STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM KOZA, SARA KOZA, OWEN KOZA, ABBY KOZA, and BAILEIGH KOZA,

Plaintiffs-Appellees,

v

PATRIOT HOMES, d/b/a LINCOLN PARK HOMES, SANTORO & SCARCELLO CONCRETE, BEATRICE ANGEL, d/b/a BEA ENTERPRISES, I.P.C. PEST CONTROL, DUANE JENROW & SONS, INC., MIKE MAKIMMA, d/b/a WOLVERINE HOMES, SCOTT SHEPPARD, d/b/a MUDSLINGERS, and GREG THOMAS d/b/a G.T.S.,

Defendants,

and

TYRONE PARK ASSOCIATES, LP, d/b/a CIDERMILL CROSSING,

Defendant/Cross-Plaintiff,

and

AIRPORT HOME CENTER, INC., d/b/a HILL STREET HOMES,

Defendant/Counter-Plaintiff,

and

JOHNNIES CONCRETE REPLACEMENT, INC.,

Defendant/Cross-Defendant,

and

UNPUBLISHED
April 28, 2009

No. 282347
Livingston Circuit Court
LC No. 05-021480-CK

GREGORY A FINKBEINER d/b/a UNIQUE ELECTRIC,

Defendant-Appellant.

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Defendant[1] appeals as of right from the trial court's order dismissing the case and denying sanctions for all parties. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs sued for damages that occurred when their modular home leaked, fell apart, and became consumed in toxic mold, apparently due at least in part to an improper foundation and footings. They named as defendants a number of entities that each played some role in the construction and installation of their home. Defendant was not originally named in the suit, but Johnnies Concrete Replacement, Inc. ("Johnnies"), named defendant (and several others) as a nonparty at fault, MCR 2.112(K). The notice of nonparty fault stated that each of the entities listed

> are the, or at least a, proximate cause of the subject incident. All such non-parties failed to act in a reasonable and prudent fashion, to the extent that all were involved as contractors who performed work at the subject site, from information provided by co-defendant, and contributed, whole or in part, to the problems with respect to the installation, set-up, and construction of the property.

The notice stated that Johnnies intended to ask the trial court to instruct the jury to assess a percentage of fault attributable to the nonparties named in the notice.

The trial court entered a stipulated order to amend the complaint and add the entities named in the notice of nonparty fault, which plaintiffs did, filing their second amended complaint.

Defendant moved for summary disposition and sought an award of attorney fees and costs under MCR 2.114 (document signed is not well grounded in fact, absence of reasonable inquiry) and MCL 600.2591 (frivolous actions). The trial court granted the motion for summary disposition, but held in abeyance defendant's request for fees and costs. Eventually, the overall case was resolved by a settlement between the remaining parties, but it was "contingent on a finding of no costs or sanctions by the court against any party." The trial court approved the settlement and denied all requests for costs and fees. Several times throughout the litigation, the

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[1] "Defendant" as used in this opinion refers to Gregory Finkbeiner, d/b/a Unique Electric, the only defendant to appeal.

court expressed concern with the notice of nonparty fault filed by Johnnies, but the court never indicated that plaintiffs acted frivolously or without reasonable care in amending their complaint to include defendant.

The trial court's ruling regarding whether a claim is frivolous will not be disturbed on appeal unless it is clearly erroneous. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 408; 651 NW2d 756 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999); *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been made. *Yee, supra* at 408. If there is a finding that a complaint is frivolous, the court is required to sanction the nonprevailing party because the Legislature used the term "shall" in § 2591, denoting mandatory sanctions and the absence of discretion. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996) ("trial court did not have discretion to forgo sanctions").

We hold that the trial court here did not clearly err in its ruling. This is not a case in which there was no evidence linking defendant to the home and the suspected area of the problems. Defendant indisputably worked on the home and the work that he did, which included digging along the foundation, could conceivably have caused the problems, and indeed, Johnnies made that claim in the notice of nonparty fault. The fact that the claims against defendant were later dismissed does not render them frivolous. See *Attorney Gen v Harkins*, 257 Mich App 564, 576-577; 669 NW2d 296 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly