STATE OF MICHIGAN

COURT OF APPEALS

PRIME FINANCIAL SERVICES, L.L.C.,

Plaintiff-Appellee,

v

CASEY VINTON,

Defendant,

and

BANK ONE, N.A., f/k/a BANK ONE MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
January 6, 2011

No. 290735
Kent Circuit Court
LC No. 01-010952-CK

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant Bank One, N.A. (Bank One) appeals by right the trial court's order granting its motion for costs but denying its motion for attorney fees on the basis of MCR 2.405(D)(3). We reverse and remand for further proceedings consistent with this opinion.

I

This is the second time that this matter has been before this Court. See *Prime Fin Services LLC v Vinton*, 279 Mich App 245; 761 NW2d 694 (2008). In the first appeal, Bank One challenged the jury's verdict in favor of plaintiff Prime Financial Services, LLC (Prime Financial).[1] This Court reversed and remanded, concluding that the trial court should have granted Bank One's motion for judgment notwithstanding the verdict (JNOV). *Id*. at 279.

[1] The jury also returned a verdict against defendant Casey Vinton. However, that judgment was not at issue in the first appeal, *Prime Fin Services LLC*, 279 Mich App at 255 n 5, nor is Vinton a party to the present appeal.

This case initially arose out of the failure of Bedford Financial, Inc. (Bedford), which was in the business of making short-term subprime loans to consumers. Because Bedford lacked the cash reserves to fund all of its lending activities, it obtained funding through investor Arthur Bott. In the summer of 1997, Bott organized Prime Financial with Patrick Hundley, the owner of Bedford. Eventually, Bott became Prime Financial's sole officer. He began funding Bedford through Prime Financial, although he continued to provide some funding through his trust. In November 1997, Bank One agreed to provide a short-term construction loan facility to Prime Financial for $5 million. Bott gave his personal guaranty and that of his trust to Bank One. In January 1998, Prime Financial provided a $10 million credit facility to Bedford. Bedford granted Prime Financial a security interest in certain notes, which it was required to deliver to Prime Financial with the corresponding mortgage. Bedford was also required to assign the mortgage to Prime Financial. Despite this requirement, Prime Financial permitted Bedford to retain the notes in its possession. Thereafter, Prime Financial funded loans originated by Bedford with its own funds, as well as funds drawn on its facility with Bank One. But Prime Financial also funded other loans originated by Bedford without drawing on the credit facility with Bank One.

After Prime Financial provided the credit facility to Bedford, Bott became concerned with Bedford's loan practices. In March 1999, Bott told Hundley to find another lender. In June 1999, Bank One provided Bedford with a new $15 million credit facility under which Bank One would directly fund Bedford's lending. The facility was made possible in part by the personal guaranty of investor Richard Baidas. Bank One was required to pay off the amount currently owed by Prime Financial to Bank One under the prior $5 million credit facility, effectively transferring the debt from Prime Financial to Bedford and relieving Bott and his trust of liability under their guaranties. Bedford granted Bank One a security interest in property "now owned, or at any time hereafter acquired," including "all Mortgage Notes and Mortgages . . . which from time to time are delivered, or caused to be delivered, to the Bank . . . pursuant hereto or in respect of which an extension of credit has been made by the Bank under the Credit Agreement." At Bank One's request, Bedford brought all its notes and mortgages to the closing, including some notes funded solely by Prime Financial, and obtained Uniform Commercial Code (UCC) termination statements from several lenders, including Prime Financial.

In May 2000, Bank One informed Bedford that it considered Bedford to be in default on the $15 million credit facility. Bank One settled with Baidas, accepting a payment of approximately $5.5 million. Bank One agreed to transfer to Baidas the collateral it held under its agreement with Bedford, which included 23 notes originated by Bedford using funds provided by Prime Financial. Bedford also owed Prime Financial almost $1.7 million. Pursuant to a settlement agreement between Prime Financial, Bedford, and Hundley, Hundley was required to apply the $825,000 he had personally guaranteed to reduce debts owed to the Bott trust.

In October 2001, Prime Financial sued Vinton, an employee of Bedford, for conversion. Prime Financial subsequently amended its complaint, adding numerous claims against Bank One. The case proceeded to trial, and the trial court submitted five claims against Bank One to the jury. The first four claims—conversion, unjust enrichment, aiding and abetting conversion, and aiding and abetting breach of fiduciary duty—were all related to the 23 notes and mortgages originated by Bedford using funds from Prime Financial and given to Bank One as collateral for

the $15 million credit facility. The jury returned a verdict in favor of Prime Financial and against Bank One in the amount of $1,180,358.16.

Bank One appealed the judgment. The primary issues before this Court were "whether prior Article 9 of the [UCC] governed the creation of a security interest in a note secured by a mortgage and, if it did, whether a properly recorded assignment of mortgage could give the assignee greater rights to the note than the assignee had under Article 9." *Prime Fin Services LLC*, 279 Mich App at 248. This Court issued a published opinion, concluding "that Article 9 governed the creation of the security interests at issue and that an assignment of mortgage can give no greater rights to the assignee than it has in the note underlying the mortgage." *Id*. It further concluded that "after applying Article 9 to the undisputed facts of this case, Bank One's interest in the notes was superior to that of Prime [Financial]." *Id*. Accordingly, this Court held that Bank One's "actions cannot—as a matter of law—constitute conversion, unjust enrichment, or aiding and abetting conversion or breach of fiduciary duty" because "Bank One's dispositions of the notes and mortgages were specifically authorized under Article 9." *Id*. It reversed "the trial court's decision to deny Bank One's motion for [JNOV] and remand[ed] for entry of judgment in favor of Bank One on all of Prime [Financial]'s claims." *Id*. This Court denied Prime Financial's motion for reconsideration, *Prime Fin Services LLC v Vinton*, unpublished order of the Court of Appeals, entered July 16, 2008 (Docket No. 273264), and our Supreme Court denied leave to appeal, *Prime Fin Services LLC v Vinton*, 482 Mich 1069 (2008).

The trial court subsequently entered a judgment of no cause of action in favor of Bank One and dismissed with prejudice all claims asserted by Prime Financial against Bank One. Thereafter, Bank One moved for costs and attorney fees pursuant to MCR 2.405, asserting that Prime Financial had rejected its counteroffer to settle the case. The trial court granted Bank One's motion for costs, but declined to award attorney fees under the interest-of-justice exception of MCR 2.405(D)(3). The trial court opined that this Court had addressed several issues of first impression in the first appeal, "and that the development of the law in this important and prevalent area was furthered by this case not settling." Bank One now appeals the trial court's decision in this regard.

II

Bank One argues that the trial court abused its discretion by refusing to award it attorney fees on the basis of the interest-of-justice exception of MCR 2.405(D)(3). We agree.

"Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). Under the offer-of-judgment rule, MCR 2.405, parties may serve on their opponents a written offer to stipulate to the entry of a judgment. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 297. The offer of judgment rule's purpose is "to avoid protracted litigation and encourage settlement." *Id*. Under MCR 2.405(D)(1), "[i]f the offeree rejects the offer and the adjusted verdict is more favorable to the offeror than the average offer, the offeror may recover actual costs from the offeree." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 297. For purposes of MCR 2.405, "[a]ctual costs" include "reasonable attorney fee[s]." MCR 2.405(A)(6). However, the trial court "may, in the interest of justice, refuse to award attorney

fee[s.]" MCR 2.405(D)(3). Here, it is undisputed that Bank One was entitled to costs under MCR 2.405(D)(1).[2] The trial court awarded Bank One costs, but refused to award it attorney fees on the basis of the interest-of-justice exception of MCR 2.405(D)(3).

In general, "[t]he decision to award sanctions under the offer of judgment rule is reviewed for an abuse of discretion." *Pitsch v Blandford*, 264 Mich App 28, 34; 690 NW2d 120 (2004), rev'd on other grounds 474 Mich 879 (2005). A trial court's application of the interest-of-justice exception to specific facts is also reviewed for an abuse of discretion. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004). The Legislature's use of the term "may" rather than "shall" in MCR 2.405(D)(3) indicates a discretionary action. See *Murphy v Ameritech*, 221 Mich App 591, 600; 561 NW2d 875 (1997); see also *Sanders v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987) (observing that "MCR 2.405 by its terms is discretionary"). We review de novo underlying questions of law, such as a trial court's interpretation of MCR 2.405(D). See *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007); see also *Marilyn Froling Revocable Living Trust*, 283 Mich App at 296-297.

Michigan courts decide the applicability of the interest-of-justice exception on a case-by-case basis. *Lamson v Martin (After Remand)*, 216 Mich App 452, 463; 549 NW2d 878 (1996). Significantly, our courts have limited the applicability of the exception. Absent unusual circumstances, the interest-of-justice exception does not preclude an award of attorney fees under the offer of judgment rule. *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). In *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995), this Court observed that even though a trial court has discretion to deny an award of attorney fees, there are few situations in which the interest-of-justice exception will actually justify such a denial. This Court has been "particularly concerned with limiting the exception because of its susceptibility to broad interpretations that could potentially consume the general rule and thus nullify MCR 2.405's purpose of encouraging settlement." *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 338-339; 602 NW2d 596 (1999); see also *Luidens*, 219 Mich App at 33. When a trial court decides *not* to award attorney fees on the basis of the interest-of-justice exception, it "must articulate why the 'interest of justice' will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules." *Hamilton*, 214 Mich App at 597.

Although MCR 2.405 does not describe the circumstances that would trigger application of the interest-of-justice exception, our case law provides examples of such circumstances. In *Luidens*, 219 Mich App at 35-36, this Court noted that making an offer of judgment for gamesmanship purposes or other misconduct on the part of a party otherwise entitled to attorney fees may trigger application of the exception. This Court further noted that "a case involving a

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[2] Prime Financial made an offer of judgment to settle the case for $1,100,000. Bank One rejected that offer and made a counteroffer of $285,000. As indicated, all of Prime Financial's claims against Bank One were ultimately dismissed with prejudice.

legal issue of first impression or a case involving an issue of public interest that should be litigated are [also] examples of unusual circumstances in which it might be in the 'interest of justice' not to award attorney fees . . . ." *Id*. at 35. The *Luidens* Court suggested that "the exception would [also] apply 'where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant.'" *Id.* at 36 (citation omitted). "The common thread in these examples is that there is a public interest in having an issue judicially decided rather than merely settled by the parties." *Id*.[3]

It is true that this Court decided issues of first impression in *Prime Fin Services LLC*. Indeed, that case involved several matters arising under Article 9 of the UCC that had not been previously addressed by the Michigan courts. See *Prime Fin Services LLC*, 279 Mich App at 248-272. However, we cannot conclude that the interest in having such matters judicially decided "override[s] MCR 2.405's purpose of encouraging settlement," *Luidens*, 219 Mich App at 36, especially given that the parties to this case are sophisticated business entities represented by experienced counsel. As explained earlier, the general rule is that "[a]ctual costs" include "reasonable attorney fee[s]" for purposes of the offer-of-judgment rule, MCR 2.405(A)(6), and that the interest-of-justice exception "does not preclude an award of attorney fees," *Luidens*, 219 Mich App at 32; see also *Hamilton*, 214 Mich App at 597. There is a significant public interest in encouraging settlement between sophisticated business entities, particularly when complicated financial transactions are at issue. After all, sophisticated business entities like Prime Financial and Bank One certainly "know how to protect their own interests, and they are well equipped to evaluate risks and rewards." *United States v Charles George Trucking, Inc*, 34 F3d 1081, 1088 (CA 1, 1994). We believe that awarding attorney fees in matters involving sophisticated parties and complex financial transactions furthers "MCR 2.405's purpose of encouraging settlement[.]" *Luidens*, 219 Mich App at 35.

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[3] Bank One dismisses much of the *Luidens* Court's discussion of the interest-of-justice exception as obiter dictum. Obiter dictum is "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (quotation marks and citations omitted). "When necessary to determine an issue in a case, a statement of law cannot be dictum." *Ross v Blue Care Network of Mich*, 480 Mich 153, 173; 747 NW2d 828 (2008). In *Luidens*, 219 Mich App at 36-37, this Court ultimately concluded that the trial court abused its discretion by refusing to award attorney fees on the basis of interest-of-justice exception. In reaching that conclusion, this Court first sought to define the interest-of-justice exception and then cited several examples of circumstances that might trigger the exception. *Id.* at 31, 35-36. We consider the *Luidens* Court's analysis of the interest-of-justice exception necessary to the resolution of that case. Regardless, the analysis is persuasive given the Court's in-depth discussion and review of the relevant case law.

We acknowledge that this litigation has involved several novel issues of law and that the trial court relied on this fact when it decided to invoke the interest-of-justice exception. However, we cannot conclude that the trial court's denial of attorney fees served the interests of justice in this case. See *Hamilton*, 214 Mich App at 597. Instead, when sophisticated financial companies are involved, "we believe that the interest of justice is served by awarding attorney fees and costs to vindicate the purpose of the rule, thereby increasing the prospect that parties seriously will engage in the type of settlement process the rule clearly contemplates." *Id*. On the facts of this case, we hold that the trial court abused its discretion by invoking the interest-of-justice exception of MCR 2.405(D)(3) and by declining to award attorney fees in favor of Bank One. *Luidens*, 219 Mich App at 37. On remand, the trial court shall award Bank One its "reasonable attorney fee[s] . . . necessitated by [Prime Financial's] failure to stipulate to the entry of judgment." MCR 2.405(A)(6); see also *Sanders*, 163 Mich App at 694.[4]

In light of our resolution of the issues, we need not consider the remaining arguments raised by the parties on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Bank One may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen

[4] "It is inherent in the court's power to determine reasonableness" for purposes of MCR 2.405(A)(6). *Sanders*, 163 Mich App at 694. In calculating the amount of reasonable attorney fees due to Bank One, the trial court on remand should consider factors such as those enumerated in MRPC 1.5(a) and *Smith v Khouri*, 481 Mich 519, 529-530 (opinion of TAYLOR, C.J.), 538-539 (opinion of CORRIGAN, J.); 751 NW2d 472 (2008).