

STATE OF MICHIGAN
COURT OF APPEALS

MCALPINE & ASSOCIATES, P.C.,

Plaintiff-Appellant/Cross-Appellee,

v

BOOMER COMPANY and STEEL
STRUCTURES, INC.,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED
December 27, 2011

No. 300063
Wayne Circuit Court
LC No. 10-003169-CZ

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, McAlpine & Associates, P.C. (McAlpine), appeals the trial court's order that denied its motion for summary disposition and granted summary disposition to defendants, Boomer Company (Boomer) and Steel Structures, Inc. Boomer and Steel Structures cross appeal the trial court's denial of its request for attorney fees. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

On August 22, 2007, McAlpine and Boomer entered into a retainer agreement in which McAlpine agreed to provide Boomer legal representation "in its dispute with Oxford Area Community Schools . . . arising from the construction of the new Oxford High School" The agreement further stated that, "[i]n addition, McAlpine may agree to pursue additional claims or contract matters that arise during the course of this representation and the Project." The parties agreed that Boomer could monitor and administer costs and expenses incurred during McAlpine's representation, but that McAlpine would advance all expenses. The agreement contained a provision that specified how McAlpine would be compensated for fees and expenses if Boomer received any settlement or judgment.

McAlpine represented Boomer in its dispute with Oxford Area Community Schools and the matter went to arbitration. The arbitration panel awarded Boomer \$814,921.82. Boomer had an agreement with Steel Structures to share any arbitration award it received in the dispute. Thereafter, McAlpine and Boomer disagreed about the amount McAlpine should be paid under the retainer agreement. McAlpine placed the award in a client trust account and, on March 15, 2010, McAlpine filed an interpleader complaint for a determination of how the arbitration award should be distributed.

McAlpine and Boomer both filed motions for summary disposition. McAlpine maintained that it is entitled to \$522,697.66 and Boomer took the position that McAlpine should receive \$452,505.43. The trial court ultimately agreed with Boomer and granted its motion for summary disposition. At the motion hearing, Boomer also requested attorney fees under the offer of judgment rule, MCR 2.405. The trial court denied Boomer's request.

II. DISCUSSION

A. COMPENSATION FOR MCALPINE

Because it relied on documentary evidence outside the pleadings, it appears the trial court granted summary disposition under MCR 2.116(C)(10). As this Court explained in *Ward v Titan Ins Co*, 287 Mich App 552, 554; 791 NW2d 488 (2010):

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.

This case also involves the interpretation of a contract. We review the proper interpretation of a contract de novo as a question of law. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). As this Court in *Smith* further stated:

In interpreting a contract, this Court's obligation is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. *Wilkie [v Auto-Owners Ins Co]*, 469 Mich 41, 47; 664 NW2d 776 (2003).] If the contractual language is unambiguous, courts must interpret and enforce the contract as written. *Quality Products, supra* at 375. "Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.*

The disputed portion of the retainer agreement addresses as follows the amount Boomer will pay McAlpine from any judgment or settlement:

In exchange for its services for legal representation, McAlpine will be compensated as follows:

1. Out of the net proceeds generated in any of these separate matters or any one of them ("Net Proceeds" shall be the total value of any settlement or judgment, including non-monetary consideration, interest or costs, minus all Expenses), McAlpine shall first be paid 45%; and
2. Boomer will then receive the remaining 55% of the Net Proceeds.

3. McAlpine shall be reimbursed for the Expenses out of Boomer's share of the Net Proceeds.

McAlpine maintains the compensation provision requires that, after expenses of \$155,982.85,¹ McAlpine should receive 45 percent of the net proceeds of the arbitration award, plus reimbursement of \$155,982.85 for the expenses, plus an additional 45 percent of the expenses (\$70,192.28), for a total of \$522,697.66. Boomer takes the position that it should pay McAlpine 45 percent of the net proceeds of the arbitration award, plus reimburse McAlpine \$155,982.85 for the expenses out of Boomer's percentage, and keep any remainder. We agree with Boomer.

The parties do not dispute that McAlpine incurred expenses in the amount of \$155,982.85. According to the unambiguous terms of the contract, McAlpine is entitled to 45 percent of the net proceeds of the \$814,921.92 award, which is specifically defined as the total value of the award, "minus all [e]xpenses." Forty-five percent of the net proceeds amounts to \$296,522.58. Boomer is entitled to receive 55 percent of the net proceeds, which amounts to \$362,416.49. Boomer must also reimburse McAlpine for expenses out of its share of the net proceeds, which means Boomer must pay McAlpine \$155,982.85. McAlpine should, therefore, receive a total of \$452,505.43.

McAlpine's interpretation of the agreement fails for several reasons. First, McAlpine's calculation would permit it to actually recover 45 percent of the gross award, plus expenses, rather than the net proceeds as specifically defined in the agreement. Or, viewed another way, McAlpine is attempting to recover twice for some of the expenses already paid under the terms of the agreement. Both results are mathematically the same and are clearly contrary to the intent of the parties as expressed in the agreement.

We further observe that McAlpine's position appears to assume that, when all of the calculations are complete, the full arbitration award must be divided between McAlpine and Boomer. To the contrary, Boomer's point is well taken that the arbitration panel made the award to Boomer, not to McAlpine and Boomer. Thus, any remaining portion of the award after McAlpine is properly paid belongs to Boomer, or to Boomer and Steel Structures as their independent agreement may require. While item number three of the compensation clause may have some effect considering a different award amount or a different amount of expenses, it in no way provides, either explicitly or implicitly, that McAlpine is entitled to an additional 45 percent of the expenses as part of its attorney fee.² The agreement clearly provides that the

¹ The trial court's order indicates the amount of expenses as \$159,979.85. However, McAlpine states the amount of expenses as \$155,982.85, and Boomer also bases its calculations on that amount. Because \$155,982.85 is also the amount the parties cited in their trial court briefs, this is the amount to be used in calculating McAlpine's compensation.

² To the extent McAlpine suggests that the compensation clause was intended to protect its right to expenses for litigating other legal matters for Boomer, it is undisputed that McAlpine represented Boomer in only the Oxford Community School District matter and, in any case, the agreement explicitly provides that, if McAlpine provided additional representation, "each

parties intended that McAlpine would receive 45 percent of the net proceeds, plus reimbursement for expenses. This is what the trial court ruled and the trial court correctly denied McAlpine's motion for summary disposition and correctly granted summary disposition to Boomer.

B. OFFER OF JUDGMENT

On cross-appeal, Boomer argues that the trial court should have granted its request for attorney fees and costs under the offer of judgment rule, MCL 2.405. This Court reviews a trial court's denial of attorney fees under MCR 2.405 for an abuse of discretion. *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). We agree with McAlpine that Boomer failed to properly file a request for costs under the rule as required by MCL 2.405(D). Moreover, the record below and on appeal contains no documentation to support Boomer's assertion that it made an offer of judgment and that McAlpine rejected the offer. The trial court properly exercised its discretion in declining to award costs and fees to Boomer.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause

separate matter stands on its own and will not be aggregated for any reason in calculating the fees to be paid to McAlpine.”