STATE OF MICHIGAN

COURT OF APPEALS

BENINATI CONTRACTING SERVICES, INC., Plaintiff-Appellee, v VIP COMPANY and JOSEPH Z. ORAM, Defendants, and M-59 JOY, L.L.C., Defendant-Appellant.	UNPUBLISHED April 19, 2011 No. 296218 Macomb Circuit Court LC No. 2008-004502-CH

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant M-59 Joy, L.L.C. ("M-59"), appeals as of right from a default judgment for $76,706, entered in favor of plaintiff Beninati Contracting Services, Inc. ("Beninati"), after M-59's agent, defendant Joseph Oram, failed to appear for trial. We affirm.

I. BACKGROUND

In October 2006, M-59 and Beninati entered into a contract for Beninati to remove and chip trees and stumps from property in Mount Clemens. The contract required Beninati to haul away the wood chips, root rake clearing areas, and rough grade dirt piles on the property. In October 2007, Beninati filed a claim of construction lien in the amount of $46,590.79 with the Macomb County Register of Deeds. The next year, on October 10, 2008, Beninati filed this instant action to recover $46,590.79 from M-59, plus accrued interest and other permissible collection costs, under various contract, tort, and equitable theories of liability. Beninati also sought to foreclose on the construction lien. Beninati also alleged that defendants Oram and VIP Company could be held liable as alter egos of M-59.

In July 2009, the trial court dismissed defendants Oram and VIP Company after finding no basis for imposing liability on them for M-59's alleged liability. M-59 thereafter retained new counsel, who unsuccessfully moved to amend the pleadings to modify M-59's affirmative defenses and to file a four-count counter-complaint against Beninati.[1] After Oram failed to appear for the scheduled trial on January 12, 2010, the trial court granted Beninati's motion for a default against M-59. The court thereafter conducted an evidentiary hearing to determine damages. At the hearing, Beninati relied on the written contract between the parties, as orally modified, and also offered evidence of lost profits from wood chip revenue. The trial court awarded Beninati damages of $76,706 and entered a default judgment that also permitted Beninati to seek foreclosure remedies, if applicable.

II. DEFAULT SANCTION

On appeal, M-59 first argues that the trial court abused its discretion by imposing the sanction of default based on Oram's failure to appear at the scheduled trial. M-59 argues that the trial court erred by failing to consider other, less drastic sanctions, before imposing the severe sanction of a default. M-59 argues that its counsel made diligent efforts to produce Oram as a witness for trial, but that a default was inappropriate in any event because it, as a corporation, was distinct from Oram, who was only a witness.

First, the fact that M-59, and not Oram, was the only remaining party defendant is immaterial because the trial court relied on MCR 2.506(F) as authority for entering a default against M-59. That rule provides six possible sanctions where "a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend." Sanctions under MCR 2.506(F) are directed at the party, see *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 286-288; 404 NW2d 242 (1987), but a corporation may only act through its employees and agents. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 213-214; 476 NW2d 392 (1991); *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938). The record establishes, and M-59 does not dispute, that Oram was its sole member and managing agent.

Next, while a trial court has discretion in ordering sanctions under MCR 2.506(F), *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995), an abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Although there is authority recognizing that a trial court should carefully evaluate its options on the record before ordering a drastic sanction of dismissal or a default, see *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), that approach was derived from cases involving discovery

---

[1] This Court denied M-59's application for leave to appeal the trial court's December 7, 2009, order denying the motion to amend the pleadings. See *Beninati Contracting Servs, Inc v M-59 Joy, LLC*, unpublished order of the Court of Appeals, entered January 8, 2010 (Docket No. 295582).

violations. See *id.* at 506-507, and cases cited therein, including *Houston v Southwest Detroit Hosp,* 166 Mich App 623; 420 NW2d 835 (1987).

MCR 2.506(F) does not require an on-the-record consideration of the possible sanctions listed in the rule. Further, MCR 2.517(A)(4) does not require findings of fact or conclusions of law in decisions on motions unless required by a particular rule. In addition, this Court has upheld a dismissal sanction where the record clearly indicates that the trial court was aware of all relevant circumstances before ordering dismissal. See *Bass v Combs,* 238 Mich App 16, 35; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC,* 481 Mich 618, 628; 752 NW2d 37 (2008). More recently, in *Oram v Oram,* 480 Mich 1163; 746 NW2d 865 (2008), our Supreme Court applied the general abuse of discretion standard in reviewing a trial court's dismissal sanction against a party for failure to comply with a court order.

In this case, even considering M-59's arguments in light of the applicable court rule, MCR 2.506(F), we would not conclude that the trial court abused its discretion in ordering a default. While the trial court did not consider all available options on the record before ordering a default, the court was not unaware of the other available options in MCR 2.506(F). On the contrary, the trial court noted that the rule provided "among other things" for a default. The "dismissal" option in MCR 2.506(F)(5) was clearly inapplicable, and the options of striking all or part of M-59's pleadings or refusing to allow M-59 to support or oppose designated claims or defenses, see MCR 2.506(F)(3) and (4), had little relevance to the circumstances of this case, which involved a party's failure to attend the trial, and not a failure to produce particular documents or evidence.

The other options were to stay proceedings until the order is complied with or to tax costs, MCR 2.506(F)(1) and (2), but it is clear from the record that these options were presented to the trial court through the arguments of M-59's counsel. The record reflects that the trial court gave careful consideration to the reasons offered by M-59's counsel for Oram's nonappearance in concluding that a default was warranted. It is apparent that the court was not satisfied with counsel's explanation that he could take instructions from Oram, but was unable to secure his appearance at trial, and that it would not allow another adjournment, let alone one conditioned on the payment of costs. At the close of the hearing, the trial court discussed the prior adjournments in the case, found that M-59 should have been prepared for trial, and that the default was appropriate for Oram's failure to appear. Considering the record as a whole in light of the circumstances, the sanction of default was within the range of reasonable and principled outcomes and, accordingly, was not an abuse of discretion. *Oram,* 480 Mich at 1163; *Saffian,* 477 Mich at 12.

III. STATUTE OF FRAUDS

M-59 next challenges the evidence and writings offered by Beninati to establish damages, arguing that it did not comport with the statute of frauds applicable to a transfer of an interest in land. We conclude that this issue is insufficiently briefed to permit appellate review. M-59 does not identify the particular damages evidence that it believes constitutes a transfer of an interest in land within the meaning of MCL 566.106, or might constitute a contract for the sale of an interest in land within the meaning of MCL 566.108. M-59 argues only that the claim for

damages "manifested and exploited an interest in M-59's real property" and that the trial court "in error admitted parol and inadmissible evidence of Beninati's interest in M-59's land." An appellant may not leave it to this Court to search for factual support for a claim. *McIntosh v McIntosh,* 282 Mich App 471, 484-485; 768 NW2d 325 (2009). This Court need not address an issue that is given only cursory treatment in a brief, with little or no citation to supporting authority. *Id.* at 485. "The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959).

IV. DAMAGES

M-59 next argues that the trial court erred in awarding damages in excess of the $28,000 amount stated in the written contract, less a payment of $5,000 previously received by Beninati. M-59 correctly observes that the trial court's findings are reviewed for clear error, but it does not identify any particular finding that it alleges is clearly erroneous. M-59 also summarily asserts that attorney fees were improperly included in the damages award. However, contrary to M-59's suggestion that there was no authority for an award of attorney fees, the parties' written contract specifically provides that M-59 "will be responsible for any attorney and/or court costs involved in the collection of this debt." Attorney fees are recoverable as an element of damages when expressly allowed by contract. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club,* 283 Mich App 264, 297; 769 NW2d 234 (2009).

M-59 also argues that it had a right to have a jury determine damages. This issue is unpreserved because M-59 did not object to the absence of a jury at the hearing on damages. *Walters v Nadell,* 481 Mich 377, 387-388; 751 NW2d 431 (2008). Further, M-59 has not demonstrated that the failure to grant relief with respect to this unpreserved issue will result in a miscarriage of justice. *Id.*

A default operates as an admission of liability as to all well-pleaded allegations, but leaves open the issue of damages until the judgment is entered. *Wood v Detroit Auto Inter-Ins Exch,* 413 Mich 573, 578; 321 NW2d 653 (1982); *Dollar Rent-A-Car Sys v Nodel Constr,* 172 Mich App 738, 743; 432 NW2d 423 (1998). Under the rule governing default judgments, "the court may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution." MCR 2.603(B)(3)(b). The Michigan Constitution provides that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. The right to a jury trial does not apply to equitable cases. *Draggoo v Draggoo,* 223 Mich App 415, 427; 566 NW2d 642 (1997).

Because the record reflects that the trial court awarded contract damages and that Beninati demanded a jury trial when filing its complaint, we agree that M-59 had a right to have a jury determine damages. Once a jury trial is properly demanded by one party, both parties have a right to a jury trial. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 54; 698 NW2d 900 (2005). Nonetheless, a waiver of a properly demanded jury trial may be inferred from the totality of the parties' conduct. *Id.*

Although there is no record of an express waiver by either party, both parties participated in the damages hearing. M-59's counsel did not protest or object to the lack of a jury, but rather directed his protest at the entry of the default itself. Even when M-59's counsel' demanded a hearing because the damages sought were not for a sum certain and the trial court responded by stating, "This is the hearing," counsel said nothing about wanting a jury to determine damages. Counsel remained silent, even though the trial court had indicated at the beginning of the proceeding that a jury was available.

The totality of the circumstances demonstrates that M-59 waived the right to have a jury determine damages. *Id*. at 54. Therefore, this unpreserved issue does not warrant appellate relief. *Walters*, 481 Mich at 387-388.

V. FAILURE TO STATE A CLAIM

M-59 also argues that Beninati's complaint would not have withstood a motion for summary disposition under MCR 2.116(C)(8), except for the breach of contract claim, which M-59 asserts was unproven. M-59 asserts that its counsel unsuccessfully sought the trial court's consent to bring such a motion during a recess on the adjourned trial date of January 5, 2010.

"A court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Because M-59 neither formally moved for summary disposition nor obtained an order from the trial court with respect to its claim, this issue was not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Furthermore, we find that M-59's argument is moot with respect to counts I, III to V, and VII of Beninati's complaint, because Beninati concedes that it did not pursue these claims. With respect to Beninati's foreclosure on the construction lien in count VIII, we note that the Construction Lien Act, MCL 570.1101 *et seq*., establishes an equitable action to enforce a construction lien in circuit court through foreclosure. MCL 570.1118. A lien claimant may file a foreclosure action at the same time as an underlying contract action, or may file it separately. *H A Smith Lumber & Hardware Co v Decina*, 480 Mich 987; 742 NW2d 120 (2007), rem on reconsideration 480 Mich 1132 (2008).

Here, Beninati neither pursued the foreclosure action at the time of the January 12, 2010, proceeding nor obtained a default judgment of disclosure under the Construction Lien Act. At most, the record reflects that Beninati's counsel expressed an interest in pursuing foreclosure as a possible remedy if M-59 failed to pay the damages award, but that M-59 thereafter posted an appeal bond sufficient to pay the damages award. The default judgment itself provided only that Beninati may pursue foreclosure remedies. Because the trial court did not enter a foreclosure judgment and the appeal bond renders it unnecessary for Beninati to resort to foreclosure, the foreclosure claim is moot for purposes of this appeal. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003) (an issue is moot where a subsequent event renders it impossible for this Court to fashion a remedy).

With respect to Beninati's claim for unjust enrichment or quantum meruit, M-59 correctly observes that this type of claim, which is equitable in nature, is not viable where an

express contract covers the same subject matter. *Biagini v Mocnik*, 369 Mich 657, 659; 120 NW2d 827 (1963); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006), *Belle Isle Grille Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). But because there is no record evidence that Beninati was granted an equitable remedy, this claim is also moot and we decline to consider it further. *Walters*, 481 Mich at 387-388. Rather, as previously indicated, Beninati was awarded contract damages for the breach of contract claim in count II of its complaint.

VI. MOTION TO AMEND PLEADINGS

M-59 lastly argues that the trial court abused its discretion in denying its pretrial motion to amend the pleadings. We disagree.

This Court reviews a trial court's grant or denial of a motion to amend under MCR 2.118(A)(2) for an abuse of discretion. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12. In general, a trial court should deny a motion to amend only for particularized reasons, such as undue delay, bad faith or dilatory motives on the part of the movant, repeated failures to cure deficiencies in prior amendments, undue prejudice to the nonmoving party, or futility. *Miller v Chapman Contracting*, 477 Mich 102, 107; 730 NW2d 462 (2007); *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010).

Here, M-59's original answer to the complaint and affirmative defenses were filed jointly with defendants Oram and VIP in January 2009. At the time M-59 filed its motion to amend on November 25, 2009, Oram and VIP were no longer parties. Trial had already been adjourned once and was scheduled to begin on January 5, 2010. In the proposed amendment, M-59 sought to make changes to its affirmative defenses and to file a counter-complaint against Beninati.

An affirmative defense does not deny allegations in the complaint, but rather asserts some ground not disclosed in the plaintiff's pleadings. See *Meyer & Anna Prentis Family Foundation, Inc*, 266 Mich App at 54; see also MCR 2.111(3). Stated otherwise, "[a]n affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). An affirmative defense is distinguished from a counterclaim, which "represents the defendant's right to have the claims of the parties counterbalanced, in whole or in part, and to have judgment entered for any excess." 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff, § 1. Stated otherwise, "[a] counterclaim does not seek to defeat the plaintiff's claim as a cause of action but is, instead, an independent affirmative claim for relief." *Id.* MCR 2.110(C) provides:

> (2) If a party has raised a cross-claim or counterclaim in the answer, but has not designated it as such, the court may treat the pleading as if it had been properly designated and require the party to amend the pleading, direct the opposing party to file a responsive pleading, or enter another appropriate order.

> (3) The court may treat a cross-claim or counterclaim designated as a defense, or a defense designated as a cross-claim or counterclaim, as if the designation had been proper and issue an appropriate order.

In this case, the affirmative defenses filed with M-59's original answer were, for the most part, reduced and stated in more general language in M-59's proposed amendment. In both instances, Beninati's alleged failure to state a claim was listed as an affirmative defense, even though a failure to state a claim need not be asserted in a responsive pleading. See MCR 2.111(F)(2); *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). The proposed amendment also contained a defense that Beninati's action is "statute-barred." By comparison, the original affirmative defenses contained a statute of limitations defense.

Each of the other three affirmative defenses that M-59 sought to add related to the alleged contract. M-59 alleged "a failure of consideration," "fail[ure] to comply with a condition precedent" and "[f]ailure of performance, Plaintiff having failed to perform as agreed under the contract." By comparison, M-59's original affirmative defenses were:

> 9. Plaintiff breached the contract between the parties when it failed to do the work called for under the contract.
>
> 10. Performance of the Plaintiff's work under the contract between the parties was a condition precedent to the obligation of M-59 Joy, LLC to pay consideration to Plaintiff.
>
> 11. Plaintiff's Complaint overstates the amount of consideration which could be owed pursuant to the contract between the parties.
>
> 12. Plaintiff's Complaint contradicts the information contained in the documents attached as exhibits thereto.
>
> 13. Plaintiff was negligent in the way it performed (a portion of) the work under the contract resulting in damages to Defendant M-59 Joy, LLC.

M-59 also sought leave to file a four-count counter-complaint to allege that the contract price was $28,000 and that Beninati had agreed to provide various services for this amount, including the removal of all trees and stumps from the property.

In count I (breach of contract), M-59 alleged a claim that mirrored its affirmative defenses and, specifically, "a total failure of consideration." At the same time, M-59 alleged that Beninati partially performed the contract. M-59 also alleged partial performance in count III (negligence) of the proposed counterclaim. M-59 sought damages based on an allegation that Beninati "poorly and partly performed its services in a most defective and negligent manner, such that [sic] has caused damages to the property as well as additional remedial costs on M-59 Joy" In count IV (accounting), M-59 sought an equitable accounting of proceeds from timber and woods harvested by Beninati from the property.

In count II (slander of title), M-59 alleged that Beninati maliciously and in bad faith placed a construction lien on the property in the amount of $46,590.79. At the same time, the

affidavit executed by Omar that was filed with the proposed counterclaim indicates that Beninati was not contesting the propriety of placing a construction lien on the property, but rather disputed the correct amount, if any, that was due. In M-59's original affirmative defenses to the complaint, it claimed that "Plaintiff's lien is defective in that it does not contain accurate information."

In denying the motion to amend, the trial court did not express concern with matters that would constitute affirmative defenses, but refused to allow the counter-complaint in light of the trial scheduled for January 2010 and the inconsistencies between the proposed amendment and prior arguments. It found no reasonable basis for the proposed amendment.

With respect to undue delay, mere delay does not warrant denial of a motion to amend. *Decker*, 287 Mich App at 666. But a court may deny the motion if the delay was in bad faith or the nonmoving party would suffer actual prejudice. *Id.* at 682. Prejudice exists if the amended pleadings would prevent the nonmoving party from receiving a fair trial. *Id.* "[A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997).

While this case does not involve a motion to amend brought on the eve of trial, Beninati showed that the case had proceeded sufficiently close to the rescheduled trial date to establish unfair prejudice with respect to counterclaims based on an equitable accounting and slander of title. The equitable accounting was also inconsistent with M-59's claim that an express contract governed the parties' relationship. While M-59 argues on appeal that it "insistently had protested" Beninati's self-dealing in timber and wood chips from the land, it provides no factual support for this claim. And while M-59 asserts that it "insistently objected" to an unauthorized lien, the thrust of a common-law or statutory slander of title claim is that a defendant maliciously published false statements that disparage a plaintiff's property rights and cause special damages. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Even where a lien is invalid, that is not enough to infer malice. *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990). Here, the allegation of malice in M-59's proposed counterclaim was inconsistent with M-59's original affirmative defenses, which indicated that only the lien amount was being contested. Under the circumstances, the trial court's determination that there was no reasonable basis for M-59's belated motion to amend is within the range of reasonable and principled outcomes with respect to both of these claims. *Saffian*, 477 Mich at 12.

With respect to the proposed counterclaim for breach of contract, the trial court reached the right result when denying the motion to amend because a failure of consideration is an affirmative defense, not a counterclaim. MCR 2.111(F)(3)(a). Further, M-59 pleaded the failure of consideration as an affirmative defense in both the original and proposed amended affirmative defenses, and the trial court indicated that it would allow pleaded affirmative defenses. An amendment is futile where it merely restates allegations already pleaded. *Wormsbacher*, 284 Mich App at 9. Therefore, although it is unclear whether the trial court applied a futility standard to deny the filing of a counterclaim for breach of contract, it reached the correct result.

"[T]his Court will not reverse a trial court's order if it reached the right result for the wrong reason." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

We note that negligence was similarly pleaded in M-59's original answer to Beninati's complaint as an affirmative defense. Further, the negligent performance of a contract may constitute an actionable tort where there is a violation of a legal duty separate and distinct from the contract obligation. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 466-467; 683 NW2d 587 (2004). But the failure to fully perform services according to the terms of a promise is contractual in nature, regardless of the name assigned to the claim by a party. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 85; 559 NW2d 647 (1997).

Beninati has failed to establish that its proposed negligence counterclaim should be treated as an independent cause of action, as opposed to an affirmative defense to Beninati's contract action. Regardless, the trial court's entry of the default precluded any need for it to consider whether M-59 should have been permitted to proceed with the negligence claim in light of M-59's original pleading of this claim as an affirmative defense. As such, any error was harmless. MCR 2.613(A).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey