STATE OF MICHIGAN

COURT OF APPEALS

VICKI LYNN PHILLIPS,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

WOLGAST RESTORATION,

Defendant-Appellee,

and

DESHANO CONSTRUCTION,

Defendant/Cross-Defendant-Appellee,

and

CHASE MANHATTAN BANK USA, doing business as CHASE HOME FINANCE, LLC,

Defendant.

UNPUBLISHED
November 17, 2016

No. 328309
Gladwin Circuit Court
LC No. 13-007228-CK

VICKI LYNN PHILLIPS,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant/Cross-Plaintiff,

No. 329740
Gladwin Circuit Court
LC No. 13-007228-CK

and

WOLGAST RESTORATION,

Defendant-Appellee,

and

DESHANO CONSTRUCTION,

Defendant/Cross-Defendant,

and

CHASE MANHATTAN BANK, USA, doing business as CHASE HOME FINANCE, LLC,

Defendant.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

In these consolidated appeals, in Docket No. 328309, plaintiff, Vicki Lynn Phillips, appeals as of right the trial court's order dismissing defendant DeShano Construction under MCR 2.116(C)(7) on the basis of the parties' arbitration agreement. In Docket No. 329740, Phillips appeals as of right the trial court's judgment awarding offer of judgment attorney fees and costs to defendant Wolgast Restoration. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

DeShano originally built Phillips's home and sold it to Philips in 2005. At the time of the sale, Phillips and DeShano entered into a limited warranty agreement to cover construction defects, including major structural defects. The agreement provided that unresolved disputes between the parties would be resolved in binding arbitration.

In May 2013, a storm damaged Phillip's home. Phillips had insured the home through State Farm Insurance Company, who advised Phillips to find someone to do the repairs. Phillips hired Wolgast to repair the home. State Farm made an initial payment of $50,000 into an escrow account at Chase Bank, which held a mortgage on the home, and Chase Bank issued a check to Wolgast for approximately $16,600 to begin repairs. Wolgast hired Paragon Forensics to perform a thorough engineering assessment, and Paragon's report suggested that much of the damage to the home was "precipitated by numerous construction defects" and that "had the home been properly built, it is unlikely that any significant damage would have occurred."

Wolgast sent Paragon's report to State Farm, which questioned its obligation to provide coverage in light of the house's substandard construction. Given the uncertainty, Wolgast stopped making repairs. Wolgast's employee, Mike Bellor, testified at trial that Wolgast had earned all but approximately $3,800 of the initial $16,600 payment at the time it stopped repairs.

In December 2013, Phillips filed a complaint against State Farm, Wolgast, DeShano, and Chase Bank. Plaintiff alleged that State Farm had breached its obligations under the insurance policy, that Wolgast breached its duty by sharing Paragon's report with State Farm, that Wolgast and State Farm had engaged in fraudulent conduct, that DeShano breached its duties by failing to disclose defects in the home, and that she was entitled to the funds escrowed at Chase Bank.

In its answer to Phillips's complaint, DeShano raised the arbitration clause as an affirmative defense. Wolgast presented Phillips with an offer of judgment to settle the case for $500. Phillips did not respond, effectively rejecting the offer. A case evaluation panel issued a non-unanimous award in November 2014 that recommended that Phillips receive $25,000 from State Farm, $15,000 from Wolgast, and $10,000 from DeShano. Wolgast accepted the award; Phillips rejected it.

Shortly before trial, DeShano filed its motion for summary disposition on the basis of the arbitration clause. The trial court found that DeShano had not waived its rights but had remained in the litigation to make good-faith efforts to settle the case. It dismissed Phillips's claims against DeShano for arbitration.

Phillips's claims against Wolgast and State Farm proceeded to trial, during which Wolgast's counsel gave plaintiff a check for approximately $3,800, representing the amount that Bellor admitted Wolgast had not earned. Ultimately, the jury attributed 50% responsibility to DeShano and 50% to Phillips, and it found that neither State Farm nor Wolgast had acted wrongfully or breached material elements of their contracts. The trial court entered a judgment of no cause of action.

Following judgment, Wolgast moved for offer of judgment sanctions. The trial court granted the motion, finding that the no cause of action verdict was more favorable to Wolgast than its $500 offer of judgment. The trial court awarded Wolgast $2,482.15 in costs and $51,497.50 in attorney fees.

II. ARBITRATION DISMISSAL

A. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). MCR 2.116(C)(7) entitles a defendant to summary disposition if the plaintiff's claims are barred because of "an agreement to arbitrate or to litigate in a different forum . . . ."

We review de novo questions of law, including the existence and enforceability of an arbitration agreement. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). We also review de novo whether a party waived its rights to arbitration. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). We review "for clear error the trial

court's factual determinations regarding the applicable circumstances." *Id*. The trial court clearly errs when we are definitely and firmly convinced that it made a mistake. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

B. ANALYSIS

In Docket No. 328309, Phillips first contends that the existence of the contractual arbitration agreement did not bar her torts-based claims against DeShano. We disagree.

The economic loss doctrine provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." *Neibarger v Universal Coops, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992) (citation and quotation marks omitted, brackets in *Neibarger*). This doctrine applies to consumer, as well as commercial, transactions. *Sherman v Sea Ray Boats*, 251 Mich App 41, 50-51, 53-54; 649 NW2d 783 (2002). A plaintiff may maintain a tort action only if the defendant owes the plaintiff a duty separate and distinct from the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004).

In this case, Phillips alleged that DeShano should have known about the defects in the structure, failed to properly represent the property when marking it, and violated its duty to disclose structural defects. The parties only had a legal relationship because DeShano contracted to sell Phillips the home. Phillips's claims involved no duties that arose separately and independently from that relationship. We conclude that Phillips's remedies lie solely with the parties' contract, which provided that any disputes would be resolved by binding arbitration.

Phillips provides no support for her additional assertions that arbitration provisions are contrary to the public policy of this state or that the enforceability of the contract was tied to a dissolved condominium project, and we reject her assertions for failing to support them. See *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Second, Phillips contends that DeShano waived its arbitration provision by participating in Phillips's case for 17 months. We again disagree.

Generally, courts disfavor the waiver of a contractual right to arbitration. *Madison Dist Pub Sch*, 247 Mich App at 588. However, a party may waive an arbitration agreement by conduct, with each case decided on the particular facts and circumstances of that case. *Id*. at 589. A party seeking to establish that another party has waived an arbitration clause must establish that the party seeking to enforce the clause has acted inconsistent with the right to arbitration, and that those acts prejudiced the opposing party. *Kauffman v Chicago Corp*, 187 Mich App 284, 292; 466 NW2d 726 (1991). Pursuit of discovery is inconsistent with a demand for arbitration. *Joba Constr Co v Monroe Co Drain Comm'r*, 150 Mich App 173, 178-179; 388 NW2d 251 (1986). A party may also waive arbitration by failing to state it as an affirmative defense, conducting discovery, exchanging witness and exhibit lists, filing motions to compel discovery, and participating in mediation and facilitation. See *Myers*, 247 Mich App at 596-597.

While Phillips contends that DeShano did assert the arbitration clause as a defense right away and delayed in bringing its summary disposition motion for 17 months, a failure to timely assert a right without more is a forfeiture, not a waiver. See *Quality Prods & Concepts Co v*

Nagel Precision, Inc, 469 Mich 362, 379; 666 NW2d 251 (2003). In the interim, DeShano did attend scheduling and settlement conferences and defended the depositions requested by other parties. However, DeShano did not conduct any independent discovery or file any motions other than its eventual motion for summary disposition. At the hearing on the motion, DeShano asserted that its presence at case evaluation and facilitation were attempts to settle the dispute. We are not definitely and firmly convinced that the trial court made a mistake when it found that DeShano did not engage in the litigation in a way inconsistent with its rights to arbitration. Accordingly, we conclude that the trial court properly determined that DeShano had not waived its right to arbitration, and it properly granted summary disposition under MCR 2.116(C)(7).

III. OFFER OF JUDGMENT SANCTIONS

A. STANDARDS OF REVIEW

"This Court reviews a trial court's decision to award sanctions under MCR 2.405 for an abuse of discretion." *J C Bldg Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). The trial court abuses its discretion when its decision falls outside the reasonable and principled range of outcomes. *Augustine*, 292 Mich App at 424. We review de novo the interpretation and application of our court rules. *Id*. at 423.

B. ANALYSIS

In Docket No. 329740, Phillips contends that the trial court improperly awarded Wolgast offer of judgment sanctions under MCR 2.405. We disagree.

When a party rejects an offer of judgment, "[i]f the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." MCR 2.405(D)(1). The trial court may not award offer of judgment sanctions if the case has been submitted to case evaluation, unless the case evaluation award was not unanimous. MRE 2.405(E).

In this case, the case evaluation award was not unanimous. Therefore, MCR 2.405(E) does not preclude Wolgast from seeking offer of judgment sanctions. Phillips's reliance on cases interpreting previous versions of MCR 2.405 is misplaced.

Phillips also contends that awarding Wolgast offer of judgment sanctions was not in the interest of justice because Wolgast engaged in gamesmanship when it offered only $500 to settle the case but later paid $3,800 that it admitted it had not earned. We agree with the trial court's conclusion that offer of judgment sanctions were not against the interests of justice.

"MCR 2.405 can be, and sometimes is, abused by making a de minimis offer of judgment early in a case, not with intention to settle, but with the hopes of tacking attorney fees to costs in the event of success on trial." *Sanders v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987). MCR 2.405(D)(3) provides that "[t]he court may, in the interest of justice, refuse to award an attorney fee under this rule." The interests of justice exception does not apply absent unusual circumstances, but it may apply when the offer of judgment rule was used for gamesmanship rather than sincere efforts at negotiation. *Luidens v 63rd Dist Court*, 219 Mich App 24, 32-33, 35; 555 NW2d 709 (1996).

While Wolgast's initial, low offer of judgment may be viewed as insincere, Wolgast continued to engage in settlement negotiations throughout the case, while there is no evidence that Phillips was similarly engaged. Phillips could have, but did not, make a counter-offer to Wolgast's low offer of judgment. Phillips rejected the $15,000 non-unanimous case evaluation award that Wolgast accepted. Phillips acknowledges on appeal that she rejected a $25,000 offer from Wolgast at or immediately before the trial. And Phillips also sought $1,000,000 in damages on a home worth $200,000. The jury ultimately found that Wolgast had not acted wrongly. Given that the overriding purpose of the court rule was to encourage settlement and that Wolgast actively engaged while Phillips utterly failed to engage, we conclude that the trial court's decision to award offer of judgment sanctions was a reasonable and principled outcome.

We also reject Phillips's argument that Wolgast was not a "prevailing party." While a party must be a prevailing party for entitlement to costs under MCR 2.625, the language of MCR 2.405 contains no such requirement and Phillips provides no legal basis for imposing one.

Finally, Phillips contends that the trial court's attorney fee award was not reasonable. Phillips did not raise this argument before the trial court, and thus it is not preserved for appeal. See *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). This Court could review this issue for a plain error affecting Phillips's substantial rights. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). However, given the extremely cursory nature of Phillips's argument, her failure to raise the issue in her statement of questions presented, and her failure to present any evidence to support her position that the award of fees was unreasonable, we conclude that Phillips has abandoned this issue. See MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

We affirm. As the prevailing parties, DeShano and Wolgast may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Peter D. O'Connell
/s/ Elizabeth L.Gleicher