

STATE OF MICHIGAN
COURT OF APPEALS

ARNOLD D. DUNCHOCK,

Plaintiff/Cross-Appellee,

v

MARK L. TEICHER,

Defendant/Cross-Appellant.

UNPUBLISHED

June 18, 1999

No. 204745

Oakland Circuit Court

LC No. 97-542939 NM

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

PER CURIAM.

Defendant cross-appeals from the trial court's order granting defendant's motion for summary disposition, pursuant to MCR 2.116(C)(8), dismissing plaintiff's case with prejudice, and denying sanctions and amendment of the complaint. Plaintiff's appeal was previously dismissed by this Court for want of prosecution. We affirm.

Defendant argues that the trial court erred when it found that plaintiff's complaint was not frivolous and denied defendant's request for sanctions under MCR 2.114 and MCR 2.625. We will not reverse a trial court's finding that a claim or defense was or was not frivolous unless clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). 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. *Id.*

Although the trial court dismissed plaintiff's complaint pursuant to MCR 2.116(C)(8) (failure to state claim on which relief can be granted), such a dismissal does not require a finding that the complaint was frivolous. See *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a). The determination whether a claim is frivolous does not turn on the ultimate merit of the claim, but rather, the relevant inquiry is whether a plaintiff has pleaded facts and presented sufficient evidence to allow a court to conclude that plaintiff could have reasonably believed that there was legal authority on which to base the claim. *Aguirre v Secula*, 194 Mich App 22, 24; 486 NW2d 60

(1992). After reviewing the record in this case, we conclude that the trial court did not clearly err in denying defendant's request for sanctions. The trial court was correct in implicitly concluding that plaintiff could have reasonably believed that there was legal authority on which to base the claim and that it was not plaintiff's primary purpose to harass, embarrass, or injure defendant.

Defendant also argues that he is entitled to sanctions in connection with plaintiff's appeal to this Court. We disagree. The prevailing litigant is not ordinarily entitled to collect attorney fees from the loser. *DeWald v Isola (After Remand)*, 188 Mich App 697, 702; 470 NW2d 505 (1991). Because we conclude that plaintiff's appeal was not taken frivolously and was not pursued for a vexatious purpose, defendant is not entitled to costs or attorney fees incurred in opposition of plaintiff's appeal or in pursuit of the present cross appeal. See MCR 7.216(C).

Affirmed.

/s/ Janet T. Neff

/s/ Harold Hood

/s/ William B. Murphy