

STATE OF MICHIGAN
COURT OF APPEALS

MARK S. MILLER and PATRICIA R. MILLER,
Plaintiffs, Counterdefendants,

UNPUBLISHED
July 5, 2002

V

ALBERT L. WOKAS and MARYAN WOKAS,
Defendants, Counterplaintiffs and
Third-Party Plaintiffs-Appellees,

No. 228861
Wayne Circuit Court
LC No. 90-023406-CZ

and

ROSETTA A. BRADEN REAL ESTATE CO.

Third Party Defendant,

and

JAMES MCINERNEY,

Appellant.

Before: Zahra, P.J. and Neff and Saad, JJ.

PER CURIAM.

James McInerney, attorney for Mark and Patricia Miller, appeals as of right the trial court's order which granted defendants, Albert and Maryan Wokas' motion for sanctions. We affirm.

I. Facts and Procedural History

The Millers executed a purchase agreement to buy a home in Grosse Ile from Albert and Maryan Wokas. The purchase agreement became binding on both parties after the completion of a satisfactory home inspection. The purchase agreement also contained an "as is" clause.

The Millers had the home inspected by an engineer and said they were satisfied with the results of the inspection. After moving into the home, the Millers removed carpeting to replace it and discovered substantial floor cracks. Upon further investigation, the Millers learned that,

contrary to the Grosse Ile Township building code, there were no foundation footings under several rooms of the house.

The Millers filed suit against defendants and alleged fraudulent concealment, breach of warranty, and intentional fraud. Ultimately, the trial court granted defendants' motion for summary disposition. The Millers filed an appeal and this Court affirmed the trial court's decision.¹ Thereafter, defendants moved for sanctions and argued that the Millers had filed a frivolous civil action. The trial court ruled that plaintiffs' action lacked arguable legal merit and ordered the Millers and McInerney to pay defendants \$40,800 in attorney fees and costs. The Millers settled the matter with defendants and were released from further liability. McInerney now appeals the award of sanctions.

II. Analysis

A. Standard of Review

This Court will not disturb a trial court's finding that a defense was frivolous unless the finding was clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW 2d 212 (1997). A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Powell Production v Jackhill Oil Co*, 250 Mich App 89; 94 __ NW2d __ (2002).

B. Sanctions Under Michigan Statutes and Court Rules

We agree with the trial court's specific finding on March 19, 1999, that "plaintiffs' legal position at the time their suit was filed was devoid of arguable legal merit, and thus, a frivolous lawsuit."² Moreover, we hold that the trial court correctly assessed sanctions against plaintiffs' counsel, the only appellant in this appeal, under MCL 600.2591,³ MCR 2.114(E), (F)⁴ and MCR 2.625(A)(2).⁵

¹ *Miller v Wokas*, unpublished per curiam opinion of the Court of Appeals, issued 8/20/96 (Docket No. 189837); *Miller v Wokas*, unpublished per curiam opinion of the Court of Appeals, issued 10/5/94 (Docket No. 151156).

² Order, March 19, 1999, p 4.

³ MCL 600.2591 provides:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action 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.

(2) 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.

(continued...)

(...continued)

(3) As used in this section:

(a) "Frivolous" means that at least 1 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.

(b) "Prevailing party" means a party who wins on the entire record.

⁴ MCR 2.114(E) and (F) provide:

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, 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. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

⁵ MCR 2.625(A)(2) provides:

(A) Right to Costs.

(2) Frivolous Claims and Defenses. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

The trial court also relied on MRPC 3.1 which provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

MRPC 3.1 refers to the prohibition on an attorney asserting "an *issue*" that is frivolous, not merely a frivolous cause of action.

MCL 600.2591 provides statutory authority for the court to impose costs and attorneys fees “against the non-prevailing party and their attorney” for frivolous litigation. MCL 600.2591 defines frivolous to mean that “the party’s legal position was devoid of arguable legal merit.” MCL 600.2591(3)(a)(iii). Further, the trial court correctly relied on MCR 2.114(F) which provides that, “In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2).” With respect to plaintiffs’ complaint, the court found each and every *claim* to be frivolous because each and every claim was devoid of legal merit.

We hold that the trial court’s findings that all three counts were devoid of legal merit is not clearly erroneous. Count I alleged “fraudulent misrepresentation” despite the uncontroverted fact that no representations were made by the sellers to the purchasers. Count II alleged “breach of warranty” despite the uncontroverted fact that the purchase agreement executed by all parties provided that the property was sold “as-is” and despite the fact that the purchasers had the property inspected and stated in writing that they were satisfied with the condition of the property. Count III alleged “intentional fraud,” again, despite the uncontroverted fact that there were no representations made by sellers to purchasers of this “as-is” sale of real property.

The trial court’s decision was ultimately upheld by two separate decisions of our Court and our Supreme Court ultimately refused to hear plaintiffs’ appeal. Thereafter, defendants sought and obtained sanctions for frivolous litigation for proceedings before the trial court and our appellate courts. Again, we hold that the trial court did not clearly err in granting sanctions under MCL 600.2591 and MCR 2.114(E).⁶

The primary deficiency in plaintiffs’ claim for fraud, fraudulent concealment or silent fraud is that these theories require, at minimum, some affirmative misleading, statement, or deceptive comment, on the part of the seller. Here, it is uncontroverted that the sellers made absolutely no comments or representations, much less misleading statements. Indeed, the sellers of this Michigan property were in California at the time of the sale and defendants purchased the property “as-is” after three inspections, including an inspection by a certified engineer which the purchasers accepted and advised the sellers of that acceptance in writing.

Plaintiff contends that the sanctions should not have been granted under MCL 600.2591 because Count I, “fraudulent misrepresentation,” was not devoid of legal merit. Plaintiff maintains that, at the time the complaint was filed, case law arguably supported a claim that an “as-is” sale could be the subject of a fraudulent misrepresentation suit absent an unreasonably dangerous condition. We reject plaintiff’s argument because, under the facts of this case, no case law supported the fraudulent concealment count.

Though plaintiff relies on *Lorenzo v Noel*, 206 Mich App 682; 522 NW2d 724 (1994), *Shimmons v Mortgage Corp of America*, 206 Mich App 27, 520 NW2d 670 (1994) overruled by *M&D, Inc v WB McConkey*, 231 Mich App 22 (1998), and *Clemens v Lesnek*, 200 Mich App 456; 505 NW2d 283 (1993), to support his position that the purchasers could claim concealment

⁶ The award was joint and several against the Millers and their attorney McInerney, the appellant here. The Millers, represented by new counsel, settled with the Wokas’ on the sanctions issue and are not parties to this appeal.

or misrepresentation on an as-is sale, it is quite clear that these cases do not support plaintiff's position here. In *Lorenzo*, this Court specifically noted that “[a]s is’ clauses . . . transfer the risk of loss [to the buyer] where the defect should have reasonably been discovered upon inspection but was not.” *Lorenzo, supra* at 687. Here, unlike *Lorenzo*, the house was inspected three times including once by a licensed contractor and, as noted, the purchaser signed a document expressly stating that he was satisfied with the condition of the house. This Court also observed in *Lorenzo* that the risk of loss does not transfer if “ ‘a seller makes fraudulent representations before a purchaser signs a binding agreement.’ ” *Id.*, quoting *Clemens, supra* at 460. Again however, unlike *Lorenzo*, not only were there no fraudulent representations, half truths or deceptive comments here, but the sellers simply made no representations whatsoever. Indeed, it was admitted and known at the time of the filing of the complaint that this 1) was an as-is sale, 2) the sellers were in California and never met the purchasers, much less made any representations and 3) three inspections were conducted and the purchaser expressed satisfaction with the home's condition.

Similarly, in *Shimmons*, the seller was advised that the premises were “uninhabitable” before the sale. The seller who dealt directly with the purchaser knew this and concealed this information. Moreover, unlike the instant case, in *Clemens*, the defendant made specific misrepresentations about certain defects at issue which were regarded as misrepresentations. In brief, none of the cases cited by plaintiff support his assertion that a party may sue for fraudulent concealment or misrepresentation under the facts of this case.

Here, the trial court summarily dismissed Counts II and III, but allowed plaintiff to amend their complaint to pursue what was clearly an unsupportable count -- fraudulent representation premised on a theory that the conditions were “unreasonably dangerous.” Though the law did not support Count I, in reconsidering Count I, after discovery, the trial court found that there was absolutely no evidence to show that the conditions were unreasonably dangerous. This finding, coupled with the known facts recited above, demonstrated to the trial court that similar to Counts II and III, Count I was totally frivolous.

We must note that \$16,500 of the \$40,800 sanction was allocated by Judge Torres to post-judgment activities, particularly the appeal of this frivolous case, twice to the Court of Appeals and twice to the Michigan Supreme Court. We affirm the trial court's holding in this regard. Under our appellate rules, MCR 7.216, we may, on our own motion, assess sanctions for vexatious appeal and remand the case to the trial court for a determination of actual damages. Further, the language and purpose of MCR 7.216 is similar to MCR 2.114. *Fisher v Detroit Free Press, Inc.*, 158 Mich App 409, 418; 404 NW2d 765 (1987). Also, in *Briarwood v Faber's Fabrics, Inc.*, 163 Mich App 784; 415 NW2d 310 (1987), our Court observed that, if a case is filed in violation of MCR 2.114 because it is frivolous and devoid of legal merit, then an appeal of the dismissal of the case brought on the same grounds is vexatious under MCR 7.216:

Regarding Briarwood's request for expenses and attorney fees pursuant to MCR 7.216(C)(1)(a), we note that the rule is similar to MCR 2.114, allowing this Court to assess actual and punitive damages against one bringing a vexatious appeal. Defendants' arguments to the trial court were meritless and, being identical, are equally so on appeal. Because defendants filed their appeal without any reasonable basis to support a meritorious issue, we grant to Briarwood its expenses, including attorney fees, incurred in this appeal. The amount of said

expenses shall be determined by the trial court on remand. [*Briarwood, supra* at 795 (citations omitted).]

For all the foregoing reasons, we affirm the trial court's grant of sanctions against appellant.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad