STATE OF MICHIGAN

COURT OF APPEALS

RICHARD HAINER and SUZANNE HAINER,

Plaintiffs-Appellants/Cross-Appellees,

v

LASALLE BANK MIDWEST NATIONAL BANK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
September 23, 2010

No. 292124
Oakland Circuit Court
LC No. 2006-078304-CZ

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal by right a final judgment awarding them $15,000 in damages for private nuisance after a bench trial. Defendant cross-appeals. We affirm.

A. ATTORNEY FEES

Plaintiffs argue that the court abused its discretion when it failed to award attorney fees. We disagree. A trial court's decision regarding the granting of attorney fees is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). "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).

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception to this general prohibition exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Nuisance actions are codified under MCL 600.2940. MCL 600.2940(2) states, "When the plaintiff prevails on a claim based on a private nuisance, he may have judgment for damages and may have judgment that the nuisance be abated and removed unless the judge finds that the abatement of the nuisance is unnecessary." MCL 600.2940 clearly does not allow for the reimbursement of attorney fees, as there is only a provision for "damages."

Plaintiff also relies MCR 2.625(A)(1) to recover attorney fees, which allows for the prevailing party in an action to recover "costs." However, this type of general language is insufficient to stand for a recovery of attorney fees. *Dessart*, 470 Mich at 42. An explicit

reference to attorney fees, as found in MCR 2.403(O)(6),[1] is required to allow for such recovery. *Id.*

The next question is whether the common law allows for the award of attorney fees.

> Recovery [of attorney fees] has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct. See *Oppenhuizen v Wennersten*, 2 Mich App 288; 139 NW2d 765 (1966) (fraud); *Tutton v Olsen & Ebann*, 251 Mich 642, 650; 232 NW 399 (1930) (malicious prosecution); *Bates v Kitchel*, 166 Mich 695; 132 NW 459 (1911) (false imprisonment). [*Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991).]

The current case deals with the potential award of attorney fees arising from a private nuisance claim. These facts do not support an award of attorney fees under any of the recognized exceptions to the general rule that such fees are not recoverable. Accordingly, the trial court did not abuse its discretion when it failed to grant attorney fees to plaintiffs, and plaintiffs' claim fails.

B. DAMAGES

Plaintiffs on appeal argue that the $15,000 they were awarded by the trial court was inadequate. Conversely, defendant, on cross-appeal argues that the $15,000 was excessive. We disagree with both parties.

"Liability for damage caused by a nuisance may be imposed where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employed another that it knows is likely to create a nuisance." *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 488; 532 NW2d 183 (1994). In addition to damages for nuisance being based on any diminution of the value of property caused by the nuisance, damages can also be based on a claim that the nuisance was of such an extent as to prevent the use of property. *Travis v Preston (On Rehearing)*, 249 Mich App 338, 351; 643 NW2d 235 (2002), citing *Kobs v Zehnder*, 326 Mich 202, 207; 40 NW2d 120 (1949).

MCL 600.2940, Michigan's private nuisance statute, provides, in relevant part:

> (2) When the plaintiff prevails on a claim based on a private nuisance, he may have judgment for damages and may have judgment that the nuisance be abated and removed unless the judge finds that the abatement of the nuisance is unnecessary.

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[1] MCR 2.403 deals with case evaluation, which is not implicated in this matter. However, MCR 2.403(O)(6) defines "actual costs" to include "a reasonable attorney fee."

"A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Unibar Maint Servs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911, 925 (2009). "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Additionally, our Supreme Court has stated, "We do not, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable." *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960).

Here, plaintiffs presented evidence that they were denied the use and enjoyment of their back yard on account of flooding caused by the runoff from defendant's property. Richard Hainer testified that one of the reasons they purchased their house was the nice, usable backyard. Their children previously played regularly in the backyard. However, after the dirt was imported onto the Bank Property and the flooding started to occur, plaintiffs' yard continually would be mucky and muddy, thereby depriving them of their use of the backyard. Furthermore, Hainer testified that for nearly two years, before defendant implemented some remedial measures, the backyard was essentially unusable.

We conclude the trial court did not clearly err by awarding $15,000 in damages. Determining damages in this type of nuisance case with any type of mathematical precision is impossible. Accordingly, the fact that plaintiffs did not prove with certainty an actual amount of damages is not a bar to recovery. See *Purcell*, 359 Mich at 576. The trial court's award of $15,000 for compensating plaintiffs for the lost use of the use of their yard does not leave us with a definite and firm conviction that a mistake was made. As a result, the trial court's award of $15,000 in damages will not be disturbed.

Plaintiffs also argue that they were entitled to additional money in the form of a $500 per day fine against defendant. We disagree.

There can be no dispute that parties have a duty to follow a court's orders, even when the order is clearly incorrect. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). It is equally well settled that trial courts have the inherent authority and discretion to sanction litigants for failing to comply with their orders. *Porter v Porter*, 285 Mich App 450, 462; 776 NW2d 377 (2009). However, "[c]oncomitant with this power is the power to relieve a litigant of the burden of such sanctions should the court, in the further exercise of its discretion, so choose." *Anspaugh v Imlay Twp*, 273 Mich App 122, 127; 729 NW2d 251 (2006), vacated on other grounds 480 Mich 964 (2007).

Here, in an order entered July 31, 2007, the trial court required defendant to complete the implementation of the Fenn plan designs by August 24, 2007. Additionally, the court stated that defendant "shall pay the Hainers the sum of $500 each day thereafter if the work is not completed." Defendant completed the work prior to August 24, 2007, but albeit not in a 100 percent compliant way. Plaintiffs presented evidence showing that the construction work done by defendant was not fully compliant with the Fenn plans: (1) the retaining wall was too short, (2) the swale did not extend long enough into the front yard, (3) the slope was too severe near the retaining wall, and (4) the grade was only a temporary grade and not a final grade. Defendant's

contractor testified that the work was completed on August 15 or 16, 2007, well ahead of the court's deadline. The contractor also testified that the retaining wall was constructed in accordance with the Fenn plans and that the temporary versus final grade was a distinction without a difference in this matter.[2]

The trial court found that the slope leading from the retaining wall to the installed swale exceeded the three-to-one maximum ratio that was allowable per the Fenn plans and Oakland Township. The court also found that the installed swale did not continue into the front yard as depicted in the Fenn plans. Without explicitly stating whether the wall was constructed in compliance with the Fenn plan, the court stated that the wall could remain in its current condition, thereby implicitly stating that the wall was, in fact, acceptable. None of these findings is clearly erroneous.

Although the trial court did not expressly find that the grade was only a temporary grade, we surmise that the trial court, consistent with previous findings, agreed with the contractor that the finality of grade was minor. Thus, we cannot conclude that this finding is clearly erroneous.

With regard to the $500 per day fine that the court listed in its prior order, the court stated:

> I understand the costs that you're asking for and I know that you've asked for, you know, thousands and thousands of dollars worth of damages, you know, at $500.00 a day, and my feeling on that was this, I entered those orders as to try to light a fire. . . . I was understanding of the bank's position [of having to hire outside contractors, and] I'm satisfied that their intent is there to try to get this done.
>
> I do believe there's substantial compliance [with the court's previous order] . . . .

On plaintiffs' motion for reconsideration, the trial court expounded that it was satisfied that defendant acted in good faith while trying to implement the Fenn plans and believed it would have been inappropriate to impose a $500 per day sanction.

We conclude that the trial court was implementing its inherent authority and discretion to decide whether to impose any sanctions against defendant. In determining that defendant failed to strictly comply with the Fenn plans, and consequently the court's order, the court determined that any such failures were not the result of any ill intent or bad faith. As a result, the trial court properly used its inherent discretion to choose not to follow through with the $500 per day fine,

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[2] The contractor also noted that final grades are only implemented *after* a home's construction is complete, which this home was not.

which otherwise would have resulted in an additional award to plaintiffs of at least $165,000.[3] No abuse its discretion is present. Plaintiffs' claim fails.

C. THE JULY 31, 2007, ORDER

Defendant argues that the trial court erred when it placed a $500 per day fine for each day defendant failed to meet the deadline when it ordered defendant to perform remedial work on its property. However, in light of our disposition of the above issues and the fact that defendant never was required to pay any fines associated with the July 31, 2007, order, defendant's claim regarding the validity of the order is moot, and we need not address it. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). An issue is moot when it is impossible for a reviewing court to grant meaningful relief. *Id.* Here, since the trial court knowingly chose to not enforce the $500 per day sanction against defendant and we uphold that decision, whether the original order was properly entered is of no consequence.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

[3] There were approximately 11 months that had elapsed from the deadline of August 24, 2007, until trial started on July 30, 2008. With 11 months each having approximately 30 days equates to 330 days, and 330 x $500 = $165,000.