

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ZYBLE and LYNN ZYBLE,

Plaintiffs-Appellees/Cross-Appellants,

v

MICHAEL FISCHER BUILDERS, LLC, doing
business as DREAM MAKER KITCHEN AND
BATH OF GREATER LANSING,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 27, 2021

No. 352681
Clinton Circuit Court
LC No. 2019-011909-CZ

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant, Michael Fischer Builders, LLC, doing business as Dream Maker Kitchen and Bath of Greater Lansing, appeals as of right the trial court’s order denying its ex parte motion to stay enforcement of a judgment in favor of plaintiffs, David and Lynn Zyble, in the amount of \$45,665. Plaintiffs cross-appeal the portion of the order concerning the award of attorney fees. Because we conclude that the repairs considered in the inspection company’s calculation of damages were within the scope of the settlement agreement, we affirm the portion of the order that denied defendant’s motion to stay enforcement of the judgment. However, we remand the matter to the trial court to reconsider plaintiffs’ motion for attorney fees.

I. FACTUAL BACKGROUND

Plaintiffs hired defendant to complete a renovation for their home for a total contract price of \$122,478. After the renovation was complete, plaintiffs discovered that much of the work was incomplete or subpar. The parties participated in mediation with facilitator Patrick D. Hanes. As a result of mediation, the parties signed a settlement agreement, which provided, in relevant part:

7. Dream Makers [sic] agrees that it shall complete all warranty repairs, as outlined in the Energy Wise estimate attached as **Exhibit A**, and the August 1, 2018 letter from Michael Pattwell to Dream Maker, attached as **Exhibit B**, on or before June 15, 2019.

8. Accurate Inspection LLC (“Accurate Inspection”), 12228 US Hwy 27, Dewitt, Michigan 48820, shall inspect the home by March 11, 2019, for determining the baseline for scope of work described in **Exhibit A**, and approve any and all warranty repairs completed by Dream Makers [sic] pursuant to **Exhibit A** on or before June 15, 2019. Dream Makers [sic] shall pay all fees and costs associated with the engagement of Accurate Inspection. Dream Makers [sic] shall provide three days’ notice to the Zybles before work is commenced. Upon completion, Dream Makers [sic] shall clean up all working construction so that the Home is habitable and can be occupied on or before June 15, 2019. For clarification, Accurate Inspection shall be the sole arbiter for the work to be done and quality.

9. Dream Makers has signed and approved a document titled “Confession of Judgment and Complaint,” which further sets forth the rights and obligations of the parties hereto, which has been held by the Zyble’s attorney. (A copy of said Confession of Judgment and Complaint is attached hereto and incorporated herein.)

10. In the event that Accurate Inspection determines there are still outstanding warranty repairs that must be completed, Accurate Inspection will provide Dream Makers [sic] a list of work to be performed and Dream Makers [sic] shall perform said work by June 15, 2019. Dream Makers [sic] agrees that if Accurate Inspection determines that work is not 100% complete by June 15, 2019, that the Confession of Judgment shall be entered against him in the amount Accurate Inspection determines it will take to correct and complete any outstanding warranty issues identified in **Exhibit A**, plus 25% of that amount, statutory costs, interests, and actual attorney fees to collect.

11. In consideration of Dream Maker’s agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment.

* * *

19. This Agreement shall be governed by, and shall be construed, interpreted, and enforced in accordance with, the laws (excluding choice of law rules) of the State of Michigan. The Parties agree that the laws of Michigan have a reasonable relationship to the subject matter of this Agreement and that it is appropriate that this Agreement be construed, interpreted, and enforced under those laws. Any dispute arising under this Agreement shall be adjudicated in County [sic] Circuit Court, State of Michigan.

Exhibit A of the settlement agreement was an estimate from Energy Wise Homes, Inc., for the cost of completing some of the warranty repairs that were at issue at the time of the settlement agreement. The estimate set forth a total of \$35,589 in repairs to be completed in the master bathroom, including demolition, installation of new fixtures and tiles, and paint and drywall repairs. The estimate also included a separate calculation of \$6,133.02 to repair the uneven slope in the shower to fix pooling water, and an estimate for \$15,962.74 for installation of new bamboo

flooring. Further, the estimate described that trim repairs were required in the mudroom and kitchen. Exhibit B of the settlement agreement was a letter from plaintiffs outlining a list of concerns regarding the warranty claims and defendant's work, including an extensive list of issues in each room that needed to be repaired.

Accurate Inspection did not complete the home inspection by March 11, 2019, as provided for in the settlement agreement. However, Accurate Inspection completed its final inspection of plaintiffs' home on October 17, 2019, and determined that additional warranty repairs were necessary in the master bathroom, kitchen, mudroom, garage, second bedroom, and main bath in the amount of \$36,532. Plaintiffs filed the confession of judgment and complaint in the trial court, which stated that plaintiffs were entitled to judgment in the amount of \$45,665, based on the calculation of damages by Accurate Inspection plus a 25% increase, as provided for in the settlement agreement. The trial court signed the judgment. Defendant then filed a motion to stay enforcement of the judgment, arguing that Accurate Inspection calculated damages for items that were outside the scope of its authority under the settlement agreement. Plaintiffs filed a motion requesting \$23,242.50 for attorney fees and costs. After a hearing on both issues, the trial court denied defendant's motion and entered an order for defendant to pay plaintiffs \$45,665, which the court deemed to include damages, attorney fees, costs, and interest. This appeal followed.

II. ANALYSIS

Defendant first argues that Accurate Inspection calculated repairs that were outside the scope of the settlement agreement because the agreement only contemplated the repairs contained in Exhibit A. We disagree.

A. JURISDICTION

At the outset, plaintiffs assert that this Court does not have jurisdiction over this appeal because defendant did not appeal a final order pursuant to MCR 7.202(6). "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).

MCR 7.203(A)(1) provides, in part, that this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6)" MCR 7.202(6)(a) states:

"[F]inal judgment" or "final order" means . . . [i]n a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order

(ii) an order designated as final under MCR 2.604(B);^[1]

(iii) in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity

In the instant case, defendant appeals the trial court's denial of an ex parte motion to stay enforcement of judgment, which did not fall under any definition provided in MCR 7.202(6). However, the judgment, as the first judgment that disposed of all the claims and adjudicated the rights and liabilities of the parties, constituted a final order under MCR 7.202(6)(a)(i). MCR 7.204(A)(1)(d) states that the period to file an appeal of right in a civil case runs from the entry of "an order deciding a post-judgment motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period" In this case, the judgment was entered on October 23, 2019. Defendant filed its motion to stay enforcement of the judgment on November 12, 2019. The trial court denied that motion in a January 24, 2020 order, and defendant filed its appeal on February 1, 2020. Therefore, the appeal is timely from the October 23, 2019 judgment pursuant to MCR 7.204, and this Court has jurisdiction to consider an appeal from that judgment.

B. SETTLEMENT AGREEMENT

A trial court's decision involving enforcement of a consent judgment is reviewed for an abuse of discretion. *Trendell v Solomon*, 178 Mich App 365, 370; 443 NW2d 509 (1989). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Ronnisch Constr Group, Inc v Lofts On the Nine, LLC*, 306 Mich App 203, 208; 854 NW2d 744 (2014). "Moreover, questions involving the proper interpretation of a contract" are reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

This case involves the interpretation of a settlement agreement. "A settlement agreement is a binding contract." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 665; 770 NW2d 902 (2009). Such an agreement is "governed by the legal rules applicable to the construction and interpretation of other contracts." *Id.* at 663. "Moreover, by definition, a settlement agreement is a compromise of a disputed claim." *Id.* at 664. "The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Edmore v Crystal Auto Sys, Inc*, 322 Mich App 244,

¹ MCR 2.604(B) provides: "In receivership and similar actions, the court may direct that an order entered before adjudication of all of the claims and rights and liabilities of all the parties constitutes a final order on an express determination that there is no just reason for delay."

262; 911 NW2d 241 (2017) (quotation marks and citation omitted). Therefore, “this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself.” *Id.* “The language of a contract is to be given its ordinary, plain meaning; technical, constrained constructions should be avoided.” *Id.* Moreover, “[i]nartfully worded or clumsily arranged contract terms do not render a contract ambiguous if it fairly admits to one interpretation. *Id.* “Contracts must be construed as a whole, giving effect to all provisions.” *Id.* at 263. As a result, the court “must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms.” *Id.* Finally, “[p]arties are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy.” *Id.*

In the instant case, defendant does not contest the authority of Accurate Inspection to determine the amount of damages, but argues that Accurate Inspection exceeded the scope of its authority under the agreement. According to defendant, ¶¶ 8 and 10 of the settlement agreement only required Accurate Inspection to inspect and calculate the cost of repairs related to the items identified in Exhibit A. Therefore, defendant asserts that Accurate Inspection erred by calculating the cost of repairs for items identified in Exhibit B.

Paragraph 7 of the settlement agreement states that defendant agreed to “complete *all* warranty repairs,” as outlined in Exhibit A and Exhibit B (emphasis added). Both exhibits were attached to the settlement agreement. Considering the settlement agreement as a whole, and giving effect to all its provisions, *Edmore*, 322 Mich App at 264, we conclude that the repairs identified in both Exhibit A and Exhibit B were reasonably contemplated within the scope of the agreement. Indeed, defendant was also required to make the repairs listed in Exhibit B, and Exhibit B was attached to the settlement agreement. It is unlikely that the parties would agree that defendant would complete the repairs listed in both exhibits, but only require Accurate Inspection to inspect the repairs identified in Exhibit A. In that instance, there would be no consequences resulting from defendant’s failure to properly complete the repairs listed in Exhibit B. Such an interpretation conflicts with ¶ 7, in addition to the attachment of Exhibit B and the confession of judgment to the settlement agreement. Accordingly, the repairs listed in both exhibits were within the scope of the settlement agreement, and Accurate Inspection did not exceed its authority by completing the inspection and calculating the cost to finish the repairs identified in both exhibits.²

Further, defendant’s argument that Accurate Inspection failed to complete its inspection by March 11, 2019, as stated in the settlement agreement is immaterial. Although Accurate Inspection did not complete its initial inspection by March 11, 2019, as contemplated in the settlement agreement, it completed its final inspection on October, 17, 2019. The final inspection occurred four months after the June 15, 2019 deadline for defendant to complete the repairs. Therefore, despite the lack of an initial inspection, defendant agreed to complete the work described in Exhibits A and B, and was given an additional four months to complete that work. Further, in the

² Defendant does not argue that any of the items listed in the Accurate Inspection report were not included in either Exhibits A or B. At any rate, although the items are described differently in the exhibits than in the report, there does not appear to be any items in the report that were not contemplated by either exhibit.

event that Accurate Inspection determined that the work was not completed, defendant agreed to pay the amount Accurate Inspection calculated it would take to finish the work. See *Trendell*, 178 Mich at 369 (explaining that “[t]he accepted rule is that the failure of a party to perform under a consent judgment does not void the judgment”). Accordingly, Accurate Inspection’s failure to complete the initial inspection as stated in the consent agreement did not excuse or alter defendant’s responsibilities under that agreement.

Moreover, the judgment in this case was entered as a result of the parties’ consent agreement; ¶10 provides that if Accurate Inspection determined that the work was not completely done by June 15, 2019, the confession of judgment would be entered against defendant in the amount Accurate Inspection determined it would cost to complete the work, plus 25%. A section at the end of the judgment, titled “Stipulation to Entry of Order,” provided that “[t]he parties hereby stipulate and consent to the entry of the above order and judgment.” The parties’ attorneys signed and dated the stipulation on February 21, 2019, the date in which the parties signed the settlement agreement.

“It is elementary that one cannot appeal from a consent judgment, order or decree.” *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958). “When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court.” *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986). “Absent fraud, mistake or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties, nor is it subject to appeal. *Id.* at 407 (citations omitted). Although the amount of damages was added after the parties signed the confession of judgment, defendant agreed that Accurate Inspection would calculate the amount of damages, if necessary, after completing its inspection. As discussed, Accurate Inspection properly calculated the cost to finish the remaining work listed in Exhibits A and B as required by the settlement agreement. As a result, defendant has not established a ground to set aside the consent judgment. See *id.*

Finally, defendant waived appellate review of the settlement agreement and corresponding judgment by signing the provision in the settlement agreement that stated: “In consideration of Dream Maker’s agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment.” A waiver is “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.” *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011) (quotation marks and citation omitted; alteration in original). “To waive a right, the language of [an agreement] must show an intent to plainly relinquish that right.” *Nexxter Auto Corp v Mando America Corp*, 314 Mich App 391, 395-396; 886 NW2d 906 (2016). “The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Reed*, 293 Mich App at 176 (quotation marks and citation omitted). The plain language of the settlement agreement shows that defendant expressly waived its right to an appeal. See *id.* Therefore, we decline to disturb the judgment entered in this case, and conclude that the trial court did not abuse its discretion by denying the motion to stay enforcement of the judgment. *Trendell*, 178 Mich App at 370.

C. APPOINTMENT OF FACILITATOR

Defendant next argues that the trial court erred by ordering that additional issues would be resolved through arbitration without vacating what defendant characterizes as the arbitrator’s

award and because the settlement agreement provides that any disputes relating to the agreement will be adjudicated by the circuit court. We disagree.

The trial court's order that denied defendant's motion to stay enforcement of the judgment also ordered that remaining issues regarding administrative matters and amounts in the judgment were subject to facilitation by Hanes. The court explained the following at the motion hearing:

Now this order is entered—and the order will specifically say that it's entered without prejudice to the parties requesting further binding facilitation by Mr. Hanes respecting any issues remaining between them, and quite frankly, that would be the way to go, because I'm not reopening this file, I'm going ahead and giving you that opportunity to correct administrative matters any amounts in the judgment post-judgment, for up to one year that's allowed under the court rules.

As an initial matter, defendant does not have an appeal of right from the portion of the trial court's postjudgment order requiring that further disputes between the parties will be subject to facilitation because it does not fall within any of the definitions of "final order" listed in MCR 7.202(6)(a). See MCR 7.203(A).

At any rate, the parties already participated in mediation facilitated by Hanes, which resulted in the settlement agreement. As a result, contrary to defendant's assertion, the trial court did not assign the parties to a new "arbitrator." The trial court affirmed the judgment, and then explained that if the parties had further disagreements, to bring those disputes to Hanes. In other words, the trial court concluded that the judgment was properly entered on the basis of the parties' mediated settlement agreement, but permitted the parties to raise additional disputes in mediation. Given that the parties negotiated the settlement agreement through mediation, which included a confession of judgment, the trial court did not err by giving the parties the opportunity to settle further disputes with the same facilitator.

D. CROSS-APPEAL

Plaintiffs filed a cross-appeal, arguing that the trial court abused its discretion by awarding an amount of attorney fees that was contrary to the settlement agreement. We agree.

This Court reviews a trial court's decision whether to award attorney fees for an abuse of discretion. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996). "[Q]uestions involving the proper interpretation of a contract" are reviewed de novo. *Rory*, 473 Mich at 464.

Paragraph 10 of the settlement agreement provides that in the event that Accurate Inspection determined that there were outstanding repairs, the confession of judgment would be entered against defendant in the amount Accurate Inspection calculated that it would take to correct, "*plus 25% of that amount, statutory costs, interest, and actual attorney fees to collect.*" (Emphasis added).

Accurate Inspection determined that there were \$36,532 in outstanding warranty repairs. The addition of 25% of that amount (\$9,133) brought the total damages to \$45,665. Plaintiffs filed a motion for attorney fees and costs, comprised of \$20,710 for attorney fees, \$1,266.25 for

mediation fees, and \$12.45 in costs.³ Regardless, the trial court determined that the settlement agreement intended that attorney fees, costs, and interest were all encompassed by the additional 25% added to the calculated damages, and ordered defendant to pay \$45,665. Considering the plain language of the agreement, *Edmore*, 322 Mich App at 262, “actual attorney fees to collect” were listed separately from the calculated cost of repairs and the 25% increase. Because the express language of the agreement states that the 25% was related to the cost of warranty repairs and listed actual attorney fees, costs, and interest as separate items, it shows that the parties intended that plaintiffs’ attorney fees would be calculated separately from the damages. See *id.* Therefore, the trial court erred by ordering that attorney fees, costs, and interest were rolled into the calculated cost of repairs plus 25%. *Mitchell*, 215 Mich App at 729. Accordingly, we vacate the portion of the order related to attorney fees and remand for consideration of plaintiffs’ attorney fee request.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering

³ Plaintiffs requested a total of \$23,242 for attorney fees and costs, but the itemization of their attorney fees and costs does not support this figure. The trial court can make the proper determination on remand.