STATE OF MICHIGAN

COURT OF APPEALS

GLENDA VIDOSH,

Plaintiff/Counter-Defendant/Appellee-Cross Appellant,

v

TRANS AUDIT, INC., TRANS AUDIT PARCEL SERVICES, LLC., CHARLES W. KENNEDY, IV, MICHAEL COULTER, CYRIL GRASSO,

Defendants/Counter-Plaintiffs,

and

ROBERT OAKES,

Defendant/Appellant-Cross Appellee.

UNPUBLISHED
August 13, 2013

No. 306746
Oakland Circuit Court
LC No. 2010-107278-CK

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant Robert Oakes[1] appeals as of right the circuit court order denying his motion to impose sanctions and tax costs. Plaintiff cross-appealed the circuit court's opinion and order granting defendant summary disposition pursuant to MCR 2.116(C)(10). Because we hold that some of plaintiff's claims were devoid of arguable legal merit and/or that plaintiff had no reasonable basis to believe the facts underlying those claims were in fact true, either when initially made or on March 16, 2011, when she opposed defendant's motion for summary disposition, we reverse the trial court's order with respect to those claims. We affirm the trial court with regards to plaintiff's cross-appeal, which we deem abandoned. We remand for an

[1] We will refer to defendant Oakes as "defendant" in this opinion. Although there were other named defendants in the trial court proceeding, they are not parties to this appeal.

award of sanctions, and for a determination by the trial court on the appropriate amount of such sanctions, with respect to those claims we have determined to be frivolous. However, we deny defendant's request for sanctions for a vexatious appeal.

I. BACKGROUND

Defendant was a minority shareholder and member of the board of directors of Trans Audit, Inc (TAI), a New York based corporation in the parcel auditing business. In 2008, TAI entered into an agreement with plaintiff to form Trans Audit Parcel Services, LLC (TAPS) a Michigan limited liability company. Pursuant to the agreement, plaintiff owned 33.33% of TAPS, and TAI owned the remaining interest. Plaintiff was to serve as TAPS' president and as a member of TAPS' board of directors. Defendant was also a member of the TAPS board. Plaintiff was entitled to 40% of the first $250,000 of TAPS' annual revenue and she was also entitled to a percentage share of TAPS' distributed profits based on her ownership interest. Plaintiff did not receive any of the profit-sharing distributions in 2008 or 2009. She was either fired or resigned in September of 2009.

On January 26, 2010, plaintiff filed a six-count complaint against defendant, TAI, TAPS, and three other TAI and TAPS board members. In her complaint, plaintiff demanded a formal accounting and alleged breach of contract, unjust enrichment, breach of fiduciary duty, oppression, and statutory conversion. In his March 18, 2010 answer, defendant requested that the trial court dismiss all six counts. Then, on September 7, 2010, he moved for summary disposition; the trial court denied his motion without prejudice so that discovery could be completed. Defendant filed an amended motion for summary disposition on December 30, 2010. After hearing oral arguments, the trial court took the matter under advisement, and on April 7, 2011, the court dismissed plaintiff's entire complaint as to defendant.

Thereafter, on April 14, 2011, defendant moved to impose sanctions pursuant to MCR 2.114, MCR 2.625, and MCL 600.2591. After hearing arguments, the trial court denied defendant's motion for sanctions on May 4, 2011, stating:

> although the court granted Defendant Robert Oakes' Motion for Summary Disposition, the court cannot find any basis to grant defendant's motion for costs and sanctions and accordingly, Defendant Robert Oakes' motion for costs and sanctions is denied.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for costs and attorney fees is reviewed for an abuse of discretion. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. However, this Court reviews for clear error a trial court's findings with regard to whether a claim or defense was frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). "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." *Id*.

III. SANCTIONS GENERALLY

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Keinz*, 290 Mich App at 141 (quotation omitted). "The purpose of imposing sanctions for asserting frivolous claims is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (quotation marks and citation omitted).

MCR 2.114(C) provides that every document of a party represented by an attorney must be signed by at least one attorney of record and every document of an unrepresented party must be signed by the party. By signing the party or attorney 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).]

In this case, defendant alleges that plaintiff and her attorney signed documents in violation of the second certification, i.e. the complaint and defense of the complaint lacked either a factual or legal basis. "If a pleading is signed in violation of MCR 2.114, the party or attorney or both must be sanctioned." *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003); see also MCR 2.114(E). Moreover, MCR 2.114(F) provides that "a party pleading a frivolous claim . . . is subject to costs as provided in MCR 2.625(A)(2)." In turn, MCR 2.625(A)(2) provides that "if the court finds . . . an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." If a claim or defense is found to be 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 and fees against the nonprevailing party and their attorney." MCL 600.2591(1). Pursuant to MCL 600.2591, a claim is frivolous if one 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.

In conjunction with MCL 600.2591, defendant argues that some of the claims were devoid of arguable legal merit and that plaintiff had no reasonable basis to believe the facts underlying

other claims were in fact true. Whether a claim or defense is frivolous is based upon the circumstances at the time the claim or defense was asserted. *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008). And, "'[n]ot every error in legal analysis constitutes a frivolous position.'" *Kitchen*, 465 Mich at 663.

IV. APPLICATION TO PLAINTIFF'S CLAIMS

Although, in addressing defendant's motion for sanctions, the trial court did not discuss its application to each of plaintiff's claims individually, we find that a proper evaluation of the trial court's denial of sanctions requires that we do so.

A. BREACH OF CONTRACT

Defendant argues that plaintiff's breach of contract claim was "frivolous" because it was "devoid of arguable legal merit." We agree; the trial court's finding that the breach of contract claim was not frivolous is clearly erroneous and must be reversed.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). Here, plaintiff's claim was devoid of arguable legal merit because a party to a contract cannot sue a non-party to the contract for a breach of contract. In other words, in order to sue a defendant for breach of contract there must first be a contract between the plaintiff and the defendant. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990) (holding that the plaintiff's breach of contract claim failed because she did not establish all the elements of a contract). Here, defendant was not a party to the contract upon which plaintiff brought suit; accordingly, plaintiff's breach of contract claim lacked arguable legal merit insofar as it related to a claimed breach by defendant.[2]

B. UNJUST ENRICHMENT

Next, defendant asserts that there is neither arguable legal merit nor an adequate factual basis for plaintiff's unjust enrichment claim.

In order for a plaintiff to sustain a claim for unjust enrichment, the plaintiff must show that (1) the defendant received a benefit from the plaintiff and (2) it is inequitable to the plaintiff for the defendant to retain the benefit. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). If those requirements are established, then "a contract will be implied by law to prevent unjust enrichment." *Id.* But "a contract cannot be implied when an express contract already addresses the pertinent subject matter." *Id.*

[2] At no time did plaintiff argue or present any legal or evidentiary basis for holding defendant liable under a theory of piercing the corporate veil.

In this case, defendant argues that plaintiff's claim is devoid of arguable legal merit because there is an express contract addressing the pertinent subject matter. However, Michigan law only prohibits a plaintiff from suing a defendant for unjust enrichment when there is an express written contract on the same subject matter *between the parties*. *Morris Pumps v Centerline Piping*, 273 Mich App 187, 194; 729 NW2d 898 (2006). In *Morris Pumps*, the plaintiffs had an express contract with Centerline that dealt with the subject matter of the lawsuit between the plaintiffs and the defendant. However, the plaintiffs did not have an express written contract with the defendant covering the subject matter. Because there was not an express contract between the plaintiffs and the defendant on the subject matter, this Court held that the defendant could pursue a claim for unjust enrichment.

Here, there is an express contract between plaintiff and TAI, but there is no express contract between plaintiff and defendant. As a result, plaintiff's claim for unjust enrichment was not devoid of arguable legal merit.

However, a claim or defense that is not devoid of legal merit may still be frivolous if the "party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591. Further, sanctions are appropriate under MCR 2.114 if, to the best of the signor's knowledge, information and belief formed after reasonable inquiry, a document is not well grounded in fact. Furthermore, the law will only "imply a contract to prevent unjust enrichment . . . if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*. at 195.

Assuming *arguendo* that plaintiff had a reasonable basis to believe that the facts underlying her legal position were true when she filed the complaint on January 26, 2010, we nevertheless cannot find that she could have had a reasonable basis for believing her claim to be factually viable on March 16, 2011, when she opposed defendant's motion for summary disposition.

Sanctions are appropriate from the time a party knows his or her claim or defense is frivolous and decides to proceed anyway. *BJ's & Sons Constr Co, Inc*, 266 Mich App at 408. Plaintiff initially argued that her claim was not frivolous because she had made a demand for TAPS' financial documents in order to evaluate her claim, but the documents were not provided. As a result, she proceeded with her claim on the reasonable belief that monies were wrongfully withheld and that defendant had received a portion of those monies. However, as of March 16, 2011, plaintiff conceded that because of earlier discovery, she knew that defendant had not received a distribution of monies from TAI or TAPS. She also apparently conceded that the monies allegedly wrongfully withheld from her were wrongfully withheld *after* defendant had been removed from a position of authority with TAPS and TAI.[3]

[3] Defendant was removed from his positions on the boards of TAI and TAPS in March of 2009. In June of 2009, his employment with the companies was fully terminated and his only remaining relationship was that of a minority shareholder in TAI.

On appeal, plaintiff argues that defendant benefited from the wrongfully withheld monies because TAI's retention of the money meant that the value of his TAI stock increased. There are no facts on this record indicating that the value of defendant's TAI stock increased. However, even assuming that an increase in stock value was a benefit, there are simply no facts on this record from which to conclude that it would be *unjust* for defendant to retain the benefit. "[N]ot all enrichment is necessarily unjust in nature." *Morris Pumps*, 273 Mich App at 195. In *Morris Pumps*, this Court stated

> [a] third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefitted has not requested the benefit or misled the other parties. . . . Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, *unjust enrichment*, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, *in the absence of some misleading act by the third person*, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person [*Morris Pumps*, 273 Mich App at 196, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628 (emphasis supplied).]

Thus, without some facts suggesting that defendant had some level of culpability, there does not appear to be a factual basis for plaintiff's unjust enrichment claim. And, as noted supra, plaintiff conceded that the decisions she complained about occurred after defendant was removed from the companies. Accordingly, the trial court erred in finding that plaintiff's unjust enrichment claim was not frivolous, as of the time of defendant's summary disposition motion.

C. CONVERSION

Next, defendant asserts that plaintiff's claim for statutory conversion is "frivolous." Statutory conversion consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." MCL 600.2919a. "To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). "The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship." *Id*. (quoting *Citizens Ins Co v Delcamp Truck Center, Inc*, 178 Mich App 570, 575, 444 NW2d 210 (1989)).

Here, plaintiff argues that because defendant is a shareholder of TAI, any profit TAI makes will go to defendant. Further, she alleges that because defendant was involved in the finances and bookkeeping of TAI and TAPS, he either knew or had reason to know that monies were wrongfully diverted from plaintiff. Plaintiff points to two specific "sums" of money: $1,400.00 that she claims she is owed as a reimbursement for expenses; and a $6,147.47 check, issued to her for reimbursement, on which TAI apparently stopped payment. She does not offer any specific details relating to either of the "sums." For instance, she does not indicate when payment was stopped on the check, or the circumstances or authority under which defendant may have acted. She also has not articulated what expenses the reimbursement was supposedly for, when the expenses were incurred, or whether defendant had anything to do with denying plaintiff

the monies. Even after discovery, she has not provided evidence relating to these details. Furthermore, the contract between TAI and plaintiff expressly stated that TAPS would reimburse plaintiff for expenses, so there is no factual basis to conclude that defendant ever had an obligation to return to plaintiff specific money entrusted to his care. *Head*, 234 Mich App at 111. In fact, there is no indication on this record that any of plaintiff's money was entrusted to defendant. Accordingly, we find that the trial court clearly erred in finding that this claim was not frivolous.

D. BREACH OF FIDUCIARY DUTY AND OPPRESSION

Defendant also asserts that plaintiff's claims for breach of fiduciary duty and oppression are "frivolous." He concedes on appeal that the claims are legally viable, but argues that there is no factual basis for the claims. In support he points out that it is undisputed that he was removed from the board of TAPS and TAI in March of 2009. Further, he notes that plaintiff was told about his removal when he was first removed. Essentially, he argues that he could not have breached a fiduciary duty to plaintiff or oppressed her because he was not on either board when the actions she complained of occurred. However, plaintiff never claimed that all of the allegedly wrongful conduct occurred *after* March 2009. Instead she maintained that she was being oppressed from the outset of the contract to form TAPS. She also claimed that defendant breached his fiduciary duties by wrongfully imposing expenses on TAPS before he was removed. Defendant was involved with the financial aspects of the boards of both TAPS and TAI. Additionally, defendant was involved in the profit-sharing decision for 2008, so it is reasonable to conclude that if a wrongful decision was made at that time, he took part in it. Thus, plaintiff's belief about defendant's role was not so far-fetched as to render her claims frivolous. Additionally, simply because her claim eventually was dismissed does not mean that her claim was frivolous. *Kitchen*, 465 Mich at 662.

E. ACCOUNTING

Defendant finally argues that plaintiff's demand for an accounting was frivolous because he did not have access to any of the requested records because he was removed from the board of TAPS in March of 2009. Further, he again notes that before she initiated her suit, plaintiff was informed that he had been removed from the board.

MCL 450.4503 addresses when a member of a limited liability company may request a formal accounting. Subsection 5 provides that "[a] member may have a formal accounting of a limited liability company's affairs, as provided in an operating agreement or whenever circumstances render it just and reasonable." MCL 450.4503. In this case it is undisputed that there is no TAPS operating agreement. However, because plaintiff owns 33.33% of TAPS, it would appear to be just and reasonable for her to obtain a formal accounting of TAPS' affairs. The question, therefore, is who is responsible for providing the formal accounting. Plaintiff knew that before defendant was removed from the board of TAPS he was heavily involved in the record keeping and financials of TAPS. Thus, she had a basis to conclude that defendant may have had copies of the requested documents. However, although defendant admitted that he was responsible for maintaining the records for TAI and TAPS from 2007 until March 4, 2009, discovery revealed that as of March 4, 2009, he had no access to the records of either company. Additionally, it is undisputed that he was terminated from all employment with TAI and TAPS

as of June 16, 2009 and that he was terminated from his board positions as of March 4, 2009. Thus, plaintiff's accounting demand is essentially a demand that someone no longer associated with TAPS should somehow be liable for producing records that he does not have even after she learns that he does not have the records and even though she is aware he was no longer employed by TAPS or TAI. Based on those facts, we conclude that the trial court clearly erred in finding that this claim was not frivolous.

V. CROSS-APPEAL

Plaintiff raises two issues on cross-appeal. First, she argues without citation to legal authority that her claim for unjust enrichment should not have been summarily dismissed. Second, she argues without citation to applicable legal authority that her accounting claim should not have been summarily dismissed. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Therefore, we need not address this issue further. However, we note that with regard to these claims, not only did the trial court not err in dismissing them, but we have found that they were in fact frivolous. Additionally, with regard to plaintiff's claim for accounting, discovery revealed that defendant did not possess or control any of the requested records and had no access to the records of TAI or TAPS after March 4, 2009. We conclude that the trial court did not err in dismissing this claim. See *Mousseau v Walker*, 356 Mich 373, 379; 97 NW2d 110 (1959) (Stating that a reviewing court will not reverse a trial court's decision on an accounting unless "the evidence clearly preponderates the other way.") We therefore affirm the trial court relative to the issues raised in the cross-appeal.

VI. VEXATIOUS APPEAL

Finally, defendant has requested sanctions for a vexatious appeal. However, as this Court has previously held:

> Sanctions requested for a vexatious appeal are governed by MCR 7.216(C)(1). MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that [the defendant] has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions. Therefore, [the] request for sanctions is denied. [*The Meyer & Anna Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005).]

Likewise, in this case, defendant has neither filed a motion separate from the appeal brief nor provided appropriate legal authority, thereby requiring denial of the request.

VII. CONCLUSION

Because we have concluded that the trial court clearly erred in finding that plaintiff's demand for an accounting and her claims for unjust enrichment, statutory conversion, and breach of contract were not frivolous, we reverse and remand for an award of sanctions, and for a determination by the trial court as to the appropriate amount of such sanction, with respect to

those claims. Because we conclude that plaintiff's cross appeal was abandoned and is without merit, we affirm the trial court's order dismissing plaintiff's complaint as to defendant. We deny defendant's request for sanctions for a vexatious appeal.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction. Neither party having prevailed in full, no costs may be taxed. MCR 7.219(A)(1).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray