

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA P. SIMON and PIZZA QUEEN, INC.,

Plaintiffs/Counter-Defendants-
Appellees,

v

IDA B. KELLY, EMERAL A. CROSBY, and
TONI M. MOORE,

Defendant/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

August 9, 2007

No. 267998

Wayne Circuit Court

LC No. 04-429476-CZ

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right, challenging the circuit court's judgment that required them to sell their shares of a corporation to plaintiff Simon. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When the complaint was filed, Simon was a minority shareholder of Pizza Queen, Inc., and defendants Kelly and Crosby owned the remaining shares. Defendant Moore purchased Kelly's shares while the action was pending. Plaintiffs' complaint essentially alleged breach of fiduciary duties by defendants.

On December 13, 2005, the parties' attorneys appeared before the trial court and explained that they had "agreed to a mechanism to resolve the litigation" By this time Moore had already purchased Kelly's shares. It was agreed that defendants Moore and Crosby would determine a value for the corporation, and plaintiff Simon would then have the option of either purchasing the other shareholders' interests based on that value, or selling her interest to defendants. The value figure was to be provided in two weeks, and Simon was to decide whether to sell her shares or buy defendants' shares within a week.

After defendants failed to provide a value figure within the time agreed, Simon filed a motion for "appointment of a receiver, entry of judgment on liability and/or imposition of sanctions."

At a hearing on January 3, 2006, the trial court determined that defendants breached the settlement agreement. After hearing testimony from Moore and Simon, the court stated that

defendants breached the settlement agreement by failing to provide a value figure and determined that “an appropriate remedy for breach of the agreement [was] that the plaintiff be allowed to purchase the shares.” The court ordered defendants to transfer their shares to plaintiff Simon, who would pay \$5,000 that day and the balance of \$20,000, with four percent interest for the first 90 days, and five percent thereafter. The court entered a judgment on January 4, 2006, with those terms.

On appeal, defendants argue that they were denied due process when the trial court set a value for Moore’s and Crosby’s interests and forced a settlement on terms that were unacceptable to them, and that they were not given adequate notice and an opportunity to be heard.

Issues raised for the first time on appeal, including constitutional issues, are not ordinarily subject to appellate review. *Michigan Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 167; 533 NW2d 339 (1995). Defendants did not object to the procedure employed by the trial court on any grounds, much less on the basis that the procedure denied them due process. Instead, the defense participated in the evidentiary hearing and presented argument in a manner showing agreement with the trial court’s handling of the matter. Allowing defendants, evidently dissatisfied with the outcome, to now obtain relief on the basis that the procedure was improper would essentially allow them to harbor error as an appellate parachute. See *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001).

Moreover, defendants’ due process arguments are not persuasive. In civil cases, due process generally requires “notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker.” *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Defendants’ claim that no settlement agreement was reached is refuted by the record of the proceedings on December 13, 2005, and defense counsel’s acknowledgement of the agreement on the record on January 3, 2006.

Defendants argue that a court cannot “compel a settlement” prior to trial on terms that one or both parties find unacceptable. Here, however, the trial court did not compel a settlement. The transcript of the December 13, 2005, proceeding shows that the parties reached an agreement, which defendants subsequently breached. In awarding relief at the hearing on January 3, 2006, the trial court was not compelling a settlement, but rather was fashioning a remedy for defendants’ breach of the settlement agreement.

Defendants note that Crosby was not present at the settlement conference or the January 3, 2006, hearing, and that there is no record that either he or Moore agreed to the terms of any settlement. However, Crosby and Moore were represented by counsel. “[A] client is bound by the actions and inactions of the client’s attorney that occurred within the scope of the attorney’s authority.” *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324; 712 NW2d 168 (2005). Defendants do not argue that their attorney acted outside the scope of his authority.

Defendants also contend that during the unanticipated evidentiary hearing, Moore “was not afforded an opportunity to present witnesses, assemble and produce crucial tax collection and evidence of indebtedness documentation.” However, defense counsel did not request an opportunity to present additional evidence or an adjournment. He did not object to the trial court’s handling of the matter, but rather participated in the questioning of witnesses and presented argument before the court’s decision. In light of defendants’ failure to request additional time or to present further evidence and their acquiescence to the trial court’s action, they will not be heard to complain that the court denied them an opportunity to present evidence. *Hilgendorf, supra*.

Defendant Crosby also asserts that he was not notified of the hearing. Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Petition by Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 3; 732 NW2d 458 (2007) (citation and internal quotation marks omitted). Actual notice is not required. See *id.* The court rules generally require service on a party’s attorney. See MCR 2.107(B). Here, notice provided to Crosby’s attorney, in compliance with the court rules, was reasonably calculated to apprise Crosby of the pendency of the action and adequately protected his due process rights.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly