STATE OF MICHIGAN

COURT OF APPEALS

TURTLE LAKE CLUB,

Plaintiff/Counter-Defendant-Appellant-Cross Appellee,

v

UPPER MULVANEY RESOURCES GROUP,

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

UNPUBLISHED
December 1, 2009

No. 285700
Montmorency Circuit Court
LC No. 06-001519-CZ

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision granting defendant's motion for summary disposition, dismissing plaintiff's claims, and awarding attorneys fees as contract damages. Defendant cross appeals the trial court's decision to award less than the amount of attorneys fees requested as damages. We affirm in part and reverse in part.

Plaintiff Turtle Lake Club (TLC) is a nonprofit corporation. In 1982, TLC transferred the mineral rights of the property it owned in several counties to defendant Upper Mulvaney Resources Group (UMRG), a partnership formed by the 20 members of TLC for the purposes of receiving, managing and profiting from those mineral rights. Some time later, TLC questioned the legality of the 1982 transfer and, in 1996, following extensive bargaining, TLC and UMRG reached a settlement whereby UMRG returned roughly half of the mineral rights to TLC. The settlement agreement also included a covenant not to sue on any issue related to the 1982 mineral rights transfer.

Notwithstanding that, in August 2006, TLC filed the instant action, asserting that the original transfer of mineral rights to UMRG in 1982 was void ab initio and that the subsequent 1996 settlement was also void because it was an agreement to ratify the initial, illegal transfer. TLC sought to recover royalties paid to UMRG under mineral rights lease agreements. UMRG filed a counter-complaint seeking damages on the basis that TLC's act of filing suit constituted a breach of the 1996 settlement agreement's covenant not to sue.

UMRG moved for summary disposition seeking dismissal of TLC's claims. The trial court granted UMRG's motion, concluding that the 1996 settlement between the parties was a valid agreement and that TLC had breached that settlement agreement by filing the present

action. The trial court explained that the settlement agreement was "long and thorough and clearly was intended to be a final resolution of the issue whether the [1982] transfer of mineral rights several years before was a valid transfer. Among other things the agreement forbade the filing thereafter of any lawsuit concerning the issue."

After the trial court dismissed TLC's complaint, UMRG moved for partial summary disposition on its cross claim for damages related to TLC's breach of the 1996 settlement agreement, requesting that the trial court conclude that it was entitled to recover attorneys fees. UMRG submitted a billing for attorneys fees in the amount of $570,793.05. The trial court concluded that this amount was unreasonable for several reasons, including the fact that the billing included fees for work billed prior to the filing of the lawsuit, the relatively short duration of the case, the fact that no discovery was taken, experts in gas law were retained when the primary issue related to contract law, it was not necessary to go to trial or prepare for trial, and the case did not necessitate extraordinary skill. The trial court awarded UMRG attorneys fees in the amount of $255,000.

TLC argues that summary disposition of its claim against UMRG was improper because genuine issues of fact remained related to the legality of the 1982 transfer. We disagree. We review the decision of a trial court pertaining to a motion for summary disposition de novo. *Associated Builders & Contractors v Consumer & Industry Services Director*, 472 Mich 117, 123; 693 NW2d 374 (2005). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Generally, a contract expressing the intent of the parties in clear and unambiguous language must be enforced as written. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). However, an exception to this rule applies when the contract violates law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).

TLC, as a nonprofit corporation, could not operate for the purpose of providing profit or pecuniary gain for its members. MCL 450.117, repealed by 1982 PA 162, §1098, effective January 1, 1983. The transfer at issue occurred in 1982. At that time, a nonprofit corporation was prohibited from issuing payment to shareholders of dividends or "any portion of earnings . . . derived through increment of value upon property or otherwise incidentally made." MCL 450.119, repealed by 1982 PA 162, §1098, effective January 1, 1983. The statute also provided that upon dissolution of a nonprofit corporation, the shareholders would be entitled to only the original subscription price of the stock, unless otherwise provided for in the articles of incorporation. *Id*. TLC contends that the transfer of mineral rights from TLC to UMRG constituted an illegal dividend payment because the members of TLC were also the members of UMRG. However, this Court has previously defined the term "dividend" as a "distribution of the net income of the corporation to the shareholders of that corporation." *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 314; 206 NW2d 490 (1973), aff 391 Mich 729 (1974). The deed transferring mineral rights from TLC did not list the shareholders of TLC as the grantees. Instead, UMRG was the designated grantee of the transfer. Even though the

membership of the two entities was the same, the transfer in question was still a transfer between two separate corporate entities with similar shareholders, rather than from one corporate entity to its own shareholders. Therefore, the 1982 transfer was not an illegal dividend payment to TLC's members.[1]

Because TLC cannot demonstrate that the 1982 transfer of mineral rights violated law or public policy, it must be enforced as written. *Rory*, *supra* at 491. Because the legality of the 1982 transfer was not an outstanding question of fact, the trial court did not err in granting summary disposition in favor of UMRG. *Veenstra*, *supra* at 164.

Moreover, it is a long held policy of this Court that a party may not benefit from a claim of error resulting from conduct that the aggrieved party contributed to by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). TLC seeks to place UMRG in the position of wrongdoer. However, if wrongful conduct did in fact occur, TLC itself was an active participant in such wrongdoing and should not now benefit from those actions.

We also reject TLC's claim that the 1996 settlement agreement is unenforceable as a matter of law because it constituted the ratification of prior unlawful conduct. A settlement agreement is a contract and is governed by the legal principles applicable to interpretation and construction of contracts. *Columbia Assoc v Dep't of Treasury*, 250 Mich App 656, 668; 649 NW2d 760 (2002). The construction and interpretation of a contract is a question of law that we review de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

Settlement agreements are contracts and are "governed by the legal rules applicable to the construction and interpretation of other contracts." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009); see also, *MacInnes v MacInnes*, 260 Mich App 280, 289-290; 677 NW2d 889 (2004). Contracts, including settlement agreements, will be enforced as written unless they violate law or public policy. *Reicher*, *supra* at 663; *Bloomfield Estates Improvement Ass'n Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). Because we have concluded that the 1982 transfer was valid and did not violate then existing law, TLC's argument that the settlement agreement is invalid lacks merit. Therefore the trial

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[1] TLC contends that our Supreme Court's holding in *German Corp of Negaunee v Negaunee German Aid Society*, 172 Mich 650; 138 NW 138 (1912) compels a different conclusion. In that case, the Court held that a deed transferring mineral rights from a benevolent society directly to its members, share and share alike, was void "because made upon inadequate consideration by and for the benefit of those in control of the corporation, and also for want of the necessary element of two parties to the contract." *Id*. at 656. In *German*, however, it was only after the initial transfer of the mineral rights to the members directly that the members formed a corporation for mining purposes, to whom they then transferred the mineral rights. *Id*. at 653. As noted above, the transfer at issue in the instant case was not a transfer from TLC directly to its members, but rather was from TLC to another separate and distinct corporate entity, whose shareholders were also members of TLC. That distinction renders *German* inapposite here.

court did not abuse its discretion by enforcing the clear settlement agreement and granting summary disposition in favor of UMRG. *Veenstra, supra* at 164.

TLC's final issue on appeal challenges the trial court's authority to award attorneys fees in the instant case. We agree that the trial court erred in doing so. We review a trial court's decision to award attorneys fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

The general rule in Michigan is that attorneys fees are not recoverable unless authorized by statute, court rule, or contract. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004); *In re Temple Marital Trust* (*After Remand*), 278 Mich App 122, 129; 748 NW2d 265 (2008). Exceptions to the rule generally prohibiting an award of attorneys fees are narrowly construed. *Fleet Business Credit v Kraphol Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007).

The settlement agreement between the parties did not include a provision specifically authorizing the payment of attorneys fees in the event of a breach. However, UMRG argues that the settlement agreement nonetheless provides a contractual basis for the award of attorneys fees because, by filing this lawsuit, TLC breached its contractual commitment not to sue and, as a reasonably foreseeable result, UMRG incurred attorneys fees which should be recoverable as actual damages. UMRG thus distinguishes this case, where it argues that attorneys fees were awarded as a measure of the actual damages resulting from TLC's violation of the contract, from cases where a prevailing party seeks to tax attorneys fees as costs, i.e., "as an incidental matter to its being the successful litigant in [a] case." UMRG admits that the approach it advocates has not been adopted (or even considered) by any Michigan authority, but points to cases from foreign jurisdictions where it has been used. See e.g., *Anchor Motor Freight, Inc v Int'l Bd of Teamsters*, 700 F2d 1067 (CA 6, 1983).

We recognize the logic of UMRG's argument and acknowledge that it has not been specifically rejected by any Michigan precedent. Nonetheless, we feel constrained to reject it on the basis of the Michigan authority that is available.

As noted earlier, the rule as applied in our state is that attorneys fees are not recoverable, and the exception for cases where a contract authorizes the recovery of attorneys fees must be narrowly construed. And, contrary to UMRG's argument, our precedents have stated the rule as prohibiting "an award of attorneys fees as an element of costs *or damages*." *Newport West Condo v Venier*, 134 Mich App 1, 17; 350 NW2d 818 (1984) (emphasis added).[2] "Generally,

[2] We further note that our Supreme Court has adopted the "American rule" against the general recovery of attorneys fees as that rule has been handed down by US Supreme Court precedents. *In the matter of Kelman v Lauria*, 406 Mich 497, 503; 280 NW2d 457 (1979). In *Alyeska Pipeline Services v Wilderness Society*, 421 US 240, 249-250; 95 S Ct 1612; 44 L Ed 2d 141 (1975), the Supreme Court extensively reviewed the development of the American rule and noted, significantly for our purposes here, that it stemmed initially from a case involving "the inclusion of attorneys fees *as damages*." (Emphasis added).

attorneys fees are not recoverable as an element of costs *or damages* unless expressly allowed by statute, court rule, or common law exception, or where provided by contract of the parties." *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). (Emphasis added). In cases where the contract of the parties "expressly allowed" for the imposition of attorneys fees, our court has approved the award of those fees as damages. *Sentry Ins v Lardner Elevator*, 153 Mich App 317, 326; 395 NW2d 31 (1986). *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). Thus, "a contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorneys fees is valid." *Fleet Business Credit, supra*.

In contrast to these cases, UMRG would have us impose attorneys fees against TLC in the absence of any express authorization in the parties' contract. Because we are bound by precedents requiring that we narrowly construe the contract exception to the American rule, we must reject this argument.

As we have concluded that the trial court erred in awarding attorneys fees, we need not address UMRG's cross-appeal challenging the amount of attorneys fees awarded. We affirm in part and reverse in part. Neither party having fully prevailed, no costs may be taxed pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto