**S T A T E  O F  M I C H I G A N**

**C O U R T  O F  A P P E A L S**

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CONCEPTS PLUS, LLC,

Plaintiff/Counterdefendant/Cross-Appellee,

v

DANIEL S. GOLDMAN,

Defendant/Counterplaintiff/Third-Party Plaintiff/Appellee/Cross-Appellant,

and

ECOLOGIC INDUSTRIES, LLC,

Defendant/Counter-Plaintiff/Appellee/Cross-Appellant,

and

ROBERT F. CAREY, III as trustee of the ROBERT F. CAREY, III TRUST, KENOSHA INVESTMENTS, LLC., and TIMOTHY S. CAREY,

Third-Party Defendants-Appellants.

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UNPUBLISHED
June 27, 2013

No. 302203
Grand Traverse Circuit Court
LC No. 2009-027664-CK

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Following trial, the jury returned a verdict finding (1) no cause for action on a claim of breach of the duty of good faith and fair dealing by plaintiff Concepts Plus, LLC against defendant Daniel S. Goldman, (2) no cause for action on defendant Ecologic Industries, LLC's counterclaim against Concepts Plus, and (3) that Concepts Plus was entitled to $42,230.08 from Ecologic Industries for breach of contract. Based on the determination that Goldman did not breach a duty of good faith and fair dealing, third-party defendants Robert F. Carey III and Timothy S. Carey were held liable on Goldman's third-party indemnification claim that was premised on having to honor a personal guaranty after Concepts Plus failed to pay on a bond.

Plaintiff and the third-party defendants appealed from the final judgment entered on this verdict. However, the appeal has been dismissed as to all appellants except Robert F. Carey III (hereinafter appellant) based on the failure to file an appellate brief.[1] Defendants Goldman and Ecologic Industries have cross-appealed. For the reasons set forth below, we affirm.

Goldman owned Ecologic Industries and also had managerial responsibility for Concepts Plus. After Concepts Plus began making furniture components for Ecologic Industries, Concepts Plus became insolvent. Concepts Plus sued, in essence maintaining that Goldman made misrepresentations about the furniture line and/or had mismanaged Concepts Plus, and that Ecologic Industries had an outstanding balance due of $42,230.08.

Though all parties were ordered to appear for a mediation and final pretrial/scheduling conference in a civil scheduling conference order, appellant failed to appear. As a result, the court sanctioned him $12,300 pursuant to MCR 2.401(G), which allows for default or dismissal in the event of a failure to appear as ordered or a "just order other than one of default or dismissal." The court concluded that a default would be unreasonable, but imposed the sanction based on the cost for Goldman and his attorney to attend the mediation and final settlement conference, plus $500 for Grand Traverse County. Appellant argues that the sanction was not a "just order other than one of default or dismissal" because neither the mediation nor the conference were rescheduled such that the other parties incurred additional costs, his brother appeared with full authority to settle, he would have had to travel from San Francisco to Traverse City, and he was available by telephone. We note that counsel for appellant argued that a default judgment would be unduly harsh, and he took issue with the amount of the sanction imposed, but he did not otherwise argue that a monetary sanction was inappropriate. Accordingly, this issue has not been preserved and our review is for plain error affecting a substantial right. See generally *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

In arguing that the sanction should not have been imposed, appellant cites 2 Longhofer, Michigan Court Rules Practice, p 542, which states in pertinent part:

> The rationale behind the discretionary payment of expenses permitted by MCR 2.401(G)(2) is basic, although not immediately obvious. If a party fails to attend any other hearing permitted by the rules, that hearing may proceed in the party's absence. This is not true with a rule 2.401 conference. All parties must be present or the conference does not proceed. Thus, if a party fails to attend, that non-attendance will require that other counsel (and parties) attend not only one, but possibly two, additional hearings. Counsel will have to attend any show cause hearing ordered by the court (or a motion to set aside a default or dismissal), and, if the case continues, will also have to attend the rescheduled conference. For the

[1] *Concepts Plus, LLC v Goldman*, unpublished order of the Court of Appeals, entered February 1, 2013 (Docket No. 302203) (Timothy S. Carey and Kenosha Investments, LLC); *Concepts Plus, LLC v Goldman*, unpublished order of the Court of Appeals, entered December 29, 2011 (Docket No. 302203) (Concepts Plus).

> court to order that the offending party reimburse the other parties for at least a portion of this additional expense is reasonable.

Once the court decided that a default would be unreasonable, it could have "excuse[d] a failure to attend," but was required to ("shall") "enter a just order other than one of default or dismissal." MCR 2.401(G)(2). The rule references conditioning the "just order" on the "payment by the offending party or attorney of reasonable expenses," but does not limit the "just order" to those reasonable expenses. Ordering payment of the reasonable expenses incurred by the defense in preparing for and attending the two proceedings was a just sanction.[2]

Defendants Goldman and Ecologic Industries argue that the verdict of $42,230.08 was against the great weight of the evidence. Defendants did not preserve this issue by moving for a new trial. When a claim that the verdict is against the great weight of the evidence is not raised in a motion for new trial, the issue is unpreserved, see *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001), and thus is reviewed for plain error affecting a substantial right, *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011), and/or manifest injustice, *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). We find neither.

Edward Colson, the general manager of Concepts Plus, testified that Concepts Plus had unpaid invoices for 2009; he referenced an exhibit, which was based on the company's general ledger for 2009 and showed the balance due for Ecologic Industries as being $42,235. A summary of all invoices and payments, together with a summary of open invoices, were also included in the exhibit and showed an ending balance of $42,235.08.[3] Defendants argue that Colson's credibility was called into question because his testimony with regard to another document was undermined. However, there were no concessions from Colson regarding the unpaid invoice balance of $42,235.08. Although Goldman gave testimony that raised questions about these invoices,

> [w]hen a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [*Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (citations omitted).]

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[2] We observe that, though, as discussed, trial courts have wide discretion to impose appropriate sanctions, the rationale in imposing a sanction like the one here is to redress the failure to comply with court orders, and it is improper to sanction a party with an intent to financially punish a party.

[3] The initial claim and the jury verdict were for $42,230.08. This exhibit, however, included an additional unpaid invoice for $5.00.

Colson’s testimony regarding the unpaid invoices was competent evidence, and the jury could reasonably conclude that Ecologic Industries is liable for the unpaid invoices.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra