STATE OF MICHIGAN

COURT OF APPEALS

NANCY HARROWER,

Plaintiff,

and

DON VALENTE and MARY VALENTE,

Plaintiffs-Appellants,

v

FIRST UNION HOME EQUITY BANK, MICHAEL L. MOREY, and CHIRCO TITLE COMPANY,

Defendants,

and

CLEMENT J. WALDMANN and CLEMENT J. WALDMANN, P.C.,

Defendants-Appellees.

UNPUBLISHED
November 5, 2002

No. 233127
Oakland Circuit Court
LC No. 97-543016-CK

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Plaintiffs Don and Mary Valente appeal as of right the trial court's order granting defendants sanctions pursuant to MCR 2.114(E).[1] We affirm.

Defendant Clement Waldmann, P.C., was the settlement and disbursement agent for First Union Home Equity Bank for a real estate closing. At the closing, plaintiffs released mortgages

[1] Plaintiff Nancy Harrower and defendants First Union Home Equity Bank, Michael L. Morey, and Chirco Title Company were not affected by the sanctions order and do not appeal. As used herein, "plaintiffs" refers to the Valente plaintiffs and "defendants" refers to the Waldmann defendants.

they held on a non-parties' property to give First Union a first priority. Plaintiffs then executed new mortgages, to be recorded after First Union's mortgage. Michael Morey, a manager for First Union, agreed to record plaintiffs' subsequent mortgages. First Union's mortgage and plaintiffs' releases were recorded; however, the subsequent mortgages were not and, over time, plaintiffs became unsecured. Defendant Clement J. Waldmann was not personally present at the closing; his firm was represented by Norman Rice. Neither Waldmann nor Rice nor anyone associated with the Waldmann firm told plaintiffs that defendants would record the subsequent mortgages.

Plaintiffs filed a claim against defendants, alleging in part:

> That attorney Clement Waldmann, not only as the settlement &/or disbursing agent for "First Union" but also as an attorney with extraordinary expertise and knowledge relative to the nuances of such a refinance transaction, had duties and responsibilities to inquire relative to uncustomary aspects of such a transaction and to make sure his employer &/or principal "First Union's" obligations to [plaintiffs] were met and for his negligence in not fulfilling same, if any, is liable to [plaintiffs] for any loss or costs incurred by [plaintiffs].

The trial court concluded that the complaint was not well grounded in fact or law, concluding, in part:

> Three of Plaintiffs' claims alleged negligence, common law duty of care, and liability of agent in control of property, yet Plaintiffs failed to show that Waldmann owed them *any* legal duty as either an attorney or agent for the bank. As stated previously, the facts clearly indicate that Waldmann was not present during the closing when the promise to discharge and re-file the mortgage was made. Plaintiff Don Valente *was* present, however, and should have known Waldmann was not. Instead, it was defendant Michael Morey, a First Union bank officer, who signed the promise to re-file the mortgage interest.

Therefore, the trial court awarded $38,716.17 in sanctions pursuant to MCR 2.114(E), including $17,647.47 in costs and fees incurred after defendants were dismissed.

Plaintiffs first argue that the sanction award was based on the trial court's erroneous factual determination that Waldmann was not present at the closing when, in fact, defendant's agent Rice was present instead. We disagree with the characterization of the trial court's reasoning upon which this argument rests.

Plaintiff Don Valente, an attorney, signed the complaint for all plaintiffs. Plaintiffs' claims against defendant were not premised on Rice's alleged negligence. To the contrary, plaintiffs' claim intimates that Waldmann was personally present at the closing and, based on his "extraordinary expertise," owed some duty to protect plaintiffs. It is undisputed that Waldmann was not personally present at the closing and that Don Valente was aware of that fact before he signed the complaint. Therefore, the trial court's factual conclusion that Waldmann was not personally present at the closing was not only factually accurate but relevant to the determination of defendants' motion for sanctions.

Plaintiffs next argue that the imposition of sanctions pursuant to MCR 2.114(E) was improper because the complaint was well grounded in fact and law. We disagree. We review a trial court's finding that a pleading was signed in violation of MCR 2.114 for clear error. *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998). MCR 2.114(C) requires that "[e]very document of a party represented by an attorney . . . be signed by at least one attorney of record." The signature is a certification that the signatory read the document and, to the best of the signatory's knowledge 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." MCR 2.114(D). If a document is signed in violation of MCR 2.114(D), the trial court must impose appropriate sanctions. MCR 2.114(E).

MCR 2.114(D) imposes an "affirmative duty on each attorney [or party] to conduct a reasonable inquiry into the validity of a pleading before it is signed." *Davids v Davids*, 179 Mich App 72, 89; 445 NW2d 460 (1989); see also *Morris v Detroit*, 189 Mich App 271, 281; 472 NW2d 43 (1991). The reasonableness of the inquiry is evaluated using an objective standard, depending largely on the facts and circumstances of the specific claim. *Davids*, *supra*; *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993). Violation of MCR 2.114 does not require that the pleading or paper be filed for improper purposes. *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 794-795; 415 NW2d 310 (1987).

Plaintiffs' claims were premised on the factual conclusion that Rice *could have* taken plaintiff's subsequent mortgages when he left the closing and improperly failed to record them. However, at the time they filed their complaint, plaintiffs had no evidence that Rice took the mortgages. To the contrary, plaintiffs were aware that Morey, not Rice, promised to record the mortgages. Therefore, we conclude that the complaint against defendants was not well grounded in fact.

Neither was it well grounded in law. In their complaint, plaintiffs alleged claims of negligence, breach of the common law duty of care, liability of agent in control of property, and third-party beneficiary. These allegations were clearly without merit.

As the trial court properly found with respect to plaintiffs' first two claims, defendant owed no duty to plaintiffs. Duty can arise by contract, statute, special relationship, or "by application of the basic rule of common law, which imposes an obligation to use due care or act so as to not unreasonably endanger the person or property of others." *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). The Waldmann firm represented First Union at the closing. Normally, an attorney owes no duty to a non-client. See, e.g., *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997); *Friedman v Dozorc*, 412 Mich 1, 20; 312 NW2d 585 (1981). Plaintiffs acknowledge there was no contract between them and defendants. In addition, defendants' contract with First Union did not require the recording of any documents. Finally, plaintiffs cite no authority supporting their contention that a settlement agent for a closing has a duty to record documents for a party he does not represent. Therefore, plaintiffs' negligence and breach of common law duty claims had no merit and were not warranted by existing law or a good-faith argument for extension of the law. MCR 2.114(D).

Plaintiffs' claim that defendants are liable as agents in control of property was even less compelling. Cf. *Bannigan v Woodbury*, 158 Mich 206; 122 NW 531 (1909). Plaintiffs had no

evidence that either defendants controlled plaintiffs' property at any time. In fact, the evidence indicated that Morey, not Rice, had control of the mortgages. Therefore, this claim was meritless.

Plaintiffs' third-party beneficiary claim was equally without merit. A third party cannot maintain an action on a contract merely because the party receives an incidental benefit from the performance of the contract or is injured by its breach. *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 676; 66 NW2d 227 (1954). Rather, "[t]hird-party beneficiary status requires an express promise to act to the benefit of the third party." *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995). The contract between defendants and First Union contained no express promise to act on plaintiffs' behalf. The only incidental benefit plaintiffs received from the agreement was the receipt of a check to pay their original mortgage. Plaintiffs received that check. Therefore, we conclude that the trial court's decision was not clearly erroneous and sanctions were appropriate pursuant to MCR 2.114(E).

Plaintiffs also argue that the trial court improperly awarded $17,647.47 in fees and costs incurred after defendants were dismissed from the case. Again, we disagree. The amount of sanctions imposed under MCR 2.114 is reviewed by this Court for an abuse of discretion. *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). Fees and costs incurred in pursuing sanctions are reasonable expenses caused by the filing of the improper pleading. *Id*. Therefore, recovery of those fees and costs may be imposed as a sanction pursuant to MCR 2.114(E). It is irrelevant that the party seeking sanctions has been dismissed from the case.

Moreover, plaintiffs conceded before the trial court that defendants' attorney's hourly rate was reasonable and that the attorney actually spent the time claimed on the case. Therefore, evidentiary testimony on those issues was waived. We conclude that by waiving the reasonableness of the fees before the trial court, plaintiffs waived the right to raise the issue on appeal. See *In re Vanidestine*, 186 Mich App 205, 212; 463 NW2d 225 (1990); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Finally, we conclude that this appeal was frivolous because plaintiffs' issues are so devoid of merit that no reasonable attorney would contest them in good faith. See MCR 7.216(C)(1)(a). Accordingly, we remand to the circuit court for a determination of defendants' actual damages and expenses, including reasonable attorney fees incurred in defending plaintiffs' appeal. *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169-170; 550 NW2d 846 (1996).

We affirm and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage