STATE OF MICHIGAN

COURT OF APPEALS

RICHARD H. DAVIS,

Plaintiff-Appellant/Cross-Appellee,

v

THERMAL-TEC/MICHIGAN, INC. and EARL SITERLET,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 17, 1996

No. 156439
LC No. 88-60636-CK

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff appeals and defendants cross-appeal from an order denying their respective motions for costs and attorney fees. We affirm.

I

This case arises out of a failed joint venture between plaintiff and defendants involving the manufacture and distribution of an insulation product that had been developed by Kasco International. Plaintiff's complaint alleged that he and defendants entered into their business agreement in May, 1988, and that under the terms of the agreement, he advanced $26,000 in cash to defendants and was employed as a sales representative. The agreement provided that the venture could be terminated by either party. The agreement also provided that if it was terminated, plaintiff was to be repaid all sums he had advanced. Count I of plaintiff's complaint alleged that on August 23, 1988, defendant Siterlet terminated the business venture but defendants refused to return plaintiff's $26,000. Count II alleged that defendants refused to fully pay plaintiff his draw and expenses totaling $3,100.73. Count III alleged that defendants had failed to pay him his commission for certain orders he had procured and refused to perform an accounting of his sales. Count IV alleged that defendants were unjustly enriched by withholding plaintiff's advance, draw, and commission. Count V alleged that defendants breached their duty of good faith and fair dealing and listed the instances of alleged breaches pleaded in Counts I

* Circuit judge, sitting on the Court of Appeals by assignment.

through IV. Plaintiff was subsequently granted summary disposition as to Count I and defendants were ordered to repay plaintiff his $26,000 advance, plus interest.

Defendants then filed a four-count counter-complaint. Count I alleged that plaintiff and Siterlet agreed at an August 2, 1988 meeting that they would each advance an additional $12,500, but that plaintiff failed to advance any money, "thereby breaching his contractual obligation and causing Siterlet and Thermal-Tec to pay the entire $25,000." Count II alleged that under the terms of the parties' independent salesperson contract agreement, plaintiff was liable for the repayment of a $5,000 draw; Count III alleged that plaintiff was unjustly enriched by his nonpayment of the draw. Count IV alleged that plaintiff failed to pay his share of the attorney fee incurred in drafting the venture agreement. Defendants attached a copy of the independent salesperson contract agreement to their counter-complaint.

At trial, plaintiff indicated that the salesperson contract relied on by defendants contained terms, including the term involving his draw, that were added after plaintiff signed the document. He also testified that he stood ready to pay the additional $12,500 agreed upon at the August 2 meeting, but Siterlet terminated the venture before he made the payment. Siterlet, on the other hand, testified that the salesperson agreement was completed before plaintiff signed it and that nothing was added. He further testified that he had sent a $15,000 check to Kasco International as a payment to proceed with the venture before the parties' August 2, 1988 meeting; at the meeting it was decided that this payment covered his $12,500 contribution, and that plaintiff's contribution would be paid by his placing $10,000 in the company checking account and reimbursing Siterlet $2,500 toward the Kasco check. A Kasco representative, however, testified that the $15,000 check was never cashed. Additionally, Siterlet admitted that defendants advanced no money to the company after the August 2 meeting.

The jury returned a special verdict form finding that defendants had breached their contract with plaintiff and wrongfully altered the independent salesperson contract agreement. The jury awarded plaintiff damages in the amount of $3,100 and then offset the award by $889.49 to compensate defendants for "half of the attorney bill for the venture agreement."

Plaintiff subsequently filed a motion for sanctions pursuant to MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591; MSA 27A.2591. Specifically, plaintiff maintained that defendants had asserted frivolous counter-claims and defenses because they relied on a false allegation – that defendants paid the entire $25,000 agreed to at the August 2, 1988 meeting – and on a document that the jury found to have been altered. The trial court denied the motion, stating only that "the court declines to make that finding [that defendants' claim and defenses were frivolous]."

Defendants also moved for costs and attorney fees "pursuant to statute cited," MCL 600.2591; MSA 27A.2591, for having to defend against plaintiff's motion for sanctions. They argued that plaintiff's motion was frivolous because plaintiff was not a prevailing party entitled to sanctions under the statute or MCR 2.114(F). The court stated only that the "motion is denied. I don't see a basis for granting your motion."

II

The imposition of sanctions for frivolous claims and defenses is governed by both court rule and statute. MCR 2.114(F) provides:

> **(F) Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2).…

MCR 2.625(A)(2) provides:

> *Frivolous Claims and Defenses.* In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

MCL 600.2591; MSA 27A.2591 provides in part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their [sic] attorney.
>
> * * *
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

Under both the statute and the court rules, an objective standard of reasonableness is appropriate when examining an argument that a claim or defense was frivolous because there was no reasonable basis to believe the underlying facts were true, *Davids v Davis*, 179 Mich App 72, 89; 445 NW2d 460 (1989), and the inquiry is whether there was a reasonable basis *at the time the lawsuit was filed* to believe the supporting facts. *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991) (emphasis in the original).

III

When reviewing a claim for costs and attorney fees under the court rules, this Court will not reverse a trial court's finding concerning whether an action or defense was frivolous unless the finding was clearly erroneous. *Gramer v Gramer*, 207 Mich App 123, 126; 523 NW2d 861 (1994). This Court has applied the same standard when reviewing a motion for sanctions under MCL 600.2591; MSA 27A.2591. See *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1990); *DeWald v Isola*, 180 Mich. App. 129, 137; 446 NW2d 620 (1989).

In this case, we find no clear error in the trial court's refusal to find that defendants' claims and defenses were frivolous under MCR 2.114(F) and MCL 600.2591; MSA 27A.2591. First, the record reveals that the allegation in the counter-complaint, that plaintiff's failure to pay his $12,500 contribution caused defendants "to pay the entire $25,000," had some factual basis. While defendant Siterlet admitted that he had not paid an additional $25,000 *after* the August 2, 1988 meeting, he also explained that it was his understanding that the $25,000 referred to in the counter-complaint came from $77,000 defendants had previously invested in the venture. Siterlet also indicated that he did not know until trial that his $15,000 check to Kasco had never been cashed. This later known fact cannot be attributed to defendants' opinion and beliefs at the time the counter-complaint was filed. *Louya, supra*, p 162.

Moreover, the fact that the jury found that the salesperson contract had been wrongfully altered does not constitute a per se showing that defendants knew that the document, and thus their counter-claim and defense, was without factual basis. The jury's finding does not address the question whether defendants knew that the document had been altered at the time they filed their counter-complaint. Siterlet testified that the terms of the contract were filled in after reaching agreement with plaintiff on all the terms, and that he believed that the parties had reached an agreement on all the terms contained in the document. The fact that a jury later determined that the document was "wrongfully altered" is not indicative of the reasonableness of defendants' belief at the time the counter-claim was filed. *Louya, supra*, p 162. We therefore conclude that the trial court properly declined to find defendants' claims and defenses frivolous under MCR 2.114(F) or MCL 600.2591; MSA 27A.2591. The court's order denying plaintiff's motion for costs and attorney fees is affirmed.

IV

Defendants contend that the trial court should have denied plaintiff's motion for attorney fees on the basis that plaintiff was not the prevailing party at trial. We express no opinion concerning this claim because the trial court specifically refused to rule on its merit. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

V

Finally, defendants contend that the trial court erred in refusing to award them attorney fees they incurred in defending against plaintiff's motion for costs and fees. According to defendants, they were entitled to such an award because plaintiff's motion was frivolous. We conclude that the trial court

reached the right result when it denied defendants' request and accordingly we affirm. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Defendants sought an award of attorney fees "pursuant to statute cited," MCL 600.2591; MSA 27A.2591, and not under the court rules. As stated in 1 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), 1996 Pocket Part, p 79:

> There are, however some notable differences between statute [MCL 600.2591; MSA 27A.2591] and rule [MCR 2.114].…The statute…deals exclusively with costs and fees related to prosecution or defense of *the entire action*.…While the rule may be utilized to order costs and fees for the entire action, it may also be utilized to sanction frivolous motions. MCR 2.113(A). [Emphasis added.]

See also *Bechtold v Morris*, 443 Mich 105, 108; 503 NW2d 654 (1993) (sanctions can be imposed under MCR 2.114(E) for filing frivolous motions).

Because MCL 600.2591; MSA 27A.2591 provided defendants no basis for seeking an award of attorney fees incurred in defense of plaintiff's motion, the trial court reached the right result in denying their motion.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer