STATE OF MICHIGAN

COURT OF APPEALS

STAR OF DETROIT LINE, INC., and HENRY A. WILSON, JR.,

Plaintiffs-Appellants/Cross-Appellees,

v

COMERICA BANK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 16, 1999

No. 198090
Wayne Circuit Court
LC No. 93-308606 CB

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

Plaintiff Star of Detroit Line, Inc., (plaintiff corporation), appeals as of right the trial court's grant of a directed verdict in favor of defendant Comerica Bank (defendant bank).[1] Defendant bank cross-appeals as of right the trial court's refusal to assess actual costs against plaintiff Henry A. Wilson, Jr. We affirm in all respects.

I

On June 17, 1992, plaintiff corporation, by its president, plaintiff Wilson, and Manufacturer's Bank, a predecessor to defendant bank, entered into a loan commitment for financing the purchase of the Star of Chicago, a dinner cruise ship. The loan commitment, as subsequently amended, contained certain terms and conditions, including, the following:

> C. Conditions.
>
> The Bank's obligation to make the Loan is subject to the following conditions:
>
> (i) The closing of a loan to [plaintiff corporation] in an amount not less than $350,000 from BIDCO[2] on the terms and conditions set forth in the June 8, 1992 letter from BIDCO to [plaintiff corporation] and having such other terms as are acceptable to the Bank.

(ii) The receipt by the Bank of . . . a copy of the contract ("Boblo Contract") between the owners of Boblo Island Amusement Park and [plaintiff corporation] for the transportation of passengers to Boblo Island . . . .

* * *

(v) The Bank's receipt of an acceptable subordination agreement from BIDCO.

For ease of reference, these provisions shall be subsequently referred to as the BIDCO loan, the Boblo contract and the BIDCO subordination agreement.

The loan commitment expired on July 1, 1992, without plaintiff corporation and defendant bank having closed the loan. Plaintiff corporation did not thereafter acquire the Star of Chicago or any other ship and never commenced its planned dinner cruise operation.

Plaintiff corporation and plaintiff Wilson filed suit, asserting various claims arising out of the failed venture against various parties, including a breach of contract claim against defendant bank for breach of the loan commitment. Following dismissal or settlement of most of these claims, the only claim left for trial was the breach of contract claim against defendant bank.

On the first day of trial, the trial court ruled that plaintiff Wilson was not a plaintiff with respect to the breach of contract claim, thus leaving plaintiff corporation as the sole plaintiff for purposes of this claim. After plaintiff corporation presented its proofs with respect to the breach of contract claim, defendant bank moved for a directed verdict. Defendant bank contended that various provisions of the loan commitment, including the provisions concerning the BIDCO loan, the Boblo contract and the BIDCO subordination agreement, were conditions precedent that plaintiff corporation had been required to satisfy before defendant bank's obligation to make the loan arose. Defendant bank contended that plaintiff corporation's proofs raised no question of fact that the various conditions had been satisfied. Defendant bank contended that therefore its obligation to make the loan never arose and thus no breach of the loan commitment had occurred.

The trial court granted the directed verdict. The court agreed that no question of fact had been raised that plaintiff corporation had satisfied the provisions concerning the BIDCO loan, the Boblo contract and the BIDCO subordination agreement.

On appeal, plaintiff corporation raises a number of grounds for its contention that the trial court erred in granting the directed verdict. Specifically, plaintiff corporation first argues that the provisions concerning the BIDCO loan, the Boblo contract and the BIDCO subordination agreement are not conditions.

"Traditionally, a condition is defined as an act or event other than a lapse of time, which, unless excused, affects a duty to render a promised performance." Calamari & Perillo, Contracts, § 11-2, p 438. "'A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor.'" *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953) (quoting 3 Corbin, Contracts, § 633). This Court is not inclined to construe the provisions of a contract

as conditions precedent unless compelled to do so by the language of the contract. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). The intent of the parties as expressed in the contract is the paramount consideration. *Cramer v Metropolitan Savings & Loan Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977).

"Conditions may be classified in at least two different ways." Calamari, § 11-3, p 439. First, conditions may be classified "based upon the time when the conditioning event is to happen in relation to the promisor's duty to perform a promise." *Id*. Under this classification, "conditions are labeled as conditions precedent, conditions concurrent and conditions subsequent." *Id*. "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance." *Yeo v State Farm Ins Co*, 219 Mich App 254, 257; 555 NW2d 893 (1996); see also Calamari, § 11-5, p 439.

The second way in which conditions may be classified is based upon how the condition arises. Calamari, § 11-8, p 444. If the condition is placed in the contract by the parties, it is an express condition. *Id*. If the condition is imposed by law to do justice, it is a constructive condition. *Id*.

In this case, the provisions relating to the BIDCO loan, the Boblo contract and the BIDCO subordination agreement were placed in the contract by the parties. These provisions create no rights or duties in either plaintiff corporation or defendant bank. Rather, these provisions concern acts or events that affect defendant bank's obligation to make the loan. Specifically, these provisions concern acts or events that must take place before defendant bank's obligation to make the loan arises. The contract denominates these acts or events as conditions and provides that defendant bank's obligation to make the loan is "subject to" these conditions. Words such as "subject to" usually indicate that a promise is not to be performed except upon a condition. 17A Am Jur 2d, Contracts, § 466, p 487. We conclude that the loan commitment's provisions relating to the BIDCO loan, the Boblo contract and the BIDCO subordination agreement are express conditions precedent.

Next, plaintiff corporation contends that it substantially performed and thereby satisfied the conditions concerning the BIDCO loan, the Boblo contract and BIDCO subordination agreement.

We agree with plaintiff corporation that Michigan recognizes the doctrine of substantial performance. See, e.g., *Gibson v Group Ins Co of Michigan*, 142 Mich App 271, 275; 369 NW2d 484 (1985). However, in *Brown-Marx Associates, Ltd v Emigrant Savings Bank*, 703 F2d 1361, 1367-1368 (CA 11, 1983), the court explained that the doctrine of substantial performance is the standard that is applied to the performance of a promisor's obligations under a contract, not the standard to be applied to the fulfillment of an express condition:

> The substantial performance doctrine provides that where a contract is made for an agreed exchange of two performances, one of which is to be rendered first, substantial performance rather than exact, strict or literal performance by the first party of the terms of the contract is adequate to entitle the party to recover on it. The intent of the doctrine is equitable: to prevent unjust enrichment or the inequity of one party's getting the benefit of performance, albeit not strictly in accord with the contract's terms,

with no obligation in return. The courts will allow recovery under the contract, less allowance for deviations, where a party in good faith has substantially performed its obligations. See generally, 3A Corbin on Contracts, Sections 700-701; 6 Williston on Contracts (Third Edition), Section 842. The doctrine is widely applied to building contracts, though not always limited to them.

The doctrine is not primarily concerned with substantial performance of a "condition" but rather with substantial performance by one party of his obligations arising out of the agreed exchange under the contract. Its object is to prevent forfeiture of work, labor and materials supplied by the substantially performing party. Its application is illustrated in terms of construction contracts in 3A Corbin on Contracts, Section 701:

"[I]t is not with express conditions or interpretation that we are now primarily concerned. We are now dealing with a contract that consists of two exchanged promises requiring the rendition of two promised performances, without making either promise expressly conditional on anything. The builder promises to build and the owner promises to pay.

* * *

It is substantial performance of what the builder promised to do, of the construction work, of the equivalent for which the owner has promised to pay, that is the "condition" of the owner's duty to pay. It is not substantial performance of "a condition" that must be rendered; "substantial performance" is the condition—the fact that must exist before payment is due.

Accordingly, we reject plaintiff corporation's argument that the doctrine of substantial performance applies to the fulfillment of express conditions. However, the question remains what standard applies in determining whether an express condition has been fulfilled. Our review of several leading legal authorities indicates that generally the standard to be applied to the fulfillment of express conditions is literal fulfillment. Calamari, § 11-8, p 445; Am Jur, § 618, p 627; see also 2 Restatement Contracts, 2d, § 226, comment c, p 172.[3] In *Brown-Marx*, the court explained that express conditions in loan commitments must be exactly fulfilled:

Courts have usually treated the terms and conditions of a loan commitment as conditions precedent to the lender's obligation to perform. . . . The loan commitment fee is paid for the privilege of later borrowing the money if the conditions are met. . . . The language of the loan commitment here expressly provides that compliance with the minimum annual rental provisions is a "condition" to receiving the loan. Concerning such an express condition, 5 Williston on Contracts (Third Edition), Section 675, states:

> "As a general rule, conditions which are either express or implied in fact must be exactly fulfilled or no liability can arise on the promise which such conditions qualify." [*Brown-Marx, supra* at 1367.]

In *Brown-Marx, supra* at 1364, a bank's obligation to make a loan was expressly conditioned on a minimum of $714,447 in annual rentals. The court held that less than this amount in annual rentals did not satisfy the express condition because "the bank was entitled to require total compliance with the minimum annual rental requirement." *Id*. at 1369.

In Michigan, caselaw provides that if an express condition precedent is not fulfilled or satisfied, the right to enforce the contract does not come into existence. *Knox, supra* at 117-118; *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995). However, our review of Michigan caselaw reveals that in determining whether an express condition precedent has been fulfilled or satisfied, the courts have not formally enunciated a literal or exact fulfillment standard. Rather, in determining whether an express condition precedent has been fulfilled or satisfied, Michigan courts look to the plain language of the contract in light of the surrounding circumstances. See *MacDonald v Perry*, 342 Mich 578, 587; 70 NW2d 721 (1955); *Smeader v Mason*, 341 Mich 139; 67 NW2d 131 (1954); *Berkel, supra* at 419-420.[4] This then is the standard that we shall apply to plaintiff corporation's next argument, i.e., that the proofs at least created a question of fact concerning whether the conditions concerning the BIDCO loan, the Boblo contract and the BIDCO subordination agreement were fulfilled or satisfied in this case.

We first consider the BIDCO loan condition. Plaintiff corporation argues that it did in fact obtain the BIDCO loan and that, therefore, the BIDCO loan condition was satisfied. In support of this argument, plaintiff corporation notes that it introduced into evidence documents and testimony indicating that BIDCO and plaintiff corporation, like defendant bank and plaintiff corporation, had entered into a loan commitment. However, the plain language of the BIDCO loan condition at issue in this case provides that defendant bank's obligation to make the loan was subject to:

> The *closing* of a loan to [plaintiff corporation] in an amount not less than $350,000 from BIDCO on the terms and conditions set forth in the June 8, 1992 letter from BIDCO to [plaintiff corporation] and having such other terms as are acceptable to the Bank. [(emphasis supplied).]

If contractual language is clear, construction of the contract is a question of law for the court. *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). If the contract is susceptible to two reasonable interpretations, a question of fact is created concerning the intent of the parties. *Id*. at 722. The language of a contract should be given its ordinary and plaintiff meaning and dictionary definitions may be consulted. *Id*.; *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 167; 550 NW2d 846 (1996).

In this case, plaintiff corporation does not contend that the language of the BIDCO loan condition is ambiguous. The term "loan commitment" is defined as a lending institution's commitment to loan a specific amount whereas the term "closing" is defined as the final phase of a transaction. See

Black's Law Dictionary (6th ed); *Random House Webster's College Dictionary* (1991). Various provisions of the loan commitment between defendant bank and plaintiff corporation make clear that the commitment to loan plaintiff corporation a specific amount is distinct from "closing" such loan. We conclude that the plain language of the BIDCO loan condition admits of only one interpretation, i.e., that defendant bank's obligation to make the loan did not arise when plaintiff corporation and BIDCO simply entered into a loan commitment, but rather arose only when the final phase of this transaction occurred. Plaintiff corporation has not submitted any evidence indicating that BIDCO and plaintiff corporation ever closed on the BIDCO loan. Although plaintiff presented evidence that the closing on defendant's loan and the BIDCO loan were to have taken place at the same time, there was no evidence at trial that plaintiff was prepared to close on the BIDCO loan before the BIDCO loan commitment expired on June 30, 1992. It appears that plaintiff's position on appeal is that, by virtue of the testimony of defendant's representative O'Keefe, plaintiff's compliance with the conditions of the BIDCO loan was waived. However, based on our review of the record we cannot agree with plaintiff's characterization of O'Keefe's testimony. Further, while plaintiff presented evidence that it had a good relationship with BIDCO, plaintiff did not present testimony evidencing that an authorized BIDCO representative extended or would have extended its $350,000 loan commitment beyond June 30, 1992, or would have waived the conditions under the BIDCO loan commitment. Thus, even viewing the proofs in a light most favorable to plaintiff corporation, we conclude that plaintiff corporation failed to create a question of fact that the express condition precedent of closing the BIDCO loan was fulfilled or satisfied. *Dickerson v Raphael*, 222 Mich App 185, 195; 564 NW2d 85 (1997). Accordingly, defendant bank's obligation to make the loan never arose and plaintiff corporation's right to enforce the loan commitment did not come into existence. *Knox*, *supra*; *Yeo*, *supra*. Therefore, we conclude that the trial court did not err in granting defendant bank's motion for a directed verdict. In light of this conclusion, we need not consider plaintiff corporation's arguments concerning the BIDCO subordination agreement and the Boblo contract. Finally, we decline to consider plaintiff corporation's anticipatory breach argument because plaintiff corporation did not raise this issue below. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994).

II

We now turn to a consideration of defendant bank's cross-appeal. Sometime before October, 1994, plaintiffs rejected, while defendant bank accepted, a mediation panel's unanimous $25,000 joint mediation award in favor of plaintiffs. In October, 1994, plaintiffs offered to stipulate to the entry of a judgment in their favor in the amount of $500,000. Defendant bank rejected this offer[5] and counteroffered to stipulate to the entry of a judgment in the amount of $10,000. Plaintiffs rejected defendant bank's counteroffer.[6]

Following the June and July, 1996, trial, defendant bank moved for actual costs against plaintiffs. Actual costs are defined under both the mediation rule, MCR 2.403(O)(6), and the offer of judgment rule, MCR 2.405(A)(6), as taxable costs and a reasonable attorney fee. At the time defendant bank moved for actual costs, the offer of judgment rule provided as follows with respect to whether the mediation rule or the offer of judgment rule applied in cases where there had been both a rejection of mediation and a rejection of an offer of judgment:

> Relationship to Mediation. In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection. [MCR 2.405(E).][7]

Defendant bank contended that it was entitled to recover costs under both rules and that, therefore, the mediation rule controlled the imposition of actual costs in this case.

Following oral argument at the August, 1996, motion hearing, the trial court ruled that the mediation rule applied in this case and ordered plaintiff corporation to pay defendant bank approximately $150,000 in mediation costs. However, the trial court refused to assess actual costs against plaintiff Wilson:

> The Court is of the opinion that under 2.405, the mediation rule is in fact the rule under which the Court should make a decision as it relates to the imposition of costs and fees.
>
> Under the circumstances, had the motion been brought previously to dismiss Mr. Wilson, the result would have been the same. Mr. Wilson is not a party to the contract between Comerica Bank and the Star of Detroit Line.
>
> Mr. Wilson was allowed to enter evidence during the course of the trial of his out-of-pocket expenses in the event that the Star of Detroit Line was able to make a recovery he could have been reimbursed for those out-of-pocket expenses.
>
> The Court does not view it as fair that he should personally be liable for any of the costs or fees that are associated with this particular case.

We make clear that no party raises any issue concerning, and therefore we have no occasion to consider, the assessment of actual costs against plaintiff corporation. Rather, on cross-appeal, defendant bank challenges the trial court's refusal to assess actual costs against plaintiff Wilson. Specifically, defendant bank first suggests, contrary to its argument below, that the offer of judgment rule controlled the award of actual costs in this case. Generally, a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). However, plaintiff Wilson also contends on cross-appeal, as he did below, that the cost provisions of the offer of judgment rule control this case. Moreover, the interpretation of a court rule is a question of law that this Court reviews de novo. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 598; 552 NW2d 523 (1996). As indicated by the following analysis, we conclude, at least with respect to plaintiff Wilson, that the trial court plainly erred in concluding that the mediation rule controlled the assessment of actual costs in this case. Thus, we will address this issue.

In *Luidens v 63rd Dist Court*, 219 Mich App 24, 29; 555 NW2d 709 (1996), this Court explained as follows:

> MCR 2.405(E) resolves the issue of which court rule [the offer of judgment rule or the mediation rule] applies. It states:
>
> "In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection."[8]
>
> Here, the "later rejection" was the rejection of the offer of judgment. Therefore, the cost provisions of MCR 2.405 control, not those of MCR 2.403. Because defendant would be entitled to costs under both rules, costs may be recovered from the date of the "earlier rejection"—here, the mediation.

Accord *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996); *Zantop International Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 365; 503 NW2d 915 (1993).

So too in this case, the "later rejection" was the rejection of the offer of judgment. Thus, the cost provisions of the offer of judgment rule control, not those of the mediation rule. However, simply because the cost provisions of the offer of judgment rule control does not mean that defendant bank is entitled to recover costs from plaintiff Wilson under this rule. Rather, as explained in *Zantop, supra* at 366, "the offer of judgment rule can apply even if the rule goes on to deny costs."

We thus turn to the cost provisions of the offer of judgment rule to determine whether defendant bank was entitled to recover actual costs from plaintiff Wilson under this rule. At the time of the August, 1996, oral argument on defendant bank's motion for costs, the offer of judgment rule provided in relevant part as follows:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs. [9]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. [MCR 2.405(D)(1)-(3).]

The offer of judgment rule defines "adjusted verdict" as follows:

"Adjusted verdict" means the verdict plus interest and costs from the filing of the complaint through the date of the offer. [MCR 2.405(A)(5).]

Since 1997, the offer of judgment rule has defined "verdict" as follows:

"Verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment. [MCR 2.405(4).]

However, when the trial court declined to assess actual costs against plaintiff Wilson at the August, 1996, motion hearing, the offer of judgment rule defined "verdict" as follows:

"Verdict" means the award rendered by a jury or by the court sitting without a jury, excluding all costs and interest. [MCR 2.405(A)(4), amended effective October 1, 1997].

Defendant bank contends in its brief on appeal that for purposes of the offer of judgment rule a "verdict" includes a directed verdict or summary disposition awarded by the trial court. Defendant bank contends that it is therefore entitled to recover actual costs from plaintiff Wilson under MCR 2.405(D)(1) because

the average offer was $260,000 while the adjusted verdict was less than zero. Therefore, Mr. Wilson, as an offeror and a rejecting offeree, must pay the Bank's actual costs except for costs incurred during the period of actual trial . . . .

In deciding this issue, we look to four cases that construed the offer of judgment rule's definition of "verdict" before its 1997 amendment. All four cases considered the issue whether a judgment entered pursuant to a ruling on a motion constitutes "the award rendered by a jury or the court sitting without a jury . . . ."

In *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 365; 466 NW2d 404 (1991), this Court held that under the offer of judgment rule a "verdict" was not intended to include a judgment entered pursuant to a ruling on a motion. Noting that at this time the mediation rule defined "verdict" to include "a judgment entered as a result of a ruling on a motion filed after mediation," this Court stated

that it believed the fact that "verdict" was defined differently under the mediation rule and offer of judgment rule persuaded it that similar constructions of the term were not intended. *Id*. (citing MCR 2.403[O][2][c]). This Court also noted that the potential for abuse inherent in the offer of judgment rule, such as where a party makes a minimal offer early in a case with the hope of later securing attorney fees and costs, mitigated against imposing actual costs on a party whose action is dismissed pursuant to a ruling on a motion. *Id*. Thus, this Court reversed an award of actual costs imposed pursuant to the offer of judgment rule where the case was decided by a grant of summary disposition. *Id*. at 358.

A few months later, our Supreme Court held in *Freeman v Consumers Power Co*, 437 Mich 514, 519; 473 NW2d 63 (1991), that for purposes of the offer of judgment rule a "verdict" did not include a summary disposition. The Court rejected the argument that the more expansive definition of verdict found in the mediation rule applied by analogy to the definition of verdict found in the offer of judgment rule. *Id*. at 518 (citing MCR 2.403[O][2][c]). The Court reasoned that "verdict" must be interpreted in accordance with the explicit definition found in the offer of judgment rule and that a summary disposition was not "the award rendered by a jury or by the court sitting without a jury . . . ." *Id*. at 519.

Likewise, in *Zantop, supra*, the trial court defaulted Zantop and dismissed its claims because Zantop's counsel violated a court order during trial. Relying on *Parkhurst*, this Court held that no "verdict" had been reached for purposes of the offer of judgment rule where the case was dismissed on motion. *Id*.

However, in *Auto Club, supra* at 599, this Court held that the grant of a directed verdict constituted a "verdict" for purposes of the offer of judgment rule. In so holding, this Court reasoned that *Freeman, Parkhust*, and *Zantop* were distinguishable because they had been decided in the context of motions under the summary disposition rule or motions for orders of dismissal and default for attorney misconduct. *Id*. at 601. This Court noted that the motion for summary disposition in *Parkhurst* had been brought just five months after the case commenced whereas in *Auto Club* the directed verdict had been granted after two years had passed and the case had proceeded to trial. *Id*. This Court stated that a motion for summary disposition cannot be equated with a motion for a directed verdict because the motions are granted pursuant to different standards and at different times in the proceedings. *Id*. This Court noted that a directed verdict technically orders the jury to find no cause of action. *Id*. This Court further noted that in that case no other rules permitting the recovery of costs or attorney fees were applicable. *Id*. Finally, this Court indicated that it was persuaded by both the proposed amendment to the offer of judgment rule that would define "verdict" to include "a judgment entered as a result of a ruling on a motion after a rejection of the offer of judgment"[10] and comments by the Supreme Court Mediation Rule Committee indicating that there was no reason for the definitions of "verdict" in the mediation rule and the offer of judgment rule to be different. *Id*.

In this case, defendant bank's brief indicates that in June, 1994, the trial court granted defendant bank's motion for summary disposition of all claims asserted against it by plaintiffs except for the breach of contract claim. Defendant bank's brief further indicates that in July, 1994, all of plaintiffs' other claims against other parties were dismissed. Thus, as of August, 1994, the only remaining claim in this case was the breach of contract claim. Plaintiffs continued to proceed with the case as if they were both

plaintiffs with respect to the breach of contract claim. For instance, plaintiffs together submitted an offer of judgment to defendant bank.

On the first day of trial, defense counsel noted that the allegations in the complaint with respect to the breach of contract claim concerned only plaintiff corporation and that plaintiff Wilson had not signed the loan commitment in his individual capacity but rather in his capacity as president of the corporation. Defendant's counsel stated that in light of these facts "we wanted to be clear before we started that there really is only the corporate plaintiff in the case, given that Count I is all that remains." The trial court agreed with defense counsel and denied plaintiffs' counsel's motion to amend the complaint "to reflect that both Mr. Wilson and the corporation make all the claims that the complaint alleges."

Following trial, a final judgment was entered indicating, in relevant part, that "[a]fter the commencement of trial, the Court, upon defendant's oral motion, dismissed all claims brought by Henry Wilson, Jr., against Comerica Bank." The judgment further provided, in relevant part, that plaintiff Wilson's claims against defendant bank were dismissed with prejudice. We conclude that the final judgment with respect to plaintiff Wilson was entered pursuant to a ruling on a motion. However, we note that the motion was not one for a directed verdict. Thus, we are not bound by the holding in *Auto Club* pursuant to MCR 7.215(H).

Like *Auto Club*, this case proceeded to trial before the ruling on the motion occurred. However, the fact that a party's case proceeded to trial before being dismissed pursuant to a motion was not a dispositive factor in *Zantop*.

We also find *Auto Club* distinguishable on its facts, i.e., a ruling that a particular party is not a plaintiff with respect to a certain claim is not the same as a motion for a directed verdict. We further find dispositive the emphasis in *Freeman* on applying the explicit definition provided in the offer of judgment rule. Although we recognize that the offer of judgment rule's definition of "verdict" has been amended and now provides that a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment," we nevertheless conclude that the explicit definition of "verdict" in effect at the time the trial court declined to assess actual costs against plaintiff Wilson controls this case. We agree with *Freeman*, *Parkhurst* and *Zantop* that a judgment entered pursuant to a ruling on a motion, at least in the context of this case, is not "the award rendered by a jury or by the court sitting without a jury . . . ." Accordingly, we conclude that although the offer of judgment rule controls the imposition of actual costs against plaintiff Wilson in this case, that rule denies defendant bank a remedy with respect to plaintiff Wilson. *Zantop*, *supra* at 366. Thus, we affirm, albeit for different reasons, the trial court's refusal to assess actual costs against plaintiff Wilson.

III

In summary, with respect to plaintiff corporation's appeal, we affirm the trial court's grant of a directed verdict in favor of defendant bank. Defendant bank, being the prevailing party, may tax costs pursuant to MCR 7.219.

With respect to defendant bank's cross-appeal, we affirm the trial court's refusal to assess actual costs against plaintiff Wilson. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Stephen J. Markman

[1] Although plaintiff Henry Wilson, Jr., is listed as an appellant on this Court's docket sheet, plaintiff Wilson does not join in the brief filed by plaintiff corporation that challenges the directed verdict and has not filed a separate brief on his own behalf with respect to this issue.

[2] Detroit Business Industrial Development Company.

[3] Our review of these same authorities indicates that generally the standard to be applied to the fulfillment of constructive conditions is substantial compliance. Calamari, § 11-8, p 445; Am Jur, § 618, p 627; Restatement, § 226, comment c, p 172.

[4] We note that this Court's recent opinion in *Yeo* could arguably be read as suggesting that a substantial compliance standard may apply to the fulfillment of express conditions. See *id*. at 258. However, any such discussion in *Yeo* is entirely dicta. *Id*. Moreover, the contractual language at issue in *Yeo* required the insured to submit to an examination under oath. Although the *Yeo* court characterizes this contractual language as a condition, such language, which imposes a duty upon the insured, actually appears to be language of promise, not condition. Finally, *Yeo* relies on a case that considers the doctrine of substantial performance as it relates to the performance of a duty or obligation. See *id.* (citing *Gibson, supra* at 275-276). Thus, we will adhere to the previously cited caselaw indicating that in determining whether an express condition precedent has been fulfilled or satisfied, Michigan courts look to the plain language of the contract in light of the surrounding circumstances.

[5] Defendant bank apparently did not expressly reject plaintiffs' offer in writing but rather rejected the offer by simply failing to accept it. See MCR 2.405(C)(2)(b).

[6] Plaintiffs apparently did not expressly reject defendant bank's offer in writing but rather rejected the offer by simply failing to accept it. See MCR 2.405(C)(2)(b). We also note that earlier in August, 1994, plaintiffs had initially offered to stipulate to the entry of a judgment in their favor in the amount of $750,000 and defendant bank had counteroffered $5,000. However the offer of judgment rule provides that "[i]f a party has made more than one offer, the most recent offer controls for the purposes of this rule." See MCR 2.405(A)(1). Thus, it is the October, 1994, offer and counteroffer that control this case.

[7] Although not applicable in this case, we note that MCR 2.405(E) was amended in 1997 and now provides as follows:

(E) Relationship to Mediation. Costs may not be awarded under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous.

[8] See footnote 7, *supra*.

[9] MCR 2.405(D)(2) was amended in 1997 and now provides as follows:

(2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

[10] As indicated previously, this proposed amendment became effective in 1997.