STATE OF MICHIGAN

COURT OF APPEALS

S & M MACHINERY, INC., Plaintiff-Appellant, v PARAVIS INDUSTRIES, INC., Defendant-Appellee, and DYNAMIC MACHINE OF DETROIT, INC., Defendant.	UNPUBLISHED February 15, 2007 No. 266316 Oakland Circuit Court LC No. 2002-007894-AV

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Following an order of remand from our Supreme Court in docket no. 258309,[1] plaintiff appeals as on leave granted from the district court's orders granting summary disposition in favor of defendant and imposing sanctions on plaintiff and the circuit court's order dismissing its claims of appeal from orders. Because summary disposition was appropriate in defendant's favor and the circuit court did not clearly err in dismissing plaintiff's appeals, we affirm.

This case arises out of the alleged breach of an oral contract concerning the sale of a wire electric discharge machine (EDM). In January 2002, plaintiff learned that Lunar Industries was in need of an EDM. Plaintiff, a used machinery dealer, knew of an available EDM owned by defendant. According to Mark Conway, a salesperson for plaintiff, defendant was willing to sell the EDM for $95,000, and any amount plaintiff obtained above that price from a buyer would go to plaintiff. Plaintiff claims that it offered the EDM to Lunar Industries for $110,000 and, following an inspection, Lunar Industries indicated they were very interested in the machine, but wanted to have a weekend to deliberate. According to Conway, defendant agreed to hold the

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[1] *S & M Machinery, Inc v Paravis Industries, Inc*, 474 Mich 912; 705 NW2d 352 (2005).

machine over the weekend. However, defendant actually sold the machine to another dealer on the same day it allegedly agreed to the hold. That dealer then completed the sale to Lunar Industries.

Plaintiff brought a breach of contract action against defendant claiming that defendant had violated an option contract to hold the machine for the weekend. The district court concluded that there was no evidence of a valid contract other than Conway's "self serving statement" and granted defendant's motion for summary disposition. The district court also granted a motion for sanctions brought against plaintiff. Plaintiff thereafter appealed the district court's rulings to the circuit court. The circuit court issued an opinion concluding that it did not have subject matter jurisdiction to hear plaintiff's appeals because they were not timely filed. The circuit court also noted that it could treat the untimely claim of appeal as an application for leave to appeal, but declined to do so "because of the Plaintiff's unexplained dilatory and procedurally improper handling of this entire appeal." On reconsideration, the circuit court determined that plaintiff's appeal from the district court's award of sanctions was timely filed. However, the circuit court concluded that plaintiff's claim(s) of appeal were still properly dismissed because of other procedural defects.

As directed by our Supreme Court, we begin by addressing plaintiff's underlying claims of error at the district court level. Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10), and the district court did not specify under which provision it was ruling. However, because the district court looked at evidence outside of the pleading to reach its conclusion that dismissal was warranted, we will treat the motion as granted under MCR 2.116(C)(10). See *Gibson v Neelis,* 227 Mich App 187, 190; 575 NW2d 313 (1998).

In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." This Court reviews de novo a trial court's ruling on a motion for summary disposition made pursuant to MCR 2.116(C)(10). *Scalise*, *supra* at 10.

An option is a continuing offer by which the owner of property agrees with another that the latter may buy the property at a fixed price within a specified period, securing the privilege to buy. *Bil-Gel Co v Thoma*, 345 Mich 698, 708; 77 NW2d 89 (1956). An option is composed of two elements: (1) the offer to sell, and (2) the completed contract to leave the offer open for a time certain. *Id.* Consideration supporting the option must be distinguished from consideration for the sale in the event of acceptance. *Sulzberger v Steinhauer*, 235 Mich 253, 257; 209 NW 68 (1926).[2]

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[2] See also *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927) (concluding that an option was an unenforceable *nudum pactum* because it was unsupported by consideration); *Mastaw v*

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In *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002), our Supreme Court stated:

> To have consideration there must be a bargained-for exchange. *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978). There must be "'a benefit on one side, or a detriment suffered, or a service done on the other.'" *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949).

In this case, plaintiff failed to present any evidence that there was consideration supporting defendant's alleged promise to leave the offer open over the weekend. In fact, plaintiff's counsel admitted "[i]nitially there was no consideration." Accordingly, if such a promise to hold the offer open was made, it was a *nudum pactum*, i.e., an unenforceable voluntary promise. *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927). Thus, the fact that Conway and defendant may have disagreed about whether the promise to hold open was actually made is not a material dispute. Even if a promise to hold the offer open was made, the offer was not legally binding because plaintiff exchanged nothing for the offer.

Plaintiff asserts that the district court impermissibly evaluated Conway's credibility in granting summary disposition in favor of defendant. However, even if this were true, this Court will not reverse where the correct result was reached, even if for the wrong reason. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Plaintiff has failed to show that the district court erred in concluding that defendant was entitled to summary disposition as a matter of law where there is no evidence the alleged option contract was supported by consideration.

Plaintiff also asserts that the district court erred by sanctioning it. On appeal, a trial court's finding "that an action is frivolous is reviewed for clear error." *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). MCR 2.625(A)(2) provides in relevant part that "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 states as follows:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action 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.
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> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs

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Naiukow, 105 Mich App 25, 30; 306 NW2d 378 (1981) (noting that the parties could have entered into an option contract supported by consideration to settle a tort claim but failed to do so); *Bd of Control of Eastern Michigan Univ v Burgess*, 45 Mich App 183, 185; 206 NW2d 256 (1973) (noting that option contracts for the purchase of land must be supported by valid consideration).

> allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
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> (iii) The party's legal position was devoid of arguable legal merit.
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> (b) "Prevailing party" means a party who wins on the entire record.

A determination of frivolousness must be assessed based on the circumstances at the time the claim was made. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). "The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003).

A quick review of the law of option contracts would have revealed to plaintiff's counsel the necessity of consideration to support the option. *Bailey*, *supra* at 554. Plaintiff's counsel admitted that there was no consideration for the option. Accordingly, he should have known that his claim of breach of contract was devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Further, the fact that some evidence was presented suggesting that plaintiff may have been more willing to bring an illegitimate claim because of the relationship between plaintiff's president and plaintiff's counsel further supports the district court's conclusion. Considering the foregoing, the district court's decision finding this action frivolous was not clear error. *Kitchen*, *supra* at 661.

As to the circuit court's dismissal of his appeal, plaintiff does not dispute that one of its appeals from the district court was not timely filed, but instead argues that its claim of appeal from this ruling should have been treated as an application for leave to appeal pursuant to MCR 7.103 under the circumstances. A circuit court's decision on an application for leave to appeal is a discretionary ruling. MCR 7.103(A).

While plaintiff claims that it had good cause for not timely filing its claim of appeal, we observe that even if plaintiff was belatedly served with notice of entry of the district court's summary disposition order, plaintiff should have known that the order had been entered long before plaintiff filed its claim of appeal. Notably, plaintiff's counsel was present at the October 28, 2002 summary disposition hearing when the district court ruled against plaintiff. The order was entered eleven days later on November 8, 2002, after plaintiff failed to respond to a request

for stipulation and then failed to object to entry of the order pursuant to MCR 2.602. Had plaintiff been concerned about preserving its appellate rights, it might also have inquired about entry of the order at the motion hearing on costs held on November 25, 2002. However, plaintiff failed to inquire until December 4, 2002, and did not file its claim of appeal from the ruling until December 20, 2002.

In addition, although plaintiff may have been relying on defendant's stipulation to toll the time available to appeal, plaintiff should have known that the circuit court would not have subject matter jurisdiction over an untimely claim of appeal, *Krohn v Saginaw,* 175 Mich App 193, 196; 437 NW2d 260 (1988), and that subject matter jurisdiction cannot be conferred by stipulation, *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). Considering the foregoing facts, the circuit court could have concluded that the reason for the delay did not justify granting leave, especially in light of the lack of merit in the claim of appeal as discussed above. MCR 7.103(B)(5), (6). Thus, the circuit court did not abuse its discretion by refusing to consider defendant's claim of appeal from the district court's summary disposition ruling as a meritorious application for leave to appeal.

Plaintiff further argues that the circuit court erred in dismissing its timely claim of appeal from the district court's award of sanctions on the basis of allegedly minor procedural irregularities. We disagree.

In dismissing plaintiff's claim of appeal from the district court's award of costs, the circuit court first looked to the fact that plaintiff had failed to request a full transcript in accord with MCR 7.101(C)(2)(d) without seeking leave to order a lesser portion. The circuit court also observed that plaintiff had apparently failed to file the claim of appeal, the transcripts, or a reporter's certificate with the district court in accord with MCR 7.101(C)(2)(a) and (F)(1), because as of the date the court decided the motion for reconsideration (nearly a year after the initial claim of appeal was filed) it had still not received the district court record. Plaintiff asserts that although the district court failed to provide the record to the circuit court, plaintiff cannot be faulted because the relevant documents were provided to the district court in accord with MCR 7.101(F).

In any event, the circuit court also noted that plaintiff's briefs failed to contain specific references to the record in accord with MCR 7.101(I)(1) and MCR 7.212(C)(6), and that plaintiff's initial circuit court appellate brief did not contain copies of the unpublished opinions to which it cited in accord with MCR 7.215(C)(1). Plaintiff argued that "there was no record to which Plaintiff could cite." However, this statement is clearly belied by the existence of the district court transcripts that were cited by defendant in its brief to the circuit court. Moreover, the record includes any pleadings, MCR 7.212(C)(6), such as the complaint plaintiff has cited in its appeal to this Court.

Plaintiff finally makes an unpreserved argument that even if these procedural errors could justify dismissal, under MCR 7.101(G) dismissal can only be after seven days notice, and dismissal can only be granted by the trial court, i.e., the district court in this case. However, the circuit court's decision was not based on MCR 7.101(G). Rather, the circuit court cited MCR 7.101(P)(1)(b) in dismissing plaintiff's claim of appeal. MCR 7.101(P)(1) provides that a circuit court may dismiss an appeal

> when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
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> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

Here, plaintiff's circuit court appellate brief violated court rules. While the violations were not egregious, MCR 7.101(P)(1)(b) does not specifically require that violations of court rules be egregious in order for an appeal to be considered vexatious. And the violations at issue would have affected the circuit court's ability to review plaintiff's allegations of error. Moreover, while the circuit court relied on MCR 7.101(P)(1)(b), we note that plaintiff's claim of appeal at least arguably violated MCR 7.101(P)(1)(a), where plaintiff's underlying suit was frivolous as discussed further herein. Accordingly, the circuit court did not clearly err by determining that the appeal was vexatious and could be dismissed pursuant to MCR 7.101(P). *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 408; 534 NW2d 143 (1995).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Alton T. Davis
/s/ Deborah A. Servitto