

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT H. VARTANIAN,

Plaintiff-Appellant,

v

WOODSON KILGORE,

Defendant-Appellee.

UNPUBLISHED

June 19, 2018

No. 337801

Wayne Circuit Court

LC No. 15-013657-CK

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for costs and attorney fees. The trial court awarded defendant costs and attorney fees because it found that plaintiff's action was frivolous. We affirm the trial court's grant of costs and attorney fees, but vacate the amount of attorney fees awarded and remand for either an evidentiary hearing to determine reasonable attorney fees or for the trial court to articulate on the record how it determined the reasonableness of the fees awarded.

On appeal, plaintiff argues that the trial court erred in awarding defendant costs and attorney fees based on plaintiff's frivolous action because the action, plaintiff contends, was not frivolous. We disagree.

We review for clear error a trial court's decision to impose sanctions on the ground that an action was frivolous. *Ladd v Motor City Plastics Co*, 303 Mich App 83, 103; 842 NW2d 388 (2013). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Pursuant to MCR 2.625(A)(2), "if the court finds on motion of a party that an action . . . was frivolous, costs shall be awarded as provided by MCL 600.62591." MCL 600.2591(1) requires a court to assess costs and fees against the nonprevailing party—and, if represented, the party's counsel—for frivolous claims brought in civil cases. See *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 534-535; 773 NW2d 57 (2009). "The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." MCL 600.2591(2). MCL 600.2591(3)(a) provides that a claim is "frivolous" if one of the following is true:

(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.

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

Here, plaintiff's complaint alleged three claims against defendant: breach of contract, breach of constructive trust, and conversion.

Plaintiff's breach-of-contract claim was premised on his assertion that a valid contract existed between the parties wherein defendant promised to convey title of 1204 Deering Street, Garden City, Michigan (the property) to plaintiff. Plaintiff claimed that defendant breached this contract when he sold the property to Santeiu Properties, LLC.

A party claiming breach of contract must establish by a preponderance of the evidence that (1) there was a valid contract (2) which the other party breached (3) resulting in damages to the party claiming a breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

Here, the parties had a valid contract in the form of a land agreement. The land agreement provided that defendant agreed to sell plaintiff the property "for the original mortgage" executed by defendant,¹ and, within two years, plaintiff would obtain a separate mortgage for the property and remove defendant from the title. The agreement was dated March 4, 2007. The parties further agreed that plaintiff would make the mortgage, tax, and insurance payments on the home until he secured a separate mortgage.

The record establishes that, at the time the complaint was filed, *In re Costs & Attorney Fees*, 250 Mich App at 94, plaintiff had no reasonable factual basis to objectively believe that defendant breached the parties' agreement, see *Davids v Davis*, 179 Mich App 72, 89; 445 NW2d 460 (1989) ("The reasonableness of the inquiry is determined by analysis under an objective standard."). Plaintiff filed an affidavit at trial attesting that "all mortgage payments, including taxes and insurance were timely made." However, defendant provided a document issued by his lender in November 2008 stating that the mortgage was in default for failure to pay the required installments. Thus, regardless of whether plaintiff was aware that he was missing the mortgage payments, the evidence established that the lender was not, in fact, receiving mortgage payments. Therefore, in November 2008, plaintiff breached the contract because he

¹ The parties agreed at trial that defendant acquired the property through a mortgage as a favor to plaintiff, who could not secure a mortgage on his own.

was not fulfilling his obligation under the contract to make the mortgage payments. Further, as of March 2009, plaintiff had not obtained a separate mortgage on the property as required by the land agreement, and defendant remained on the title. Plaintiff does not dispute that he failed to obtain a mortgage for the property—or remove defendant from the title—by March 2009. Therefore as of March 4, 2009, plaintiff—not defendant—again breached the contract. Eventually, in October 2009, the property was sold in a short sale because plaintiff was not making the mortgage payments and defendant could not afford the mortgage payments. This short sale was a direct result of plaintiff’s failure to make the mortgage payments as agreed to by the parties. Accordingly, because plaintiff failed to fulfill all of his obligations under the contract, his claim that it was defendant who breached the agreement when he was forced to sell the property in October 2009 lacked a reasonable factual basis and was devoid of arguable legal merit. Therefore, the trial court did not clearly err by concluding that plaintiff’s breach-of-contract claim was frivolous. See *Ladd*, 303 Mich App at 103; MCL 600.2591(3)(a)(ii) and (iii).²

Plaintiff’s claim for breach of a constructive trust likewise had no factual or legal basis at the time plaintiff filed the complaint. “A constructive trust is an equitable remedy created not by intent or by agreement, but by the operation of law.” *In re Filibeck Estate*, 305 Mich App 550, 552; 853 NW2d 448 (2014). A court imposes a constructive trust when equity is necessary or to prevent unjust enrichment. *Id.* at 553.

Plaintiff offered no evidence to demonstrate that a constructive trust had been imposed by a court at the time the complaint was filed. His breach-of-constructive-trust claim was premised on allegations that defendant breached the land agreement, but such a claim is devoid of legal merit because parties cannot enter a constructive trust by agreement; a constructive trust can only be imposed by a court. See *id.* at 552. In fact, this Court has clarified that “[a] constructive trust is not an independent cause of action; rather, it is an equitable remedy.” *CPAN v MCCA*, 305 Mich App 301, 325; 852 NW2d 229 (2014), vacated in part on other grounds by 498 Mich 896 (2015). Therefore, plaintiff’s breach-of-constructive-trust claim lacked factual and legal support

² Alternatively, we could conclude that the primary purpose of this claim was to harass, embarrass, or injure defendant. See MCL 600.2591(3)(a)(i). The only evidence that the mortgage was not in default and that plaintiff was making the payments was plaintiff’s self-serving affidavit; plaintiff provided no support for his assertion that the mortgage was not in default, nor did he provide any evidence—such as bank statements or check numbers—to establish that he made a single mortgage payment after November 2008. In contrast, defendant provided the default notice from the bank showing that the mortgage was in default beginning in November 2008 due to missed payments. It would not have been clearly erroneous for the trial court in this case to conclude that plaintiff (1) knew that he was not paying the mortgage, which led to the default and eventual forced short sale of the property, and (2) only pursued this breach-of-contract claim to harass defendant.

when plaintiff filed the complaint, and the trial court did not clearly err in concluding that the claim was frivolous. See *Ladd*, 303 Mich App at 103; MCL 600.2591(3)(a)(ii) and (iii).³

Plaintiff's conversion claim was also devoid of arguable legal merit because it was brought well past the applicable statute of limitations. "[C]onversion is a wrongful act of dominion over another person's property . . . and as such it constitutes an injury to property governed by the three-year limitations period." *Tillman v Great Lakes Truck Ctr*, 277 Mich App 47, 49; 742 NW2d 622 (2007). To satisfy the statute of limitations, plaintiff needed to bring his conversion claim by October 2012, but plaintiff did not file his claim until October 2015. Bringing a claim three years past the statute of limitations lacks legal merit, and, the trial court did not clearly err in ruling that plaintiff's conversion claim was frivolous. See *Ladd*, 303 Mich App at 103; MCL 600.2591(3)(a)(iii).⁴ Further, plaintiff's conversion claim was premised on his assertion that defendant was holding the property in a constructive trust, and, as stated, there was no evidence to demonstrate that a constructive trust had been imposed by a court at the time the complaint was filed. See *In re Filibeck Estate*, 305 Mich App at 552. Thus, plaintiff had no basis to believe that the facts underlying his conversion claim were true, and the trial court did not clearly err in ruling that the claim was frivolous on that basis as well. See *Ladd*, 303 Mich App at 103; MCL 600.2591(3)(a)(ii).

Plaintiff also challenges the reasonableness of the attorney fees awarded to defendant. A trial court's award of attorney fees is reviewed for an abuse of discretion. *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257, 260 (2016). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Plaintiff argues that the trial court did not take "into account" the factors for determining reasonable attorney fees. The factors that a trial court is to consider in determining reasonable attorney fees are articulated in *Smith v Khouri*, 481 Mich 519, 530-534; 751 NW2d 472 (2008), and were clarified in *Pirgu*, 499 Mich at 281-283. But before applying those factors, a trial court is to begin "by determining the fee customarily charged in the locality for similar services," and then multiplying the resulting number "by the reasonable number of hours expended in the case." *Smith*, 481 Mich at 530-531. In *Pirgu*, 499 Mich at 281, our Supreme Court clarified that a trial court "must" start its analysis with this calculation—and then "must" consider all of the remaining factors identified in *Smith*—when determining reasonable attorney fees. The trial court in this case was required to determine reasonable attorney fees, see MCL 600.2591(2), but wholly failed to engage in this mandatory analysis. Accordingly, the trial court abused its

³ We are mindful that plaintiff filed his complaint *in propria persona*, as is to his constitutionally protected right. Const 1963, art 1, § 13. However, parties who represent themselves are held to the same standards as members of the Michigan bar. *Totman v Royal Oak Sch Dist*, 135 Mich App 121, 126; 352 NW2d 364 (1984).

⁴ Again, although plaintiff filed the complaint *in propria persona* and may not have been familiar with the statute of limitations, plaintiff is held to the same standards as an attorney admitted to the bar. *Totman*, 135 Mich App at 126.

discretion by failing to follow the proper framework, and we vacate the amount of attorney fees awarded. See *Pirgu*, 499 Mich at 282-283.⁵

We affirm the grant of costs and attorney fees, but vacate the amount of attorney fees awarded and remand for either an evidentiary hearing to determine reasonable attorney fees or for the trial court to articulate on the record how it determined the reasonableness of the fees awarded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

⁵ Plaintiff broadly asserts in the relief requested portion of his brief on appeal that this Court should reverse the trial court's grant of summary disposition to defendant. However, plaintiff did not appeal the trial court's order of summary disposition. Moreover, even if we could consider this issue, plaintiff does not brief the merits of the issue or cite any legal authority supporting his position, thereby abandoning this claim. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).