

STATE OF MICHIGAN
COURT OF APPEALS

C. W. PETERSON & CO.,

Plaintiff/Counter
Defendant-Appellant,

UNPUBLISHED
January 31, 1997

v

KEN K. S. NANDA and NEW LANS
CORPORATION,

Defendants/Counter
Plaintiffs,

No. 179996
Ingham Circuit Court
LC No. 93-75125 CK

and

THOMAS E. WOODS,

Defendant-Appellee.

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding attorney fees to defendant Thomas E. Woods based on the finding that plaintiff filed a frivolous suit. We affirm.

Plaintiff entered into an agreement with Lans Corporation (*not* defendant New Lans Corporation) whereby he would be paid a finder's fee upon obtaining a buyer for Lans Corporation. It was specified that plaintiff's commission, though dependent on the sale price, would be no less than \$50,000. Plaintiff found a willing buyer, defendant Ken Nanda, but the deal fell through because Nanda was unable to obtain financing. Because the deal was not consummated, plaintiff received no commission.

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

Approximately a year later, Lans Corporation went into receivership and defendant Woods was appointed receiver. Woods, as receiver for Lans Corporation, and Nanda struck a new deal, with Nanda agreeing to purchase the equipment of Lans Corporation. This contract expressly referred to the commission due plaintiff. A short time later, plaintiff agreed to accept \$20,000 in satisfaction of the finder's fee it was due.

A hearing was held to confirm the sale of the equipment. Plaintiff objected because there was no provision that plaintiff's fee was to be paid out of the proceeds of the sale. The trial court found that plaintiff was an unsecured creditor with respect to its commission despite the fact that defendant Woods, as receiver, conceded that the sale to defendant Nanda was "substantially in excess of what liquidators estimated would be received at auction after the expenses of the auction and auctioneer's fees were deducted from gross proceeds." There is no evidence that any unsecured creditor, including plaintiff, received any proceeds from the dissolution of Lans Corporation.

Plaintiff appealed the court's decision that it was an unsecured creditor to this Court, which affirmed in *In re Dissolution of Lans Corp*, unpublished opinion per curiam of the Court of Appeals, issued 10/6/95 (Docket No. 160818). This Court concluded that plaintiff's "commission agreement with Lans [Corporation] was null and void at the time Woods was appointed receiver, and [plaintiff] is not a priority administrative creditor because the receiver never enlisted Peterson's services." We have no authority to revisit that decision.

The present suit concerns plaintiff's continuing attempt to recover the finder's fee. Plaintiff sued Nanda, New Lans Corporation (the corporation apparently created with the equipment purchased by Nanda from Lans Corporation) and Woods, as receiver. As relevant to the present appeal, plaintiff sued Woods, as receiver, for breach of contract and breach of fiduciary duty. Defendant Woods, as receiver, retained himself, as attorney, to defend against the suit. The trial court granted summary disposition in favor of Woods, holding that plaintiff had no viable suit against Woods and that there was no authority for the proposition that a receiver owed a fiduciary duty to a creditor. The court also awarded defendant Woods attorney's fees, finding that plaintiff's suit was not well grounded in law.

Plaintiff has appealed the award of attorney's fees. An undercurrent apparent throughout plaintiff's brief on appeal is that his prior appeal, *In re Dissolution of Lans Corp, supra*, was wrongly decided. However, that issue is not presently before this Court, and we are powerless to alter that decision. Considering only the issue presently on appeal, we are constrained to conclude that plaintiff has failed to persuade this Court that the award of attorney's fees in the present case was inappropriate.

On appeal, plaintiff first argues that there exists no legal basis for the award of attorney fees in the present case. MCR 2.114 provides that a party may recover reasonable attorney fees where the opposing party files a pleading not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." See also *Bourne v Farmer's Ins Exchange*, 449 Mich 193, 202; 534 NW2d 491 (1995). Here, the court ruled that plaintiff's complaint was not well grounded in law, meaning the award of attorney's fees to defendant was appropriate.¹

Plaintiff next contends that defendant Woods, as receiver, should be allowed to recover his attorney's fees only from the receivership assets, and not from plaintiff. Woods *was* entitled to recover his fees from the assets of the receivership, see *Band v Livonia Associates*, 176 Mich App 95, 110; 439 NW2d 285 (1989), but because of plaintiff's groundless suit, Woods was also allowed to recover on behalf of the receivership from plaintiff. MCR 2.114. Plaintiff has directed this Court's attention to no authority suggesting that the sanction provisions of MCR 2.114 do not apply in the receivership context.

Plaintiff also asserts that because defendant Woods received \$150 per hour in his defense of plaintiff's suit, rather than \$110 as he received in his role of receiver, there existed a conflict of interest. Plaintiff fails to make apparent precisely where a conflict of interest arises. The amount a trial court awards to a receiver or an attorney is with the court's discretion. *Band, supra*, pp 110-111. Here, the court justified the discrepancy because of the differing skills used by Woods in his two roles. We find no abuse of discretion in this distinction.

Finally, under the present facts we must reject plaintiff's argument that public policy should preclude recovery of attorney fees where suit is brought by an entity "in the right." In this context, plaintiff again relies on his belief that his previous appeal in the related suit was wrongly decided. However, regardless of plaintiff's sincere belief that he should have been allowed recovery in the prior suit, this does not justify the filing of the instant action, which the trial court found to be groundless and which holding plaintiff does not contest on appeal. In other words, if plaintiff was "in the right," it was in his prior suit, not in the current one. The trial court properly awarded attorney fees pursuant to MCR 2.114. Defendant also requests sanctions on appeal. However, we do not find this to be a vexatious appeal and therefore decline defendant's request.

Affirmed.

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

/s/ Daniel J. Kelly

¹ We note that plaintiff does not contend that his theories of recovery were, in fact, legally supportable, but only that there existed no legal basis for the award of attorney's fees. Accordingly, we address only the question whether, given the court's conclusion that plaintiff's complaint was not well grounded in law, there existed a legal basis for the award of attorney's fees.