STATE OF MICHIGAN

COURT OF APPEALS

ROBERT PRUD'HOMME,

Plaintiff,

v

DAVID IAN KATZMAN and MARY MICHELLE BELANGER KATZMAN,

Defendants-Appellees,

and

PAUL J. NICOLETTI and FABRIZIO, NICOLETTI & WATSON, P.C.,

Appellants.

UNPUBLISHED
March 7, 1997

No. 188674
Lapeer Circuit Court
LC No. 95-021074-CK

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Plaintiff's counsel, Paul J. Nicoletti of Fabrizio, Nicoletti & Watson, P.C., appeals by right an order awarding defendants $5,000 as sanctions for filing a frivolous lawsuit and for violating MCR 2.114(D), which prohibits signing a pleading which is not warranted by existing law or a good-faith argument for extending, modifying or reversing existing law. We affirm.

Plaintiff and defendants entered into an oral contract for plaintiff to put an addition onto defendants' home. Plaintiff acted as general contractor although he was not licensed to do so by the State of Michigan. Defendants repudiated the contract after paying plaintiff $52,916.22. Plaintiff sued, claiming he was entitled to an additional $53,858.98, and advancing four theories of the case: (1) breach of contract, (2) lien foreclosure, (3) builder's trust fund violation, and (4) quantum meruit. Plaintiff later advanced two additional theories: (1) exemption from the licensing requirement, and (2) estoppel where defendants knew plaintiff was unlicensed when they hired him. The trial court granted

* Circuit judge, sitting on the Court of Appeals by assignment.

defendants summary disposition and costs, finding plaintiff's claim had no significant legal merit where (1) the Residential Builders Act, MCL 339.2412; MSA 18425(2412), bars unlicensed contractors from recovery for breach of contract; (2) plaintiff was not entitled to a lien under the Construction Lien Act, MCL 570.114; MSA 26.316(114), because it permits recovery only for licensed contractors pursuant to a written contract; (3) plaintiff could not recover for builder's trust fund violations under MCL 570.151; MSA 26.331 because it imposes a trust on funds held by contractors, not owners; and (4) quantum meruit was not available because the law will not imply a contract when an express contract already exists. *Steele v Cold Heading Co*, 125 Mich App 199; 336 NW2d 1 (1983). The trial court also found the plaintiff was not exempt from the Residential Builders Act licensing requirement because under counsel's interpretation of the statutory exemption provision the statute would be rendered a nullity, permitting unlicensed individuals to contract without penalty, and that plaintiff's estoppel theory had been previously considered and rejected by the Michigan Supreme Court. See *Kirkendall v Heckinger*, 403 Mich 371; 269 NW2d 184 (1978); *Green v Ingersoll*, 89 Mich App 228; 280 NW2d 496 (1979); *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476; 516 NW2d 99 (1994). The trial court then ordered the $5,000 in sanctions.

Plaintiff's counsel claims it was clear error for the trial court to sanction him for bringing a frivolous lawsuit and for violating MCR 2.114(D) when he made a good-faith argument for extending, modifying or reversing existing law. He argues that the Legislature did not intend the Residential Builders Act be used to defraud builders and that defendants should therefore be estopped from raising plaintiff's lack of a license as a defense where defendants knew plaintiff was unlicensed when they hired him. Counsel for plaintiff cites *Wormuth v Lower Eastside Action Project, Inc*, 335 NY Supp 2d 896 (1972), in which the New York Supreme Court estopped the defendant from raising the lack of a license as a defense when the defendant knew the plaintiff, a Louisiana architect, did not have a New York license when he was hired. However, the Michigan Supreme Court has held that the Residential Builders Act is a consumer protection act intended to penalize unlicensed builders and divest them of the power to sue. *Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977). Michigan courts have not varied from this position when asked to create a judicial exception to the licensing statute. See, e.g., *Featherly Construction Co*, *supra*; *Kirkendall v Heckinger*, 403 Mich 371; 269 NW2d 184 (1978); *Green v Ingersoll*, 89 Mich App 228; 280 NW2d 496 (1979); *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476; 516 NW2d 99 (1994). Moreover, the dissent in *Wormuth* noted that "in every case where an unlicensed professional violates the law by practicing without a state license -- with or without the knowledge of the client -- there exists a sympathetic claim of unjust enrichment." However, the dissent maintained, it is "necessary to ignore the plight of the statute violator, even where the beneficiary of his services had knowledge of . . . the statutory violation, or else we render our licensing law meaningless." *Wormuth*, *supra* at 897. Although counsel for plaintiff presented his estoppel theory as an issue of first impression in Michigan, the state of the law in Michigan has been settled for more than twenty years and is consistent with the *Wormuth* dissent. Reliance on *Wormuth* was ill-advised and a reasonable inquiry should have revealed that fact. Notably, there was evidence that plaintiff's counsel put forth his estoppel theory after defendants' counsel had pointed out the deficiencies in the initial complaint. Under the circumstances,

the trial court did not clearly err in finding that the complaint was devoid of merit and thus frivolous, and that counsel for plaintiff had violated MCR 2.114(D).

Plaintiff's counsel also claims the amount of the sanction was improper because it was based on the costs incurred in defending against plaintiff's claim. If an attorney files a frivolous claim, the trial court must award reasonable costs and attorney fees incurred by the prevailing party. MCL 600.2591; MSA 27A.2591; MCR 2.114(F); MCR 2.625(A)(2); *Broadway Coney Island, Inc v Commercial Union Ins Co*, 217 Mich App 109, 117 (No. 173719, rel'd 6/7/96). Upon a finding that an attorney violates the court rules by signing a meritless claim in violation of MCR 2.114(D), the attorney, the party or both, must be subject to an "appropriate" sanction under MCR 2.114(E); *People ex rel Prosecutor v Cergnul*, 203 Mich App 69, 73; 512 NW2d 49 (1993). The only limitation on the trial court is that it may not assess punitive damages. MRE 2.114(E); *People v Herrera (On Remand)*, 204 Mich App 333, 337; 514 NW2d 543 (1994). An award of reasonable expenses actually incurred is warranted for a frivolous claim and is "appropriate" under MCR 2.114(E). In the instant case, there was evidence that defendants had incurred in excess of $9,000 in attorney fees and costs. Under the circumstances, the trial court did not abuse its discretion in setting the amount of sanctions at $5,000. *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991), lv den 440 Mich 896; 488 NW2d 747 (1992).

Finally, plaintiff's counsel claims an award of sanctions is governed by MCR 2.625(F)(2) under which defendants failed to timely request sanctions, thus waiving their right to collect costs. Counsel's reliance on MCR 2.625(F)(2) is misplaced because it has been interpreted to apply only to situations in which costs may be taxed by the court clerk. This rule does not apply when a statute requires that costs be determined by the court. *Oscoda Chapter of PBB Action Committee, Inc, v Dep't of Natural Resources*, 115 Mich App 356, 361-362; 320 NW2d 376 (1982). Costs awarded pursuant to MCL 600.2591; MSA 27A.2591 require a judicial determination and thus, MCR 2.625(F) does not apply. *Avery* v *Demetropoulos*, 209 Mich App 500, 503; 531 NW2d 720 (1995). Although requests for sanctions should be made within a reasonable time after the prevailing party is determined, *Avery, supra*, 209 Mich App 500, 503; 531 NW2d 720, defendants brought their motion for sanctions thirty-eight days after entry of the final judgment, which is reasonable.

Affirmed. Defendants being the prevailing party, they may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson