

STATE OF MICHIGAN
COURT OF APPEALS

PHIL BELLFY,

Plaintiff-Appellant,

v

CITY OF EAST LANSING and DENNIS E.
MCGINTY,

Defendants-Appellees.

UNPUBLISHED

June 18, 2013

No. 309521

Ingham Circuit Court

LC No. 12-000027-CZ

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and imposing sanctions pursuant to MCR 2.114. We affirm.

Plaintiff, Phil Bellfy, filed suit against defendants, the City of East Lansing and Dennis McGinty, the city attorney, alleging a violation of the Open Meetings Act (OMA), MCL 15.261 *et seq.* Plaintiff requested a closed session of the East Lansing City Council for the purpose of discussing whether to conduct an ethics investigation of McGinty. Plaintiff's allegations against McGinty included tax fraud, conflicts of interest, and unlawful threats of eminent domain connected to the City Center II development project. During the November 1, 2011 Council meeting, McGinty stated that he had "advised the council" that it could not convene a closed session for such a purpose.

Plaintiff filed an amended complaint on January 23, 2012, asserting that the East Lansing City Ethics Code required that the Council make a decision on ethics complaints against city officials, that defendants' conduct on or about November 1, 2011, violated the OMA because the decision to take no action on his allegations was not made during an open meeting, that defendants should be enjoined from further violating the OMA, and that plaintiff should be awarded costs and attorney fees pursuant to MCL 15.271(4).

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the secret meeting about which plaintiff complained never took place. Defendants asserted that no member of the Council ever moved to go into closed session and that, aside from a telephone call between McGinty and the Mayor and the Mayor's request that McGinty state his conclusion on the record at the meeting on November 1, 2011, plaintiff's request was not discussed in any

manner. Defendants submitted affidavits from members of the Council in support of its assertions. In addition, defendants noted that section 2-86 of the Ethics Code allowed the Council to determine that no action need be taken on claims such as those made by plaintiff. Furthermore, defendants argued that McGinty was not a public body subject to the OMA and that, as city attorney, he was not subject to the OMA. Finally, defendants argued that they were entitled to sanctions against plaintiff and his attorney, Jeffrey Hank, pursuant to MCR 2.114(D) and costs and fees pursuant to MCL 600.2591(2) on the ground that the complaint was frivolous and that both plaintiff and Hank had made frivolous allegations against McGinty.

The trial court granted defendants' motion for summary disposition, noting that plaintiff submitted no evidence to contradict the affidavits submitted by defendants and that the issue of whether the Council violated the OMA was separate from the requirement under the City Ethics Code to reach a consensus regarding allegations such as those brought by plaintiff. In addition, the trial court granted defendants sanctions in the amount of \$2,000 against plaintiff and his attorney.

On appeal, plaintiff first asserts that the trial court erred by granting summary disposition to defendants. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999). All reasonable inferences must be made in favor of the non-moving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). The possibility that a claim might become supportable by evidence at trial is insufficient to avoid summary disposition. *Maiden*, 461 Mich at 121.

The OMA was created to insure an open and accountable government. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 192 Mich App 574, 580; 481 NW2d 778, 782 (1992), rev'd in part on other grounds, 444 Mich 211 (1993). The OMA requires that meetings and decisions of a public body be open to the public. MCL 15.263(1), (2). The relevant inquires for determining whether the OMA has been violated are: (1) whether the Council acted as a public body; (2) whether there was a meeting; (3) whether the members deliberated or rendered a decision; and (4) whether any exceptions apply. *Schmiedicke v Clare School Bd*, 228 Mich App 259, 261, 577 NW2d 706 (1998). The OMA defines a meeting as any "convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act." MCL 15.262(b). The elements of a meeting are: (1) a quorum, (2) deliberation or rendering of a decision, and (3) a matter of public policy being at issue. *Schmiedicke*, 228 Mich App at 262. A decision is "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." *Id.*, quoting MCL 15.262(d). A determination refers to a discussion, which is "defined as the act of exchanging views on something." *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000) (quotation marks, citations, and emphasis omitted).

Meetings of a constructive quorum or sub-quorum violate the OMA. *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 472; 425 NW2d 695 (1988). A constructive quorum or sub-quorum occurs when a public body intentionally meets in smaller groups outside

of open meetings in order to set public policy. *Id.* A governing body may not delegate the deliberation to a committee and then simply adopt its recommendation; such action violates the OMA. *Schmiedicke*, 228 Mich App at 263-264. However, the requirement that deliberations be open is subject to specific exemptions. MCL 15.268.

Plaintiff argues the trial court improperly granted summary disposition in this case. Plaintiff asserts that questions of fact existed, including: (1) whether McGinty's statement "therefore, as I have advised Council" constituted evidence that a closed meeting occurred; (2) whether the requirement under the City Ethics Code that a decision be made indicated either the Council violated the OMA by having a closed meeting or violated the City Ethics Code; (3) why the Mayor, assuming he was being truthful, made legal decisions without input from other Council members; (4) whether the Mayor was acting on his own as a "committee"; (5) whether the Council just ignored plaintiff's emails and letters; and (6) whether the lack of comment by the Council members at the meeting indicated that they had already discussed the issue and reached a decision.

Plaintiff's argument is without merit. There was no evidence that the Council deliberated privately in violation of the OMA. The only evidence offered by plaintiff was his interpretation of McGinty's statement at the Council meeting. No reasonable interpretation of this statement supported an inference that defendants violated the OMA and any such interpretation was directly contradicted by defendants' affidavits from Council members. A possibility that a claim might be supportable by evidence at trial is insufficient to support a denial of a motion for summary disposition. *Maiden*, 461 Mich at 121. Plaintiff presented only speculation that defendants violated the OMA. These inferences were not adequate to preclude summary disposition.

Plaintiff next argues that the trial court erred in assessing sanctions under MCR 2.114. We disagree. We review for clear error a trial court's decision to award sanctions under MCR 2.114. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Every complaint must be signed by either an attorney or a party if the party is not represented by an attorney. MCR 2.114(C)(1). The signature certifies that:

- (1) he or she has read the document;
- (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
- (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [MCR 2.114(D).]

If a document is signed in violation of this rule, the court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to

pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.” MCR 2.114(E); *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). An attorney has an affirmative duty to “conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed.” *Harkins*, 257 Mich App at 576. This is an objective standard, and an attorney’s subjective good faith is irrelevant. *Id.* The determination whether a claim is frivolous depends on the particular circumstances of each case. *Kitchen*, 465 Mich at 662. On motion of a party, if a court finds that a civil action is frivolous, the court “shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs against the nonprevailing party and their attorney.” MCL 600.2591(1). The term “frivolous” means that “[t]he party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party,” or “[t]he party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true,” or “[t]he party’s legal position was devoid of arguable legal merit.” MCL 600.2591(3)(a).

Here, plaintiff’s claims were based on speculation and conjecture. Based on an objective standard, the particular circumstances indicated that plaintiff and his attorney failed to make reasonable efforts to inquire as to the viability of the claim before filing suit. This case appears to have been filed to harass defendants and to produce a forum for plaintiff and his attorney to articulate their complaints in regards to the City Center II project and the Council. The trial court did not clearly err by awarding sanctions.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens