STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN DOOR SYSTEMS, INC.,

Plaintiff/Counterdefendant-Appellee,

v

JENNIFER FIORE, GASPER FIORE, and JOAN FIORE,

Defendants/Counterplaintiffs-Appellants,

and

JP MORGAN CHASE BANK, NA, formerly known as WASHINGTON MUTUAL BANK,

Defendant.

UNPUBLISHED
November 24, 2020

No. 350865
Wayne Circuit Court
LC No. 18-000911-CH

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

Jennifer and Gasper Fiore purchased more than $136,000 in doors and windows from American Door Systems, Inc. The Fiores withheld almost $44,000, challenging the quality of American Door's workmanship. The parties filed competing lawsuits and eventually reached a settlement under which American Door would make repairs and the Fiores would pay out $20,000 pending approval of the work by the parties' experts.

But the experts' verdicts were unclear. The circuit court held a cursory hearing on American Door's motion to enforce the settlement agreement and ultimately ordered the Fiores to pay out the $20,000, denying their request for an evidentiary hearing. An order then entered dismissing the case. We vacate that order and remand for an evidentiary hearing to determine the extent to which each party complied with the settlement agreement.

I. FACTUAL BACKGROUND

The Fiores contracted with American Door to install $136,102 of doors and windows in their home. The Fiores claimed that some of the doors and windows were not properly installed and withheld $43,902 from their payment. The parties filed countercomplaints against each other, but eventually reached a settlement agreement on the record in open court. American Door promised to complete a list of specific repairs within four weeks and to provide a one-year warranty on this work. The Fiores placed $20,000 in escrow. Once the work was completed, experts for both parties would walk the property to ensure that the repairs were made satisfactorily. The Fiores would then release the funds. If there were "any disagreements," the matter would return to the court "for a decision on what to do." The court also expressed its preference that the experts conduct the walk-through together.

American Door completed the repairs and informed the court that the parties' attorneys walked through the home to ensure that all repairs were made satisfactorily. The Fiores refused to release the $20,000 from escrow, however, contending that an unnamed expert inspected the repairs and found them wanting as water seeped into the residence. The Fiores asserted that they offered American Door the opportunity to send its own expert to inspect the repairs, but that American Door never responded. The Fiores also denied that their attorney walked the home with counsel for American Door to ensure that the repaired doors and windows were operational.

American Door filed a motion to enforce the settlement agreement and the court conducted a brief hearing. At that hearing, counsel for the Fiores indicated that he was present on the day American Door made the ordered repairs. Counsel "went around to every single window." An unidentified person from American Door indicated that there were no issues with any of the windows and doors and stated that counsel for the Fiores promised to walk through with his clients. Counsel for the Fiores, however, asserted that some were sticking and would not open and others were very hard to open. He continued that he provided a letter to American Door's counsel stating "exactly what was wrong with any spot that we did based on our expert pursuant to the settlement terms that were placed on the record." This "expert" was "a licensed builder" who inspected each window and door.

American Door, on the other hand, claimed that it had an expert inspect its work but that the Fiores refused to have their expert come at the same time. American Door also asserted that the "windows are sticky, because [the Fiores] will not permit us to put silicon or the EZ glide on them" even though "[i]t's standard."

The court ordered the Fiores to pay American Door $20,000 and stated, "I don't think you want to see what I'm going to do if you're not here by 11:15 [a.m.] with a check for $20,000, and then I'm going to get a dismissal of this case by no later than Monday at 4:00 [p.m.]" The Fiores' counsel asserted, "just for record sake," that "there's evidentiary disputes, I think we should have an evidentiary hearing." The court rejected that motion. The parties then entered a stipulated order of dismissal "as to form only."

The Fiores now appeal the trial court's final resolution of this case without conducting an evidentiary hearing.

II. ANALYSIS

A. FORFEITURE/WAIVER

Before addressing the Fiores' appellate challenge, we must resolve American Door's claim that the Fiores either forfeited their claim of error because they failed to request an evidentiary hearing before the circuit court reached its decision or waived any error by stipulating to the final judgment. The Fiores neither forfeited nor waived their challenge.

"An issue is preserved for appellate review when it is raised in and decided by the trial court." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 10; 930 NW2d 393 (2018). In *Kernen v Homestead Development Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002), this Court determined that a party's request for an evidentiary hearing was not preserved, i.e. was forfeited, because the party raised it for the first time in the party's motion for reconsideration. *Kernen* is inapposite. The Fiores did not wait until after the court proceeding to seek a hearing. Rather, the Fiores requested an evidentiary hearing when the court entertained American Door's motion to enforce the settlement agreement, immediately after the court ordered the Fiores to release the funds held in escrow. The court considered the request, although cursorily, stating, "Okay, denied." This issue therefore was not forfeited.

"Waiver is the voluntary and intentional relinquishment of a known right." *Varran v Granneman (On Remand)*, 312 Mich App 591, 623; 880 NW2d 242 (2015). By intentionally relinquishing a right, the party extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). To effectively waive a claim, a party must express approval of the court's action or somehow demonstrate that he or she deems the court's act proper. See *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 566; 840 NW2d 375 (2013); *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010).

Here, the Fiores strenuously argued that the order should not enter as questions of fact remained regarding the parties' compliance with the settlement agreement terms. The Fiores were backed into a corner, as the court warned them, "I don't think you want to see what I'm going to do if" they did not release the funds from escrow and enter a dismissal. Ultimately, the Fiores stipulated to the entry of the dismissal order, but "as to form only."

A party is not deemed to have waived a claim of error even where it approves the court's final order as to both form and substance or content when the party "vigorously challenged the trial court's ruling—both before and after entry of the order." *Sulaica v Rometty*, 308 Mich App 568, 588; 866 NW2d 838 (2014). Under such circumstances, "the approval of the order as to 'form and content' [is] not a waiver, but rather an acknowledgement that the prepared order contained the substance of the trial court's decision." *Id.* The Fiores were very clear in this case that they approved the order as to form only, acknowledging that the order embodied the circuit court's ruling. The Fiores in no way waived their claim that an evidentiary hearing was required.

B. EVIDENTIARY HEARING

As the Fiores neither forfeited nor waived their challenge, we review it as fully preserved. "A trial court's decision that an evidentiary hearing is not warranted is reviewed for an abuse of discretion." *Kernen*, 252 Mich App at 691. See also *Manley v DAIIE*, 425 Mich 140, 159; 388 NW2d 216 (1986). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

The circuit court abused its discretion when it denied the Fiores' request for an evidentiary hearing and ordered the Fiores to release the funds held in escrow. The parties entered an enforceable settlement agreement in open court. See MCR 2.507(G). That settlement agreement is a contract and must be interpreted and enforced as such. See *Clark v Al-Amin*, 309 Mich App 387, 394; 872 NW2d 730 (2015). The clear and unambiguous terms of this agreement provided that each party would hire an expert to examine the repairs. In the event the experts disagreed regarding the sufficiency of the repairs, the parties agreed to notify the court, and the court would determine whether the terms of the settlement agreement were met. The agreement was silent in regard to the manner in which the court would make this determination. Accordingly, an evidentiary hearing was not contractually required.

However, on the existing record the court could not fairly determine if American Door had met its end of the bargain, triggering the Fiores' duty to release the escrowed funds. At the hearing on American Door's enforcement motion, the parties' attorneys made competing arguments regarding the completion and inspection of the repairs, the adequacy of those repairs, and the other party's lack of cooperation. But arguments were all these were. "[I]t is well settled that an attorney's statements and arguments are not evidence." *In re Conservatorship of Brody*, 321 Mich App 332, 349; 909 NW2d 849 (2017).

And neither side presented any evidence useful to resolving the dispute. Neither side presented a report, affidavit, or even a letter from an expert. No photographic evidence was offered. Moreover, given the nature of the hearing, no witnesses testified. Instead, American Door offered an untitled list of the repairs it had agreed to make. The Fiores presented a series of emails in which the attorneys argued about whether the agreed-upon repairs had been properly made and when the parties would arrange for their experts to sign off on the repairs. Another email stated that the Fiores had hired an unnamed expert who found remaining problems with the repairs, but provide no detail. Importantly, none of this evidence supported that American Door had actually hired an expert who inspected the repairs as required by the settlement agreement. This left a gap in the record, preventing the circuit court from determining that the parties' duties under the settlement agreement had been completed.

Although the terms of the settlement agreement itself did not demand an evidentiary hearing, absent record evidence that American Door hired an expert as required, coupled with the competing unsupported arguments about the sufficiency of the repairs, the circuit court had no reasonable option but to hold an evidentiary hearing. The court abused its discretion in failing to do so.

We vacate the court's order dismissing this action and remand for an evidentiary hearing regarding whether the terms of the settlement agreement were satisfied. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro