STATE OF MICHIGAN

COURT OF APPEALS

GEORGE SWISTOCK,

Plaintiff/Counter-Defendant-Appellee,

v

JAMES GNEWKOWSKI and NANCY GNEWKOWSKI,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

JOSEPH CAROL, INC.,

Defendant-Appellant,

and

MARK TOTH,

Defendant-Appellee,

and

BRUCE KWASELOW,

Third-Party-Defendant-Appellant,

and

DAVID ZUCKERMAN,

Third-Party-Defendant-Appellee.

UNPUBLISHED
September 18, 2007

No. 270497
Oakland Circuit Court
LC No. 2005-065509-CK

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Appellants Joseph Carol, Inc., and Bruce Kwaselow appeal as of right from the trial court's order denying their motions for sanctions against plaintiff George Swistock and defendants James and Nancy Gnewkowski. We affirm in part, vacate in part, and remand for reconsideration of the issue regarding case evaluation sanctions.

This case arises from a failed real estate transaction. Plaintiff George Swistock agreed to purchase the home of James and Nancy Gnewkowski for $975,000, but refused to complete the sale. Swistock then brought an action alleging fraud in the inducement against the Gnewkowskis and the real estate agents involved in the transaction, defendants Mark Toth and Joseph Carol, Inc. The complaint identified defendant Mark Toth as the "selling real estate agent" and appellant Joseph Carol, Inc., as a "listing real estate agent" involved in the proposed sale. Swistock alleged that he was induced to enter into the purchase agreement because of false representations including that the property had never been listed before, that the sellers intended to list the property for well over $1,000,000, and that they had a potential purchaser at the higher price. The Gnewkowskis filed a countercomplaint against Swistock, as well as cross claims and third-party claims against appellants, Joseph Carol, Inc., and its owner Bruce Kwaselow. The Gnewkowskis alleged that appellants breached their duty to procure a power of attorney from David Zuckerman authorizing Swistock to sign on his behalf,[1] that they violated the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, and that they were also liable for contribution. The Gnewkowskis did not specify a particular basis for the contribution claim.

Appellants Joseph Carol, Inc. and Kwaselow filed separate motions for summary disposition, one seeking dismissal of plaintiff Swistock's claim against Joseph Carol, Inc., and the other seeking dismissal of the Gnewkowskis' cross claims and third-party claims against Joseph Carol, Inc. and Kwaselow. The trial court granted both motions. Appellants subsequently moved for case evaluation sanctions and sanctions for filing a frivolous claim against both Swistock and the Gnewkowskis. The trial court denied both of those motions.

Appellants first argue that the trial court erred by flatly denying their requests for case evaluation sanctions against both Swistock and the Gnewkowskis. We agree. "A trial court's decision to award mediation sanctions involves a question of law that is reviewed de novo." *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). "Generally, a party that rejects a mediation evaluation is subject to sanctions if the party does not improve its position at trial." *Id.* at 378. "However, because a trial court's decision whether to award costs pursuant to the 'interest of justice' provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion." *Harbour v Correctional Medical Services*, *Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

---

[1] The Gnewkowskis alleged that Zuckerman, Swistock's business partner, was also a party to the purchase agreement.

The case evaluation award recommended that the Gnewkowskis receive Swistock's $25,000 deposit, that appellant Joseph Carol, Inc., and defendant Toth each pay Swistock $2,500, and that appellants have no liability to the Gnewkowskis. Appellants accepted the award; Swistock accepted the award on the condition, among others, that all the other parties accept it; and the Gnewkowskis rejected it by not responding. According to MCR 2.403(L)(3)(c), "[i]f a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept."

Because Swistock accepted the award subject to the condition that all other parties accept it, and the Gnewkowskis' rejected the award, the litigation was not concluded and appellants were forced to continue defending this case until they were granted summary disposition from every claim. The trial court's orders granting appellants' motions for summary disposition were "verdicts" for purposes of the case evaluation rule. MCR 4.403(O)(2)(c). Because Joseph Carol, Inc., accepted unconditionally, Swistock's conditional acceptance is considered a rejection with regard to Joseph Carol, Inc. MCR 2.403(L)(3)(c). The order dismissing plaintiff's claim against Joseph Carol, Inc., was not more favorable to Swistock than the case evaluation award, so Joseph Carol, Inc., is entitled to case evaluation sanctions against Swistock unless the trial court determines that the award would contravene the interests of judgment. MCR 2.403(O)(1), (11).

Regarding the Gnewkowskis, the case evaluation did not award any money to appellants, but this fact does not preclude liability for case evaluation sanctions. The Gnewkowskis did not have a more favorable verdict because they presumably had to expend money and time to defend appellants' summary disposition motions. This presumption is encompassed in MCR 2.403(O)(3), which states, "If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." The award recommended that appellants have no liability to the Gnewkowskis, and appellants were granted summary disposition of the Gnewkowskis' claims. Therefore, the verdict dismissing the action was not more favorable to the Gnewkowskis than the case evaluation. MCR 2.403(O)(3).

Although MCR 2.403(O)(11) authorized the trial court to refuse an award of actual costs in the interest of justice, the trial court instead erroneously believed that MCR 2.403(O) simply did not apply. However, the circumstances of this case are rather unusual, and the full factual basis for the claims and counterclaims never came to light. It appears that the evaluators may have considered Swistock's actions more a symptom of buyer's remorse than legitimate delusion, and Swistock's request for a clarification of the bare award was not unreasonable under those circumstances. Although acceptance by the Gnewkowskis is slightly more straightforward regarding the extent of liability that their acceptance would have entailed, the law was not at all clear regarding appellants' responsibility to assure Zuckerman's contractual liability. Real estate agents are not potted plants, and an agency relationship necessarily includes various responsibilities. Again, the liability for specifically performing or paying the purchase price for the breached contract was a principal issue in the case, and the case evaluation award did not conclusively settle the issue. Under the circumstances, the trial court may have exercised its discretion and refrained from awarding case evaluation sanctions in the interest of justice. MRE 2.403(O)(11); *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 448-450; 702 NW2d 637 (2005). We are not in a position to interpose our opinion into this incomplete inquiry and forestall the trial court's decision on the record before us, so we merely vacate the trial

court's order denying case evaluation sanctions and remand for the trial court's full consideration of the issue in the appropriate legal light.[2]

Appellants also argue that plaintiff Swistock's complaint and the Gnewkowskis' cross claims and third-party claims were frivolous, entitling them to sanctions under MCL 600.2591. We disagree. Under MCR 2.114(F), a trial court must award sanctions when a party pleads a frivolous claim or defense. Absent clear error, we will uphold a trial court's decision on a challenge that a claim or defense is frivolous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). According to MCR 2.625(A)(2), "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." "'Frivolous' means that . . . [t]he party's primary purpose . . . was to harass, embarrass, or injure . . . [, t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true, [or t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(i) - (iii).

Here, the trial court correctly found that the claims of Swistock and the Gnewkowskis were not frivolous. As an initial matter, appellants have failed to demonstrate that Swistock or the Gnewkowskis lacked any reasonable basis for their factual claims. The trial court specifically found that there was at least some factual support for Swistock's misrepresentation claim against the Gnewkowskis. Although the court ultimately determined that there was no factual support for plaintiff's claim that Joseph Carol, Inc., made any misrepresentation or had knowledge of any misrepresentation, plaintiff presented evidence that Kwaselow was present when the Gnewkowskis made some of the alleged misrepresentations. Kwaselow, Joseph Carol, Inc., and the Gnewkowskis were all interconnected in the transaction and associated with the alleged misrepresentations. Therefore, there was a reasonable factual and legal basis for Swistock to believe that Joseph Carol, Inc., may have a degree of vicarious liability for any fraud. Therefore, the trial court correctly found that plaintiff Swistock's claim against Joseph Carol, Inc., was not frivolous.

Similarly, the Gnewkowskis' cross-claims and third-party claims against appellants were not frivolous. The trial court ultimately found that appellants had no duty to the Gnewkowskis to secure a power of attorney document from Swistock, and that this allegation was immaterial to the facts of the case. However, the existence of the duty to secure the appropriate documentation had arguable legal merit, especially since the lack of proper documentation could have resulted in the loss of a liable party and a valuable source of recovery. Regarding the various legal theories, we have previously held, on the basis of Supreme Court precedent, that MCPA claims may be brought against real estate brokers. *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993). *Price* has not yet been overturned. Although the factual basis for the Gnewkowskis' contribution claim was somewhat unclear and questionable, the case evaluators did not find that Joseph Carol, Inc., was an innocent bystander in the ill-fated transaction. They assigned the real estate agency a degree of liability. Therefore, a contribution claim, in the

---

[2] Only appellant Joseph Carol, Inc., may recover sanctions from plaintiff Swistock, because appellant Kwaselow was not a party to plaintiff's principal action.

traditional sense, lodged by the Gnewkowskis for whatever degree of fault may lay with the corporation and Kwaselow individually, was not devoid of all arguable legal merit. Moreover, the Gnewkowskis persuasively argued at the sanction hearing that the contribution they claimed actually related to the portion of any reward that they could not collect from Zuckerman. Although poorly labeled, this claim was not clearly proven to be frivolous. Therefore, the trial court did not clearly err by finding that these claims were not frivolous.

Affirmed in part, vacated in part, and remanded for reconsideration of the issue regarding case evaluation sanctions. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald