STATE OF MICHIGAN

COURT OF APPEALS

LAURA HAMMERLE and PAUL HAMMERLE, Plaintiffs-Appellants, v HOWLING HAMMER BUILDERS, INC., LAKE ISABELLA PROPERTY OWNERS ASSOCIATION, and CENTRAL MICHIGAN SURVEYING & DEVELOPMENT CO., INC., Defendants, and ARTHUR DELORENZO and MARGARET DELORENZO, Defendants-Appellees.	UNPUBLISHED March 11, 2014 No. 313745 Isabella Circuit Court LC No. 2011-009008-NZ

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order awarding defendants[1] attorney fees pursuant to their motion for case evaluation sanctions brought under MCR 2.403(O). Because the circumstances of this case did not fall within MCR 2.403(O)(11)'s interest of justice exception, we affirm the award of case evaluation sanctions to defendants.

I. BACKGROUND

Plaintiffs and defendants own neighboring properties in Lake Isabella, Michigan. In 2010, defendants hired Howling Hammer Builders, Inc. to construct a residence on their property. Plaintiffs became concerned that the residence violated an elevation restriction in the Lake Isabella Property Owners Association (LIPOA) building and use restrictions and that the

[1] We will use the term "defendants" to refer to defendants-appellees, Arthur and Margaret DeLorenzo.

residence's proximity to the lake would impede their view of the lake. On March 9, 2011, plaintiffs filed suit against defendants, LIPOA, Howling Hammer, and Central Michigan Surveying & Development Co, Inc., who prepared a mortgage survey report of defendants' property. The evidence established that defendants' house was located within all the prescribed setbacks/offsets. But at least one portion of the basement was located less than a foot below the prescribed elevation minimum. On November 8, 2011, a case evaluation panel recommended an award of $2,000 in favor of plaintiffs on their claim against LIPOA and $10,000 against the other defendants. All the defendants accepted the award, but plaintiffs rejected it. Subsequently, the trial court granted summary disposition in favor of all defendants except for the DeLorenzos. Thereafter, the DeLorenzos filed a second summary disposition motion, which the court granted. The trial court then granted their motion for case evaluation sanctions.

II. ANALYSIS

Plaintiffs argue that the trial court abused its discretion in awarding sanctions because the circumstances of the case were unusual enough that the court should have applied the "interest of justice" exception to case evaluation sanctions found in MCR 2.403(O)(11).

We review the trial court's decision to grant case evaluation sanctions under MCR 2.403(O) 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. *Id.* "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

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.

Plaintiffs do not dispute that, according to the rule, defendants would be entitled to case evaluation sanctions because plaintiffs did not better their position after rejecting the original evaluation. Instead, plaintiffs claim that the "interest of justice" exception from MCR 2.403(O)(11) applies, which would circumvent the award of any case evaluation sanctions. MCR 2.403(O)(11) provides that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." However, "[t]he term 'interest of justice' . . . must not be too broadly applied so as to swallow the general rule of subsection 1 and must not be too narrowly construed so as to abrogate the exception." *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 448; 702 NW2d 637 (2005).

> [F]actors normally present in litigation, such as a refusal to settle being viewed as "reasonable," or that the rejecting party's claims are "not frivolous," or that disparity of economic status exists between the parties, are insufficient "without more" to justify not imposing sanctions in the "interest of justice." [*Id.*]

Instead, "interest of justice" exceptions have been found where the case is one of first impression, a party has engaged in misconduct, and the law is unsettled and substantial damages are at issue. *Id*. at 448-449, citing *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996). "The common thread in these examples," *Luidens* instructs, "is a public interest in having an issue judicially decided rather than merely settled by the parties." *Luidens*, 219 Mich App at 36.

Because none of the indicators from *Haliw* and *Luidens* was present in the instant case, the trial court did not abuse its discretion in failing to utilize the interests of justice exception.

Plaintiffs claim that delays in discovery and issuance of the trial court's summary disposition orders were grounds to invoke the exception. However, such delays are hardly "unusual." Indeed, experience shows that delays in discovery are somewhat common, as is a court taking a motion under advisement for a period of time. It is true that the court stated in the motion hearing addressing the first motion for case evaluation sanctions that there had "been an unusual set of circumstances that's delayed several things in this case." However, the court tailored defendants' claim for cost and fees to those that accrued after March 19, 2012, which is the date that the court previously denied case evaluations sanctions to the other defendants. Further, although delays in discovery can cause difficulty for a party in deciding how to proceed, plaintiffs do not assert on appeal that the delays in discovery were due to misconduct by defendants.

Additionally, plaintiffs claim that the case evaluation panel's failure to make individual awards against each of the defendants is ground for the court to refuse to award sanctions. However, the failure to comply with the court rule does not change the fact that by getting nothing ultimately, plaintiffs still failed to better their position after rejecting the award, regardless if defendants were apportioned the full $10,000 or even $1. Under these facts, the court's decision not to award costs because of the MCR 2.403(K) violation was within the range of principled outcomes.

Plaintiffs also claim that this case presents a public issue because numerous homeowners are affected by LIPOA's building and use restrictions. However, the actual issue in this case is a dispute between two neighbors, where one neighbor primarily sought monetary damages over the other's failure to adhere to a particular restrictive covenant. Because the house was legally within the prescribed setbacks, the court found that there was no causal connection between any violation of the elevation requirement, where an unseen portion of the basement fell below the required elevation, and plaintiffs' alleged damages. Accordingly, the trial court's finding that there was not a public interest at issue is not in error.

Plaintiffs also assert that it would be in the interest of justice to deny sanctions because the trial court and the case evaluations panel did not specifically address plaintiffs' claim for injunctive relief. However, the impact of injunctive relief is taken into account in the court rules. MCR 2.403(O)(5) provides that if the final verdict includes the award of equitable relief, the court is to consider the equitable relief when calculating whether the parties improved upon their case evaluation positions. Here, since the trial court dismissed all of plaintiffs' claims in the final verdict, plaintiffs' final outcome was still nothing, and they did not improve upon the original case evaluation award. Furthermore, plaintiffs could have moved under MCR

2.403(A)(3) to have their one claim for injunctive relief be exempt from case evaluation, but they did not.

Plaintiffs also assert that the trial court issued inconsistent decisions because it first found that defendants were subject to enforcement of the restrictive covenant when deciding the first summary disposition motion and then, in the second motion, the court dismissed plaintiffs' claims. However, in the second opinion the trial court never held that defendants were not subject to the restrictive covenants. Instead, the court merely held that plaintiffs had not established a causal connection between the technical violation of the elevation restriction and their alleged damages. Importantly, the court noted that if a homeowner complied with certain enumerated building restrictions, a homeowner could build below the cited elevation.

Finally, plaintiffs claim that the trial court inconsistently held that on one hand the case was not unusual and that on the other hand it was novel and complex. As plaintiffs note, the court did refer to the case presenting a "somewhat novel issue," but that issue was the liability of LIPOA and its responsibility for enforcing the building and use restrictions. The case against LIPOA was summarily dismissed in January 2012. Further, in the latter motion hearing, the court also referred to the issues presented as being "novel" and "complex," but that was in the context of evaluating the reasonableness of the fees of defendants' attorney. See *Smith*, 481 Mich at 529. Within the context of the interest of justice exception, the court noted that "[w]hile plaintiffs again attempt to label their case as unusual, the court does not find it to fit within the type of cases described in [*Luidens*, 219 Mich App 24]." The court was correct. This is not a case of first impression or concerning matters where the law is unsettled.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter