STATE OF MICHIGAN

COURT OF APPEALS

DEZAAK MANAGEMENT, INC.,

Plaintiff-Appellant,

and

THOMAS VANDUINEN,

Plaintiff,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 23, 2012

No. 307025
Alpena Circuit Court
LC No. 10-003311-CK

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff DeZaak Management, Inc. ("DeZaak"), appeals as of right the trial court's order enforcing a settlement agreement between DeZaak and defendant Auto-Owners Insurance Company ("Auto-Owners"), dismissing DeZaak's suit, and awarding Auto-Owners taxable costs and attorney fees. DeZaak, which is a corporation that owns and manages rental properties, is owned by plaintiff and its president Thomas VanDuinen ("VanDuinen"), and VanDuinen, on behalf of DeZaak, entered into the settlement agreement with Auto-Owners for $4,500 in open court. DeZaak challenges the validity of the settlement agreement on the basis of mistake and duress, and it also challenges the award of costs and attorney fees. We affirm.

Auto-Owners insured a rental property owned by DeZaak against losses or damages resulting from vandalism or malicious mischief committed by others, including tenants, and DeZaak filed a claim under the policy after exiting tenants damaged the property. Auto-Owners and DeZaak, while agreeing that Auto-Owners was liable under the policy, could not reach an agreement regarding the amount of damages and payment owing under the policy. The lawsuit was filed and eventually a trial was commenced, with VanDuinen being called as the first witness. It was DeZaak's intention to have VanDuinen testify with respect to damages and cost and repair estimates. Auto-Owners objected to the testimony on the basis that VanDuinen's estimates were predicated on replacement or repair costs, which was not the proper measure of damages according to Auto-Owners. DeZaak's counsel argued to the contrary, and the trial court

then excused the jury and examined the insurance policy, finding that it was "an actual cash value policy," which, according to the court's construction of the policy, meant that damages were measured by the cost to replace the property minus the amount of any depreciation applicable to the damaged property. The court queried whether VanDuinen was qualified to testify regarding the depreciation of the property at issue. The trial court believed that VanDuinen would need to be qualified as an expert, in connection with depreciation, in order "to assign a useful life to each element of loss." The court warned that it would not let the jury speculate on the matter of depreciation.

With the jury still out, the trial court allowed DeZaak's counsel to question VanDuinen in an attempt to qualify him in regard to testifying on depreciation. The trial court thereafter stated, "I'm not hearing a lot of qualifications from him on him being – either having the education, training, or experience to assign a useful life to [various articles of property]. I think we have got a problem. We are going to take our recess. I'm going to talk to both of you." Approximately 20 minutes later, the trial court went back on the record, and the parties expressed that a settlement had been reached in the amount of $4,500 payable by Auto-Owners to DeZaak for full and final release of the claim. VanDuinen, on behalf of DeZaak, indicated on the record that he was knowingly and voluntarily entering into the $4,500 settlement agreement. In an affidavit subsequently executed by VanDuinen, he averred that the trial judge had been his attorney before taking the bench, that the judge spoke to him alone in chambers, ostensibly during the recess, that the judge informed him that he should settle the case or see it dismissed and face fees and sanctions, that he did not want to settle the case but felt compelled and threatened to do so based on the judge's comments, and that he "did not recall anyone being present during [the] conversation." We note that nothing in the record, outside of the affidavit, confirms the substance of VanDuinen's averments. Auto-Owners adamantly maintains that counsel for the parties, along with VanDuinen, all met together with the trial judge in chambers during the recess and had a brief discussion and that DeZaak's counsel then had a private discussion with VanDuinen in the hallway outside the courtroom just prior to placing the settlement agreement on the record.

Subsequently, Auto-Owners prepared a proposed stipulation and order of dismissal and release based on the in-court settlement agreement; however, DeZaak would not agree to the proposed order, and Auto-Owners then filed a motion to enforce the settlement agreement and dismiss the lawsuit. Auto-Owners also requested costs and attorney fees associated with DeZaak's refusal to comply with the settlement agreement. DeZaak objected, claiming that the settlement was not entered into voluntarily and was forced upon VanDuinen. DeZaak also filed a brief, arguing that the settlement agreement should be set aside on the ground of mistake, that the trial court was mistaken when it ruled that expert testimony was required to prove the amount of damages, and that, assuming expert testimony was required, the court erred in not finding VanDuinen to be qualified as an expert relative to the amount of damages. Following a hearing, the trial court entered an order requiring performance of the settlement agreement, deducting $1,437 in attorney fees and costs from the $4,500 settlement because of DeZaak's failure to execute the proposed stipulation and settlement agreement prepared by Auto-Owners, and dismissing the action with prejudice. In a motion for reconsideration, which had attached VanDuinen's affidavit referenced above, DeZaak argued that the settlement agreement had to be vacated because of the alleged ex-parte communications that pressured VanDuinen into settling the case and because of the court's legal errors regarding the necessity of expert testimony. The

trial court denied the motion, noting that, if the court had made legal errors, the appropriate remedy was to file an appeal. DeZaak now appeals the trial court's decision to enforce the settlement agreement.

"The finding of the trial court concerning the validity of the parties' consent to a settlement agreement placed on the record will not be overturned absent a finding of abuse of discretion." *Howard v Howard*, 134 Mich App 391, 396-397; 352 NW2d 280 (1984); see also *Keyser v Keyser*, 182 Mich App 268, 270; 451 NW2d 587 (1990). MCR 2.507(G) provides that "[a]n agreement . . . between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless . . . ." An agreement between parties to settle a pending lawsuit constitutes a contract and is governed by the legal principles that are applicable to the interpretation of contracts. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009); *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994); *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 379; 521 NW2d 847 (1994). Unambiguous agreements must be enforced according to their plain terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). In the absence of duress, fraud, mutual mistake, severe stress, or unconscionable advantage taken by one party over the opposing party, courts are bound to enforce settlement agreements. *Jackson v Wayne Circuit Judge*, 341 Mich 55, 60; 67 NW2d 471 (1954); *Lentz v Lentz*, 271 Mich App 465, 474; 721 NW2d 861 (2006); *Thomas*, 206 Mich App at 268; *Keyser*, 182 Mich App at 269-270; *Calo v Calo*, 143 Mich App 749, 753; 373 NW2d 207 (1985); *Hilley v Hilley*, 140 Mich App 581, 585; 364 NW2d 750 (1985).[1] A litigant who asserts that a settlement agreement entered into by the parties in open court should be set aside "carries a heavy burden of persuasion[;] [and] [e]very presumption of judicial care, of professional competence, and of decretal stability is against overthrow [] in the appellate court[.]" *Wagner v Myers*, 355 Mich 62, 68; 93 NW2d 914 (1959). "[S]ettlement agreements should not normally be set aside and . . . once a settlement agreement is reached a party cannot disavow it merely because he has had a 'change of heart.'" *Metro Life Ins Co v Goolsby*, 165 Mich App 126, 128; 418 NW2d 700 (1987).

DeZaak devotes a considerable portion of its appellate brief to arguing that the trial court committed legal errors in *sua sponte* raising the issue regarding the need for expert testimony, which was never an issue posed by Auto-Owners, in demanding that expert testimony be presented to establish DeZaak's losses under the policy, and in ruling that VanDuinen was not qualified to testify as an expert on the matter of damages recoverable under the policy. DeZaak

[1] "A mutual mistake may be one of fact or one of law." *Johnson Family Ltd Partnership v White Pines Wireless, LLC*, 281 Mich App 364, 379; 761 NW2d 353 (2008). A mutual mistake of fact means "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). A settlement agreement generally cannot be set aside on the basis of a unilateral mistake. *Hilley*, 140 Mich App at 585. To establish a claim of duress, a party must show that he or she was illegally compelled or coerced to engage in an act under fear of serious injury to his or her person, reputation, or fortune. *Farm Credit Servs of Mich's Heartland, PCA v Weldon*, 232 Mich App 662, 681; 591 NW2d 438 (1998).

states that the litigation against Auto-Owners progressed at a good pace, with the parties working well together in a civil manner and understanding that the trial would be a straightforward dispute in which the jury would merely resolve the amount owing for losses under the policy. DeZaak complains that the trial court essentially disrupted what otherwise was a simple case with its erroneous rulings and that the court "over-stepped" its bounds. We hold that none of these arguments has any relevance whatsoever to setting aside the settlement agreement. If DeZaak believed that the trial court rendered erroneous rulings or did anything that would warrant reversal, it could have allowed the trial to proceed and then, after the likely entry of a directed verdict in favor of Auto-Owners, DeZaak could have appealed the rulings to this Court. Instead, DeZaak made the decision to settle the case.

DeZaak proceeds to engage in a discussion about the inappropriateness of the trial court's actions in allegedly having ex-parte communications with VanDuinen, which, DeZaak maintains, resulted in VanDuinen agreeing to settle the action under duress and premised on mistake. DeZaak fails to explain its mistake theory or provide any legal authorities or analysis on the law of mistake, mutual or unilateral. Possibly, DeZaak believes that the settlement agreement should be set aside because the trial court made "mistakes" in its legal rulings or that VanDuinen entered into the settlement under a "mistaken" belief that the court's rulings were legally sound. Either theory fails and finds absolutely no support in the law; this case simply does not entail the contract defense of mutual mistake given the circumstances presented. With respect to the defense of duress or undue influence, assuming for the sake of argument that the alleged ex-parte communications occurred and that the trial judge told VanDuinen to settle the case because the judge was otherwise going to dismiss the action and impose sanctions, we are not prepared to reverse and set aside the settlement agreement. As reflected above in our discussion of the trial proceedings, it was more than evident that, wrongly or rightly, the trial court was poised to dismiss the lawsuit before the recess occurred. Even without any presumed ex-parte discussion, VanDuinen, as well as DeZaak's counsel, had to have been under the impression that the action was about to be dismissed. In other words, the pressure to settle already existed, and any assumed ex-parte discussion added nothing to the equation. The imposition of sanctions would also have been fairly typical in a situation where a party went to trial lacking, in a trial court's view, a necessary witness to establish the cause of action. We certainly do not condone ex-parte communications, and we are hesitant to even give DeZaak the benefit of the assumption that such communications occurred where VanDuinen simply could not "recall" whether anyone else was present, but, regardless, under the facts of this case in which the court telegraphed its position to all in open court before the recess, there is no basis to set aside the settlement agreement. We will not find duress or undue influence where a trial court has voiced its position on a legal issue during trial that strongly motivates, or even pressures, a party to settle an action; this is not an uncommon occurrence. Moreover, VanDuinen expressly acknowledged on the record that he *knowingly and voluntarily* was entering into the settlement agreement, which conflicts with his affidavit and the defenses of mistake and duress. Reversal is unwarranted.

Finally, DeZaak challenges the award of costs and attorney fees, where the trial court indicated, in a conference call and in advance of the hearing on Auto-Owners' motion to enforce the settlement agreement and dismiss the lawsuit, that it would assess costs and fees if DeZaak and VanDuinen refused to go through with the settlement. DeZaak, in a cursory argument, simply claims error because the trial court's action violated the principle "that all parties should

be allowed to have their claims objectively heard by a trial court prior to the court having ruled on an issue." The trial court was very familiar with the proceedings and at the hearing on Auto-Owners' motion, the trial court allowed DeZaak to fully argue its position and it fairly entertained the motion and objections. We note that DeZaak makes no argument that the court lacked a legal basis to award fees and costs. Reversal is unwarranted.

Affirmed. Auto-Owners, having fully prevailed on appeal, is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra