STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER S. ARNOLD, ELAINE ARNOLD, GERALD ARNOLD, LINDA G. CLARK, and BARBARA J. NANCE,

Plaintiffs-Appellants,

v

AMERICAN INVESTORS LIFE INSURANCE COMPANY, MICHAEL EUGENE KELLEY, GINA M. MCKAGUE, JEFFREY R. MITCHELL, MITCHELL VALERI & ASSOCIATES, AMERIGO VALERI, ROBERT A. VALERI, and ROBERT VALERI,

Defendants-Appellees

and

GALAXY PROPERTIES MANAGEMENT, RICK GREENE, M & O MARKETING, INC., MTL EQUITY PRODUCTS, RESORT HOLDINGS INTERNATIONAL, RUTTENBERG FINANCIAL MARKETING, and AMY STRAUB,

Defendants.

UNPUBLISHED
February 19, 2013

No. 293429
Oakland Circuit Court
LC No. 2007-080081-CZ

MABLE C. AUSTIN, STEPHANIE AUSTIN, NELLIE M. DUKE, DOLORES MCELREATH, ALFRED H. PHILLIPS, VAL JEAN PHILLIPS, QUETA L. SIEFKER, ATORA TODESCHINI, and DOROTHY TODESCHINI,

Plaintiffs-Appellants/Cross-Appellees,

v

AMERICAN INVESTORS LIFE INSURANCE COMPANY, GOLDEN RULE INSURANCE

Nos. 293431 & 293534
Oakland Circuit Court
LC No. 2006-076946-CZ

COMPANY, ING USA ANNUITY & LIFE INSURANCE COMPANY, GINA M. MCKAGUE, NATIONAL WESTERN LIFE INSURANCE COMPANY, AMERIGO VALERI, ROBERT A. VALERI, and ROBERT VALERI,

Defendants-Appellees,

and

JEFFREY R. MITCHELL and MITCHELL VALERI & ASSOCIATES,

Defendants-Appellees/Cross-Appellants,

and

GALAXY PROPERTIES MANAGEMENT, RICK GREENE, MICHAEL EUGENE KELLY, MTL EQUITY PRODUCTS, RESORT HOLDINGS INTERNATIONAL, RUTTENBERG FINANCIAL MARKETING, and AMY STRAUB,

Defendants.

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

In these consolidated cases, both sets of plaintiffs[1] appeal by right multiple orders of the trial court that dismissed various defendants and causes of action, denied amendment of the final complaint to add a count of unjust enrichment, and denied their motion for reconsideration. In addition, defendant Jeffrey R. Mitchell appeals the trial court's order of June 17, 2009, denying case-evaluation sanctions against the Austin plaintiffs. We affirm.

I. BACKGROUND

According to plaintiffs and the United States government, from approximately 1997 through 2004, defendant Michael E. Kelly engaged in an elaborate Ponzi scheme in which he sold interests in timeshare apartments at Mexican resort hotels (called resort investments) to

[1] Plaintiffs in Docket Nos. 293429 and 293431 have filed a single brief on appeal. When necessary to distinguish between the two cases, nouns will be prefaced with "Arnold" or "Austin," e.g., the Arnold plaintiffs, the Austin pleadings.

investors who would then lease them back to third parties at a profit. Kelly used funds from new investors to pay the "dividends" owed to previous investors. According to the FBI, Kelly received approximately $400 million from investors. Kelly was ultimately arrested and has been charged with mail fraud and various securities violations.

Defendant Ruttenberg Financial Marketing promoted and marketed the sale of the resort investments to financial professionals. Defendants American Investors Life Insurance Company, ING USA Annuity and Life Insurance Company, National Western Life Insurance Company, and Golden Rule Insurance Company (collectively the insurance defendants) had annuity or insurance contracts with one or more plaintiffs, which contracts were liquidated by plaintiffs and the funds used to purchase the resort investments. Defendants Robert Valeri and Mitchell were allegedly plaintiffs' sole financial advisors and licensed insurance agents who had previously sold plaintiffs annuities or life insurance policies issued by the insurance defendants. Plaintiffs alleged that Robert Valeri and Mitchell were the owners of defendant Mitchell Valeri & Associates (MV&A), which plaintiffs believed to be a partnership. Defendants Gina McKague, Amerigo Valeri, and Robert A. Valeri (not the aforementioned Robert Valeri) were allegedly employed by MV&A; they purportedly assisted Mitchell and Robert Valeri in the solicitation and sales of the fixed annuities and, later, the resort investments at seminars and plaintiffs' homes. Plaintiffs alleged that each individual working for MV&A was an agent of at least one of the insurance defendants.

The Austin plaintiffs filed their complaint on August 25, 2006. The Arnold plaintiffs filed their complaint on January 12, 2007. Through a protracted series of motions for summary disposition and leave to amend, the claims were winnowed down, as was the number of remaining plaintiffs and defendants. By the time trial commenced in February 2009, the remaining defendants were Greene, Ruttenberg, Mitchell, Robert Valeri, MV&A, and Kelly.

However, in the Arnold case, the trial court had entered a default judgment against Kelly as a discovery sanction on January 11, 2008. Because Kelly was in default, the allegations in the third-amended complaint were presumed true, and Kelly was present at trial only to contest damages. In addition, Kelly was no longer a defendant in the Austin case because the Austin plaintiffs had obtained a default judgment against him in another matter. See *Austin v Kelly*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2009 (Docket No. 282583).

At the conclusion of plaintiffs' proofs at trial, plaintiffs requested a default against Ruttenberg for failure to appear. The trial court noted that it would not enter a default judgment because they were in the middle of trial, but would "enter a default for not being here and you can incorporate a request of judgment at the time of your conclusion for defendants if we have everything." Plaintiffs' counsel then indicated that it had dollar amounts for each plaintiff and requested full damages for each plaintiff against Ruttenberg. The trial court granted the default and, ultimately, entered default judgments against Ruttenberg for $1,656,846 in the Austin case and $1,388,059.95 in the Arnold case.

Plaintiffs also requested a default against MV&A, which was ultimately denied. Defendants made motions for involuntary dismissal on the grounds that: (1) under the tort reform act, damages must be allocated but, because 100 percent of the damages had already been

obtained through a default judgment, there could be no additional allocation; and (2) plaintiffs had failed to prove their damages.

At the end of May 2009, the trial court entered multiple orders and opinions related to the various motions. The trial court concluded that plaintiffs had failed to show the present value of the resort investments and, thus, could not show the "true measure of their damages"; the court dismissed all claims against the defendants other than Kelly, except for the unjust enrichment claim. The trial court denied the motion with respect to Kelly because the third amended complaint, which Kelly could not contest, "provides sufficient facts to allege damages." The trial court further concluded that Mitchell and Robert Valeri were not plaintiffs' fiduciaries and dismissed all claims against them related to breach of fiduciary duties.

Finally, the trial court dismissed all remaining defendants because plaintiffs had "already received default judgments for all of the damages they seek." The trial court acknowledged that the Austin plaintiffs had two default judgments—against both Kelly and Ruttenberg—and simply indicated that it was dismissing "all the Defendants against whom a default judgment has not already entered." The Arnold defendants were dismissed based on the default for 100 percent of the damages being allocated to Ruttenberg.

Plaintiffs moved for reconsideration on June 9, 2009. Eight days later plaintiffs filed appeals in both cases with this Court (Docket Nos. 292645 and 292646). On July 7, 2009, this Court held that plaintiffs had failed to file within 21 days because the order of May 27, 2009, was the final order—not the order of May 28, 2009; however, this Court indicated that plaintiffs could file an application for leave to appeal. See *Austin v American Investors Life Ins*, unpublished order of the Court of Appeals, entered July 7, 2009 (Docket No. 292645); *Arnold v American Investors Life Ins*, unpublished order of the Court of Appeals, entered July 7, 2009 (Docket No. 292646). On July 23, 2009, the trial court denied the motion for reconsideration for failure to demonstrate palpable error.[2]

Also in June 2009, Mitchell and Robert Valeri filed a two-page motion in the Austin case for case-evaluation sanctions. The motion simply cited MCR 2.403(O)(1), noted that plaintiffs had rejected a $25,000 evaluation that they had accepted, and requested $41,640.11. Attached as exhibits were the case-evaluation acceptance, the notice of rejection, and itemized attorney statements. On the morning of June 12, 2009, the Austin plaintiffs argued that case-evaluation sanctions were optional because judgment was entered as a result of ruling on a motion and that, as a matter of public policy and in the interest of justice, the trial court should not award sanctions. In addition, the Austin plaintiffs noted that the motion failed to address any of the legally required factors to determine reasonableness and also contained no sworn affidavit regarding time and expenses incurred. That same afternoon, counsel for Mitchell and Robert Valeri filed an affidavit in support of the motion for case-evaluation sanctions.

[2] The trial court denied the motion on two grounds, the first of which was a belief that it no longer had subject matter jurisdiction. However, because this Court concluded that the order of May 27, 2009, was the final order, rending the appeals untimely, the appeals never commenced and the trial court was never divested of jurisdiction.

The trial court held a hearing on the motion for case-evaluation sanctions and ultimately denied the motion "for two independent reasons." First, the trial court concluded that Mitchell and Robert Valeri, as the moving parties, had "not provided sufficient support to even have an evidentiary hearing with regard to the fees sought." Second, the trial court concluded that a motion for involuntary dismissal was "a motion after rejection of a case evaluation" and that MCR 2.403(O)(11) applied because the motion was addressed prior to the conclusion of trial, permitting invocation of the interest-of-justice exception. Counsel noted that he had filed an affidavit related to the motion, but the trial court held that it was untimely. The trial court entered an order denying the motion and striking the untimely affidavit. The order also stated that the affidavit was insufficient to warrant an evidentiary hearing because it was conclusory and failed to address the relevant factors.

II. STANDARDS OF REVIEW

A motion for involuntary dismissal at a civil bench trial is equivalent to a motion for directed verdict. See *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995); see also MCR 2.504(B)(2). Accordingly, our review is de novo. See *Coates v Bastion Bros, Inc*, 276 Mich App 498, 502; 741 NW2d 539 (2007). A trial court's grant of such a motion is proper if, viewing the evidence in the light most favorable to the nonmoving party, reasonable minds could not differ. *Id.* at 502-503. Likewise, we review de novo issues of statutory interpretation. *Holman v Rasak*, 281 Mich App 507, 508; 761 NW2d 391 (2008).

"A trial court's decision whether the grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The trial court's award of attorney fees and costs is reviewed for an abuse of discretion, which occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.*

III. ANALYSIS

A. DOCKET NOS. 293429 & 293431

Plaintiffs argue that the trial court erred by involuntary dismissing various defendants based on the existence of a default judgment without making any findings of fact related to the proportion of damages for which any other defendants might be liable. "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Servs, Inc*, 210 Mich App at 639, quoting MCR 2.504(B)(2).

The trial court dismissed the remaining defendants because both sets of plaintiffs had obtained a default judgment for 100 percent of their damages, leaving nothing to be allocated to the remaining defendants. Specifically, the Austin plaintiffs received a default judgment for $2,361,411.50 against Kelly in a related action. In addition, at the close of their proofs, plaintiffs in both cases obtained a default judgment against Ruttenberg (for $1,656,846 in the Austin case and $1,388,059.95 in the Arnold case) because Ruttenberg failed to appear for trial.

Plaintiffs do not challenge that these default judgments represent 100 percent of their damages. Instead, plaintiffs argue that the default judgments did not preclude liability against the remaining defendants and that the trial court erred by failing to made a determination of fault. We cannot agree.

MCL 600.2957(1) provides:

> In an action based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

In turn, MCL 600.6304(1) provides in pertinent part:

> In an action based on tort or other legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, *unless otherwise agreed by all parties to the action*, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury . . . . [Emphasis added.]

We agree with plaintiffs that, generally, "the trier of fact in a tort-based action must allocate liability among those at fault." *Jones v Enertel, Inc*, 254 Mich App 432, 436; 656 NW2d 870 (2002). However, plaintiffs overlook the language in MCL 600.6304(1), emphasized above, that such allocation is only required "unless otherwise agreed" by the parties to the action.

After plaintiffs moved for a default judgment against Ruttenberg, the trial court attempted to simply grant a default against Ruttenberg and let plaintiffs "incorporate a request for judgment at the time of your conclusion for defendants if we have anything." Instead, plaintiffs pressed ahead, immediately seeking a default judgment and requesting their total amount of damages from Ruttenberg. Had plaintiffs accepted the trial court's offer to simply have a default entered, plaintiffs' position would be correct—they would have been entitled to a determination of liability concerning the remaining defendants and how much liability should be allocated to each one. However, by seeking and obtaining a default judgment for 100 percent of their damages, plaintiffs were no longer entitled to any allocation to the remaining defendants; they had already requested and received judgment for 100 percent of their damages from Ruttenberg. Accordingly, it was implicitly agreed by the parties that 100 percent of the fault would be allocated to Ruttenberg, thereby waiving the requirement that the trial court formally allocate fault. See MCL 600.6304(1).

Contrary to plaintiffs' assertion, this result is not inequitable and does not encourage fraud and collusion. It was plaintiffs' explicit request to have a default judgment entered against Ruttenberg for the full amount of their damages. This resulted in the remaining defendants being precluded from liability. Plaintiffs did this to themselves, and are thus precluded from arguing on appeal that the trial court should have allocated fault in any other manner. See *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006).

With respect to the remainder of this appeal, the existence of the default judgments against Kelly and Ruttenberg preclude an assessment of damages against any other defendant. Accordingly, whether the trial court properly granted summary disposition to Robert Valeri, Mitchell, or the insurance defendants, or whether the trial court properly determined that various defendants had no liability to plaintiffs for reasons other than the allocation of damages, are moot issues. The default judgments for 100 percent of plaintiffs' damages preclude us from awarding plaintiffs' additional requested relief.

B. DOCKET NO. 293534

In Docket No. 293534, Mitchell contends that the trial court erred when it denied his motion for case-evaluation sanctions. The trial court denied the sanctions on two separate grounds, both of which Mitchell contends were erroneous. However, because Mitchell and Robert Valeri (who joined in the motion before the trial court but not in this appeal) were not entitled to case-evaluation sanctions, we affirm the trial court's decision.

Under MCR 2.403(O), the party rejecting case-evaluation is required to pay case-evaluation sanctions in the event it does not improve its position more than 10 percent. However, in cases involving multiple parties, the following rules apply:

> Except as provided in subrule (O)(4)(b),[3] in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and the verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. *However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.* [MCR 2.403(O)(4)(a) (emphasis added).]

The term "aggregate," which is not defined in the court rule, means "a sum, mass, or assemblage of particulars; a total or gross amount." *Random House Webster's College Dictionary* (2000).

It appears that the case was evaluated for a total of $25,000. Who was responsible for paying this $25,000 is less clear. Nevertheless, there is no question that Mitchell and Robert Valeri were ultimately dismissed because of the default judgments against Ruttenberg and Kelly.

[3] MCR 2.403(O)(4)(b) involves verdicts with joint and several liability. There is no joint and several liability in this case. Accordingly, MCR 2.403(O)(4)(b) is inapplicable.

Therefore, regardless of how the case-evaluation award was to be divided up, there is no question that they improved their position.

However, as noted previously, costs cannot be imposed on "a plaintiff who obtains an aggregate verdict more favorable than the aggregate evaluation." MCR 2.403(4)(a). In this case, each Austin plaintiff obtained an aggregate verdict substantially greater than the aggregate $25,000 case evaluation, with the smallest individual verdict being $59,000. Therefore, under MCR 2.403(4)(a), Mitchell was not entitled to sanctions and we affirm the trial court's decision not to impose case-evaluation sanctions. We will not reverse when the trial court has reached the correct result, even when it has done so for the wrong reason. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

IV. CONCLUSION

In Docket Nos. 293429 and 293431, the trial court properly dismissed the remaining defendants based on the existence of default judgments for 100 percent of plaintiffs' damages. In addition, the default judgments preclude liability against any other defendants, regardless of the propriety of the other rulings made by the trial court, rendering those issues moot.

In Docket No. 293534, the trial court properly denied case-evaluation sanctions. Plaintiffs' aggregate verdict was greater than the aggregate evaluation. MCR 2.403(4)(a).

Affirmed. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood