

STATE OF MICHIGAN
COURT OF APPEALS

DAVID A. BRANDON,

Plaintiff/Cross-Appellant,

v

DAVID JAMES KLINSKE and BETTY BRYKELL,

Defendants/Cross-Appellees

UNPUBLISHED

February 27, 1998

No. 194598

Oakland Circuit Court

LC No. 95-491624-CK

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendants had appealed as of right from the judgment entered in favor of plaintiff; however, the appeal was dismissed. In the cross-appeal, plaintiff appeals as of right the trial court's denial of his motion for attorney fees and mediation sanctions pursuant to MCR 2.114 and MCR 2.403(O)(5). We affirm.

Plaintiff first argues that he is entitled to costs and attorney fees pursuant to MCR 2.114(F) because defendants raised frivolous defenses to plaintiff's claim for an injunction. We disagree.

A party pleading a frivolous defense is subject to sanctions and costs pursuant to MCR 2.114(F), MCR 2.625(A)(2) and MCL 600.2591; MSA 27A.2591. A defense is frivolous when one of the following conditions are met:

(1) The party's primary purpose in asserting the defense was to harass, embarrass, or injure the prevailing party;

(2) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true;

(3) The party's legal position was devoid of any arguable legal merit. [MCL 600.2591(3)(a)(i)-(iii); MSA 27A.2591(3)(a)(i)-(iii); *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997).]

Whether a defense is frivolous is determined at the time it was filed. *Louya v Beaumont Hospital*, 190 Mich App 151, 162; 475 NW2d 434 (1991). Furthermore, this Court will not construe a statute in a manner which penalizes a party from presenting a defense which initially may appear viable, but later may become less persuasive. *Id.* at 163. Also, this Court has interpreted this statute so as not to have a chilling effect on the filing of cases or presentation of defenses which are difficult or novel. *Id.*

Plaintiff's argument is based upon the fact that defendants continued to pursue their defense that plaintiff would not suffer irreparable harm after the trial court had issued the preliminary injunction. The issuance of a preliminary injunction is a finding by the trial court that plaintiff is likely, not certain, to prevail on the issues. *MSEA v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984). In this case, because the trial court was ruling on plaintiff's request for a preliminary injunction, it's finding that plaintiff was likely to prevail was not conclusive and defendants were entitled to continue to pursue their defenses. Although defendants may not have ultimately succeeded on their defenses, at the time they filed their affirmative defenses, they were entitled to require plaintiff to prove the elements of his claims. Therefore, we find the defenses raised by defendants were not frivolous.

Next plaintiff argues that the trial court erred when it denied his motion for mediation sanctions. The trial court's decision whether to award mediation sanctions under MCR 2.403(O)(5) is reviewed for an abuse of discretion. See *Great Lakes Gas Transmission v Markel*, 226 Mich App 127; 129; ___ NW2d ___ (1997). MCR 2.403(O)(5) allows a court to order mediation sanctions when the verdict of monetary relief, combined with equitable relief, improves a party's position more than ten percent over the mediation evaluation, and it is fair to award sanctions under all of the circumstances. Plaintiff received a mediation evaluation of \$10,001. At trial, plaintiff received an award of \$10,000 plus \$779.90 in costs and interest. Plaintiff argued that the monetary relief combined with the equitable relief, in the form of a permanent injunction, exceeded the ten-percent threshold. However, the trial court ruled that the verdict did not exceed the mediation evaluation by ten percent and that it would not be fair under all of the circumstances to award sanctions in this case. This case presented an unusual factual situation. The trial court heard extensive oral arguments on various matters throughout this litigation and listened to three days of trial testimony. After a review of the record, we find that plaintiff has failed to present evidence or arguments that suggest that the trial court abused its discretion in denying plaintiff's motion for mediation sanctions.

However, because defendants have totally failed to acknowledge or respond to plaintiff's claims on cross-appeal, we do award plaintiff costs pursuant to MCR 7.219(I). These costs are to be taxed personally against David J. Klinske and Betty Brykell. MCR 7.219(I).

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Roman S. Gribbs