STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF UNION,

Plaintiff/Counter-Defendant,

V

UNITED INVESTMENTS, INC.,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff-Appellant,

and

JEANNE PFEIFFER, ALPHA S. CLARK, and
JULIE M. CLARK,

Third-Party Defendants-Appellees.

UNPUBLISHED
August 17, 2001

No. 222053
Isabella Circuit Court
LC No. 97-010410-CZ

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant/counter-plaintiff/third-party plaintiff-appellant (appellant) appeals as of right the circuit court's orders granting appellees summary disposition pursuant to MCR 2.116(C)(8) and (10) of appellant's third-party complaint against third-party defendants-appellees (appellees) alleging intentional interference with a contract and tortious interference with a prospective business advantage,[1] and awarding sanctions to appellees. We affirm.

This case arises out of appellees' prompting plaintiff/counter-defendant township's original suit for zoning compliance against appellant. The township and appellants resolved the matter through a consent judgment and this appeal involves only appellant and appellees.

[1] Appellant also brought trespass claims. These claims were severed from the rest of the action, and appellant was ordered to take certain action by a specified date if it desired to pursue the trespass claims. Appellant did not take the required actions within the specified time period. Although appellant mentions the trespass claims in its brief, it does not direct its argument to any action taken by the court with respect to those claims. Thus, the dismissal of the trespass claims is not before us.

Appellant first asserts that the circuit court erred in granting summary disposition to appellees, arguing that the court applied incorrect standards in deciding whether there were genuine issues of material fact. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider the affidavits, pleadings, depositions, and any other documentary evidence in the light most favorable to the party opposing the motion and determine whether a genuine issue of material fact exists. *Id.* at 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The reviewing court must accept all well-pleaded factual allegations as true, and construe them in the light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Appellant's arguments concerning the standard applied are unfounded. In a (C)(10) motion, the moving party has the initial burden of supporting its position by documentary evidence, and the burden then shifts to the nonmovant to establish that a genuine issue of fact exists. *Smith, supra* at 455, quoting *Quinto, supra* at 362-363. Appellant's affidavit denying appellees' arguments did not suffice to create an issue of fact under the (C)(10) standard, *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997), and appellant's promise that it would have presented particular evidence at trial also falls short. *Maiden, supra* at 121. We find no error.

The court correctly concluded that there were no genuine issues of fact, and that appellees' activity was protected. In *Azzar v Primebank, FSB*, 198 Mich App 512; 499 NW2d 793 (1993), this Court discussed the right to petition and resultant legal immunity:

> The right to petition, as guaranteed by the First Amendment of the United States Constitution, protects the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws, regardless of their intent in doing so. *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127, 139; 81 S Ct 523; 5 L Ed 2d 464 (1961) . . . .
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> Accordingly, unless the petitioning is a sham, the knowing infliction of injury from petitioning does not render the campaign illegal because to hold otherwise would be tantamount to outlawing all such campaigns. *Id*. pp 143-144. See also *United Mine Workers v Pennington*, 381 US 657, 669-672; 85 S Ct 1585; 14 L Ed 2d 626 (1965). . . . [T]he *Noerr-Pennington* doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs. . . .

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> [ ] Moreover, the Supreme Court has recently held that the sham exception to the *Noerr* doctrine involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all and is inapplicable to the defendant who genuinely seeks to achieve his governmental result, but does so through improper means. *City of Columbia v Omni Outdoor Advertising, Inc*, 499 US [365, 380]; 111 S Ct 1344; 113 L Ed 2d 382 (1991). [*Azzar, supra* at 516-518.]

It is uncontested that appellees attended and spoke at meetings, wrote letters and circulated a petition in opposition to appellant's conduct concerning zoning regulations. This is protected activity under the First Amendment. *Azzar, supra* at 516. Appellant's evidence in support of its assertion that this activity was a sham and appellees' real objective was to force appellant to purchase appellees' property was insufficient to raise a genuine issue regarding motivation. Taken in context, the statements reveal only a recognition that if appellant were to purchase the adjacent property, the adjacent landowners, appellees, would not be disturbed by the zoning violations.

Moreover, even if punishing appellant for not buying appellees' property was appellees' true reason for their petitioning, under the sham exception, "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49, 60; 113 S Ct 1920; 123 L Ed 2d 611 (1993). The sham litigation exception requires that appellees' petitioning, and the township's lawsuit, prompted by the appellees, be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id*. That appellees could expect success from their petitioning is borne out by the fact that the township's suit, culminating in the consent judgments, was at least partly successful for plaintiff and appellees. Further, appellees' actual success in prompting plaintiff to find appellant was violating ordinances, plaintiff's suit, and the consent judgment reached ordering compliance with zoning laws, makes the sham exception inapplicable to appellees' actions. *Azzar*, *supra* at 520. Thus, appellees' conduct with respect to the zoning enforcement was protected.

Appellant additionally alleged intentional interference stemming from alleged communications to appellant's franchisor. Apparently, newspaper clippings regarding the alleged zoning violations were sent to appellant's franchisor. However, appellant failed to link these communications to appellees. Further, as the circuit court observed, "[a]ny damages resulting from this claimed conduct are speculative at best."

Appellant also claims error in the circuit court's award of sanctions to appellees, including attorney fees. Again, we find no error.

A circuit court's decision that a claim is frivolous is reviewed for clear error, *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997); its award of specific attorney fees as a sanction is reviewed for an abuse of discretion, *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

Appellant first asserts that the circuit court failed to make findings of fact in support of its conclusion that the third-party complaint lacked factual and legal support. However, there is no requirement that the trial court make detailed findings of fact in awarding sanctions. *In re Attorney Fees & Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999); *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241-242; 497 NW2d 225 (1993). Here, the court's statements provide adequate indication of its reasoning to facilitate review.

To guard against an allegation of a frivolous action, an attorney is bound to factually and legally research a possible lawsuit before filing the first pleading, according to an objective standard of reasonableness. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). It seems probable that appellant would have discovered in its mandatory preliminary legal research that exercising the right to petition generally immunizes one from a lawsuit, and should have realized that although appellees mentioned the purchase of their property, the context would not support an inference that their ultimate objective was to compel purchase of their property rather than to secure compliance with zoning regulations. Further, appellant should have conducted a factual investigation and found at least some indication of who had sent newspaper articles to its franchisor before alleging that it was one of the appellees. *Id*.

Additionally, the circuit court could have reasonably viewed appellant's third-party complaint as aimed at "harass[ing]" appellees under MCL 600.2591(3), pursuant to a finding that, under the *Noerr-Pennington* doctrine discussed in *Azzar, supra,* appellant's complaint was "devoid of arguable legal merit." *Id*. Further, appellant's principal seemed to recognize that appellees had a right to petition the government, and testified indicating that the real reason for including appellees in the litigation was to obtain a final resolution, which seemed impossible without them because they had been so involved and vocal. MCL 600.2591(3) makes appellant susceptible to paying all appellees' reasonable costs, including court costs and attorney fees, in addition to sanctions ordered under MCR 2.114(D)-(E) and MCR 2.625(A)(2). As a result, we cannot say that the circuit court clearly erred or abused its discretion in awarding sanctions on these facts. Nor can we say the court erred in concluding that certain activities of the Clarks' counsel were rendered reasonably necessary by appellant's claims.

Lastly, in their brief on appeal, the Clarks request sanctions under MCR 7.216(C) for a vexatious appeal. We agree that sanctions are appropriate under MCR 7.216(C)(1)(a), and remand to the trial court for a determination of actual damages to be assessed in the amount of the Clark's reasonable attorney fees. MCR 7.216(C)(2). MCR 7.216(C)(1) provides for sanctions on motion of a party or on the Court's own motion. Under the circumstances, sanctions consisting of reasonable attorney fees are appropriate in favor of Pfeiffer as well, and we also remand for a determination of that amount.

Affirmed and remanded for a determination of sanctions. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot