STATE OF MICHIGAN

COURT OF APPEALS

SELESTER KIRKWOOD, LELA KIRKWOOD, STEVEN KIRKWOOD, JAMES KIRKWOOD and DEXTER ROSLYN KIRKWOOD,

Plaintiffs-Appellants,

v

MICHIGAN INVESTMENT SERVICES, MARLANA GEHA, Individually and as Personal Representative of the ESTATE OF MANUEL S. YATOOMA, NORMAN A. YATOOMA, and BUTZEL LONG, P.C.,

Defendants-Appellees,

and

CARL M. WEIDEMAN, JR.,

Appellant.

UNPUBLISHED
March 1, 2002

No. 225519
Wayne Circuit Court
LC No. 99-930622-NZ

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants and also appeal, along with their attorney Carl Weideman, Jr., as of right the award of sanctions against plaintiffs and Weideman, jointly and severally, in the amount of $7,500. We affirm.

I

This continuing action stems from an alleged $18,600 loan Manual Yatooma ("Yatooma"), now deceased, made in 1990 to Selester and Lela Kirkwood, and subsequent demands for repayment of the loan by Yatooma's estate following his death in 1993. This case has a lengthy procedural history, beginning with legal action by Yatooma and Michigan Investment Services in 1992 to collect on the loan and foreclose on real property securing the

loan, which resulted in a $22,306.50 default judgment against plaintiffs, and culminating in this action filed by plaintiffs to set aside the judgment on the basis of fraud.

A

Various facts concerning the loan and repayment are in dispute;[1] however, it is agreed that in August 1990, Manuel Yatooma, president of defendant Michigan Investment Services, made a loan to Selester and Lela Kirkwood. At the time of the loan, the Kirkwoods signed an $18,600 promissory note stating that they had received a loan of $18,600 at seven percent interest per annum, to be repaid in one month.[2] In conjunction with the loan, James and Dexter Kirkwood jointly, and Steven Kirkwood, separately, deeded to Michigan Investment Services two parcels of real property.

In May 1992, Manuel Yatooma and Michigan Investment Services filed suit against plaintiffs, seeking repayment of the loan. The suit alleged that plaintiffs had not repaid any of the $18,600 loan, which was due on September 16, 1990, and that the real estate transfers were security for the loan. Defendants sought to foreclose on the real properties and quiet title to the properties. The Kirkwoods did not respond to the suit, and the court issued a default judgment in the amount of $22,306.50 against them, with a provision for a judgment of foreclosure and quiet title on the properties if the judgment amount was not paid in full.

When Manuel Yatooma died in 1993, his estate, through defendant Marlana Geha as personal representative, sought collection on the default judgment. Geha was represented by defendant Norman Yatooma,[3] an attorney with Butzel Long, PC. In November 1998, the estate served a request and writ for garnishment on plaintiffs. In response, plaintiffs filed a motion to stay all issued writs, claiming that payment had already been made. Following a hearing on plaintiffs' motion, the trial court ordered an evidentiary hearing on their claim of payment, but directed that if plaintiffs failed to produce proof of payment in satisfaction of the judgment, the estate would be awarded attorney fees and costs.

Following the evidentiary hearing, the court denied plaintiffs' motion for stay, finding that they failed to produce proof of payment, and the court directed the estate to submit a bill of costs. On March 26, 1999, plaintiffs filed a motion to set aside the default and default judgment. Following a response by defendants, the trial court denied the motion. On May 7, 1999, the court ordered sanctions against plaintiffs in the amount of $1,653.60 for costs and fees related to their motion to stay. Plaintiffs' (then defendants) subsequent appeal of the trial court's decision was dismissed by this Court on September 1, 1999, for lack of jurisdiction.

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[1] The facts and proceedings are presented as best can be determined on appeal, given that neither party has adhered to the requirements of MCR 7.212(C)(6) in preparing its brief.

[2] According to plaintiffs, Selester and Lela Kirkwood received a one-month loan of $15,000, to which interest of $3,600 was added up-front and claimed to be part of the principal amount.

[3] Norman Yatooma is the son of Manuel Yatooma.

B

On September 28, 1999, plaintiffs filed the instant lawsuit, seeking: 1) relief from the default judgment under MCR 2.612(C)(3) due to fraud on the court; 2) damages for breach of a suretyship contract by Michigan Investment Services and Marlana J. Geha; and 3) sanctions against Norman Yatooma and Butzel Long, P.C. under MCR 2.114. Defendants filed a motion for summary disposition and a motion for sanctions against plaintiffs under MCR 2.114, MCR 2.625, and MCL 600.2591(3)(a). Following a hearing, the trial court granted defendants' motion for summary disposition and sanctioned plaintiffs, and attorney Weideman, $7,500 for filing a frivolous lawsuit. Plaintiffs appeal.

II

Plaintiffs first argue that the trial court erred in dismissing their independent action under MCR 2.612(C)(3). We disagree. This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Summary disposition is properly granted under MCR 2.116(C)(7) on the basis of res judicata. *Sprague v Guhagiar*, 213 Mich App 310, 313-314; 539 NW2d 587 (1995). MCR 2.116(C)(7) provides that a claim may be dismissed because it is barred due to prior judgment or other disposition of the claim before commencement of the action. In ruling on a motion for summary disposition under this subrule, the court considers all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party. *McFadden v Imus*, 192 Mich App 629, 632; 481 NW2d 812 (1992).

A

The doctrine of res judicata bars plaintiffs' claims regarding alleged fraud on the court and whether plaintiffs made repayment on the underlying debt either prior to the default judgment or in 1994. Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires that: (1) the prior action was decided on the merits; (2) the matter contested in the second case was or could have been resolved in the first; and (3) both actions involved the same parties or their privies. *Id*.; *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Michigan has adopted the broad view of res judicata, which bars litigation in the second action of not only those claims actually litigated in the first action, but also claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated but did not. *Sewell, supra*; *Sprague, supra* at 313.

The record indicates that throughout the proceedings in the earlier case, plaintiffs raised the identical issues: whether they were entitled to certain credits and payments on the loan either before the default judgment or in 1994. Further, it appears undisputed that plaintiffs raised the issue of defendants' alleged fraud, albeit toward the plaintiffs rather than the court itself, in the previous proceeding, and the trial court specifically found that plaintiffs had failed to establish a claim of fraud. Thus, because the previous lawsuit involved the same parties and the same issues as those sought to be relitigated by plaintiffs in the instant suit, the valid final judgment in that

proceeding precludes plaintiffs' instant action, especially given that plaintiffs rely on the same evidence as in the earlier case to support their "new" cause of action. The claims raised in the second lawsuit, including the alleged fraud and misrepresentation, either were, or clearly could have been, raised in the first action. *Id.* "Res judicata is designed to avoid relitigation of claims, and to prevent vexation, confusion, chaos, and the inefficient use of judicial resources." *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).

B

Moreover, summary disposition was proper because plaintiffs have no basis for an independent action for fraud given the facts in this case. Plaintiffs essentially argue that they made various payments on the loan, and defendants nonetheless took a default judgment in the full amount of the loan, sought foreclosure of real properties, and obtained writs of execution and garnishment, by falsely representing to the court that no payments had been made and without crediting the value of the real properties. This Court has recognized that an independent action for fraud may not be maintained on the basis of intrinsic fraud, e.g., perjury or discovery fraud. *Sprague*, *supra* at 313-314. The fraud exception to res judicata pertains only to extrinsic fraud, i.e., fraud outside the facts of the case, such as fraud with regard to filing a return of service. *Id*. "Extrinsic fraud is a fraud which actually prevents the losing party from having an adversary trial on a significant issue." *Rogoski v Muskegon*, 107 Mich App 730, 736; 309 NW2d 718 (1981). "[W]hile perjury constitutes a fraud in obtaining a judgment, it does not prevent an adversary trial." *Id*. at 737. Plaintiffs' remedy in this case was a motion for relief from judgment, which was once before litigated and is now precluded. See *Daoud v De Leau*, 455 Mich 181, 203-204; 565 NW2d 639 (1997); *Sprague*, *supra* at 314.

C

Plaintiffs' argument that summary disposition was premature is without merit. Where a party fails to adequately specify what factual support would be uncovered during any remaining discovery, summary disposition is not premature. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994). Plaintiffs have failed to show that further discovery would have created a genuine issue of material fact. *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 540; 599 NW2d 493 (1999). Despite ample opportunity during the lower court proceedings over the course of seven years, plaintiffs proffered no evidence that resolved the issue of payment, nor did they advance any explanation or justification for their failure to do so. Plaintiffs have failed to substantiate any particular need for or benefit of additional discovery.

III

Plaintiffs also argue that the trial erred in dismissing Steven, James, and Dexter Kirkwood's action for breach of suretyship contract. A surety is one who undertakes to pay money or to do any other act if the principal fails therein. *In re Forfeiture of US Currency*, 172 Mich App 790, 792; 432 NW2d 442 (1988).

Plaintiffs essentially argue that defendants breached a suretyship contract by failing to apply the value of the properties subject to foreclosure, to the underlying default judgment debt. However, plaintiffs fail to establish factual and legal bases for their argument. The record is

devoid of evidence of the underlying agreement, the legal proceedings concerning the real property at issue, or the final disposition of the property. The trial court's grant of summary disposition under MCR 2.116(C)(10) was proper. See *Spiek*, supra at 337.

Further, we conclude that the claim is barred under res judicata. The suretyship claim arises out of the same events as the first lawsuit, and the facts and evidence essential to the action are identical to those essential to the prior action. *Sewell, supra* at 575-576.

IV

Plaintiffs next argue that the trial court abused its discretion in awarding sanctions. A trial court's finding that a claim or defense is or is not frivolous will not be reversed on appeal unless clearly erroneous. *LaRose Mkt, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

The court granted defendants' motion for sanctions pursuant to MCR 2.114, MCR 2.625 and MCL 600.2591, concluding that plaintiffs were arguing a cause of action that had no legal basis. Sanctions are warranted if a pleading is signed in violation of MCR 2.114, which includes a certification that the pleading 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. MCR 2.114(D); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998).

Further, a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). MCR 2.114(F); *FMB-First Michigan Bank, supra*. MCR 2.625(A)(2) provides that costs are to be awarded pursuant to MCL 600.2591. *Id*. 720-721. MCL 600.2591(1) requires that sanctions be imposed for a frivolous claim or defense in a civil case upon the nonprevailing party and his attorney. *In re Attorney Fees & Costs, supra* at 701. A claim or defense is frivolous when the party's position is devoid of arguable legal merit. MCL 600.2591(3)(a)(iii); *In re Attorney Fees & Costs, supra* at 701-702.

These provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Mkt, Inc supra* at 210. The reasonableness of the inquiry is based on an objective standard and depends on the facts and circumstances of the case. *Id*.

Under the circumstances, we find no clear error in the trial court's determination that sanctions were proper. The underlying issues in this action were previously raised in the first suit, including specifically whether defendants had acted fraudulently in their attempts to collect monies owed by plaintiffs. It appears that because plaintiffs failed to prevail in the earlier suit at appropriate stages in the proceedings, they simply attempted here to once more relitigate the same issues with the same evidence, an action which could indeed be termed frivolous under the circumstances. Nor did plaintiffs present either factual or legal support for a suretyship claim.

V

Plaintiffs further contend that the amount of the sanctions was unreasonable. The trial court's determination of the amount of sanctions is reviewed for an abuse of discretion. *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997).

Sanctions imposed under MCR 2.114 may include payment to the opposing parties of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. *Id.* at 32. Similarly, under MCL 600.2591, the court must award the reasonable costs and fees incurred by the prevailing party, including court costs and reasonable attorney fees. MCL 600.2591(1) and (2); *FMB-First Michigan Bank, supra* at 721. The court need not detail its findings as to each specific factor. *In re Attorney Fees & Costs, supra* at 705. If the underlying facts are in dispute, the trial court should make findings of facts regarding the disputed issues in determining a reasonable fee. *Howard v Canteen Corp*, 192 Mich App 427, 438; 481 NW2d 718 (1991), overruled in part on other grounds *Rafferty v Markovitz*, 461 Mich 265, 602 NW2d 367 (1999).

Plaintiffs indicate no specific basis for their challenge to the amount of fees and costs awarded, but rather merely argue "that such an amount could only have been advanced for punitive purposes." It appears from the record that defendants presented the court and plaintiffs with an affidavit of fees and costs incurred in this lawsuit in the amount of approximately $17,000. The court noted that the bill was "rather substantial," finding it too high. After inquiring concerning the basis and nature of the billings, the court recessed the hearing for plaintiffs to confer with defendants regarding a reasonable amount. When the parties could not agree on a figure that reasonably compensated defendants, the court resumed the hearing.

The court then provided plaintiffs an opportunity to review the billing and voice any objections. The record does not reflect that plaintiffs disputed any particular underlying facts, thus necessitating a factual finding by the court. The court thereafter also gave plaintiffs an opportunity to suggest a reasonable compensation figure, but plaintiffs declined to do so. Plaintiffs cannot now be heard to complain on appeal that the amount was unreasonable. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998) (Error requiring reversal may not be one to which the aggrieved party contributed by plan or negligence.). We find no abuse of discretion in the award of $7,500 fees and costs.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ Joel P. Hoekstra