STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW J. VALE,

Plaintiff-Appellant,

v

MARY E. SAUL,

Defendant-Appellee,

and

SCOTT J. BEZEAU,

Defendant.

UNPUBLISHED
August 16, 2002

No. 231474
Macomb Circuit Court
LC No. 99-001270-CK

MATTHEW J. VALE,

Plaintiff-Appellee,

v

MARY E. SAUL,

Defendant,

and

SCOTT J. BEZEAU,

Defendant-Appellant.

No. 231951
Macomb Circuit Court
LC No. 99-001270-CK

MATTHEW J. VALE,

Plaintiff-Appellee,

v

No. 232257
Macomb Circuit Court

MARY E. SAUL, LC No. 99-001270-CK

Defendant-Appellant,

and

SCOTT J. BEZEAU,

Defendant.

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

These consolidated appeals arise out of two unsuccessful attempts by plaintiff and his former wife to purchase from defendant Mary Saul a parcel of property in Macomb County. Plaintiff brought suit to enforce two property purchase agreements against Saul, and to raise claims of tortious interference with contract and business expectancy and defamation against defendant Scott J. Bezeau. Following a bench trial, the trial court entered judgment of no cause of action in favor of defendants and dismissed plaintiff's case with prejudice. The trial court denied defendants' subsequent motion for sanctions pursuant to MCR 2.114(E) and MCL 600.2591. Plaintiff and defendants appealed as of right, and the appeals were consolidated. We affirm in part, reverse in part, and remand to the trial court for proceedings consistent with this opinion.

Facts

In 1993, plaintiff allegedly acted as a salesperson in an agreement under which his wife, Loretta Evans, was to purchase from Saul twenty-one acres of land in Macomb County for the amount of $120,000. However, Saul refused to consummate the transaction and returned the $2,500 deposit that Evans had paid. Evans was aware that she had rights to enforce the agreement, but she opted to accept the deposit. In 1994, plaintiff entered into an agreement with Saul to purchase nineteen acres of the land that was the subject of the unsuccessful 1993 transaction, for a total amount of $92,500. However, a few weeks before the scheduled closing date, plaintiff attempted to include several purchasers into the transaction, and Saul refused to consummate the transaction. Subsequently, plaintiff prepared and signed a mutual release to his claims to the 1994 agreement. In 1998, Saul sold a portion of the property to defendant Bezeau. In 1999, plaintiff learned that Saul and Bezeau were in the process of selling the entire twenty-one acre property to a third party at a total cost of $450,000. Evans assigned her property interests in the 1993 agreement to plaintiff, who recorded the interest. Plaintiff then filed the instant lawsuit a few months before the transaction between defendants and the third party took place.

Docket No. 231474

Defendants' theory of the case was that plaintiff's claims, if any, were extinguished when plaintiff signed the mutual release to the terms of the 1994 agreement. Defendants reasoned that

plaintiff and Evans were considered the same party when they entered the 1993 and 1994 agreements because they were operating in a partnership. Defendants argued that, because the two agreements between the same parties were inconsistent, the latter agreement superceded the former one, and any claims were extinguished by the mutual release.

The trial court granted defendants summary disposition regarding the 1994 agreement and the claims against Bezeau. The only two issues at trial were whether a partnership existed between plaintiff and Evans and whether Evans abandoned her rights under the 1993 agreement. Following a bench trial, the trial court concluded that a partnership existed and that Evans abandoned her rights under the 1993 agreement.

On appeal, plaintiff argues that the trial court erred in concluding that a partnership existed between plaintiff and Evans at the time Evans entered into the 1993 agreement. Plaintiff reasons that, because no partnership existed at the 1993 agreement, Evans' interest in that agreement was not superceded by the 1994 agreement and, therefore, Evans assigned a valid interest in the 1993 agreement to plaintiff. We decline to address this issue because it is not dispositive in this case. Whether a partnership existed is irrelevant because Evans ceased to have any property interest in the 1993 agreement at the moment she accepted a refund of her deposit pursuant to the 1993 contract termination clause.

Docket Nos. 231951 and 232257

Defendants argue that the trial court erred in concluding that plaintiff's claims were not frivolous. Specifically, defendants argue that plaintiff knew that he validly released his claims to the 1994 agreement, that he knew he could not prove his claims of tortious interference with contract and with business expectancy, and that he failed to diligently seek the proper party for his defamation claim. We agree.

Generally, this Court reviews for clear error a trial court's factual finding that a pleading or other paper was signed in violation of MCR 2.114. *Brown v Townsend*, 229 Mich App 496, 500; 582 NW2d 530 (1998). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

The imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule or a frivolous action or defense had been pleaded. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). MCR 2.114(C) requires an attorney to sign each pleading and certify that, "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, 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)(2), and that it was not filed for the purpose of harassment or delay. MCR 2.114(E) mandates that attorneys and parties be sanctioned if they violate the certification requirement. Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). "Frivolous" means that "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(ii). Plaintiff must present a sufficient argument grounded in law and fact to avoid a finding of frivolity. *Id*.

Our review of the record shows that plaintiff's case against defendants was frivolous in that the pleading was not well grounded in fact and was not warranted by existing law. MCR 2.114(D)(2). Although defendants do not raise on appeal the issue of the 1993 agreement because it was not before the trial court, we will address it because it is dispositive to the resolution of the issue. This Court may address an unpreserved issue if it is one of law and all facts necessary for its resolution were presented. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997). With respect to plaintiff's claims against Saul for breach of contract and specific performance of the 1993 agreement, plaintiff never mentioned in his initial complaint, first amended complaint, or second amended complaint that the 1993 agreement terminated upon return of Evan's deposit pursuant to the terms of the agreement. Plaintiff testified that Evans' deposit was returned to her and that she in turn used the deposit money to purchase a different house. Plaintiff also testified that he had been a real estate salesperson since 1988. This means that he had about five years of experience in real estate transactions before Evans signed the 1993 agreement, and about ten years' experience before Evans signed the 1999 assignment. A reasonable conclusion may be made that plaintiff was fully aware of the contract termination provision in the 1993 agreement because the agreement was made on a standard offer to purchase real estate contract used by Re/Max, plaintiff's place of business since 1991. Moreover, it strains credulity to believe that plaintiff's counsel would fail to inquire into the most basic of property questions regarding what property interest, if any, did Evans have in the 1993 agreement before bringing a claim based on that property interest. Hence, we conclude that the claim was frivolous in that plaintiff's legal position was devoid of arguable legal merit, MCL 600.2591(3)(a)(iii), and that the trial court made a mistake in finding that the complaint was not signed in violation of MCR 2.114. *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Similarly, with respect to plaintiff's claims against Saul for breach of contract and specific performance of the 1994 agreement, plaintiff testified that he prepared, signed, and faxed to defendants' counsel a release of the 1994 agreement. Instead of challenging the 1994 release under a theory of duress, plaintiff failed to mention the release in his complaint and ignored the existence of the release until the issue was raised at his deposition. Because plaintiff is a sophisticated party, plaintiff surely understood the ramifications inherent in signing a release of claims. Therefore, plaintiff's claim of interest in the 1994 agreement was frivolous in that plaintiff's legal position was devoid of arguable legal merit.

With respect to plaintiff's claims against Bezeau for tortious interference with the 1993 and 1994 contracts and business expectancy, defendants argue that plaintiff filed a lawsuit without any proof of these two claims. The elements of tortious interference with contract are (1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). The elements of tortious interference with a business relationship are (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989).

Here, plaintiff did not know who made the challenged statements, and plaintiff could not show that any of these statements were even communicated to Saul. Plaintiff's claims of tortious

interference with contract and business expectancy were grounded solely on the basis that Bezeau must have interfered with the contract because the two agreements were never consummated. However, as previously discussed, plaintiff had no claim to the 1993 agreement. Regarding the 1994 agreement, the evidence showed that it was plaintiff who caused Saul to breach the contract when plaintiff attempted to add on the names of several more purchasers to the 1994 agreement a few weeks before the closing date. Under these circumstances, it cannot be concluded that plaintiff reasonably believed that he had any legal grounds in claims of tortious interference with contract or business expectancy.

Finally, with respect to the defamation claim, Bezeau argues that plaintiff failed to diligently seek and sue the correct party. Plaintiff admitted that he sued the wrong party. Here, a man by the name of Bezeau, who worked at a real estate agency, left plaintiff a message to call him at a real estate agency. When plaintiff made the call, the man demanded that plaintiff release his claims to the 1994 agreement. Because Scott Bezeau was one of Saul's tenants, plaintiff assumed that the Bezeau who called him was Scott. However, attached to defendants' motion for summary disposition was Scott Bezeau's affidavit in which he asserted that he was an assembly line worker at Ford Motor Company and could not receive telephone calls. He asserted that his brother, Robert Bezeau, was a real estate agent.

In light of the above, it is difficult to conclude that plaintiff acted diligently to locate the proper defendant. Plaintiff is a real estate agent and could have easily obtained the correct name of the real estate person with whom he had spoken. The real estate purchase agreement under which Scott Bezeau and Saul sold the property to the third party in 1999 lists the name of Robert Bezeau as the salesperson. Plaintiff filed the instant lawsuit to stop that particular transaction. This leads to the conclusion that plaintiff was aware of the parties involved in that transaction, including the salespersons. Moreover, upon learning that he had sued the wrong party, plaintiff failed to dismiss his claim against Scott Bezeau. Where a plaintiff fails to dismiss the action after he was aware he sued the wrong party, the trial court can properly award attorney fees pursuant to MCR 2.114. *Maryland Cas Co v Allen*, 221 Mich App 26, 32 n 1; 561 NW2d 103 (1997).

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell