STATE OF MICHIGAN

COURT OF APPEALS

PENTWATER POINTE CONDOMINIUM ASSOCIATION,

Plaintiff/Counter-Defendant/Appellant-Cross Appellee,

v

LORA JUANITA LAMB and CHARLES LAMB d/b/a CHARLIE'S MARINA,

Defendants/Counter-Plaintiffs/Appellees-Cross-Appellants.

UNPUBLISHED
February 17, 2011

No. 293980
Oceana Circuit Court
LC No. 08-006824-CZ

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Plaintiff condominium association brought suit against defendants, owners of two condo units, alleging violations of the condominium documents and the Joint Agreement of Cooperation and Mutual License ("Joint Agreement"). Defendants counterclaimed for wrongful foreclosure and breach of the Joint Agreement. The trial court found no cause of action on plaintiff's claims, granted relief on defendants' counterclaim for wrongful foreclosure, and held that the Joint Agreement was invalid for lack of mutual assent to an essential term. The trial court awarded defendants attorney fees under MCR 2.114 and MCL 600.2591. Plaintiff appeals only the grant of attorney fees, and defendants cross-appeal the trial court's finding that the Joint Agreement was not a valid contract. We affirm.

This Court reviews an award of attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Findings of fact underlying the award of attorney fees, including a finding that an action is frivolous, are subject to review for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Reed*, 265 Mich App at 164. Clear error exists when, despite some evidence supporting a finding, this Court is "left with a definite and firm conviction that a mistake has been made." *Kitchen*, 465 Mich at 661-662. "[T]his Court defers to the trial court on issues of credibility." *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Questions of law receive de novo review. *Reed*, 265 Mich

App at 164.

Generally, attorney fees and costs are not recoverable under the "American rule" unless a statute, court rule, or common law exception provides otherwise. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Plaintiff first argues that the trial court did not identify any recognized authority that would permit an award of attorney fees in this case. However, the trial court clearly stated that it was adopting and incorporating by reference several sections of defendants' post-trial brief. One of these sections, titled "Attorney's Fees," lists three separate bases for awarding attorney fees. Although plaintiff is correct that the trial court specifically stated that it accepted defendants' findings of fact and made no such statement regarding defendants' legal conclusions, the briefing adopted and incorporated by the trial court provides both adequate legal authority and factual justifications for awarding attorney fees in the matter. Thus, this argument is without merit.

Plaintiff also argues that the award of attorney fees was not proper under MCR 2.114 or MCL 600.2591.[1] MCR 2.114 is intended in part "to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 724; 591 NW2d 676 (1998). MCR 2.114(D) and (E) allow a court to award attorney fees as a sanction for claims brought for an improper purpose or without sufficient prior research into the viability of the claims. Under MCR 2.114(D)(3), improper purposes include harassment or causing unnecessary delays or expenses. Additionally, MCR 2.114(F) provides that "a party pleading a frivolous claim . . . is subject to costs as provided in MCR 2.625(A)(2)." MCR 2.625(A)(2) states, "In an action filed on or after October 1, 1986, 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(1) allows a court to award attorney fees against parties who bring "frivolous" claims, which is defined to mean:

> (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. [MCL 600.2951(3)(a).]

---

[1] Plaintiff also contends that an award of fees could not have been based on MCL 559.215. Plaintiff points out that the plain language of § 115(1) only allows a court to award costs and that the term "costs" does not normally encompass attorney fees. See *Dessart*, 470 Mich at 42. Plaintiff is correct that this statute cannot support an award of attorney fees, which defendants do not dispute on appeal.

A claim is not frivolous merely because the plaintiff does not ultimately prevail. *Kitchen*, 465 Mich at 662.

The trial court adopted the following statement by defendants in their post-trial brief: "[t]he alleged defaults and misdeeds of the Lambs never occurred and were misrepresented to this Court. There never was any factual or legal basis for this lawsuit." In adopting the defendants' reasoning for attorney fees, the trial court therefore necessarily concluded that plaintiff knew that allegations in its complaint were not true when it filed them and that this lawsuit was brought for the improper purpose of harassing defendants and exerting control over them. On the record before us, this finding was not clearly erroneous. While the complaint alleged that defendants had improperly denied plaintiff access to a utility closet, there was evidence, including an email from a board member, that plaintiff did in fact have access to the utility closet. The complaint also alleges that defendants' negligence caused plaintiff to incur $3,300 in electrical construction costs. The evidence, that plaintiff's president had been considering this electrical work since at least March 2004, before defendants purchased the two units in issue, and had contracted to pay $3,300 for the work from the outset, contradicts the allegations in the complaint. So, the trial court did not clearly err in concluding that the project was not necessitated by any of defendants' actions.[2] In addition, the evidence supported a finding that plaintiff treated defendants differently than other members. Plaintiff charged defendants, but not other members, late fees for delinquencies, plaintiff repeatedly threatened defendants that it would cause them to incur costs for attorney fees, and according to a statement by a board member, it filed the complaint primarily because of a lack of control of defendants. In sum, the trial court did not clearly err in finding that plaintiff brought this suit for an improper purpose, and accordingly, attorney fees were properly awarded under both MCR 2.114 and MCL 600.2591.

Plaintiff next contends that the trial court denied defendants' motion for a directed verdict and that, therefore, the trial court necessarily concluded that there was sufficient evidence to support the filing of the complaint. We disagree. It is not clear from the record that the trial court denied the motion for directed verdict on the basis that there was sufficient factual merit to the complaint. Rather, when it denied the directed verdict motion, the trial court stated that "there's enough here to justify writing; and rather than give an answer I think the Court would rather issue an opinion based on the evidence that's before the Court now." Rather than an actual ruling on the motion, the trial court appeared to take the motion under advisement.

Defendants argue on cross-appeal that the trial court should also have awarded them damages for breach of the Joint Agreement. The Joint Agreement itself is ambiguous with

---

[2] The electrician who performed the work confirmed that, because he did not have access to defendants' unit, he spent additional time on the project worth $300 to $400, but plaintiffs did not incur any additional charges attributable to this additional time because the job was already under contract.

respect to payment for plaintiff's use of the fish cleaning station. Nevertheless, defendants argue that the parties knew what they were agreeing to because they both began performing under the Joint Agreement, and both thought that plaintiff was required to pay defendants for its use.

In order to form a valid contract, there must be a meeting of the minds on all essential terms. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). "'"Meeting of the minds" is a figure of speech for mutual assent.'" *Hall v Small*, 267 Mich App 330, 333; 705 NW2d 741 (2005), quoting *Kamalnath*, 194 Mich App at 548-549. "'A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.'" *Kamalnath*, 194 Mich App at 548, quoting *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990). The price of performance is an essential term. *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999).

Defendant Juanita Lamb testified that each condo unit was to be assessed $100 a year for use of the fish cleaning station, while plaintiff's president testified that the agreement was for plaintiff to pay 25 percent of the cost of pumping out the station. Defendants argue that these amount to the same thing because 25 percent of the average cost ($6,000) is around $1,500, or $100 a unit a year. Defendants' assertion that the two figures are equivalent is based on the current cost of pumping out the station, not the costs that existed at the time the agreement was made. The last time that the fish station was actually pumped out, the charge was $150. Assuming ten cleanings a year, as the parties do, $100 a unit would have covered the entire cost of cleaning the station, and not merely 25 percent of the cost. However, because of new regulations promulgated by the DEQ, the cost quadrupled to $600 a pumping, or $6,000 a year. The change in cost to pump the station illustrates the disjunction between plaintiff's and defendants' beliefs regarding the method of calculating payment.

Because mutual assent is judged based on objective standard, it does not necessarily matter that the parties had different subjective interpretations of the contract. Still, the only evidence of express acts in the record are the ambiguous Joint Agreement itself and the fact that defendants attempted to charge plaintiff far more than plaintiff thought it was obligated to pay. The subsequent development of the dispute regarding how much plaintiff owed defendants provides objective evidence that the parties had different understandings of the Joint Agreement. Defendants also point out that both parties originally sought to enforce the Joint Agreement, but this is of no consequence because the parties were seeking, essentially, to enforce two different price terms.

The only evidence of mutual assent on the essential term of the price of the contract is an implication that plaintiff made payments of an indeterminate amount for the first few months after defendants purchased units 16 and 17. Absent additional evidence regarding these payments, and because the parties testified to having unrelated understandings of the price term, there is objective evidence supporting the conclusion that they never reached an agreement regarding the price. Therefore, the trial court did not clearly err by finding that the parties never mutually assented to the essential terms and thus a contract was never formed. Accordingly, we

need not address the question of which party first breached the agreement.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder