

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN MARTIN,

Plaintiff-Appellant,

v

CHERYL BUTLER,

Defendant-Appellee.

UNPUBLISHED

March 15, 2012

No. 302351

Crawford Circuit Court

LC No. 08-007793-CZ

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court’s order awarding attorney fees and costs to defendant. Because the trial court properly determined that Count II of plaintiff’s complaint was frivolous and did not err by awarding defendant sanctions that included the lost proceeds of the failed liquor license sale, we affirm.¹

Plaintiff, defendant, and Grand Traverse Bay Entertainment, L.L.C. (“GTBE”) entered into a contract pursuant to which plaintiff agreed to transfer to GTBE his 50-percent interest in GTBE, and GTBE agreed to pay plaintiff \$242,000 as consideration. Plaintiff took a security interest in his ownership interest transferred to GTBE, and defendant, who owned the other 50-percent interest in GTBE, agreed to transfer a one-percent interest in GTBE to plaintiff in the event that plaintiff enforced his security interest in the shares transferred to GTBE. Defendant granted plaintiff a security interest in the one-percent membership interest.

After GTBE failed to make any of the contractually required payments to plaintiff, plaintiff filed suit against defendant alleging breach of contract and seeking \$242,000 in damages as well as the transfer of 51 percent of the ownership interest in GTBE. GTBE was not named as a defendant in the complaint. Defendant moved for summary disposition, arguing that the clear language of the contract created no personal liability on her behalf except to convey a one-percent interest in GTBE to plaintiff if he enforced his security interest against GTBE.

¹ We reject defendant’s jurisdictional challenge. This Court has jurisdiction to decide an appeal of right from a postjudgment order awarding attorney fees and costs. MCR 7.202(6)(a)(iv); MCR 7.203(A)(1).

Defendant also moved for sanctions against plaintiff for filing a frivolous complaint. The trial court granted defendant's motion for summary disposition and scheduled an evidentiary hearing on the issue of sanctions.

During the evidentiary hearing, defendant presented evidence showing that a judgment that plaintiff had obtained against her in this action, which the trial court subsequently set aside, caused a \$60,000 sale of GTBE's liquor license to fall through, and that, in the current declining market, the license was now worth less than \$40,000. Defendant also presented evidence showing that she held a security interest in the liquor license and that the failed sale of the license caused her financial harm. The trial court determined that plaintiff's lawsuit was frivolous and awarded defendant attorney fees and \$18,000 for the loss of the liquor license sale.²

Plaintiff first argues that the trial court erred by determining that Count II of his complaint was frivolous. We review for clear error a trial court's determination whether an action is frivolous. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). "A trial court's decision 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 has been made." *Id.* We also review for clear error a trial court's decision whether to impose sanctions. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

Pursuant to MCL 600.2591(1), if a court determines that an action is frivolous, the court "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." 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 . . . 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.

In Count II of plaintiff's complaint, he sought declaratory and injunctive relief. In particular, he requested that the trial court declare that (1) "Defendant has breached the security agreement," (2) Defendant's interest as a member in Grand Traverse Bay Entertainment LLC is extinguished as provided in the security agreement," and (3) "Plaintiff owns 51% of said membership interest[.]" Plaintiff's legal position was devoid of arguable legal merit.

² The trial court determined the value of the license to have declined by \$22,500, but reduced defendant's award because of her failure to mitigate her damages.

Plaintiff fails to acknowledge that the plain language of the contract on which his claim is based created no duty on behalf of defendant except to convey to plaintiff one percent of her interest in GTBE “[i]n the event that [plaintiff] enforce[d] his security interest with respect to his membership interest” in GTBE. The agreement did not require defendant to convey to plaintiff a 50-percent interest in GTBE. Pursuant to the agreement, plaintiff conveyed his 50-percent interest in GTBE to GTBE, not to defendant, and GTBE conveyed to plaintiff a security interest in the ownership interest that plaintiff transferred to GTBE. Therefore, defendant was not in a position to convey plaintiff’s 50-percent interest back to him, and plaintiff did not name GTBE as a defendant in this case.

Moreover, as a condition precedent to defendant conveying a one-percent interest in GTBE to plaintiff, plaintiff was required to enforce against GTBE his security interest in the ownership interest that he conveyed to GTBE. Plaintiff contends that he satisfied the enforcement requirement when he perfected his security interest by filing a financing statement in the proper jurisdiction. “The ‘[p]erfection of a security interest,’ however, refers to ‘the process whereby a security interest is protected, as far as the law permits, against competing claims to the collateral. . . .’” *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 128; 721 NW2d 276 (2006), quoting Black’s Law Dictionary (6th ed). The perfection of a security interest is not the same as the enforcement of a security interest. See generally, *Prime Financial Servs, LLC v Vinton*, 279 Mich App 245, 263-264; 761 NW2d 694 (2008). Because plaintiff did not enforce his security interest against GTBE, he did not satisfy the condition precedent to the requirement that defendant convey to him a one-percent interest in GTBE. Thus, plaintiff’s claim was devoid of arguable legal merit, and the trial court did not clearly err by determining that it was frivolous.

Plaintiff next argues that the trial court erred by including in the sanctions award the lost proceeds from the failed sale of GTBE’s liquor license. We review for an abuse of discretion the amount of a sanctions award. *BJ’s & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Plaintiff contends that defendant suffered no personal economic damages when the liquor license sale fell through because GTBE, rather than defendant, owned the license. Notwithstanding that defendant did not personally own the license, the trial court did not abuse its discretion by including the lost sale proceeds as a component of the sanctions award. Defendant presented evidence that she loaned GTBE \$27,000 in cash, personally guaranteed GTBE’s debt to Chase Bank, and paid nearly \$15,000 in state tax liens that had been filed against the liquor license. Defendant had obtained a security interest in the liquor license, which was GTBE’s only asset. Thus, defendant had an economic interest in the liquor license sale, and suffered economic harm when the sale was frustrated. The trial court’s decision to include the lost proceeds as part of the sanctions award did not fall outside the principled range of outcomes. *Radeljak*, 475 Mich at 603.

Plaintiff also asserts that the trial court erred by awarding the lost sale proceeds because they were not incurred in connection with this action and were therefore not properly awarded under MCR 2.625. Because plaintiff failed to preserve this issue for our review by raising it

below, our review is limited to plain error affecting his substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

Pursuant to MCR 2.625(A)(2), a trial court “shall” award costs “as provided by MCL 600.2591” if it determines that an action or defense is frivolous. MCL 600.2591(1) directs a trial court to award “to the prevailing party the costs and fees incurred by that party in connection with the civil action” MCL 600.2591(2) further directs that “[t]he amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and *any costs allowed by law or by court rule*, including court costs and reasonable attorney fees.” (Emphasis added.)

MCR 2.114(D)(2) provides that the signature of a party or attorney on a document filed with the court certifies that “the document 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(E) directs a trial court to impose sanctions on a party or attorney who violates the court rule. MCR 2.114(E) provides, “[i]f a document is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, *which may include* an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document[.]” (Emphasis added.) This Court has recognized that the italicized language “does not restrict the sanction to expenses or costs incurred[.]” but rather, that “it gives the trial court discretion to fashion another appropriate sanction.” *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 726; 591 NW2d 676 (1998).

Therefore, pursuant to MCR 2.114(E), the trial court had discretion to include the lost sale proceeds in the sanctions awarded to defendant. Because MCL 600.2591(2) directed the court to include “any costs allowed by law or by court rule,” the trial court did not err by including the lost sale proceeds. Thus, plaintiff has failed to establish plain error.

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

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood