STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TENNINE CORP.,

Plaintiff,

vs.

Case No. 12-06963-CEB

HON. CHRISTOPHER P. YATES

BOARDWALK COMMERCIAL, LLC; BOARDWALK CONDOS, LLC; CENTRAL MICHIGAN RAILWAY COMPANY; THE STRAITS CORPORATION; DARK PROPERTIES, INC.; and PARKPLACE PROPERTIES OF WEST MI, LLC,

Defendants.
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ORDER AWARDING OFFER-OF-JUDGMENT SANCTIONS

The Michigan offer-of-judgment rule, MCR 2.405, turns even the most fiscally conservative litigants and attorneys into gamblers. The rule permits any party to offer to stipulate to the entry of a judgment in any amount that party selects. See MCR 2.405(B). Then, if an opposing party rejects that offer and the case turns out less favorably than the offer, the offer-of-judgment rule calls for stiff penalties that include costs and attorney fees. See MCR 2.405(D). In this case, three defendants – Boardwalk Commercial, LLC, Boardwalk Condos, LLC, and Parkplace Properties of West MI, LLC – each presented Plaintiff Tennine Corp. ("Tennine") with an offer of judgment of $500. Ultimately, the defendants prevailed on their motions for summary disposition, thereby achieving a result more favorable than their offers of judgment. See MCR 2.405(A)(4)(c). Based on these events, the Court finds that the three defendants are jointly entitled to costs of $23.04 and attorney fees of $21,368.53 under the offer-of-judgment rule.

Faced with the three defendants' motion for costs and attorney fees pursuant to the offer-of-judgment rule, Plaintiff Tennine has chosen to contest merely on the basis of the interest-of-justice exception applicable to attorney fees. That is, Tennine does not dispute that the three defendants, in prevailing on their motions for summary disposition, achieved a result more favorable than their $500 offers of judgment. See MCR 2.405(D)(1). In addition, Tennine does not contest the amount of costs and attorney fees claimed by the three defendants.* Instead, Tennine simply asks the Court to deny attorney fees to the three defendants "in the interest of justice." See MCR 2.405(D)(3). To be sure, the language of the offer-of-judgment rule provides that the Court "may, in the interest of justice, refuse to award an attorney fee under this rule." Id. But the Court cannot find any basis for invoking that exception in this case.

"[T]he 'interest of justice' provision is the exception to a general rule, and it should not be applied 'absent unusual circumstances.'" AFP Specialties, Inc v Vereyken, 303 Mich App 497, 518-519 (2014). Therefore, factors "'such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous "are too common" to constitute the unusual circumstances encompassed in the "interest of justice" exception.'" Id. at 519. "But the exception may be applied when an offer is made for the purpose of 'gamesmanship' and not a sincere effort at negotiation." Id. To the extent Plaintiff Tennine characterizes the defendants' $500 offers

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* In its brief in response to the defendants' motion, Plaintiff Tennine conceded that the three defendants "are entitled to their costs in the amount of $23.04," see Plaintiff's Objection to Motion for Imposition of Costs at 1, and that the defendants' attorney's requested fees should by reduced by only $874.35. See id. at 11. During oral argument, the defendants' attorney explained that he had not included any billing for attending that oral argument, so the parties seemed to reach an agreement that, in offsetting the $874.35 in contested billing against the otherwise-uncompensated time for the oral argument, the defendants' attorney's fees should simply be set at the amount that he claimed in the motion for imposition of costs, *i.e.*, $21,368.53. In any event, Tennine's attorney made clear that he did not wish to take part in an evidentiary hearing to challenge the defendants' attorney fees.

in this case as *de minimis*, the Court must reject that basis for finding gamesmanship. Here, as in AFP Specialties, "there was no case evaluation award to compare with [the three defendants'] offer of judgment to conclude that it was a 'gamesmanship' or *de minimis* offer." See id. at 519-520. In addition, the three defendants have insisted from the outset of this case that Tennine's inclusion of them as defendants was frivolous. Accordingly, the three defendants concluded – correctly, as the case turned out – that Tennine had no basis for seeking recovery from them, so the three defendants made offers of judgment commensurate with their understanding of the value of Tennine's claims. As a result, the Court cannot rely upon the "interest of justice" exception to deny attorney fees to the three defendants simply because of the small amount of each offer of judgment. See id.

Plaintiff Tennine contends that the three defendants engaged in gamesmanship by refusing to provide Tennine with the factual support for their defenses in a timely manner. But that argument overlooks the simple fact that the defendants' attorney-fee request largely consists of time spent on their successful motions for summary disposition. The defendants laid out their positions in their supporting briefs, but Tennine chose to vigorously contest those positions, demonstrating for all to see that Tennine would never have abandoned its claims even if presented at an early stage with the factual support for the defendants' positions. A losing party cannot credibly insist that it would have fallen on its sword at the outset when, in fact, that losing party ultimately elects to litigate the matter to the bitter end, even in the face of compelling support for a summary-disposition motion.

Finally, Plaintiff Tennine asserts that attorney fees should be denied in the interest of justice because "the case involves a question of the public interest." According to Tennine, the "common thread of the 'public interest' cases is that the subject matter of the case is such that there is a public interest in having an issue judicially decided rather than merely settled by the parties." Specifically,

Tennine claims this case involved a dispute "'where the effect on third persons may be significant.'" See Luidens v 63rd District Court, 219 Mich App 24, 36 (1996). Although Tennine advanced legal theories predicated upon allegations of environmental contamination, governmental authorities and neighborhood property owners alike were already aware of, and deeply involved in examining, the environmental situation long before Tennine filed this lawsuit. In other words, Tennine's lawsuit did not raise issues that otherwise would have gone undetected or unresolved. Rather, Tennine filed this action on the heels of other investigations, so Tennine surely cannot claim the mantle of lonely defender of the health and safety of the property owners in the area. Put in proper context, Tennine's lawsuit can best be described as an opportunistic attempt to capitalize on the investigative efforts of others who had found no serious threat to human health or the environment.

In sum, the Court finds no basis whatsoever to deny attorney fees to the three defendants "in the interest of justice," as contemplated by MCR 2.405(D)(3). Rather, the Court concludes that this case falls within the heartland of situations in which offer-of-judgment sanctions must be applied. Consequently, IT IS ORDERED that Plaintiff Tennine must pay $23.04 in costs and $21,368.53 in attorney fees as offer-of-judgment sanctions to three defendants jointly: Boardwalk Commercial, LLC, Boardwalk Condos, LLC, and Parkplace Properties of West MI, LLC.

IT IS SO ORDERED.

Dated: October 15, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge