STATE OF MICHIGAN

COURT OF APPEALS

FRANCIS J. HEARSCH, JR.,

Plaintiff-Appellant,

v

ANDREW J. CULKIN and SUZANNE CULKIN,

Defendants-Appellees.

UNPUBLISHED
October 20, 2009

No. 285911
Macomb Circuit Court
LC No. 2007-001969-CZ

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order that required him to pay defendants $10,057 as sanctions for filing a frivolous action, pursuant to MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action for a permanent injunction against defendants to enforce deed restrictions for the subdivision in which the parties lived. Plaintiff claimed that defendants were attempting to construct an accessory building that violated the restrictions. The blueprints show the proposed structure was approximately 24 feet by 24 feet, constructed of brick, with an asphalt shingle roof and a ten-foot by eight-foot overhead door. It was to be joined to the existing attached garage with a brick wall and a wrought iron gate. The circuit court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that defendants had fully complied with the subdivision covenants and township rules and regulations, that granting an injunction would be a hardship on them, and that plaintiff had not demonstrated any irreparable harm stemming from the completion of the construction project. Subsequently, the court granted defendants' motion for sanctions:

> This Court finds sanctions are entirely appropriate, as it can be reasonably presumed that plaintiff brought his action for purposes of harassment, as he had no reasonable basis to believe the facts underlying his claims were true, because as an attorney and resident in the same subdivision, he knew, or should have known, and understood, the by-laws and covenants under which all parties were bound. The actions defendants undertook were proper and within guidelines of the by-laws and covenants relative to the project. Given all this, plaintiff's legal position was clearly devoid of any arguable legal merit, and his filing of this claim can only be considered an act of harassment.

On appeal, plaintiff argues that his action was well grounded in fact and law and that there was "no credible legal analysis" that would support the dismissal of his claim and the award of sanctions.

MCR 2.625(A)(2) provides, in relevant part, "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591(3) defines "frivolous" as follows:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense 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.

This Court reviews for clear error the circuit court's finding in regard to whether a claim is frivolous for the purpose of awarding sanctions. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

Plaintiff asserts that the restrictions that were the basis of his action were ¶ 10 and ¶ 14.K, which provide:

> 10. Temporary Structures. Trailers, tents, shacks, barns, storage sheds, whether permanent or temporary, or any other temporary building of any description whatsoever are expressly prohibited within the subdivision and no temporary residence shall be permitted in unfinished residential buildings.
>
> * * *
>
> 14. General Conditions.
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> * * *
>
> K. Garages shall be attached to and architecturally related to the principal dwelling. No garage shall provide for less than two (2) nor more than three (3) automobiles. Carports are prohibited. Owner may in its sole and uncontrolled discretion permit one unattached accessory building on any lot exceeding one (1) acre in size. Owner's permission shall be in writing and shall specify all details of the permission.

Plaintiff's claimed reliance on ¶ 10 does not show that the action was not frivolous. For this paragraph to apply, the proposed structure must be deemed a "[t]railer[], tent[], shack[], barn[], storage shed[], whether permanent or temporary, or any other temporary building . . . ." The proposed structure as depicted and described in the blueprints could not reasonably be characterized as any of those terms.

With respect to ¶ 14.K, plaintiff argues:

> If Defendants' proposed structure was in reality to be a garage, paragraph 14 K became relevant and prevented that structure because 1) Defendants' home already had a three car garage and 2) their proposed new structure was not "attached" to the principal dwelling. In addition permission from the Owner referenced in paragraph 14 K was not available to Defendants because the exception authorized in that provision only applies to lots exceeding one acre in size. Defendants' lot is less than one acre in size.

However, in his response to defendants' motion for sanctions, plaintiff did not rely on ¶ 14.K as a basis for asserting that his action was not frivolous. He maintained only that the proposed structure violated ¶ 10.

In any event, even if the proposed structure could be characterized as a "garage," plaintiff does not explain the basis for his assertion that the existence of defendants' primary three-car garage precluded the new structure. Defendants presented evidence that plaintiff expressly approved house plans that included construction of a two-car garage to be attached to a home that had a three-car garage incorporated into the main structure. As for plaintiff's contention that ¶ 14.K prevented the new structure because it was not "'attached' to the principal dwelling," the structure that was conditionally approved on September 26, 2006, was for an "attached, accessory building." The proposed structure was to be attached in the same way that a structure in plaintiff's yard is attached to his residence. For plaintiff to claim that the restrictions prohibit defendants' proposed structure but permit his structure is hypocrisy. Although hypocrisy is not frivolity for the purposes of awarding sanctions, plaintiff's inconsistency in his claimed interpretation of the restrictions supports the court's view that the filing of the action "can only be considered an act of harassment."

Plaintiff contends that the circuit court incorrectly focused on the approvals defendants obtained when the owner/developer had been dissolved and the neighbors' approval was of no legal effect. Regardless of the legal impact of those approvals, the fact that other interested parties overwhelmingly approved the proposed structure supports the court's view that plaintiff's opposition and his filing of this action were for the purpose of harassment.

Under these circumstances, we are not persuaded that the circuit court's determination that the action was frivolous amounted to clear error.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio