STATE OF MICHIGAN

COURT OF APPEALS

SYED ALI,

Plaintiff-Appellant,

v

SYED AHMED, HAMTRAMCK MARS INC., NASAH, INC.,

Defendants-Appellees,

and

JTH TAX, INC., DAVE MILLER, DAN ROMAN, and PAM DAITZ,

Defendants.

UNPUBLISHED
January 12, 2016

No. 324616
Wayne Circuit Court
LC No. 12-017031-CZ

Before: SAAD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff Syed Ali appeals as of right an order granting summary disposition to defendants,[1] and an order awarding defendants case evaluation sanctions. We reverse the order granting summary disposition to defendants and vacate the order awarding case evaluation sanctions.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This appeal arises out of a hand written settlement agreement between plaintiff and Syed Ahmed. While the background facts have no relevant effect on our legal analysis regarding the effect of the settlement agreement between the parties, they are nonetheless provided in order to give context to this appeal. The background facts are primarily recited as alleged in plaintiff's complaint.

[1] The term "defendants" refers to Syed Ahmed, Hamtramck Mars, Inc., and Nasah, Inc., as they are the only defendants relevant to this appeal.

In 2001, Ahmed formed Nasah, Inc. Ahmed, on behalf of Nasah, Inc., entered into a franchise agreement with JTH Tax, Inc. (JTH Tax) to open six Liberty Tax Service (Liberty Tax) offices in the Detroit area. At that time, Ahmed retained plaintiff to manage the six Liberty Tax franchises in Michigan. In exchange for managing the six Liberty Tax franchises, Ahmed agreed to give plaintiff ownership in the Liberty Tax franchises.

In 2002, the first Liberty Tax office opened. Over the next six years, all six of the Liberty Tax offices opened and were being managed by plaintiff. In 2011, as the franchises began to increase their profitability, Ahmed insisted on a greater share of the profits. Ahmed threatened to "kick plaintiff out of the company" if plaintiff did not allow Ahmed to take a greater share of the profits.

Due to the tension between plaintiff and Ahmed, plaintiff resigned from Nasah, Inc., on December 17, 2011, and began working for American Tax Service. Later that same month, Ahmed filed a lawsuit against plaintiff "to prevent plaintiff from competing in the market."

In early 2012, JTH Tax management approached plaintiff and Ahmed to resolve their dispute. Specifically, Dan Roman, the Detroit area developer and corporate representative, Dave Miller, the vice president of area development, and Pam Daitz, the director of operations, discussed with plaintiff possible solutions to resolve the dispute between plaintiff and Ahmed.

On January 5, 2012, Ahmed called plaintiff and offered to settle his lawsuit by selling plaintiff the Liberty Tax franchises located on Van Dyke, 9 Mile, and Gratiot Avenue. Plaintiff agreed to settle the pending lawsuit and memorialized the deal in a handwritten agreement between the parties. The handwritten settlement agreement, signed by plaintiff and Ahmed, provides:

> 1. Syed Ahmed is going to sell the three territories to [plaintiff] for $300,000 even money to be paid in three seasons $100,000 each. . . .
>
> 2. [Plaintiff] will run all 6 offices. 3 for Syed Ahmed and 3 for [plaintiff] for 2012 season.
>
> * * *
>
> 4. [Plaintiff] will have 35% of the net profit, Syed Ahmed will have 50% of the net profit and 15% of the net profit will go to Syed Azfar Ali [plaintiff's brother] from six offices for 2012 season and the profit will split on May 30, 2012.
>
> 5. [Plaintiff] and Syed Ahmed will go their separate ways after May 30, 2012.
>
> * * *
>
> 10. Syed Ahmed and [plaintiff] will make a binding agreement that there will be no accusations/charges/litigations and any other matter will be settled amicably. This is to remain in effect even after Syed Ahmed and [plaintiff] have gone separate ways.

11. [Plaintiff] and Syed Ahmed will act in good faith in all these agreement [sic].

12. Syed Ali and Syed Ahmed will sitdown in front of lawyers on January 5 [sic] and these points will be finalized in a legal document that is going to be binding upon both parties.

* * *

15. Both parties will waive any rights to the [sic] any legal action against each other.

The next day, on January 6, 2012, plaintiff and Ahmed executed a purchase and sale agreement that required Ahmed to sell the three Liberty Tax franchises to plaintiff for $305,000. The purchase and sale agreement required JTH Tax's approval of the agreement by January 9, 2012. In the event that JTH Tax did not approve the purchase and sale agreement, the agreement would be "null and void."

As it turned out, JTH Tax never approved the purchase and sale agreement by January 9, 2012. Despite the fact that the agreement was not approved by JTH Tax, plaintiff managed the six Liberty Tax offices until the 2012 tax season ended. Then, on April 17, 2012, after the 2012 tax season, plaintiff was terminated by Ahmed.

Plaintiff then filed an eight-count complaint against defendants, JTH Tax, and various employees of JTH Tax. In Count two, the only count relevant to this appeal, plaintiff alleged that Ahmed breached the January 5 settlement agreement by failing to distribute plaintiff's share of the profits on May 30, 2012.

Defendants subsequently filed a motion for summary disposition arguing that the terms of the purchase and sale agreement superseded and rescinded the terms of the settlement agreement. Defendants then maintained that because the condition precedent in the purchase and sale agreement was not satisfied, the purchase and sale agreement was "null and void."

Plaintiff, in opposition to the motion, argued that the basis of its complaint was for the profits promised to plaintiff in the January 5 settlement agreement. Plaintiff contended that the settlement agreement should be read pursuant to its terms and that defendants' discussion regarding a condition precedent was inapplicable because the settlement agreement did not have a condition precedent.

After oral argument and taking the motion under advisement, the trial court entered a written opinion and order granting summary disposition in favor of defendants. The trial court held that the terms of the purchase and sale agreement superseded the terms of the settlement agreement. After having determined that the terms of the purchase and sale agreement governed the dispute, the trial court determined that the agreement was null and void because JTH Tax never approved the agreement.

After the entry of summary disposition, defendants filed a motion for case evaluation sanctions. Defendants maintained that they were entitled to case evaluation sanctions because they accepted the case evaluation award of $1.00, while plaintiff rejected the award. In

opposition, plaintiff contended that the trial court should choose not to award case evaluation sanctions because it would be in the interest of justice not to award sanctions. See MCR 2.403(O)(11). Ultimately, the trial court granted defendants' motion for case evaluation sanctions in the amount of $15,452.82. Plaintiff then brought this appeal.

II. BREACH OF SETTLEMENT AGREEMENT

Plaintiff first argues that the trial court erred by granting summary disposition to defendants because the terms of the settlement agreement were not superseded and rescinded by the purchase and sale agreement. We review de novo a circuit court's resolution of a summary disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). It is unclear under which subrule the trial court granted summary disposition, but because the court looked beyond the pleadings, we will review the trial court's decision pursuant to MCR 2.116(C)(10). *DeHart v Joe Lunghammer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A genuine issue of material fact exists when the record, giving the benefit of a reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013).

The parties do not dispute that the settlement agreement contains all of the elements of a valid contract, i.e, offer, acceptance, consideration, meeting of the minds, but rather, the only issue on appeal is whether the purchase and sale agreement superseded and rescinded the terms of the January 5 settlement agreement.[2] It is well established that parties to an agreement may execute a subsequent agreement that "totally supersedes the terms of the original." *Archambo v Laywers Title Ins Corp*, 466 Mich 402, 412; 646 NW2d 170 (2002). When an agreement contains an integration clause, the integration clause evidences an "explicit statement of intent to abrogate the antecedent commitment." *Id*. at 413. Additionally, "[i]f parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement." *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 347; 561 NW2d 138

[2] We reject Ahmed's assertion that plaintiff's argument was not preserved for appellate review. Plaintiff argued in the trial court that the settlement agreement and the purchase and sale agreement were two separate documents that should be read separately and that the subsequent purchase and sale agreement had no effect on the terms contained in the settlement agreement. While plaintiff provides a more thorough discussion on appeal, this argument was raised, addressed, and decided in the trial court. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

(1997); *Nib Foods, Inc*, *v Mally*, 70 Mich App 553, 560-561; 246 NW2d 317 (1976). However, if the second agreement does not "delve into the specific" matters addressed in the first agreement, then the terms of the first agreement are not rescinded. *Omnicom*, 221 Mich App at 347; *Nib Foods,* 70 Mich App at 561.

First, the subsequent purchase and sale agreement does not "delve into the specific" matter regarding the division of profits for the 2012 tax season. The settlement agreement discussed all of the terms regarding the settlement of Ahmed's lawsuit, including the sale of the three Liberty Tax franchises, the conditions of plaintiff's employment for the 2012 tax season, and plaintiff's share of the profits for the 2012 tax season. On the other hand, the subsequent purchase and sale agreement was solely limited to the terms regarding the sale of the three Liberty Tax franchises. To the extent that any terms in the settlement agreement regarding the purchase and sale of the Liberty Tax franchises are inconsistent with the terms of the purchase and sale agreement, those terms are rescinded by the subsequent purchase and sale agreement. *Omnicom*, 221 Mich App at 347; *Nib Foods*, 70 Mich App at 561. However, the purchase and sale agreement does not contain any terms related to the share of the profits plaintiff and Ahmed were to receive for the 2012 tax year. As such, the purchase and sale agreement did not "delve into the specific matter" of profit sharing for the 2012 tax year. *Omnicom*, 221 Mich App at 347; *Nib Foods*, 70 Mich App at 561. Therefore, the settlement agreement's term that plaintiff was to receive 35% of the profit for the 2012 tax season was not inconsistent with any term in the purchase and sale agreement. Accordingly, the terms regarding the division of profits for the 2012 tax year were not rescinded by the subsequent purchase and sale agreement and the trial court erred in concluding that they were. See *Nib Foods*, 70 Mich App at 562.

Additionally, the integration clause in the purchase and sale agreement does not indicate that the parties intended for the purchase and sale agreement to abrogate or totally supersede the terms of the original settlement agreement. The purchase and sale agreement provides the following:

> This agreement constitutes the entire understanding of the parties and supersedes all prior negotiations, commitments, representations, and undertakings of the parties *with respect to the subject matter hereto*. [emphasis added.]

The subject matter of the purchase and sale agreement solely revolved around the purchase and sale of the three Liberty Tax franchises, not the settlement of Ahmed's lawsuit. Because the plain language of the integration clause reflects only an intent to supersede the terms in the January 5 agreement with respect to the purchase and sale of the Liberty Tax franchises, the other terms in the settlement agreement, including the terms regarding plaintiff's share of the profits, were not rescinded by the purchase and sale agreement. Accordingly, the integration clause does not evidence an intent to abrogate *all* of the terms in the settlement agreement, only those terms related to the purchase and sale of the Liberty Tax franchises.

III. CASE EVALUATION SANCTIONS

Plaintiff asserts that if we reverse the trial court's order granting summary disposition to defendant, then we must also vacate the order granting defendants case evaluation sanctions. Before addressing plaintiff's argument regarding the award of case evaluation sanctions,

defendants contend we do not have jurisdiction to address plaintiff's argument. Defendants argue that plaintiff did not file an appeal from the order awarding case evaluation sanctions. Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo. *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012).

This Court has jurisdiction of an appeal of right if the order appealed from is a final order. MCR 7.203(A). MCR 7.202(6)(a)(iv) provides that a post-judgment order awarding attorney fees under MCR 2.403 is a final order. Because plaintiff appealed as of right the order awarding case evaluation sanctions that were granted pursuant to MCR 2.403, we have jurisdiction to address plaintiff's arguments regarding the award of case evaluation sanctions. See MCR 7.203.

Plaintiff contends that the order awarding case evaluation sanctions cannot be sustained. We review de novo a trial court's decision to either grant or deny case evaluation sanctions under MCR 2.403. *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009). MCR 2.403(O)(1) provides:

> 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.

While plaintiff rejected the evaluation award and the action proceeded to verdict which was not more favorable to plaintiff in the trial court, this Court has explained that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." *McManamon v Redford Twp*, 273 Mich App 131, 141-142; 730 NW2d 757 (2006), quoting *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). Because we reverse the trial court's order granting summary disposition to defendants, the action has not proceeded to verdict. MCR 2.403(O)(1). Accordingly, we vacate the trial court's award of case evaluation sanctions. *McManamon*, 273 Mich App at 142.

We reverse the order granting summary disposition to defendants and vacate the order awarding defendants case evaluation sanctions. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs as having prevailed in full on appeal. MCR 7.219(A).

/s/ Henry William Saad
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray