

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA HAWK,

Plaintiff-Appellee,

v

JEWISH VOCATIONAL SERVICE a/k/a
JEWISH VOCATIONAL SERVICE AND
COMMUNITY WORKSHOP,

Defendant,

and

DARNELL & LULGJURAJ, P.C.,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 290048

Macomb Circuit Court

LC No. 2005-000601-NO

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff's former attorneys, Darnell & Lulgjuraj, P.C., appeal as of right an order granting plaintiff's motion for frivolous action sanctions that was filed following Darnell & Lulgjuraj's failed attempt to enforce its lien for attorney fees and costs that accrued while it represented plaintiff in an underlying litigation. We affirm.

On February 14, 2005, Darnell & Lulgjuraj filed a lawsuit on plaintiff's behalf against the Jewish Vocational Service (JVS), alleging that JVS's negligent provision of custodial services to plaintiff's employer, TACOM¹—particularly their use of dangerous carpet cleaning products—caused plaintiff to suffer injuries. Subsequently, JVS filed a motion for summary disposition arguing, in part, that plaintiff's negligence claim should be dismissed because JVS did not owe a legal duty to plaintiff. While the motion for dismissal was pending, on November 8, 2006, facilitation proceedings began and were to be continued on December 16, 2006. However, on December 8, 2006, Darnell & Lulgjuraj filed a motion to withdraw as plaintiff's counsel, which

¹ TACOM is the acronym for the United States Army Tank-Automotive and Armaments Command.

stated as the ground for withdrawal that its relationship with plaintiff had “broken down to the extent that the parties can no longer effectively communicate.”

Before the motion to withdraw was decided, on December 21, 2006, the trial court entered an opinion and order granting the motion for summary disposition with regard to plaintiff’s negligence claim, the only claim pleaded in her complaint. The trial court held that plaintiff failed to allege or establish that JVS owed her a duty that was separate and distinct from the duties JVS owed by contract to TACOM. By letter dated December 27, 2006, Darnell & Lulgjuraj advised plaintiff as discussed below, that her case was dismissed and that JVS would likely seek case evaluation sanctions against her. Although Darnell & Lulgjuraj’s motion to withdraw had not been heard and substitute counsel had not filed an appearance, the letter concluded: “This is [sic] case is now closed and this ends our representation of you in this case. Our bill for costs expended on your behalf will follow.” A copy of that opinion and order was included with the letter.

Subsequently, plaintiff retained new counsel and, on January 4, 2007, a motion for reconsideration was filed that requested permission to amend plaintiff’s complaint to add a third-party beneficiary claim. On January 11, 2007, the trial court granted the motion and allowed the amendment, but the negligence count remained stricken from the complaint. On February 9, 2007, plaintiff filed her first amended complaint which set forth the third-party beneficiary claim related to the contract between TACOM and JVS. Eventually the third-party beneficiary claim was successfully settled and, on November 1, 2007, a stipulated order of dismissal was entered by the trial court.

Thereafter, Darnell & Lulgjuraj sought to enforce its lien claim in the amount of \$110,622.11² and an evidentiary hearing was conducted. Darnell & Lulgjuraj claimed entitlement to their fees and costs on the grounds that: (1) its contingency fee agreement provided for such recovery, (2) it had expended significant and quality efforts in this matter, and (3) because of her conduct, plaintiff’s credibility was “destroyed,” i.e., it had good cause to withdraw. The evidentiary hearing occurred over the course of six days.

On August 8, 2008, the trial court delivered its 23-page verbal opinion. In brief, the court noted that it appeared that Darnell & Lulgjuraj’s decision to cease its representation of plaintiff “was a decision that was economically driven” and did not constitute good cause. Further findings included, in brief, that: (1) Darnell & Lulgjuraj abandoned plaintiff, (2) plaintiff’s alleged behavior or lack of credibility did not justify Darnell & Lulgjuraj abandoning plaintiff at a critical point in the matter, (3) Darnell & Lulgjuraj took no steps to save this matter after it was dismissed and refused further assistance, (4) the only claim pleaded by Darnell & Lulgjuraj was dismissed and the settlement plaintiff received resulted from a claim it failed to plead and did not pursue, and (5) Darnell & Lulgjuraj’s representation of plaintiff and “withdrawal” from her case contravened MRPC 1.4 and 1.6.

Plaintiff then filed a motion for sanctions pursuant to MCL 600.2591, arguing that Darnell & Lulgjuraj’s lien claim constituted a frivolous claim entitling her to an award of

² Plaintiff paid costs in the amount of \$7,844.19, which left a balance of \$102,817.92, exclusive of attorney fees and costs associated with recovering the lien.

attorney fees and costs. Plaintiff argued that the lien claim was frivolous for several reasons, including that: (1) Darnell & Lulgjuraj “withdrew” as plaintiff’s counsel without court approval and without cause—abandoning plaintiff, (2) the only claim filed by Darnell & Lulgjuraj was summarily dismissed and Darnell & Lulgjuraj refused to provide any further legal services to plaintiff, (3) Darnell & Lulgjuraj failed to take steps to protect plaintiff while she was attempting to retain new counsel despite severe time constraints, (4) Darnell & Lulgjuraj engaged in professional misconduct with regard to its representation of plaintiff and its withdrawal as her attorneys, and (5) plaintiff’s recovery was from a new claim, a third-party beneficiary claim, that was filed by her new counsel after a motion for reconsideration of the summary dismissal order was granted and leave to file an amended complaint was granted. Thus, plaintiff argued, Darnell & Lulgjuraj’s claim of lien was frivolous within the contemplation of MCL 600.2591, entitling her to an award of attorney fees and costs for having to defend against this frivolous claim.

Darnell & Lulgjuraj responded to plaintiff’s motion arguing that the request for sanctions should be denied because its lien claim was not frivolous. Darnell & Lulgjuraj argued that it withdrew from representing plaintiff after deciding that her lawsuit “would fail because of [plaintiff’s] lack of credibility and conduct at facilitation.” It alleged that plaintiff “was not honest, uncooperative and unjustifiable [sic] hostile with D & L;” thus, a zero jury verdict was expected. Accordingly, a business decision was made to terminate the relationship which represents good cause. Darnell & Lulgjuraj further claimed that it did significant and quality work on behalf of plaintiff demonstrating a factual basis for its claim to fees. In summary, Darnell & Lulgjuraj argued that it had a reasonable basis to assert its lien claim at the time it was made. In addition, because plaintiff had no interest in pursuing the motion for sanctions, her attorney lacked standing to bring the motion.

In reply to Darnell & Lulgjuraj’s response to her motion for sanctions, plaintiff argued that only one condition set forth in MCL 600.2591(3)(a) must be met for the claim to be considered “frivolous” and at least one such condition was met here. Darnell & Lulgjuraj brought the lien claim to harass, embarrass, and injure plaintiff, and even falsely accused plaintiff of perjury to explain why they wrongfully withdrew as her counsel. Darnell & Lulgjuraj’s claim was without factual or legal basis and its position was devoid of arguable legal merit. The trial court made several findings against Darnell & Lulgjuraj when it denied their lien claim, essentially finding it frivolous. Further, plaintiff had standing. The lien claim was asserted as a “contract” action based on the fee agreement Darnell & Lulgjuraj had with plaintiff and sought a lien against the settlement monies plaintiff received on a claim Darnell & Lulgjuraj did not assert.

On January 14, 2009, pursuant to MCL 600.2591, the trial court granted plaintiff’s motion for frivolous claim sanctions, incorporating by reference its order denying Darnell & Lulgjuraj’s claim of lien. Thereafter, Darnell & Lulgjuraj appealed the August 20, 2008 order denying their lien, and the January 14, 2009 order granting plaintiff’s motion for frivolous claim sanctions. This Court dismissed as untimely the appeal related to the August 20, 2008 order. *Hawk v Jewish Vocational Service*, unpublished order of the Court of Appeals, entered March 23, 2009 (Docket No. 290048). Thus, the only appeal properly before this Court relates to the January 14, 2009 order granting plaintiff’s motion for frivolous claim sanctions.

On appeal, Darnell & Lulgjuraj argues that its lien claim was not frivolous because, at the time it was asserted, Darnell & Lulgjuraj reasonably believed (1) it had good cause to seek withdrawal from plaintiff's case, and (2) that it had added value to plaintiff's case. We disagree. A trial court's decision regarding a motion for sanctions will not be reversed on appeal unless clearly erroneous. *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531-532; 644 NW2d 765 (2002). A decision 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. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

MCL 600.2591(1) grants a court authority to award sanctions, in the form of attorney fees and costs, to a moving party if an action is deemed "frivolous." To be considered "frivolous," at least one of the following conditions must be met:

- (i) The party's primary purpose in initiating the action . . . 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. [MCL 600.2591(3)(a).]

It appears that Darnell & Lulgjuraj is arguing that not one of these conditions were met; thus, its lien claim was not frivolous at the time it was asserted. Darnell & Lulgjuraj challenges several of the trial court's holdings with regard to its denial of Darnell & Lulgjuraj's lien claim. However, whether the trial court properly denied Darnell & Lulgjuraj's claim of lien is not an issue on appeal. The issue on appeal is whether sanctions were properly awarded. We conclude that the trial court's decision to grant plaintiff's motion for frivolous action sanctions was not clearly erroneous.

In that regard, Darnell & Lulgjuraj argues that it had good cause to seek withdrawal from plaintiff's case and that its efforts added value to plaintiff's case; therefore, at the time it was asserted, its lien claim was not frivolous. These arguments are without merit. Darnell & Lulgjuraj filed a complaint on plaintiff's behalf premised on a negligence claim. After a motion for summary disposition had been filed by defendant, but before it was decided, on December 8, 2006, Darnell & Lulgjuraj filed a motion to withdraw as plaintiff's counsel. Before Darnell & Lulgjuraj's motion to withdraw was heard and decided, plaintiff's entire case was summarily dismissed on December 21, 2006. Darnell & Lulgjuraj did not attend a hearing on its motion to withdraw and the motion was never granted.

Nevertheless, by letter dated December 27, 2006, Darnell & Lulgjuraj advised plaintiff that her case had been dismissed in its entirety. The letter further provided:

You have 14 days from December 21, 2006 to file a motion for reconsideration with the Court, or 21 days from December 21, 2006, to file an appeal of right to the Michigan Court of Appeals – January 4th, 2007 and January 11, 2007, respectively. This office will not be filing any further pleadings with any court on your behalf or in this case.

Please be advised that JVS may, and probably will, file a motion for case evaluation sanctions against you. If we receive such a motion, we will forward it to you, but you will need to have replacement counsel to defend you in such an action.

This is [sic] case is now closed and this ends our representation of you in this case. Our bill for costs expended on your behalf will follow.

By letter dated January 2, 2007, Darnell & Lulgjuraj advised plaintiff that it did not appear at the hearing held on that date regarding its motion to withdraw because the order granting summary disposition in defendant's favor "also closed the case; therefore, no further action is required on our part." The letter also advised that defense counsel for JVS had contacted Darnell & Lulgjuraj on that date and indicated that it might seek case evaluation sanctions in an amount between \$100,000 and \$150,000 unless plaintiff agreed to waive her right to appeal. The letter continued that Darnell & Lulgjuraj would not be filing any appeals on plaintiff's behalf and if she wanted to file an appeal, "you will either have to take this action yourself, or hire counsel for that purpose."

Thereafter, plaintiff was able to retain substitute counsel who then filed a successful motion for reconsideration that requested leave to file an amended complaint to add a third-party beneficiary claim against defendant. This third-party beneficiary claim was the claim that eventually resulted in a settlement. Under these circumstances it is unclear as to why Darnell & Lulgjuraj believed that it was entitled to assert its attorney lien for fees and costs in the amount of at least \$110,622.11. Any such belief was certainly not "reasonable."

Although Darnell & Lulgjuraj argues that it had good cause to *seek* withdrawal from plaintiff's case, Darnell & Lulgjuraj, in fact, did not withdraw as plaintiff's legal counsel. Thus, while still retained as plaintiff's attorneys, Darnell & Lulgjuraj wholly failed, and refused, to protect plaintiff's legal rights while she was attempting to secure substitute legal representation—and laboring under the threat of possible costly sanctions—for a case that had been summarily dismissed and that was subject to severe time constraints, constraints that were exacerbated by Darnell & Lulgjuraj's actions. Accordingly, Darnell & Lulgjuraj's argument that its lien claim was not frivolous at the time it was asserted because it had good cause to seek withdrawal from plaintiff's case is wholly without merit.

We likewise reject Darnell & Lulgjuraj's claim that, at the time it asserted its lien, Darnell & Lulgjuraj reasonably believed that it had added value to plaintiff's case. The case that Darnell & Lulgjuraj filed on plaintiff's behalf was dismissed in its entirety. As Darnell & Lulgjuraj repeatedly advised plaintiff—that case was closed. And Darnell & Lulgjuraj refused to provide any additional legal services to plaintiff, despite the precarious nature of her legal predicament. Thus, the trial court's award of sanctions against Darnell & Lulgjuraj for asserting their frivolous lien claim against plaintiff with regard to the settlement reached on the third-party beneficiary claim was not clearly erroneous. See MCL 600.2591(3). And Darnell & Lulgjuraj's argument that plaintiff, through her present attorney, lacked standing to pursue the motion for sanctions is illogical and wholly without merit.

In accordance with our authority, this Court awards costs to plaintiff as the prevailing party pursuant to MCR 7.219(A). Further, pursuant to MCL 600.2445(3) and MCR 7.216(C)(1)(a), (2), this Court *sua sponte* orders actual and punitive damages against Darnell & Lulgjuraj and in favor of plaintiff in an amount to be determined by the trial court.

Affirmed and remanded to the trial court for the determination of damages in accordance with MCR 7.216(C)(2). Costs to plaintiff as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly