STATE OF MICHIGAN

COURT OF APPEALS

DINO KOTSONIS,

Plaintiff-Appellant,

v

ROBERT PAUL GRABOWSKI, RICHARD JAMES GRABOWSKI and RPM XTREME POWER SPORTS, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
February 15, 2011

No. 295217
Macomb Circuit Court
LC No. 2007-000957-CZ

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order dated November 16, 2009. The order amended the final judgment of April 1, 2009, to reflect that the judgment is against defendant, Robert Paul Grabowski, only, and not against codefendants,[1] Richard James Grabowski, defendant's father, or RPM Xtreme Power Sports, L.L.C., defendant's business. We vacate the order dated November 16, 2009, and remand the case to the trial court with instructions for it to reinstate the order dated April 1, 2009, which provides that the judgment should enter against all defendants.

Plaintiff first asks us to determine whether a party filing an objection under MCR 2.602 must also serve a notice of hearing and alternative proposed order. We find this issue moot, however, and decline to pass on the issue.

"An issue is moot where circumstances render it impossible for the reviewing court to grant any relief." *In re Wayne Co Election Comm*, 150 Mich App 427, 432; 388 NW2d 707 (1986). A court will only pass on a moot issue if it is of public significance and likely to recur in

[1] We refer to codefendants individually as "Richard" and "RPM." We use "defendant" to refer to Robert only, and "defendants" to refer to Robert, Richard, and RPM collectively.

the future yet evade judicial review. *Crawford v Dep't of Civil Serv*, 466 Mich 250, 261; 645 NW2d 6 (2002).

The first mootness problem regarding this issue stems from the fact that the trial court entered plaintiff's proposed order on April 1, 2009. Presumably, the trial court did so precisely because it did not receive any objection from defendants within seven days of receiving plaintiff's proposed order, at least not one that satisfied the requirements of MCR 2.602(B). Thereafter, defendants filed a motion for relief from judgment and to quash the writ of execution, arguing that the final judgment of April 1, 2009, should either (1) not enter because defendants' response to plaintiff's certificate of noncompliance should constitute an objection or (2) enter against defendant only. In ruling on defendants' motion, the trial court ordered that the final judgment of April 1, 2009, be amended to reflect that it is against defendant only. It did not, however, make any statement regarding whether defendants' response should constitute an objection under MCR 2.602(B). Nonetheless, because the trial court ruled that the final judgment of April 1, 2009, should stand, albeit against defendant only, it presumably determined that defendants' response did not constitute an effective objection.

It appears, then, that plaintiff raises this issue on the erroneous belief that the trial court determined that defendants made a proper objection under MCR 2.602(B). In actuality, however, the trial court presumably found that a proper objection was never made, and defendants concede this point.

A second mootness problem stems from plaintiff's failure to indicate how defendants' improper objection to the proposed order relates to, or had any effect on, the order dated November 16, 2009, which is the order appealed from in this case. In fact, defendants' objection—or, more accurately, lack thereof—played no role whatsoever in the order dated November 16, 2009, which addressed plaintiff's motion for clarification. The trial court's clarification in that order—that the final judgment of April 1, 2009, should enter against defendant only—can in no way be influenced by a ruling regarding the procedure set forth in MCR 2.602(B).

In sum, passing on plaintiff's first issue on appeal would not enable us to grant plaintiff effective relief. Further, this is not an issue of public significance, and the issue is unlikely to recur in the future given the court rule's clear instruction that an objection must be accompanied with a notice of hearing and alternative proposed order.

Plaintiff's second issue on appeal is whether a motion under MCR 2.612 authorizes a court to set aside a judgment. Because plaintiff raises this issue for the first time on appeal, it is not properly preserved. *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987). We will address it, however, because the record contains sufficient facts for its resolution and it involves a question of law, *id*. at 194-195, and the proper interpretation and application of a court rule is a question of law, *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). We review questions of law de novo. *Id*.

According to plaintiff, motions to set aside judgments must be made pursuant to MCR 2.603, and not MCR 2.612. We disagree, for two reasons. First, MCR 2.603(D)(3) provides the

means by which defaults and default judgments may be set aside, and this case does not involve a default or default judgment. Rather, it involves a proposed order that entered pursuant to MCR 2.602(B). Further, contrary to plaintiff's assertion, MCR 2.612(C)(1) does authorize a court to relieve a party or parties from judgment based on, among other grounds, mistake or inadvertence, which is precisely what occurred here.[2] See *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241, 246-247; 687 NW2d 869 (2004) (holding that the trial court did not abuse its discretion in setting aside certain aspects of the parties' consent judgment pursuant to the defendant's motion for relief from judgment filed under MCR 2.612[C][1]). Here, in reviewing the parties' settlement agreement, the trial court said, "I don't see 'defendants' at all. … I'll amend it and let the judgment stand against [defendant], but not against Richard or [RPM]."

Having concluded that the order dated April 1, 2009, entering judgment against defendants, jointly, was the result of mistake or inadvertence, the trial court had the authority, under MCR 2.612(C)(1), to correct the error by setting aside the judgment as to Richard and RPM. Whether the trial court's conclusion was consistent with principles of contract law is another matter, as described more fully below. Its conclusion, however, was not improper for the reason, as alleged by plaintiff, that defendants brought their motion under MCR 2.612.

Plaintiff's final issue on appeal raises a question regarding the proper interpretation of the parties' settlement agreement, which is a contract, governed by general principles of contract law. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). The question whether contractual language is clear and unambiguous is a question of law, as is the meaning of clear and unambiguous contractual language. *Brucker v McKinlay Transp*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). We review questions of law de novo. *Id*. at 448.

In addition, we review a trial court's decision on a motion for relief from judgment for an abuse of discretion. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008). A court necessarily abuses its discretion when it makes a decision based on an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

A review of the pertinent procedural history is as follows. The order dated August 1, 2008, setting forth the parties' settlement agreement, provides:

> [¶ 1] ***THE COURT FINDS*** that the parties believe that this judgment should enter.

---

[2] MCR 2.612(C)(f) also allows a court to grant a party relief from judgment based on "[a]ny other reason justifying relief from operation of the Judgment."

[¶ 2] ***IT IS ORDERED*** that *a settlement is entered in favor of the Plaintiff and against the Defendants* in the amount of $35,000.00

[¶ 3] ***IT IS FURTHER ORDERED*** that the Plaintiff may not enforce this Order unless Defendant **ROBERT PAUL GRABOWSKI** fails to comply with this Order.

[¶ 4] ***IT IS FURTHER ORDERED*** that Plaintiff shall submit to Defendant **ROBERT PAUL GRABOWSKI** three quotes of work to be done and Defendant **ROBERT PAUL GRABOWSKI** shall perform said work at the average price of the quotes and within the average time indicated within the quotes or within seven days of Defendant receiving the quotes pay the amount of the average of the quotes to the Plaintiff and said amount shall be applied to the settlement.

* * *

[¶ 9] ***IT IS FURTHER ORDERED*** that should the Defendant not comply with this order, the Plaintiff may file a certificate of non-compliance and a judgment in the amount of $65,000 minus all credits under this order. The judgment may be submitted under the seven-day rule. No further appearance shall be required to have the judgment entered. [Emphasis added.]

Subsequently, defendant allegedly failed to comply with the order, and plaintiff filed a certificate of noncompliance and proposed order. The court signed and entered plaintiff's proposed order under the seven-day rule on April 1, 2009, providing, "***IT IS HEREBY ADJUDGED*** that a judgment is hereby entered in favor of the Plaintiff and against the Defendants in the amount of $65,000.00."

Thereafter, defendants filed a motion for relief from judgment, arguing, in pertinent part, that any judgment should enter against defendant only. In an order entered on November 2, 2009, the trial court granted defendants' motion in this regard, providing that the order dated April 1, 2009, be amended to reflect that it is against defendant only. Plaintiff then filed a motion for clarification regarding whether the order dated August 1, 2008, provides a judgment against defendants, jointly, in the event of noncompliance. To answer this question, the trial court held hearings on September 8 and November 15, 2009, and entered the following order:

THE COURT FINDS that this order should enter for the reasons placed on the record on September 8, 2009 and November 15, 2009

IT IS HEREBY ORDERED that the Judgment entered in this matter is hereby amended

IT IS FURTHER ORDERED that the Judgment against **ROBERT PAUL GRABOWSKI** was correct and should not be amended

IT IS FURTHER ORDERED that the Judgment against **RICHARD JAMES GRABOWSKI** is

___ Amended to $35,000.00

_X_ Set aside

IT IS FURTHER ORDERED that The Judgment against **RPM XTREME POWER SPORTS, LLC** is

___ Amended to $35,000.00

_X_ Set aside

As an initial matter, defendants argue that the order dated August 1, 2008, which we refer to throughout this opinion as the parties' settlement agreement, is not a contract at all, but simply a court order, and a court's interpretation of its own order may not be set aside absent an abuse of discretion. We note that the order dated August 1, 2008, states that "the parties believe that this order should enter," and "a settlement is entered." Indeed, at times, the parties' attorneys refer to the order as a settlement agreement or settlement. Therefore, we believe that characterizing the order as a settlement agreement, rather than an order, is proper.

MCR 2.507(G), however, provides that "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." In this case, there is no evidence that the settlement agreement was made in open court, nor is there a separate writing signed by defendants or their attorney to evidence the existence of such agreement. Nonetheless, even assuming that the order dated August 1, 2008, is more akin to a consent judgment than a signed writing between parties, "a consent judgment is in the nature of a contract," and ordinary contract principles govern its interpretation. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

Having determined that the order dated August 1, 2008, is a contract for all intents and purposes (whether it be a settlement agreement or a consent judgment), plaintiff argues that it unambiguously indicates that any judgment should enter against defendants, jointly. Therefore, according to plaintiff, the order dated April 1, 2009, which sets forth a judgment of $65,000, which entered because defendant failed to comply with the settlement agreement, appropriately provides that the judgment should enter against defendants, jointly. Accordingly, plaintiff contends that the trial court erred in amending the order dated April 1, 2009, to reflect that the judgment should enter against defendant, individually. We agree.

To clarify the meaning of the parties' settlement agreement, Paragraph 2 provides the settlement amount, $35,000, which shall enter "in favor of the Plaintiff and against all the Defendants"; Paragraph 3 provides that plaintiff may enforce the order only in the event that defendant fails to comply with the agreement's terms; Paragraph 4 orders plaintiff to submit quotes to defendant, and orders defendant to complete the work contained therein, the value of

which shall be applied to the settlement amount; and Paragraph 9 provides that a judgment in the amount of $65,000 shall enter if defendant fails to comply with Paragraph 4. Read together, the parties agreed that, if defendant performed $35,000 worth of labor, all defendants would be relieved from further operation of the order. The only purpose of including Paragraph 2, therefore, was to indicate the value of the work that defendant was to perform; in other words, in no event would a judgment of $35,000 actually enter. If defendant failed to perform $35,000 worth of labor, then the judgment would be increased to $65,000 as a penalty.

The contractual interpretation issue presented here surrounds the absence, in Paragraph 9, of the party (or parties) against whom the judgment of $65,000 should enter in the event that defendant fails to comply with Paragraph 4. As the Michigan Supreme Court stated in *Rory v Cont'l Ins Co*, 473 Mich 457, 468-469; 703 NW2d 23 (2005):

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "'the general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.'" …
>
> When a court abrogates unambiguous contractual provisions based on its own independent assessment of "reasonableness," the court undermines the parties' freedom of contract. [Footnotes omitted; brackets in original.]

The first issue, then, is whether the settlement agreement contains an ambiguity regarding against whom the judgment of $65,000 should enter in the event that defendant fails to comply with its terms. The standard for determining ambiguity, which applies with equal force to questions of contractual and statutory interpretation, is as follows: "'When there can be reasonable disagreement over a statute's meaning, or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, a statute is ambiguous.'" *Petersen v Magna Corp*, 484 Mich 300, 329; 773 NW2d 564 (2009), quoting *Yellow Freight System, Inc v State of Mich*, 464 Mich 21, 38; 627 NW2d 236 (2001) (CAVANAGH, J., *dissenting*).

We hold that the settlement agreement is not susceptible to multiple meanings. Rather, read as a whole, the settlement agreement unambiguously means that, in the event of noncompliance, a judgment of $65,000 should enter against all defendants. Indeed, the only part of the settlement agreement that indicates against whom any judgment should enter is Paragraph 2, and Paragraph 2 provides that a settlement is entered in favor of plaintiff and against *all* defendants.

Admittedly, Paragraph 2 provides the only reference to defendants, with the remainder of the settlement agreement referring to defendant only. Yet this does not change that, in the event of noncompliance by defendant failing to perform $35,000 worth of work, a judgment of $65,000 should enter against all defendants. Just as the settlement agreement provides that

Richard and RPM would be released from further liability in the event that defendant *did* comply with its terms, it also provides that Richard and RPM would be made liable, together with defendant, in the amount of $65,000 in the event that defendant *did not* comply with its terms. In other words, Richard and RPM stood to reap a benefit if defendant complied, but risked penalization if defendant did not comply.

Many arguments could be lobbied against this result as being unreasonable—why, after all, should Richard and RPM be punished for defendant's noncompliance, for which they have no control over and played no part?—but reasonableness is not a factor to be considered in cases where the parties' contract is clear. *Rory*, 473 Mich at 468-469. Rather, in such case, a court is obliged to enforce the parties' contract as written. *Id*. Here, because the parties' settlement agreement is clear, the trial court, in its order dated November 16, 2009, erred in setting aside the judgment of $65,000 with respect to Richard and RPM.

Accordingly, we vacate the trial court's order dated November 16, 2009, and remand the case to the trial court with instructions for it to reinstate the order dated April 1, 2009, which provides that the judgment of $65,000 should enter against all defendants.

Vacated and remanded. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly