

STATE OF MICHIGAN
COURT OF APPEALS

NANCY STEFFEY, f/k/a NANCY KRONE,

Plaintiff-Appellee,

v

BOB MORRIS, JR. and SUN COAST REALTY,

Defendants/Cross-Defendants-
Appellants,

and

SELECT PORTFOLIO SERVICING, INC., f/k/a
FAIRBANKS CAPITAL CORP.,

Defendant/Cross-Plaintiff-Appellant,

and

KALAMAZOO VALLEY HABITAT FOR
HUMANITY

Defendant.

UNPUBLISHED
October 28, 2010

No. 293078
LC No. 2007-000647-CH

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendants/cross-defendants Sun Coast Realty (Sun Coast) and Bob Morris, Jr. appeal as of right an order granting defendant/cross-plaintiff Select Portfolio Services's (SPS) motion for attorney fees and costs. On appeal, defendants argue that the trial court erred both in granting SPS's motion for summary disposition regarding an indemnification claim and for awarding attorney fees. Furthermore, Sun Coast and Morris also assert that the trial court erred in denying their motion for summary disposition regarding plaintiff Nancy Steffey's cause of action for fraud. We affirm.

Sun Coast and Morris first argue that the trial court erred in granting SPS summary disposition regarding its indemnification claim. We disagree.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). The trial court's decision was the product of contractual interpretation. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

On appeal, Sun Coast and Morris assert that the trial court erred in granting SPS summary disposition because the indemnification clause was inapplicable to the facts of this case. The section in question provided that Sun Coast would "indemnify, protect, defend and hold harmless Seller [SPS]" from any suits or actions "arising out of, caused by, or resulting from the acts, omissions, or undue delay of Broker [Sun Coast], its partners, employees, attorneys, agents, representatives, successors, and assigns." Sun Coast and Morris assert that the provision does not apply to this case because the underlying cause of action for fraud did not arise out of any act or omission on their part. They assert that the cause of action arose when plaintiff purchased the piece of property after being placed on actual and constructive notice of its true size.

As our Supreme Court has explained, "[t]he fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). The plain language of the indemnification clause demonstrates that the parties intended the provision to apply to any circumstance where the cause of action arose out of any act or omission of Sun Coast regardless of claims of contributing or comparative negligence. Sun Coast and Morris argue that they never provided plaintiff with any false information regarding the dimensions of the property and that plaintiff's own negligence resulted in her mistaken beliefs. That characterization of the facts is not supported by the record, which demonstrates that Sun Coast published an MLS listing which contained an inaccurate description of the land's dimensions. Even if plaintiff's negligence contributed to the misunderstanding, the role of Sun Coast and Morris cannot simply be ignored. Furthermore, even if Sun Coast's characterization of the facts is accepted as true, relief is still not warranted. This litigation occurred as a result of Sun Coast listing the property for sale. Even if Sun Coast had listed the property with a completely accurate description, the indemnification provision would apply. Sun Coast and Morris are essentially arguing that their actions did not lead to this litigation because none of their actions were wrongful or negligent. However, the indemnification agreement contains no such language. By entering the listing agreement, Sun Coast assumed the risk involved with indemnifying SPS in consideration for the commission that would be received for the sale of the property. To insert additional language into the agreement would violate the rules of contract interpretation.

Next, Sun Coast and Morris assert that the trial court erred in calculating the amount of attorney fees awarded to SPS and in awarding SPS the full amount of the settlement agreement it reached with plaintiff. We disagree.

This Court reviews a trial court's ruling regarding a motion for costs and attorney fees for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

As this Court has previously explained, a number of factors are relevant in determining whether an attorney's fee is reasonable. *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005). Specifically, pursuant to *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982):

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

Furthermore, when determining whether the amount of requested fees is reasonable, the trial court must determine a “baseline” fee, which is the product of a reasonable hourly rate multiplied by a reasonable number of hours billed. *Smith v Khouri*, 481 Mich 519, 533; 751 NW2d 472 (2008). “The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work.” *Id.* at 531. The skill level and experience of the attorney must be considered in determining the reasonable hourly rate. *Id.* In determining the amount of hours worked, the trial court is to rely on detailed billing records to ensure that the number of hours billed was reasonable. *Id.* at 532. Once the baseline fee is determined, the court is free to consider the *Wood* factors to determine whether an upward or downward adjustment is proper. *Id.* at 533.

In the present case, the trial court determined that the baseline fee was \$13,486.00. Regarding the hourly rate, the trial court stated, “[i]n reviewing the confidential time records of SPS, this court agrees that the figure proffered by SPS is a reasonable baseline for this type of case in Kalamazoo County.” Sun Coast and Morris argued that the trial court should have applied a downward adjustment for a variety of reasons. First, they argue that the defense of plaintiff's claim required minimal skill, time and work. According to Sun Coast and Morris, by the time SPS became involved with the litigation, much of the discovery had already been completed and the discovery efforts of SPS were minimal. They further assert that SPS only attended one court proceeding. In contrast, the court stated, “it is clear from the record that substantial time and effort was expended attempting the [sic] reach a compromise.” Sun Coast and Morris do not cite to any particular service that was improperly billed. Furthermore, they fail to consider the amount of time involved with negotiating the settlement agreement between multiple parties (SPS, plaintiff and Habitat for Humanity). As SPS argues, its counsel prepared for and attended multiple depositions, prepared several discovery documents, drafted a case evaluation summary and facilitated a complicated settlement agreement. SPS asserts that these

tasks required 61.3 hours of legal service. While Sun Coast and Morris assert that the number of hours is excessive, they fail to explain why that number is not reasonable or provide evidence that counsel for SPS did not, or should not have, performed the asserted amount of work. Consequently, relief is not warranted.

Regarding Sun Coast and Morris's failure to provide a detailed argument regarding which services were unnecessary, they argue that such arguments are not possible because SPS failed to provide them with detailed billing invoices. Sun Coast and Morris argue that the failure amounts to a due process violation. As this Court has previously established, due process generally requires "a hearing to allow a party the chance to know and respond to the evidence." *Hinky Dinky Supermarket, Inc v Dept of Community Health*, 261 Mich App 604; 683 NW2d 759 (2004). Furthermore, as explained above, *Smith* provides that the trial court must base its award of attorney fees on detailed billing statements. Sun Coast and Morris acknowledge that the court's decision was based on billing statements that SPS provided, and SPS acknowledges that it did not provide that evidence to Sun Coast and Morris. However, as SPS argues without dispute, the trial court's order granting SPS summary disposition stated that if SPS chose to pursue its claim for fees and costs, it could submit its billing invoices to the court for in camera review. There is no evidence that Sun Coast and Morris objected to the court's order or requested a copy of the evidence. Consequently, we conclude that Sun Coast and Morris waived any objection regarding the trial court's method of receiving evidence relating to this motion where that objection was not raised below in a timely manner. As a result, Sun Coast and Morris have not demonstrated any due process violation.

Sun Coast and Morris also assert on appeal that the amount of the settlement agreement was unreasonable and that SPS should not be entitled to reimbursement for the full \$10,500. Sun Coast and Morris argue that there was no potential for liability because plaintiff would not have been able to establish the elements of fraud. Therefore, it was unreasonable to settle with plaintiff for the full amount that she sought. It is unclear how Sun Coast and Morris are aware of the amount that plaintiff was seeking. This cause of action was initially filed in circuit court and the amount in controversy was therefore required to be in excess of \$25,000. There is no evidence that plaintiff ever conceded that her damages were less than that amount. Furthermore, as demonstrated above, attorney fees in this matter quickly accrued. Further delay in settling this matter may have proven to be costly. Consequently, Sun Coast and Morris have not established that it was unreasonable to settle this matter for \$10,500. Regarding liability, it is true that a party is only entitled to indemnification if it can show that there was a *potential* for liability. *St Luke's Hosp v Giertz*, 458 Mich 448, 454; 581 NW2d 665 (1998). In this case, the record demonstrates that there was certainly a potential for liability where there was evidence in the record that Sun Coast and Morris misled plaintiff regarding the size of the parcel of land and where plaintiff's affidavit indicates that the misleading statements were a factor in her decision to proceed with the purchase. While it is impossible to say how a jury would have ultimately viewed this matter, because there was admissible evidence creating questions of fact regarding each element of fraud, a potential for liability existed.

Finally, Sun Coast and Morris argue that the trial court erred in denying their motion for summary disposition regarding plaintiff's claim for fraud. This Court has previously explained that "[a]n issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Michigan Nat Bank v St Paul Fire & Marine*

Ins Co, 223 Mich App 19, 21; 566 NW2d 7 (1997). In this case, plaintiff's complaint was dismissed without prejudice after she surrendered her right to a cause of action as a term of her settlement agreement with SPS. Consequently, even if this Court determined that Sun Coast and Morris were entitled to summary disposition, it would be impossible to grant relief. On appeal, Sun Coast and Morris assert that the issue is not moot because the nature of their actions must be determined in order to conclude whether the indemnification provision applies. The argument is without merit. As explained above, the indemnification provision does not require any showing of fault. Whether Sun Coast and Morris would have ultimately been held liable for fraud is irrelevant to determining whether the indemnification provision applies. Rather, the mere existence of any action on the part of Sun Coast and Morris, when combined with a potential for liability, is sufficient for a court to reach a holding regarding the applicability of the indemnification provision.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens