

STATE OF MICHIGAN
COURT OF APPEALS

MAJIC WINDOW COMPANY,

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

THOMAS ROLANDO and KELLY ROLANDO,

Defendants/Counter-Plaintiffs/-
Appellees/Cross-Appellants,

and

HOMEOWNER LIEN RECOVERY FUND,

Defendant.

UNPUBLISHED

July 27, 2006

No. 259746

Oakland Circuit Court

LC No. 2003-051149-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, the trial court entered a judgment awarding plaintiff \$10,335, representing the \$15,500 amount remaining due on the parties' contract for the purchase and installation of windows at defendants' residence, less a credit of \$5,165 for repairs required to finish the job. Plaintiff appeals as of right, challenging the trial court's refusal to award attorney fees pursuant to the contract. Defendants cross appeal by delayed leave granted, challenging the trial court's dismissal of their counterclaims for violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* We affirm in part and remand for a determination of plaintiff's reasonable attorney fees.

This case arises from the sale of replacement fiberglass windows by plaintiff to defendants. Defendants believed that the windows they purchased would be manufactured by Comfort Line, but they were actually manufactured by Inline. Defendants were also unsatisfied with the installation of the windows and did not allow plaintiff to finish the job. Plaintiff subsequently filed a construction lien on defendants' property and brought this action to recover the unpaid purchase price on the contract. Defendants filed a countercomplaint alleging, *inter alia*, that plaintiff violated the MCPA. The trial court dismissed defendants' countercomplaint and entered judgment in favor of plaintiff for the remaining unpaid purchase price less the cost of

repairs necessary to correct some of plaintiff's installation work. The court also denied plaintiff's request for attorney fees.

On appeal, plaintiff argues that the trial court erred in denying its request for attorney fees as provided in the parties' contract. This Court generally reviews a trial court's decision to award or deny attorney fees for an abuse of discretion. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). Here, however, plaintiff argues that it was entitled to recover attorney fees under its contract with defendants. Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

Attorney fees are generally not recoverable as costs from the losing party in the absence of a statute or court rule authorizing an award of attorney fees. *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). However, an exception exists when parties specifically contract for the payment of attorney fees. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002); *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). When the provisions of a contract specifically contemplate attorney fees, they become part of the damages awardable under the contract for breach of the contract. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548-549; 362 NW2d 823 (1984).

In this case, the parties' contract provides, in relevant part:

In the event Owner commits any breach of this agreement, Owner shall be liable to Contractor for all Contractor's costs and attorney fees incurred by Contractor.

Plaintiff argues that because the contract provides for attorney fees in the event of "any breach," the trial court erred in finding that it was required to fully prevail on the contract in order to recover them. Defendants argue that plaintiff is not entitled to attorney fees because it also breached the contract.

The trial court denied defendants' breach of contract claim and found that defendants breached the contract, but it also specifically stated that "there was a breach of the contract by Majic in not performing in accordance with the wishes and desires of both Mr. and Mrs. Rolando." The law provides that two parties can breach a contract and the initial breaching party can still recover if its initial breach was not substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Because the trial court allowed plaintiff to recover on the contract, a decision not challenged on appeal, it necessarily found that plaintiff's breach was not substantial and reduced its award accordingly. Therefore, plaintiff was not barred from recovery under the contract as a result of its breach.

With regard to whether plaintiff had to prevail "entirely on the contract" in order to recover contractual attorney fees, we conclude that because the contract makes no mention of a prevailing party, such a requirement should not be read into it. MCR 2.625 requires that a party prevail in order to be entitled to attorney fees as part of its costs, but attorney fees under a contract are a part of damages, not costs. *Central Transport, supra* at 548. In *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996), this Court affirmed the trial court's decision denying the plaintiffs attorney fees under a land contract because they did not prevail in full and thus, were not the prevailing party. However, the contract in that case specifically

provided that the prevailing party could collect attorney fees. Therefore, the Court interpreted and applied the contract language. The same should be done here.

Where lawful contract language is clear, it must be enforced as written; judicial construction is not appropriate. *Rory, supra* at 461. Because it is clear from the trial court's decision that defendants were found to have breached the contract, and because the contract provides that plaintiff may recover attorney fees if defendants commit "any breach," the trial court erred by not awarding plaintiff attorney fees pursuant to the contract as part of its damages. We therefore remand this case for a determination of plaintiff's reasonable attorney fees. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195-196; 555 NW2d 733 (1996). The trial court may consider plaintiff's failure to recover all the damages it sought in determining the reasonableness of the amount to which plaintiff is entitled. *Schellenberg v Rochester, Michigan, Elks Lodge No 2225*, 228 Mich App 20, 44-45; 577 NW2d 163 (1998). Although plaintiff requests that it be allowed to present evidence on remand regarding its appellate attorney fees, the trial court must first make a determination whether the contract provides for recovery of appellate attorney fees. *Central Transport, supra* at 549.¹

On cross appeal, defendants argue that the trial court erred in denying its MCPA claim. A trial court's factual findings following a bench trial are reviewed for clear error, while its conclusion of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Defendants do not actually contest the trial court's factual findings, but rather contend that its ultimate decision was erroneous. We disagree.

Defendants assert that the trial court erred in concluding that plaintiff did not violate MCL 445.903(1)(a), (c), (e), (g), and (s) of the MCPA. These sections provide:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(a) Causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

* * *

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.

* * *

¹ In light of our decision, we find no merit to defendants' assertion that plaintiff should be sanctioned under MCR 7.216(C) for bringing a vexatious appeal. Additionally, it is unnecessary to address plaintiff's alternative argument that it is entitled to attorney fees under the Michigan Construction Lien Act, MCL 570.1101 *et. seq.*

(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

* * *

(g) Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004).

The trial court found that defendants wanted fiberglass windows and that the demonstration model used by plaintiff's representative was a Comfort Line window. There was no mention of a specific brand in the contract and the reference to "Fiber 1000" was not indicative on its face of any brand. Thomas Rolando "assumed" they had ordered Comfort Line windows, while Kelly Rolando testified that she was told they would receive Comfort Line windows. Although there was testimony that defendants were told the windows had a lifetime warranty, the contract clearly stated that there was a 50-year warranty, which was circumstantial evidence of no intent on the part of plaintiff to switch the windows. The court also found that the large stickers on the windows delivered to defendants' home identifying them as Inline windows was indicative of plaintiff's lack of intent to switch the windows. Further, the Inline windows performed superior to the Comfort Line windows. The evidence supports the trial court's findings, which defendants do not appear to dispute, and we conclude that the trial court's findings support its determination that defendants did not prove by a preponderance of the evidence that plaintiff violated the MCPA.

Affirmed in part and remanded for a determination of plaintiff's reasonable attorney fees consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood