STATE OF MICHIGAN

COURT OF APPEALS

WAFA ANTON,

Plaintiff/Counter-Defendant-Appellant,

v

BRYNMAWR CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee/Cross-Appellee,

and

SIGNAL BUILDING COMPANY,

Third-Party Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
May 22, 2007

No. 265828
Oakland Circuit Court
LC No. 2001-033436-CZ

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff Wafa Anton appeals as of right the trial court's order granting her equitable relief instead of money damages for unsatisfactory repairs to her condominium. We affirm in part and reverse in part. Plaintiff also appeals as of right the trial court's award of $13,443.34 to defendant Brynmawr Condominium Association (Brynmawr) on its counterclaim for unpaid assessment fees. We affirm. Finally, plaintiff appeals as of right the trial court's order overturning its previous ruling granting her case evaluation sanctions. We reverse. On cross appeal, defendant Signal Building Company (Signal) appeals as of right the trial court's order denying its motion for dismissal. Signal also appeals as of right the trial court's findings that its repairs of plaintiff's condominium were substandard or defective. We affirm in both instances.

I. Facts

Plaintiff owns a condominium unit in a complex governed by Brynmawr in West Bloomfield Township, Michigan. On May 3, 1999, plaintiff's condominium unit was damaged in a fire. Brynmawr held a policy insuring the condominium complex from fire damage. Plaintiff did not have a separate insurance policy covering damage to her

condominium. Apparently, Brynmawr was reimbursed for fire damage to plaintiff's unit and to common elements in the complex. Brynmawr hired Signal to repair the damage.

After Signal completed the repairs, plaintiff claimed that the repair work was substandard. On May 9, 2001, plaintiff filed a cause of action against Brynmawr to recover approximately $22,000 in money damages, noting 49 specific instances in which she demanded compensation for substandard work. Notably, plaintiff claimed that repairs to items located both outside and inside her unit were substandard. Brynmawr subsequently filed a third-party claim for indemnification against Signal.

After a bench trial, the trial court found that plaintiff established that substandard repairs occurred in 31 specific instances and granted equitable relief in lieu of money damages. The trial court did not determine whether each damaged item was a common element controlled by Brynmawr or was part of the unit owned by plaintiff. The trial court also held that Signal was liable to Brynmawr for all but four of the instances of substandard work.

In March 2001, after defendant returned plaintiff's monthly payments on the ground that they did not cover the entire amount owed, plaintiff ceased paying her condominium association fees. Brynmawr recorded a lien against her unit and, on July 2, 2001, filed a counterclaim to collect the unpaid fees.

After considering Brynmawr's motion for summary disposition, the trial court determined that plaintiff was liable for the unpaid condominium association fees, but concluded that the extent of her liability was a disputed issue for trial. Although the trial court ruled on this motion on January 23, 2002, plaintiff failed to make additional association fee payments during the pendency of the trial. By April 7, 2003, plaintiff owed $13,443.34 in unpaid assessments, fees, and interest. The trial court awarded Brynmawr this amount on its counterclaim.

The parties had submitted this case for evaluation on February 14, 2002. The case evaluation valued plaintiff's claim at $2,500 and Brynmawr's claim at $5,000. Neither plaintiff nor Brynmawr accepted the case evaluation. When plaintiff was awarded equitable relief in the bench trial, the parties agreed to assign a stipulated value of at least $4,500 for this award.

Plaintiff then moved for case evaluation sanctions against Brynmawr, claiming that she obtained a verdict that was at least ten percent more favorable to her than the case evaluation. The parties stipulated that, on the date of the case evaluation, Brynmawr's counterclaim was worth $6,235.34. At the January 14, 2004, hearing on this motion, the trial court concluded that plaintiff improved her position by more than ten percent and, pursuant to MCR 2.403(O), she was entitled to sanctions against Brynmawr. However, the presiding judge died before signing the order granting plaintiff's request for sanctions. On April 14, 2005, after a new judge was assigned to the case, the trial court signed the order granting plaintiff case evaluation sanctions for the reasons included on the record in the January 14, 2004 hearing.

Brynmawr moved for reconsideration of this order. The trial court granted this motion, finding that a "net evaluation" method should have been used to determine whether the verdict was more favorable than the case evaluation.[1] The trial court subtracted $4,500 as the stipulated value of plaintiff's award of equitable relief from the $13,443.34 award on the counterclaim to calculate a net verdict of $8,943.34 in favor of Brynmawr. Because the net verdict exceeded the $2,500 net evaluation award for Brynmawr, the trial court concluded, plaintiff was not entitled to case evaluation sanctions.

II. Appropriateness of Relief Granted

First, plaintiff claims that the trial court erroneously granted equitable relief for her claim of defective repairs when she requested relief in the form of damages. We agree in part. Pursuant to the terms of the association's bylaws, plaintiff should have received money damages to compensate for defective repairs to her condominium unit. However, equitable relief was appropriate to address defective repairs to the common elements of the condominium project.

A condominium is "[a] single real-estate unit in a multi-unit development in which a person has both separate ownership of a unit and a common interest, along with the development's other owners, in the common areas." Black's Law Dictionary (8th ed). The co-owner of a condominium "has an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed."[2] MCL 559.163. A "condominium unit" is "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed . . . ." MCL 559.104(3). The "common elements" consist of "the portions of the condominium project other than the condominium units." MCL 559.103(6).

Co-owners are required to comply with the terms of the master deed and the association bylaws. MCL 559.165. Pursuant to MCL 559.156(c), the bylaws may contain provisions "[f]or insuring the co-owners against risks affecting the condominium project, without prejudice to the right of each co-owner to insure his condominium unit or condominium units on his own account and for his own benefit."

A copy of the master deed for plaintiff's condominium unit is not included with the trial court record. However, the trial court admitted a copy of Brynmawr's bylaws in evidence. The bylaws indicate that Brynmawr is responsible for the management, maintenance, operation, and administration of the common elements in accordance with the terms of the bylaws and the master deed. Specifically, Brynmawr is responsible for "rebuild[ing] improvements after casualty, subject to the terms" of the bylaws.

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[1] The trial court defined "net evaluation" as "the difference between an award on a party's claim and the counterclaim against that party."

[2] In the Condominium Act, MCL 559.101 *et seq*, a "co-owner" refers to the owner of a condominium unit within a condominium project. MCL 559.106(1).

Further, the bylaws require Brynmawr to insure the common elements of the complex against fire. Article IV, Section 1, Subsection B of the bylaws provides as follows:

> All Common Elements of the Condominium shall be insured against fire and other perils covered by a standard extended coverage endorsement, in an amount equal to the maximum insurable replacement value, excluding foundation and excavation costs, as determined annually by the Board of Directors of the Association in consultation with its appropriate professional advisors. Such coverage may also include interior walls within any Unit and the pipes, wires, conduits and ducts contained therein and shall further include all fixtures, equipment, doors and trim within a Unit which were furnished with the Unit as standard items, in accord with the plans and specifications for the Project on file with the Township of West Bloomfield, or such replacements thereof as do not exceed the cost of such standard items. Such fixtures, equipment and trim are to consist of standard bathroom and kitchen fixtures, countertops and cabinets, but shall specifically exclude appliances, water heaters, heating and air conditioning equipment, wallcovering and floor covering. Any improvements or items installed in addition to such standard items, regardless of by whom installed, shall be covered by insurance obtained by and at the expense of the individual Co-owners . . . .

The parties do not dispute that Brynmawr insured the common elements of the condominium project from fire damage, or that Brynmawr was reimbursed for damage caused by the fire.

Article IV, Section 1, Subsection D of the bylaws governs the distribution of policy proceeds. This subsection states:

> Proceeds of all insurance policies owned by the Association shall be received by the Association, held in a separate account and distributed to the Association, the Co-owners and their mortgagees as their interests may appear; provided, however, whenever repair or reconstruction of the Condominium shall be required as provided in Article V of these bylaws, the proceeds of any insurance received by the Association as a result of any loss requiring repair or reconstruction shall be applied for such repair or reconstruction, and in no event shall hazard insurance proceeds be used for any purpose other than for repair, replacement or reconstruction of the Condominium unless all of the institutional holders of first mortgages or Units in the Condominium have given their prior written approval.

According to these terms, when Brynmawr receives proceeds from a policy, it is responsible for distributing the proceeds to the proper party. Notably, the bylaws require that the insurance proceeds recovered by Brynmawr as the result of a loss requiring repair or reconstruction shall be used to repair or reconstruct the damaged item.

However, Brynmawr is not directly responsible for repairing and reconstructing everything in the complex. Article V, Section 3, Subsection A of the bylaws specifies the following:

> If the damage is only to a part of a Unit or common elements which are the responsibility of a Co-owner to maintain and repair and/or insure, it shall be the responsibility of the Co-owner to repair such damage in accordance with Subsection B hereof. In all other cases, the responsibility for reconstruction and repair, although not necessarily the costs thereof, shall be that of the Association.

Accordingly, the responsibility for repairing and reconstructing damage in the complex is divided between Brynmawr and the co-owners. Article V, Section 3, Subsection B of the bylaws identifies as follows the items for which a co-owner is responsible for repairing:

> Regardless of the cause or nature of any damage or deterioration, each Co-owner shall be responsible for the reconstruction and repair of the interior of the Co-owner's Unit and all personal property, including, but not limited to, floor coverings, window shades, draperies, interior walls (but not any Common Elements therein), wall coverings, interior trim, furniture, light fixtures, all appliances, whether freestanding or built-in. In the event damage to interior walls within a Co-owner's Unit or to pipes, wires, conduits, ducts or other Common Elements therein is covered by insurance held by the Association, then the reconstruction or repair shall be the responsibility of the Association in accordance with Section 4 of [Article V], although the responsibility for costs thereof shall be allocated in accordance with the provisions of this Section and Section 4. In no event shall the Association be responsible for restoration of more than finished, unpainted drywall in the case of damage to ceilings and walls which are the responsibility of the Association under this Article. If any other interior portion of a Unit is covered by insurance held by the Association for the benefit of the Co-owner, the Co-owner shall be entitled to receive the proceeds of insurance relative thereto, (but the Co-owner shall be responsible for any deductible amount), and if there is a mortgagee endorsement, the products shall be payable to the Co-owner and the mortgagee jointly. In the event of substantial damage to or destruction of any Unit or any part of the Common Elements, the Association promptly shall so notify each institutional holder of a first mortgage lien on any Unit in the Condominium.

Article V, Section 4 of the bylaws identifies as follows the items for which Brynmawr is responsible for repairing:

> Subject to the responsibility of the individual Co-owners as outlined in [Article V, Section 3], and other provisions of these Bylaws or the Amended and Restated Master Deed applicable to such situations, the Association shall be responsible for the reconstruction and repair of the Common Elements. In no event shall the Association be responsible for any damage to the contents of a Unit and/or any personal property of any Co-owner or Limited Common Elements for which the Co-owner has responsibility. Immediately after a casualty causing damage to property for which the Association has the responsibility of repair and reconstruction, the Association shall obtain reliable and detailed estimates of the cost to replace the damaged property in a condition as good as that existing before the damage.

These bylaws indicate that Brynmawr is primarily responsible for repairing and reconstructing damaged common elements and, presumably, may receive insurance proceeds to cover the costs of these repairs. Conversely, if covered, the bylaws require Brynmawr to distribute insurance proceeds to a co-owner to cover the cost of repairs and reconstruction for which the co-owner is responsible. Therefore, Brynmawr properly used insurance proceeds to repair common elements damaged in the fire. To the extent that the repairs to the common elements were substandard, plaintiff is not entitled to money damages. Instead, an award granting equitable relief, by specifically requiring Brynmawr to address and fix lingering deficiencies to the common elements caused by the fire is appropriate.

However, plaintiff was entitled to receive the insurance proceeds covering items and repairs for which she had responsibility pursuant to the bylaws. Instead of directly repairing damage for which she was responsible, Brynmawr should have distributed insurance proceeds to plaintiff to cover these repairs. Because Brynmawr was not required to directly repair damage for which plaintiff was responsible, Brynmawr is also not required to repair lingering deficiencies to these items. However, Brynmawr must reimburse plaintiff for these substandard repairs. Accordingly, plaintiff is entitled to receive money damages to address deficiencies in portions of the condominium that she is responsible for repairing and reconstructing.

The bylaws do not identify the common elements of the complex or describe the individual property rights held by each co-owner. Instead, the bylaws indicate that the provisions of the amended and restated master deed govern the meanings and identifications of these terms. Because a copy of the master deed is not included in the trial court record, we are unable to determine whether Brynmawr or plaintiff is responsible for repairing each of the 31 instances in which the trial court concluded that repairs were substandard. Accordingly, we remand to the trial court to determine, based on the terms of the master deed and the bylaws, whether plaintiff should receive equitable relief (specifically, specific performance to address lingering deficiencies) or money damages in each of the 31 identified instances in which the repairs in question were substandard.[3]

III. Liability for Unpaid Assessments

Next, plaintiff argues that the trial court clearly erred when it ordered her to pay Brynmawr $13,443.34 in unpaid association assessments, late fees, and interest, and that she should only be ordered to pay $10,496 in unpaid assessments and fees. Specifically, plaintiff argues that she was not responsible for an August 1, 2000, assessment for $600 because the association never provided her with justification or explanation for it. Further, plaintiff argues that the association forfeited any right to collect late fees on the assessment payments when it refused to accept her monthly payments and returned her checks to her. We disagree.

We review a trial court's factual findings for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). "'A finding is clearly erroneous when, although

[3] We note that the question whether the court should award money damages or equitable relief was not raised until after the proofs had been completed.

there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed.'" *Id.* at 387, quoting *Vivian v Roscommon Co Bd of Comm'rs*, 164 Mich App 234, 238-239; 416 NW2d 394 (1987), aff'd 433 Mich 511 (1989).

The trial court did not clearly err when it included the disputed late fees and assessments in its calculations and awarded Brynmawr $13,443.34 in unpaid assessments and fees. First, the bylaws authorize Brynmawr to impose additional assessments at its discretion. Brynmawr established the legitimacy of the disputed $600 additional assessment through authenticated business records. An agent of Brynmawr also testified that the additional assessment was levied against co-owners in the association. Plaintiff is obligated to pay this assessment.

Plaintiff is also obligated to pay the disputed late fees. If a condominium association is successful in an action arising from the alleged default of a co-owner, the association may recover costs and reasonable attorney fees associated with that action, to the extent provided by the association's bylaws. MCL 559.206(b); *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 683; 713 NW2d 814 (2006). Brynmawr's bylaws provide that the association may collect late fees and interest for unpaid assessments. Plaintiff admitted at trial that she owed assessments dating from March 2001. Brynmawr had a right to refuse partial payment of the amount due, and plaintiff failed to make payment in full at her own peril. Because the payments were indeed owing, the assessment of late charges and attorney fees was proper. Based on this evidence, the trial court did not clearly err when it found plaintiff liable for the late fees incurred on the unpaid assessments.

IV. Case Evaluation Sanctions

Finally, plaintiff argues that the trial court erroneously compared her case evaluation against the $13,443.34 trial court award to determine if she was entitled to case evaluation sanctions. Instead, she argues, the trial court should have upheld its original order awarding her sanctions because it had properly compared her case evaluation against the value of the award in favor of Brynmawr on the date of the case evaluation to determine if she was entitled to sanctions. We agree. The parties presented the court with a stipulation of facts that included the following:

> 3. That the portion of the award in this matter of $13,443.34 that was applicable on February 14, 2002, the date of case evaluation, was $6,235.34.
>
> 4. That Defendant's costs to repair Plaintiff's residence, pursuant to the August 5, 2003, Order Granting Equitable Relief, are *at least* $4,500.00. [Emphasis added.]

Plaintiff and Brynmawr disagree regarding the significance and meaning of this stipulation. Brynmawr asserts that the stipulation simply supplied the amount of attorney fees and costs should the court determine that plaintiff improved her position by ten percent, but did not represent an agreement that $6,235 was the figure to be used in making that determination. Plaintiff takes the opposite position. Although the stipulation is ambiguous, it is significant that Brynmawr did not file a response to "Plaintiff's Motion for Determination that She Improved Her Position by 10% for Purposes of Case Evaluation Sanctions." And, when the parties appeared before the court to argue the motion, Brynmawr never asserted that $13,443.34 was the

correct figure to be used under the court rule. Rather, it argued that it should be deemed to have accepted the case evaluation because the award of $2,500 was a pass-through from Signal to plaintiff, and Brynmawr really had no role in accepting or rejecting that evaluation.

There also appeared to be a dispute regarding whether the evaluation contemplated that plaintiff receive $2,500 or pay $2,500. The court rejected Brynmawr's arguments, and Brynmawr's counsel then stated, "Your Honor, we've agreed to all the numbers so we'll present a judgment." An order was entered, and four months later (almost seven months after the hearing on plaintiff's motion), Brynmawr argued for the first time that the $13,443.34 figure should have been used in ruling on plaintiff's motion. We conclude that Brynmawr's conduct is wholly consistent with plaintiff's position and is inconsistent with Brynmawr's. Further, the stipulation clearly stated that the cost of the repairs was *at least* $4,500, indicating that the parties agreed that this figure had some significance in relation to the calculations. If the $13,443.34 had been regarded as relevant to the calculation under the court rule, the parties would no doubt have either stipulated to an exact figure or sought a determination of the actual cost.[4] Accordingly, the trial court abused its discretion when it ignored this stipulated value and compared plaintiff's case evaluation to the judgment that Brynmawr was awarded at trial to determine if she was entitled to case evaluation sanctions.

V. Motion for Dismissal

On cross appeal, Signal claims that the trial court erroneously denied its MCR 2.504(B)(2) motion for dismissal. Specifically, Signal argues that the evidence presented at trial failed to establish that it breached its contractual duties to Brynmawr or that it owed plaintiff a separate and distinct duty from the duty it owned to Brynmawr. We do not agree. We review the trial court's factual findings in a bench trial for clear error and review questions of law de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

A trial court may grant a defendant's motion for involuntary dismissal in a bench trial after the plaintiff presents her evidence if the court determines that, on the facts and the law, the plaintiff failed to establish a right to relief. MCR 2.504(B)(2). "[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as a trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). The trial court is under no obligation to view and interpret the evidence in a manner that is most favorable to the plaintiff. *Id*.

Signal's motion was premature. When Signal moved for involuntary dismissal, Brynmawr, a third-party plaintiff to the indemnification claim, had not yet had the opportunity to offer evidence regarding the terms of its contract with Signal or indicating whether Signal was

[4] Even were we to conclude that the court properly used the $13,443.34 figure, we would still reverse because the court erred in using the $4,500 figure when the stipulation stated that the cost of the repairs was *at least* this much.

liable for indemnification to Brynmawr. Further, Signal failed to move for involuntary dismissal after Brynmawr presented its proofs. Because Signal only moved for dismissal before Brynmawr presented its proofs, Signal's motion failed to meet the requirements of MCR 2.504(B)(2) and its motion was properly denied.

Signal's reliance on *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467, 469-470; 683 NW2d 587 (2004), is misplaced. Plaintiff alleged in her complaint that Brynmawr violated its duty to repair her condominium pursuant to the terms of the association's bylaws. Plaintiff did not have the burden to establish the terms of Signal's contractual duty to Brynmawr or to demonstrate that Signal owned her a "separate and distinct" duty from the duty found in the underlying contractual obligation. At the time Signal moved for dismissal, the trial court could not fully evaluate Signal's liability under the third-party claim. Accordingly, the trial court properly denied Signal's motion.

V. Trial Court's Findings of Substandard/Defective Repairs

Next, Signal argues that the trial court clearly erred when it found that the quality of its repair work was substandard. We disagree. Again, we review the trial court's findings of fact in a bench trial for clear error. *Sands Appliance Services*, *supra* at 238.

Although Brynmawr defended the quality of Signal's work and plaintiff was not privy to the terms of the contract between Brynmawr and Signal, the trial court still had sufficient evidence to conclude that Brynmawr was responsible for the work performed by Signal and that Signal's work was objectively substandard. At trial, Signal identified areas of the condominium that it contracted with Brynmawr to repair. Photographs of these areas admitted in evidence supported the court's conclusion that the repair work was shoddy and that replacement parts were poorly installed. The trial court did not clearly err when it concluded that the quality of Signal's repair work in the identified instances was substandard.

Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White