STATE OF MICHIGAN

COURT OF APPEALS

NORMAN R. HUGHES,

Plaintiff-Counter-Defendant/Appellant

V

CHRISTOPHER M. AND PAMELA J. HALL,

Defendants-Counter-Plaintiffs/Appellee.

UNPUBLISHED
July 3, 2003

No. 235033
Lapeer Circuit Court
LC No. 96-023073-CH

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff, Norman R. Hughes, appeals as of right from a judgment in favor of defendants, Christopher M. and Pamela J. Hall in this breach of contract claim.[1] We affirm.

This case arises out of a construction contract. Plaintiff is an architectural engineer and a licensed builder. Defendants contacted plaintiff about remodeling their basement in November 1995. Plaintiff began work on the basement on December 12, 1995. Plaintiff and defendants entered into a contract on December 18, 1995 under which plaintiff would make certain improvements to defendants' basement in exchange for $18,600. The contract called for plaintiff to provide and install a sub-floor and finished floor, cabinets and countertops, rough and finish plumbing, structural reinforcement of the first floor, a ceiling, and to add and modify walls.

Defendants observed plaintiff's work on a daily basis. Throughout the progress of the work, defendants and plaintiff agreed to substitute a booth for some of the cabinets, to modify one countertop, upgrade the ceiling tile, relocate a support column and install a bar sink. In March 1996 defendants became dissatisfied with the quality of plaintiff's work specifically finding the sub-floor, ceiling, and walls plaintiff installed unacceptable. Defendants locked plaintiff out of the work site. Defendants had already paid plaintiff $12,400 of the contract amount.

[1] For the sake on efficiency and clarity we refer to plaintiff-counter-defendant/appellant as plaintiff, and defendants-counter-plaintiffs/appellees as defendants throughout the body of this opinion.

Defendants hired Peter Neumeyer, an expert in the area of building construction, to evaluate the quantity of work that plaintiff had completed and compute its value under the contract. Neumeyer found that the ceiling, sub-floor, wall-framing, door-framing, and beam and joists installed by plaintiff were either installed poorly or improperly. Also, plaintiff had installed an unnecessary beam, and unnecessary floor joists. Neumeyer evaluated the value of plaintiff's work based on the amount of work completed and the prices stated in the contract and determined that $9,156.19 of the contract had not been completed, and that as a result, defendants determined they had overpaid plaintiff by $2,888.84.

Defendants later hired James Brown to complete the remodeling of their basement. Brown demolished, removed, and replaced the ceiling and sub-floor plaintiff installed. Brown also corrected the jambs on the door-walls plaintiff had installed. The value of Brown's contract with defendants was $7,710. The portion of the money paid to Brown to remedy plaintiff's work was $3,150.

Plaintiff brought an action to recover the remainder of the contract amount, and to recover additional damages. Plaintiff sought additional damages as modifications of the original contract, or in the alternative, under a theory of quantum meruit. Defendants filed a counter-complaint alleging plaintiff breached the contract and sought damages for the breach plus costs, interest, and attorney fees. After a protracted discovery period, the case eventually went to a bench trial. The trial court found that plaintiff's quantum meruit claim was frivolous and awarded defendants sanctions of attorney fees and costs. The trial court also awarded defendants damages for the actual loss they suffered due to plaintiff's breach of the contract. This appeal followed.

Plaintiff first argues on appeal that the trial court clearly erred when it found that plaintiff's claims were frivolous and violated MCR 2.114(F). We review a trial court's finding that a plaintiff's claim is frivolous for clear error. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). This Court reviews the trial court's findings of fact for clear error. MCR 5.974(I); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake was made. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). Moreover, this Court reviews a trial court's findings of fact for clear error giving special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility. MCR 2.613(C); *H J Tucker & Assoc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999).

A claim is frivolous when the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, or the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true, or the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a); *Cvengros, supra*, 216 Mich App 266-267. A determination whether a claim is frivolous depends upon the particular circumstances of each case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996).

Here, the trial court found that plaintiff's quantum meruit claim was devoid of arguable legal merit and stated as follows:

> In this case the Plaintiff argued that under a theory of quantum meruit, it was entitled to $20,595.42 in damages for the increased benefit it provided to the "evaluation, resale, enjoyment and use of the [Defendant's] residence." (See Plaintiff's Complaint at §22.) This argument was based on the Plaintiff's Time Sheet, where such costs as postage and correspondence fees were included in the calculations. The claim wholly ignored the fact that the Plaintiff was under an express contract to provide the remodeling for a fixed price of $18,600.00. The express contract said nothing about, nor contemplated payment for, such items as the cost of Plaintiff's personal services, mileage, or project reviews.
>
> As a matter of horn book law a contract will not be implied at law where there is an express contract covering the same subject matter. Thompson v Bronk; Spartan Asphalt, supra. In this case the Plaintiff's claims for unjust enrichment were based on the services it agreed to provide under the express contract. The modifications which were made to the contract were just that: modifications. They did not materially alter it's terms, nor the price the Plaintiff agreed to provide work for.
>
> For these reasons the Court first finds that the Plaintiff's claim for $20,595.42 in damages was frivolous. Given the existence of the express contract, the Plaintiff had no reasonable basis to believe that it could charge the Defendants for any of the items described in the Time Sheet. See MCLA 600.2591(3)(a). Pursuant to MCR 2.114(F), the Court will award the Defendants costs in the amount of $1,681.40, and attorneys fees in the amount of $15,145.00. The Plaintiff's claim for quantum meruit was not made in good faith.

A plaintiff may not bring a quantum meruit claim if it fully performed its services under a valid express contract. *Barber v SMH, Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). It is well-settled that "[a]n implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991). In *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976), this Court recognized that "while an express contract is in force between the parties, a contract cannot be implied in law which covers the same subject matter." The *Cascade* Court went on to explain that "the rule does not apply in a case such as this one where recovery is sought for items not contemplated in the original contract." *Id*.

In the case at bar, an express contract existed between the parties for construction in defendants' basement. Both parties agree that no written modifications were made to the contract. The trial court expressly found that the modifications that were made to the express contract were not material, and did not alter the terms of the contract, including the work to be performed or the price to be tendered under the contract. After reviewing the record we are not left with a firm and definite conviction that a mistake was made when the trial court made the factual determination that the "modifications" to the contract were not "extras" outside the scope of the express contract. *In re Jackson, supra*, 199 Mich App 25. Therefore, unlike the situation in *Cascade*, the present case does not involve extra work performed not contemplated by the contract. Rather, plaintiff here merely sought damages in connection with the work he performed in fulfillment of his obligation under the contract, and thus, plaintiff may not bring a

quantum meruit claim. *Scholz, supra,* 437 Mich 93; *Barber, supra,* 202 Mich App 375; *Cascade, supra,* 70 Mich App 426.

Despite plaintiff's vehement and copious arguments in his brief on appeal that his claim in quantum meruit had at least some "arguable legal merit," giving the trial court special deference because of its superior ability to view the witnesses, we find that the trial court did not clearly err in determining that plaintiff's claim was devoid of arguable legal merit, and was therefore frivolous. MCL 600.2591(3)(a); MCR 2.613(C); *H J Tucker, supra,* 234 Mich App 563; *Cvengros, supra,* 216 Mich App 266-267.

Next, despite plaintiff's presentation of the issue asserting error in the trial court's findings of fact and conclusions of law regarding the contract, quantum meruit, and engineering, plaintiff's prolonged and amorphous argument revolves around alleged error in the trial court's calculation of the damage award. This issue is not properly presented because plaintiff did not include the damage claim within the statement of the questions presented. *Brookshire-Big Tree Ass'n v Oneida Twp,* 225 Mich App 196, 201; 570 NW2d 294 (1997). The appellant must identify his issues in his brief in the statement of questions presented. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

However, because both parties briefed the issue, we will address it. This Court reviews the trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Where a court following a bench trial has determined the issue of damages, the Court reviews the award for clear error. *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000).

The trial court found as follows regarding damages:

> Based on the report prepared by Mr. Neumeyer the Defendants suffered $2,888.84 in damages in labor and materials which they paid for but never received. Mr. Brown's testimony also supports a finding that of the $7,100.00[2] he was paid, $3,150.00 was to repair and mitigate Plaintiff's poor workmanship. The Defendants did agree to certain modifications in the contract price, including the cost of the cabinet upgrades ($587.84) and the additional ceiling tiles ($350.00). Therefore, the actual loss they suffered as a result of the breach was $5,101.00.

Our review of the record supports the following regarding the damage calculation at issue in this matter. Defendants paid plaintiff $12,400 for the work he performed under the contract. Neumeyer testified that the estimated value of the work performed by plaintiff was only $9,511.16. Thus, the trial court determined that defendants had suffered $2,888.84 in damages

[2] This number should be $7,710. The trial court clearly made a typographical error when it used $7,100 instead of $7,710, which was the number testified to at trial by both Brown and Christopher Hall.

by paying for work they had not received. Additionally, although mistakenly using $7,100 for the correct figure of $7,710, the trial court found that defendants paid Brown $7,100 to complete the remodeling project. Brown estimated that $3,150 represented work he had to do to remedy plaintiff's errors due to poor construction work. Hence, the trial court found defendants' were owed a total of $6,038.84. The trial court then subtracted $587.84 for cabinet upgrades and $350 for additional ceiling tiles purchased resulting in a total damage award of $5,101 to defendants.

The total contract as found was in the amount of $19,537.84 consisting of $18,600 plus $587.84 for the cabinet upgrade and $350 representing the additional ceiling tiles. Despite plaintiff's breach, defendants ultimately paid only $20,110 ($12,400 to plaintiff and $7,710 to Brown) for the remodeling project. The trial court found that plaintiff only performed $9,511.16 worth of work resulting in an overpayment at the time of the breach of $2,888.84. "The goal in awarding damages for breach of contract is to give the innocent party the benefit of his bargain to place him in a position equivalent to that which he would have attained had the contract been performed. The injured party, however, must make every reasonable effort to minimize the loss suffered, and the damages must be reduced by any benefits accruing to the plaintiff as a consequence of the breach." *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App 131, 134-135, 255 NW2d 794 (1977).

In applying these general principles to our case, we find that indeed, the actual cost paid for the project by defendants was only slightly more than the original contract price. Nevertheless, plaintiff should not benefit from his willful breach. Therefore, we find that the trial court should have awarded damages to defendants only in the amount of $2,888.84, the amount paid to plaintiff for work they had not received. Thus, even according the trial court special deference because of its unique opportunity to view the witnesses at trial, we are left with a definite and firm conviction that the trial court made a mistake regarding the damages award. MCR 2.613(C); *Meek, supra*, 240 Mich App 121; *H J Tucker, supra*, 234 Mich App 563; *In re Jackson, supra*, 199 Mich App 25.

Defendant also argues that the trial court erred when it awarded sanctions to defendants when it did not consider equity and failed to conduct an evidentiary hearing regarding attorney fees and costs. This Court reviews a trial court's "award of sanctions based on a frivolous complaint under a clearly erroneous standard." *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 532; 644 NW2d 765 (2002). However, the trial court's determination of the amount of the sanctions imposed is reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). An abuse of discretion exists only in extreme cases where the result is so "palpably and grossly violative of fact and logic" that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *In re Nord*, 149 Mich App 817, 823; 386 NW2d 694 (1986), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

As illustrated, *supra*, the trial court properly found that defendant had pleaded and argued a frivolous claim before the trial court. MCR 2.625(A)(2) and MCL 600.2591 allow the prevailing party in an action to recover costs and fees in connection with a frivolous case. Under the court rule, sanctions under MCL 600.2591 are available only to a prevailing party, which is defined as a party who wins on the entire record. MCL 600.2591(3)(b), *Meagher v Wayne State University*, 222 Mich App 700, 729; 565 NW2d 401 (1997). Here, despite plaintiff's claims on appeal, the record supports the fact that defendants won on the entire record and were the

prevailing party in the action. Therefore, sanctions are available to defendants because they were the prevailing party in the action. *Id.*

Sanctions which may be imposed under MCR 2.114 include payment to the opposing parties of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). The court may not assess punitive damages under MCR 2.114. MCR 2.114(F). Under the statute, the court must award the reasonable costs and fees incurred by the prevailing party, including court costs and reasonable attorney fees. MCL 600.2591(1) and (2), *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 721; 591 NW2d 676 (1998).

Plaintiff filed a motion for an evidentiary hearing and reconsideration that was heard by the trial court over a year after the judgment was entered in the case. In the motion, among other things, plaintiff argued that his claim was not frivolous, but that if it was, that defendants should only be awarded costs associated with defending that specific claim. In an oral ruling, the trial court denied plaintiff's motion for reconsideration stating that it stood by its prior opinion but in regard to attorney fees, would allow plaintiff's counsel to review the attorney fees in an in camera hearing.

If the reasonableness of a fee request is challenged, the court must normally conduct an evidentiary hearing. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). Here, the record suggests that the trial court offered in camera review of the "billings" to plaintiff, who was represented by counsel at the time. However, the trial court never conducted an evidentiary hearing to determine the reasonableness of the fees and costs or the proper allocation of fees and costs attributable to the frivolous quantum meruit claim alone. Therefore, we remand the cause to the trial court for a determination of the reasonableness of the fees and costs and the amount attributable to the quantum meruit claim. *Id.*; *Maryland Casualty Co, supra*, 221 Mich App 32.

Defendant's next issue on appeal is that the trial court erred when it did not enforce mediation on the parties. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

On the second day of trial plaintiff made a motion for summary disposition to settle the matter by mediation. The trial court denied the motion. The contract specifically states:

> Disputes, if any, shall be settled by Mediation. Neither Party shall be bound by Arbitration.

Pursuant to the authority of *Salesin v State Farm & Casualty Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998), and by analogy, a party may waive the right to have a matter decided by an alternate dispute resolution model, here, mediation:

> A party may waive its right to arbitration, and each case must be decided on the basis of its individual facts. However, waiver of a contractual right to arbitration is not favored. A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice

> resulting from the inconsistent acts. [*Burns v Olde Discount Corp*, 212 Mich App 576, 582, 538 NW2d 686 (1995) (citations omitted).]
>
> In general, "defending the action or proceeding with the trial," that is defending an action without seeking to invoke a right to compel arbitration, constitutes a waiver of the right to arbitration. See *North West Michigan Constr, Inc v Stroud*, 185 Mich App 649, 651-652, 462 NW2d 804 (1990), and *Hendrickson v Moghissi*, 158 Mich App 290, 299-300, 404 NW2d 728 (1987), quoting 98 ALR 3d 767, § 2, pp 771-772.

Our review of the record reveals that plaintiff took part in extended discovery lasting over four years. The motion to compel mediation during the second day of trial was too late. Clearly the circumstances of this case squarely display that plaintiff waived his right to mediation. Thus, we find that the trial court did not err when it did not compel mediation under the contract. *Salesin, supra*, 229 Mich App 356.

Lastly, defendant argues that the trial court should have disqualified itself. The factual findings underlying a ruling on a motion for disqualification will be reversed only for an abuse of discretion, while application of the facts to the law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

A motion to disqualify a judge must be filed within fourteen days after the moving party discovers the ground for disqualification. MCR 2.003(C)(1), *Cain, supra*, 451 Mich 494. Untimeliness is a factor in deciding whether the motion should be granted. MCR 2.003(C)(1), *Band v Livonia Assoc*, 176 Mich App 95, 118; 439 NW2d 285 (1989). A claim of judicial disqualification may be waived by the failure to move for disqualification or untimely assertion of disqualification. *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). A party's failure to move for disqualification can constitute tacit approval of the judge and waiver of the issue of disqualification. *Reno v Gale*, 165 Mich App 86, 90-91; 418 NW2d 434 (1987).

The final order was issued in this matter on April 9, 2001. Plaintiff moved for disqualification of the trial court on May 20, 2002. A hearing was held on June 3, 2002 before Judge Holowka where the trial court denied the motion. At that time the trial court also granted plaintiff's request to refer the matter to the State Court Administrator's Office (SCAO) to have another judge review plaintiff's motion to disqualify. After referral from SCAO, Judge Teeple reviewed the motion for disqualification of Judge Holowka and issued an order denying the motion for disqualification on November 6, 2002.

The procedural history of the case illustrates that plaintiff did not file his motion for disqualification until over a year after the conclusion of trial and the issuance of the final order in the case. Because of the untimely assertion of disqualification, we could resolve this issue procedurally and find that plaintiff's claim of judicial disqualification has been waived. MCR 2.003(C)(1), *In re Forfeiture of $53, supra*, 178 Mich App 497; *Band, supra*, 176 Mich App 118.

Again, however, because both parties have briefed the merits of the issue we will review it. Generally, a showing of actual, personal prejudice is required to disqualify a judge under the Court Rule. MCR 2.003; *Cain, supra*, 451 Mich 495; *Armstrong, supra*, 248 Mich App 597. A

trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming the presumption. *Cain, supra*; *In re Susser Est*, 254 Mich App 232, 237; 657 NW2d 147 (2002); *Armstrong, supra*. A showing of personal prejudice usually requires that the source of the bias be in events or information from outside the judicial proceeding. *Cain, supra* at 495-496. In some circumstances, such as when the basis for judicial bias is not apparent to the parties or counsel, the trial judge is required to raise the issue of disqualification. *Wayne County Prosecutor v Doerfler*, 14 Mich App 428, 440; 165 NW2d 648 (1968).

Here, plaintiff argues that "long term antipathy and political rivalry" existed between plaintiff and the trial court without further explanation. Plaintiff also asserts that the trial court and defendants' counsel had a certain level of "intimacy" because on occasion they would have coffee together before hearings, suggesting favoritism. Clearly, a judge is disqualified when he is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B); *Armstrong, supra*, 248 Mich App 596. However, we find that plaintiff has not demonstrated personal bias on the part of the trial court such that he has established a showing of actual, or personal prejudice to overcome the strong presumption of judicial impartiality. MCR 2.003; *Cain, supra*, 451 Mich 495; *Armstrong, supra* at 597. Thus, the trial court did not err when it did not disqualify itself.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio