STATE OF MICHIGAN

COURT OF APPEALS

LANS DEVELOPMENT CORPORATION,

Plaintiff/Counterdefendant-Appellee,

V

RONALD W. LECH, II,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellant,

and

ANDREW SOLEY and LEE NORWOOD,

Third-Party Defendants.

UNPUBLISHED
May 25, 2004

No. 239061
Livingston Circuit Court
LC No. 99-017138-CH

CHARLES OKE,

Plaintiff-Appellant,

V

LANS DEVELOPMENT CORPORATION, a/k/a GOLF CLUB OF MICHIGAN, ANDREW SOLEY and LEE NORWOOD,

Defendants-Appellees.

No. 239062
Livingston Circuit Court
LC No. 00-017983-CH

LANS DEVELOPMENT CORPORATION,

Plaintiff/Counterdefendant-Appellee,

V

RONALD W. LECH, II,

No. 239588
Livingston Circuit Court
LC No. 99-017138-CH

Defendant/Counterplaintiff/Third-
Party Plaintiff-Appellant,

and

ANDREW SOLEY and LEE NORWOOD,

Third-Party Defendants.

CHARLES OKE

Plaintiff-Appellant,

V

LANS DEVELOPMENT CORPORATION, a/k/a GOLF CLUB OF MICHIGAN, ANDREW SOLEY and LEE NORWOOD,

Defendants-Appellees.

No. 240419
Livingston Circuit Court
LC No. 00-017983-CH

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Ronald W. Lech II (Lech) and Charles Oke (Oke) filed breach of contract claims against Lans Development Corporation, Andrew Soley, and Lee Norwood (hereafter collectively referred to as "Lans"). Following a jury trial, Lech was awarded $220,000 and Oke was awarded $200,000. The trial court subsequently granted motions for judgment notwithstanding the verdict (JNOV) in favor of Lans as to both Lech and Oke. Additionally, it awarded Lans case evaluation sanctions against Lech in the amount of $58,000, and against Oke in the amount of $44,000. In docket numbers 239061 and 239588, Lech now appeals as of right from the trial court's orders that granted JNOV to Lans and awarded Lans case evaluation sanctions. In docket numbers 239062 and 240419, Oke appeals as of right from the trial court's orders granting JNOV to Lans and awarding Lans case evaluation sanctions. With respect to the claims made by Oke against Lans, we affirm the orders granting JNOV and awarding case evaluation sanctions. With respect to Lech's claims against Lans, we reverse the orders granting JNOV and case evaluation sanctions and reinstate the jury's verdict of $220,000 in favor of Lech.

Both Lech and Oke first argue that the trial court erred in granting JNOV in favor of Lans. A trial court's decision on a motion for JNOV is reviewed de novo. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). In reviewing the decision, this Court must view the testimony and all legitimate inferences arising from it in the light most favorable to the

nonmoving party. *Forge*, *supra; Kallabat v State Farm Mut Automobile Ins Co*, 256 Mich App 146, 150; 662 NW2d 97 (2003). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Docket Nos. 239061 and 239588

We agree with Lech that the trial court erroneously determined that, because he was not a licensed real estate broker, he was not entitled to compensation as a matter of law under his agreement with the Lans parties.

Recently, in *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416; 662 NW2d 710 (2003), our Supreme Court considered the question whether a plaintiff who acted as a "finder" in assisting the defendant in acquiring other companies conducted itself as a "real estate broker," as defined in § 2501(d) of the real estate brokers act (REBA), MCL 339.2501(d). Section 2501(d) provides:

> "Real estate broker" means an individual . . . [or entity] who with the intent to collect or receive a fee, compensation, or valuable consideration, sells or offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate for others, as a whole or partial vocation; who engages in property management as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation.

In interpreting the REBA's definition of "real estate broker," the Court in *GC Timmis*, *supra* at 424, stated:

> The purpose of REBA, which is to protect the integrity of real estate transactions by ensuring that they are brokered by persons expert in that realm, requires the interpretation that REBA applies only to real estate transactions. The conclusion that the emphasized language of § 2501(d) applies only to real estate transactions affords reasonable meaning to this language within the context of the provisions that surround it, while maintaining the focus of REBA on transactions involving the purchase or sale of business real estate.

The Court in *GC Timmis* also considered whether MCL 339.2512a would prohibit the plaintiff from seeking compensation for its services if the plaintiff was involved in a real estate transaction, but was not a licensed "real estate broker" within the meaning of MCL 339.2501(d). MCL 339.2512a provides:

> A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of

> this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

The Supreme Court rejected the conclusion reached in *Cardillo v Canusa Extrusion Engineering, Inc*, 145 Mich App 361; 377 NW2d 412 (1985), that "one must be a licensed real estate broker when one merely performs one of the 'usual functions' of a real estate broker, including among other things 'finding' a purchaser for real estate." *G C Timmis, supra* at 427. Rather, the Court stated:

> [I]n our judgment, REBA does not require one to be a licensed real estate broker when one merely performs a "usual function" of a real estate broker, such as "finding" a purchaser. Rather, REBA expressly requires that one be a licensed real estate broker only if, for a fee, one "sells or buys" real estate or "negotiates" a real estate transaction for another. MCL 339.2501(d). Accordingly, to the extent that *Cardillo* holds otherwise, we believe that it reads too much into § 2501(d), and, thus, we reject its interpretation of this provision.
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> In rejecting *Cardillo's* interpretation of § 2501(d), we instead believe that *Turner Holdings, Inc v Howard Miller Clock Co*, 657 F Supp 1370 (WD Mich, 1987), correctly interpreted this provision. In that case, the court held that one need not possess a real estate broker's license for merely "identifying and advising" a client about a purchase of a business. Likewise, unless plaintiff's actions here are covered by § 2501(d)—that is, unless plaintiff's activities can reasonably be characterized as "sell[ing], . . . buy[ing], . . . or negotiat[ing]" the purchase or sale of real estate for another for a fee, it is not required to possess a real estate license. [*Id*. at 427-428.]

Applying *GC Timmis* to this case, we find that the trial court erred in granting JNOV to Lans on the basis that Lech was required to be a licensed real estate broker in order to be entitled to compensation under his agreement with the Lans parties. Under that agreement, Lech was "to provide specialized financial counseling services to [Lans] intended to provide an introduction to a qualified developer." In exchange, Lans agreed to "[t]ransfer free and clear of all liens and encumbrances one improved and developed lot located in the Lans Development Project in Brighton" and to pay Lech "1% of any funds received by [Lans] from Developer or $5,000 which ever is greater." The evidence indicated that Lech introduced Soley, the president of Lans, to Charles Oke, a qualified developer who had been involved with operations and real estate development of the Paint Creek Country Club in Lake Orion, Michigan, for nine years.

At trial, the testimony revealed that Lech, a financial consultant, was considered by Lans to be "our banker." Testimony showed that Lech did not represent himself to be a real estate broker, nor did he sell, offer to sell, lease, offer to lease, buy, offer to buy, list, offer to list, or negotiate for the sale, lease or mortgage of real estate. Further, Lans always retained ownership of the property, with the profits to be split with the developer after Lans sold the individual lots. In addition, Lech was not hired to find a purchaser for Lans' property or business. In sum, the evidence did not indicate that Lech participated in a real estate transaction for purposes of the REBA so as to require a real estate broker's license. We therefore reverse the trial court's order

granting JNOV to Lans on the verdict in favor of Lech, and reinstate the jury's verdict awarding Lech $220,000.

Furthermore, because the trial court's imposition of case evaluation sanctions against Lech was predicated on the Lans parties' entitlement to JNOV, we similarly reverse the court's order awarding Lans case evaluation sanctions against Lech.

Docket Nos. 239062 and 240419

With regard to Oke, we conclude that the trial court properly granted Lans' motion for JNOV.

Although Oke asserts, without specificity, that Lans breached both oral and written agreements, the jury determined only that Oke was entitled to damages for "lost profit and opportunity" pursuant to paragraph 6 of the written option contract. Thus, our consideration of this issue is limited to whether there was sufficient evidence to support a finding that Lans breached paragraph 6 of the option contract.

Generally, option contracts are strictly construed, and the time for performance is of the essence. *LeBaron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947); *Brauer v Hobbs*, 151 Mich App 769, 777; 391 NW2d 482 (1986). An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein. *LeBaron Homes, supra*. "'An option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost.'" *Id*. at 313, quoting *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927) (internal quotation omitted). "[W]here the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997) (citation omitted).

In this case, the option contract provides, in pertinent part:

> 6. *Lans agrees that if Lans fails to abide by the confidentiality requirements of this Agreement or offers the Development Property for sale to any other person, party or entity during the Due Diligence Period, then Lans shall* refund the Option Price to Oke, pay Oke all of Oke's costs of investigation of the Development Property, including without limitation, all engineering and legal fees, and *pay Oke all lost profit and opportunity on the Development Property*. [Emphasis added.]

Thus, pursuant to paragraph 6, Oke was entitled to damages for "all lost profit and opportunity" if Lans (1) breached the "confidentiality requirements" of the agreement, or (2) offered the property for sale during the due diligence period.

Initially, we agree with the trial court that there was no evidence that Lans offered the development property for sale to any other person, party or entity during the due diligence period. With regard to "confidentiality requirements," paragraph 5 of the option contract provides:

> For purposes of this Agreement, the term "confidential" shall mean that Lans or any of its officers . . . shall not at any time disclose, permit the disclosure of, discuss, mention, release . . . to any person . . . any matter that is confidential according to this agreement.

On appeal, Oke argues that Lans breached the option contract by not giving him "access to all of Lans documents and records" pertaining to the development property as required under the option contract. The option contact provides, in pertinent part:

> 3. Oke's Option Price payment to Lans shall be nonrefundable if Lans meets each of the following conditions:
>
> * * *
>
> e. Lans allows Oke and his agents, during the Due Diligence Period, *to fully examine all aspects of the Development Property including without limitation, access to all of Lans documents and records and the title records*, physical access to the Development Property, and access to Lans' golf course development plans and records. [Emphasis added.]

Even assuming that Lans did not provide Oke with "access to all of Lans documents and records," that omission, while entitling Oke to the refund of his option payment which he in fact received, does not establish a breach of the contract's confidentiality requirements, so as to entitle Oke to additional damages for "lost profit and opportunity." Similarly, Oke's assertions that Lans misrepresented the nature of the property[1] are not relevant to whether there was a breach of the contract's confidentiality requirements. To establish the latter, Oke was required to show that Lans released or disclosed confidential information to a third party. The trial court's finding that the evidence did not support a finding that this requirement was breached was correct, and, therefore, the trial court properly granted the Lans parties' motion for JNOV with respect to Oke.

We now turn to Oke's claim that the trial court erred in imposing case evaluation sanctions against him under MCR 2.403(O). We find no error.

This Court reviews a trial court's award of case evaluation sanctions de novo. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 27; 666 NW2d 310 (2003). A party who rejects a case evaluation is subject to sanctions if it fails to improve its position at trial. *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000). MCR 2.403(O) provides, in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the

[1] We note that Oke's separate claim for fraud was presented to, and rejected by, the jury.

opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

In this case, the trial court's order granting JNOV qualifies as a "verdict" for purposes of MCR 2.403(O), because it represents a judgment entered as a result of a ruling on a motion and was entered after rejection of the case evaluation. MCR 2.403(O)(2)(c). See *Jerico Constr, supra* at 31.

We reject Oke's argument that case evaluation sanctions were not warranted because it settled its action against Boss Engineering before trial and agreed to dismiss an equitable claim against Lans by removing a lien. The case evaluation that was issued in this case provided:

Oke has judgment against 1) Lans Dev. For $5000. 2) A. Solely for $5000. 3) L. Norwood for $5000. 4) Boss Engr. For $5000. not jtly (sic), all severally.

Because separate evaluations were rendered with respect to Oke's claims against Lans and Boss Engineering, Oke's pretrial settlement with Boss Engineering did not affect Lans' entitlement to sanctions with regard to Oke's claims against them. Further, because the case evaluation did not award equitable relief but only addressed Oke's claim for monetary damages, Oke's pretrial removal of its equitable lien did not affect Lans' entitlement to case evaluation sanctions.

Additionally, contrary to Oke's contention, the trial court properly did not take into account the settled claims because they were not the result of a ruling on a motion after case evaluation. See *id.* ("Because the order of dismissal was not a 'verdict' for the purpose of MCR 2.403(O), the amount of the settlement should not have been considered in deciding whether Quadrants was entitled to mediation sanctions.")

Oke also argues that Lans should be denied sanctions under the "interest of justice" exception in MCR 2.403(O)(11). Under MCR 2.403(O)(11), the court may refuse to award sanctions in the "interest of justice" if the verdict is the result of a judgment stemming from a ruling on a motion after rejection of the case evaluation. The "interest of justice" exception should be implicated only in "unusual circumstances." *Haliw v Sterling Heights*, 257 Mich App 689, 707-709; 669 NW2d 563 (2003), citing *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000), and *Luidens v 63rd Dist Ct*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996). Such unusual circumstances may exist when the case involves a legal issue of first impression or an issue of public interest, the law is unsettled and the case involves substantial damages, or when an a case litigated by an indigent party merits decision by a trier of fact. *Haliw, supra* at 707, citing *Luidens, supra* at 35-36. "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger [the

interest of justice] exception.'" *Haliw, supra* at 707, quoting *Luidens, supra* at 36. Absent such unusual circumstances, the general rule mandating an award of costs applies. *Haliw, supra* at 709. A trial court's decision whether to refuse to award costs in the interest of justice is reviewed for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). Here, we are not persuaded that the trial court abused its discretion by declining to invoke the "interest of justice" exception. Oke has not demonstrated that there are unusual circumstances justifying application of this narrow exception.

We also find no merit to Oke's claim that Lans' request for case evaluation sanctions was premature, because of the possibility that this Court might reverse the trial court's order granting JNOV. The fact that a judgment may be reversed on appeal does not mean that the judgment cannot be enforced. In any event, our determination that the trial court properly granted JNOV with regard to Oke renders this claim moot. See *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992) (holding that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)").

Finally, Oke has waived any claim of error concerning the reasonableness of the $44,000 in sanctions awarded to Lans because he stipulated to set sanctions at this amount. See *Roberts v Mecosta Co Hosp*, 466 Mich 57, 64 n 4, 642 NW2d 663 (2002).

Affirmed in part and reversed in part.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder