jury's $900,000 valuation and therefore should not affect plaintiff's 15 percent interest. The difference between capital improvements and repair expenses can be "characterized as the difference between '[putting]' and '[keeping]' a capital asset in good condition." *Moss v Commissioner of Internal Revenue*, 831 F2d 833, 835 (CA 9, 1987).

> The test which normally is to be applied is that if the improvements were made to "put" the particular capital asset in efficient operating condition, then they are capital in nature. If, however, they were made merely to "keep" the asset in efficient operating condition, then they are repairs and are deductible. [*Id.*, quoting *Estate of Walling v Commissioner*, 373 F2d 190, 192-93 (CA 3, 1967).]

Incidental repairs do not materially add to the value of the property or appreciably prolong its life, whereas capital improvements add to the value of the property, substantially prolong its life, or adapt the property to a new or different use. *Id.*, citing 26 CFR. § 1.263(a)-1(a), (b) (1976).

We defer to the trial court's conclusion that the painting and carpeting expenditures did not constitute capital improvements. At the evidentiary, Cunningham's accountant, Michael Locricchio, opined that capital improvements involving painting could include: 1) exterior painting to prevent degrading walls and prolong the life of the building, and 2) painting new walls in a restructuring project. Conversely, Locricchio opined that repainting an old wall is not a capital improvement. After reviewing a tax return in which Locricchio had classified the 1991 painting as a capital improvement, Locricchio testified that he was "pretty sure" the 1991 painting was for the exterior of the property. The trial court had the advantage of being able to consider the Locricchio's demeanor in determining how much weight and credibility to accord his testimony. MCR 2.613(C). Even though Locricchio is an expert in the field of accounting, the trial court was free to disregard his opinion. *People v Weddell*, ___ Mich ___; 774 NW2d 509 (2009). Absent any certain evidence that the painting was done outside and that it prolonged the life of the building's walls, added to the value of the property or adapted the property to a different use, this Court is not left with a definite and firm conviction that the trial court erred in concluding that the painting was not a capital improvement.

Similarly, Cunningham failed to introduce evidence to prove that the carpeting not only kept the property in efficient operating condition, but also added to its value, substantially prolonged its life, or adapted the property to a new or different use. Thus, we are not left with a definite and firm conviction that the trial court erred in concluding that the carpeting was not a capital improvement.

Cunningham further claims that the trial court clearly erred because it found that he failed to meet his burden of proof with respect to his capital improvement claims from 1988 and 1990. Cunningham estimated a total cost of capital improvements in 1988 to be $152,513 and in 1990 to be $82,765. Although he recalled that these totals included some work on the roof, ceilings, plumbing, painting, floors, bathrooms, water heaters, and sprinklers, Cunningham failed to introduce any evidence regarding the scope of these improvements or their cost. Likewise, Locricchio testified that he had classified the 1988 and 1990 improvements as capital improvements when he prepared Cunningham's corresponding tax returns. However, the trial court was free to disregard the opinion that Locricchio formed nearly 20 years earlier when he prepared the returns, especially in light of the fact that, at the evidentiary hearing, Locricchio could not recall any of the improvements or explain his reasoning for classifying each as capital. Without more specific evidence regarding the character of the improvements and their individual costs, the trial court could not make an independent determination regarding whether the improvements added to the value of the property, substantially prolonged its life, or adapted the property to a new or different use. Therefore, this Court is not left with a definite and firm conviction that the trial court erred in concluding that Cunningham failed to meet his burden of proving the 1988 and 1990 improvements were capital expenditures.

Last, Cunningham argues that the trial court erred in balancing the equities of the partition because it refused to consider evidence of costs he incurred for capital improvements following the jury verdict. We disagree.

As we noted above, the trial court endeavored to honor the jury's $900,000 valuation of the property when it balanced the equities of the partition. The trial court refused to consider evidence of costs Cunningham incurred for capital improvements following the jury verdict because those improvements may have increased the property value without benefiting plaintiff. Michigan courts have previously refused to charge a party for costs that did not benefit that party. *Fenton v Miller*, 116 Mich 45, 51; 74 NW 384 (1898). Therefore, we find no error in the trial court's exercise of discretion in balancing the equities. *In re Estate of Temple*, 278 Mich App at 142.[3]

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[3] Even if the trial court had considered evidence of Cunningham's capital expenditures following the jury verdict, there is no evidence that the result would have been different. Cunningham only claims costs incurred for repairs following a fire, which arguably only kept the property in ordinarily efficient operating condition and did not prolong the life of the property, add to its value, or adapt it to a different use. *Moss*, 831 F2d at 835.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder