

STATE OF MICHIGAN
COURT OF APPEALS

JOHN BROOM,

Plaintiff-Appellee,

v

WESTCHASE PARK HOUSING PARTNER,
d/b/a WATERFORD WEST APARTMENTS, and
CEDAR CREEK LANDSCAPING, INC.,

Defendants,

and

CONCORD REALTORS, INC., d/b/a CONCORD
MANAGEMENT,

Defendant-Appellant.

UNPUBLISHED

August 21, 2014

No. 315917

Oakland Circuit Court

LC No. 2011-123826-NO

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant Concord Realtors, Inc., d/b/a Concord Management (Concord Realtors), appeals by right the trial court's order invoking the "interest of justice" exception of MCR 2.405(D)(3) and denying its request for attorney fees following an offer of judgment. We reverse and remand to the trial court for a determination of the proper amount of, and an award of, attorney fees.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On December 25, 2008, plaintiff John Broom slipped and fell at a residence in Waterford, Michigan. On December 22, 2011 plaintiff filed a premises liability action arising out of this fall. Plaintiff alleged that Concord Realtors, as well as defendant Westchase Park Housing Partner, d/b/a Waterford West Apartments (Westchase Park), owned, possessed, or managed the property where he fell.

On January 16, 2012, defendant sent plaintiff a letter stating that it had no ownership interest in the premises at issue and that it believed plaintiff inadvertently sued the wrong party. The letter also noted that defendant had previously been confused with another company with a similar name and, as a result, had previously incorrectly been named as a party in litigation on

the east side of Michigan. Finally, the letter provided the names and telephone numbers for both the registered agent and legal counsel for defendant and requested that plaintiff contact either of these individuals to resolve the matter.

On January 20, 2012, Concord Realtors filed its answer to plaintiff's complaint and affirmative defenses. In its answer, Concord Realtors denied that it did any business with regard to the premises in question. Likewise, in its affirmative defenses, Concord Realtors stated that it was not a proper party to the lawsuit and that it had no ownership or property interest in the premises in question. On this same date, Concord Realtors sent plaintiff another letter again indicating that Concord Realtors was not a proper party to the action and requesting that plaintiff contact Concord Realtors' registered agent or counsel to discuss the matter.

On January 30, 2012, Westchase Park filed its answer to plaintiff's complaint. In its answer, Westchase Park stated that Concord Realtors "has no known interest, involvement, or relation to any of the allegations made in this case."

On February 2, 2012, Concord Realtors sent plaintiff an offer of judgment pursuant to MCR 2.405 and offered to resolve the claims against it for \$100. Plaintiff did not respond to the offer of judgment.

On March 7, 2012, Concord Realtors sent plaintiff another letter stating that it had "previously sent you letters indicating that you had sued the wrong Concord Realtors," and that it "had nothing to do with the at issue lawsuit." This letter further stated that unless plaintiff prepared and submitted an order of dismissal within 14 days, Concord Realtors would "vigorously defend the case and proceed accordingly."

On May 22, 2012, Concord Realtors sent plaintiff another letter. In this letter, Concord Realtors indicated that it had stipulated to permit plaintiff to file a first amended complaint to add Cedar Creek Landscaping, Inc., as a defendant. In addition, Concord Realtors again advised plaintiff that it believed plaintiff sued "the wrong 'Concord Realtors,'" suggested that plaintiff research the issue, and requested that plaintiff voluntarily dismiss the case against Concord Realtors.

On May 24, 2012, the trial court signed an order permitting plaintiff to file an amended complaint to add Cedar Creek Landscaping, Inc., as a defendant. On May 25, 2012, plaintiff filed an amended complaint that added Cedar Creek as a defendant and alleged that Cedar Creek owed plaintiff a duty to maintain the premises at issue because Cedar Creek had a contract with "Concord Management Limited" and Westchase Park to maintain the premises and remove snow and ice from the premises.

On July 10, 2012, Concord Realtors filed a motion for summary disposition pursuant to MCR 2.116(C)(10). In this motion, Concord Realtors stated that it had no relationship to the property at issue, that plaintiff had sued an incorrect party, and that Concord Realtors had advised plaintiff of his error on numerous occasions. In addition, Concord Realtors argued that

plaintiff's action against Concord Realtors was frivolous, and it requested costs and attorney fees as a sanction pursuant to MCL 600.2591.¹

In plaintiff's response to the motion for summary disposition, plaintiff stated that at the time he filed his complaint, there was a reasonable basis for him to believe that Concord Realtors was a proper party to the action. As support for this argument, plaintiff referred to a letter from an insurance carrier that identified the property owner as "Concord Management" of "Waterford, Michigan," and plaintiff attached this letter to his response. As additional support for his argument that his claim against Concord Realtors was not frivolous, plaintiff argued that counsel for Concord Realtors actively participated in discovery. Further, plaintiff argued that an affidavit executed by the registered agent for Concord Realtors and filed in support of Concord Realtors' motion for summary disposition "states Concord Management is a d/b/a of Defendant." Therefore, plaintiff argued that it was reasonable for him to believe that Concord Realtors was affiliated with the "Concord Management" involved in the premises at issue. However, plaintiff also conceded that based on discovery confirming that Concord Realtors did not have an interest in the relevant premises and could be dismissed from the case. Plaintiff also stated that in "repeated/multiple conversations" with counsel for Concord Realtors, plaintiff's counsel agreed to dismiss the case against Concord Realtors; however, counsel for Concord Realtors refused to sign an order dismissing the case unless the order provided for the payment of attorney fees and costs to Concord Realtors. Plaintiff stated that the most recent of these conversations occurred on August 6, 2012; however, plaintiff did not provide dates for any of the other alleged conversations and also did not provide any documentary support for these claims, such as letters confirming the content of these conversations.²

On October 25, 2012, the trial court granted Concord Realtors' motion for summary disposition pursuant to MCR 2.116(C)(10). However, the trial court denied Concord Realtors' request for sanctions pursuant to MCL 600.2591. The trial court found that "it was not unreasonable for Plaintiff's counsel to name Defendant in the complaint based upon an objective review of the material available to him, i.e., the letter from the insurer naming the insured for the incident. Thus, the motion for sanctions is denied as the matter was not frivolous as defined by statute."

¹ MCL 600.2591(1) states that "if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney."

² Counsel for Concord Realtors agreed that on one occasion plaintiff's attorney contacted him and indicated that he would voluntarily dismiss the lawsuit. However, Concord Realtors' counsel stated that this was after Concord Realtors had "incurred the time and expense of defending the case and drafting its Motion for Summary Disposition." Therefore, counsel for Concord Realtors indicated that he would not dismiss the case at that point without the payment of costs and attorney fees.

On November 20, 2012, Concord Realtors filed a motion for attorney fees and costs pursuant to MCR 2.405 because plaintiff had rejected its offer of judgment. In this motion, Concord Realtors identified all of the instances that it informed plaintiff that it was not a proper party to the action. In addition, Concord Realtors attached print-outs from the Michigan Department of Licensing and Regulatory Affairs' website indicating that although defendant's entity name did appear when a search for "Concord Management" was run on this website, the search results also confirmed that defendant was located in Grand Rapids. Concord Realtors requested costs and attorney fees totaling \$4,675 pursuant to MCR 2.405. Concord Realtors acknowledged that the trial court could, in the interest of justice, decline to award attorney fees under this court rule. However, it argued that the "interest of justice" exception was only applicable in cases that presented unusual circumstances, which this case did not.

Plaintiff objected to the motion for costs and attorney fees. Plaintiff acknowledged that following plaintiff's rejection of the offer of judgment, the trial court was required to award Concord Realtors costs pursuant to MCR 2.405; however, plaintiff argued that the trial court should, in the interest of justice, decline to award Concord Realtors attorney fees under this rule. Specifically, plaintiff argued that the offer of judgment was "a clear display of gamesmanship" because plaintiff was willing to stipulate to dismiss Concord Realtors from the action, and this was known by counsel for Concord Realtors. In addition, plaintiff argued that the offer of \$100 was *de minimis* and was not a meaningful attempt at negotiating a settlement. Finally, plaintiff argued that because the trial court already determined that plaintiff's claims against Concord Realtors' were not frivolous, the doctrines of res judicata and collateral estoppel barred the trial court from finding, in the context of the motion for costs, that it was unreasonable for plaintiff to file a complaint against Concord Realtors.

The trial court did not hold a hearing on Concord Realtors' motion for costs and attorney fees pursuant to MCR 2.405. Instead, on April 2, 2013, the trial court issued an order awarding Concord Realtors costs pursuant to MCR 2.405; specifically, the trial court ordered plaintiff to pay Concord Realtors \$216.37 as taxable costs incurred after rejection of the offer of judgment, pursuant to MCR 2.405. However, the trial court declined to award Concord Realtors attorney fees pursuant to this rule. Specifically, the trial court held as follows:

In the case at bar, the defendant claimed it was not the owner of the property where the incident occurred. The plaintiff relied upon the letter from the insurer, which referenced the defendant as the insured party in the dispute. It was subsequently discovered that the insurer had erred, and the defendant was indeed not the owner of the subject premises. The defendant, through counsel, continued to protest that it was not the owner, but the record does not identify anything from the insurer which was produced to clarify the error made by the insurer. The Court finds the circumstances in the case at bar to be sufficiently "unusual" to warrant the denial of attorney fees.

This appeal followed.

II. STANDARD OF REVIEW

A trial court's findings of fact underlying an award of attorney fees are reviewed for clear error. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 516; 844 NW2d 470 (2014). A finding is clearly erroneous when, "although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Id.* "This Court reviews for an abuse of discretion the trial court's decision regarding whether to refuse to award attorney fees under the interest-of-justice exception." *Id.* at 516. An abuse of discretion occurs "when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* at 517 (citation omitted).

III. ANALYSIS

Michigan Court Rule 2.405 governs offers to stipulate to entry of judgment. Under this rule, a party can serve on an adverse party a written offer to stipulate to the entry of a judgment for all or part of the claim; if the offer is rejected, and the verdict is more favorable to the offeror than the offeree, the offeree must pay the offeror's actual costs incurred in the prosecution or defense of the action. MCR 2.405(B) and (D). Pursuant to MCR 2.405(A)(6), "'actual costs' means the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." Pursuant to MCR 2.405(D)(3), a trial court "shall determine the actual costs incurred[;]" however, "the court may, in the interest of justice, refuse to award an attorney fee under this rule." In *AFP Specialties*, this Court stated that "[t]he purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation, and that "in light of this purpose, the 'interest of justice' provision is the exception to a general rule, and it should not be applied 'absent unusual circumstances.'" Further, in *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996), this Court found that to properly decline to award attorney fees under MCR 2.405, "the trial court must articulate why the 'interest of justice' will be served" by the denial of attorney fees and that, "in the absence of any articulated and compelling rationale," the interest of justice is best served by awarding attorney fees under this court rule. *Id.* at 32 (citations omitted).

In the instant case, the trial court invoked the "interest of justice" exception and found that the circumstances of this case were unusual because in naming Concord Realtors as a party to the action, plaintiff initially relied upon a letter from an insurer, which appeared to reference Concord Realtors as the insured party in the dispute. Although it was subsequently discovered that this was an error, the trial court found that the record did not identify any documentation from the insurer that clarified the error made by the insurer.

We hold that the trial court abused its discretion. Despite the alleged mistake by the insurer before suit was filed, the record contains ample evidence that put plaintiff on notice that Concord Realtors was not a proper party to this action at the time of receipt of the letter and

certainly within weeks of filing its complaint. Yet it refused to dismiss Concord Realtors from the suit until after substantial litigation had occurred.³

Further, the letter from the insurer identified the insured party as being located in Waterford, Michigan. However, defendant Concord Realtors is located in Grand Rapids, Michigan. Concord Realtors sent numerous letters to plaintiff advising plaintiff that it did not have an interest in the property in question and encouraging plaintiff to investigate this issue or contact the registered agent or counsel for Concord Realtors to discuss this issue. Concord Realtors also asserted in its pleadings that it did not have an interest in the property in question. Moreover, even Westchase Park asserted in its pleadings that Concord Realtors did not have any interest in the premises at issue. In light of all of this evidence suggesting that Concord Realtors was not a proper party to this action, the trial court abused its discretion when it found that because the record did not identify anything from the insurer to clarify that defendant Concord Realtors was not the entity who insured the relevant premises, “unusual circumstances” existed to warrant the denial of attorney fees pursuant to MCR 2.405.

Further, there is no merit to plaintiff’s argument that because the trial court already ruled that plaintiff’s complaint against Concord Realtors was not frivolous, Concord Realtors’ subsequent request for attorney fees pursuant to MCR 2.405 was barred by the legal doctrines of res judicata and collateral estoppel. Res judicata “bars a subsequent action between the same parties when the evidence or essential facts are identical.” *TBCI, PC v State Farm Mutual Automobile Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010). Collateral estoppel “bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.” *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Because both of these legal doctrines bar relitigation of issues in *subsequent actions*, they are inapplicable to the issue in this case. Further, in *Luidens*, 219 Mich App at 34-35, this Court held that the “interest of justice” exception requires “something more” than merely a finding that the losing party’s position was “not frivolous,” and confirmed that “a standard of ‘non-frivolousness’” does not govern a determination of whether an award of attorney fees is appropriate pursuant to MCR 2.405. See also *AFP Specialties*, 303 Mich App at 519 (holding that the fact that a claim was not frivolous is “too common” to constitute the unusual circumstances required by the “interest of justice” exception).

In sum, the trial court abused its discretion when it applied the “interest of justice” exception without any record support for its conclusion that this case presented unusual circumstances to warrant the denial of attorney fees. *Luidens*, 219 Mich App at 31-32.

³ We further reject plaintiff’s contention that the offer of judgment constituted “gamesmanship” by Concord Realtors on these facts. While arguably offering a *de minimis* judgment amount, it was offered early in the litigation, in the face of plaintiff’s unresponsiveness to Concord Realtors’ repeated entreaties, and in any event exceeded any conceivable amount of liability on the part of Concord Realtors under the circumstances, as could have been determined, with the exercise of reasonable diligence, at a much earlier point in time than at summary disposition.

Reversed and remanded for entry of an award of attorney fees consistent with MCR 2.405. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra