STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. GORBACH,

Plaintiff-Appellant,

and

ROSALIE GORBACH,

Plaintiff,

v

US BANK NATIONAL ASSOCIATION, RANDALL S. MILLER & ASSOCIATES, PC, and JASON R. CANVASSER,

Defendants-Appellees.

UNPUBLISHED
January 29, 2013

No. 308754
Manistee Circuit Court
LC No. 11-014294-CZ

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

In this challenge to a foreclosure by advertisement, plaintiff appeals by right from three orders of the trial court granting summary disposition to all three defendants as to both of plaintiff's claims. Plaintiff also disputes the court's order imposing sanctions on plaintiff for failing to appear at a pretrial conference and for filing a frivolous claim against defendant Jason Canvasser, an attorney at the law firm of Randall S. Miller & Associates, P. C. (Miller), which represented US Bank National Association (US Bank) during the foreclosure proceedings. Although plaintiff asserts several points of error, the dispositive issue in this case is whether plaintiff lost standing to pursue the instant claims when he filed for bankruptcy. Because the record is inadequate to answer this question, and the lower court never expressly addressed the matter, we remand to the trial court for consideration of this crucial issue. Because most of the other issues may become moot depending on the outcome of the proceedings on remand, we decline to address them now. The record is, however, sufficiently developed to determine whether the trial court erred in imposing sanctions on plaintiff. We hold that the trial court did not err in awarding Canvasser $4,000 in attorney fees because plaintiff pursued a frivolous claim for negligence against him. But the trial court abused its discretion by failing to address plaintiff's challenge in his motion for reconsideration to the award of $1,000 to both US Bank and Miller. We direct the trial court to reconsider the matter on remand.

I. FACTUAL BACKGROUND

On August 4, 2006, plaintiff acquired a $155,000 loan from Quicken Loans Inc. (Quicken), secured by a mortgage on the property held by Mortgage Electronic Registration Systems, Inc. (MERS), Quicken's nominee and the mortgagee. The mortgage contained a power of sale; although the mortgage did not explicitly grant the mortgagee the right to assign the mortgage, it implicitly contemplated such assignments when it granted a security interest to "MERS . . . and to the successors of MERS." This mortgage was subsequently assigned on January 19, 2011, to MASTR Adjustable Rate Mortgages Trust 2007-1 (MASTR), for which US Bank was the trustee. US Bank recorded the assignment on January 28, 2011. The parties do not dispute that the assignment did not transfer plaintiff's underlying debt to MASTR.

Plaintiff admittedly suffered a loss of income between 2009 and 2010 and failed to make the regular mortgage payments on the note. On September 16, 2010, Miller sent plaintiff a notice that it was foreclosing on his property by advertisement. The notice was published on September 21, 2010, and indicated that Miller was retained by One West Bank, FSB (One West), to foreclose on the property. The notice stated that One West was the servicer of the mortgage, but it did not identify the mortgage owner.

To avoid foreclosure, plaintiff contacted Five Cap, Inc., a housing counselor, and agreed to participate in the Homeownership Counseling Program to modify the mortgage and avoid foreclosure. While plaintiff initially agreed to provide Miller information necessary to modify the mortgage, plaintiff ultimately failed to do so. After multiple warnings, Miller again notified plaintiff on January 14, 2011, that it was proceeding on the foreclosure and that the property would be auctioned on February 17, 2011. This notice was published on January 19, 2011. Plaintiff made no attempt to cure his default on the mortgage during this time. On February 17, 2011, the property was auctioned and sold to US Bank via sheriff's deed.

Plaintiff filed for bankruptcy under Chapter 7 on June 11, 2011, and received a discharge from bankruptcy on October 12, 2011. On August 15, 2011, two days before the redemption period expired on August 17, 2011, plaintiff filed the instant complaint against defendants, alleging that defendants collectively failed to follow the statutory requirements, including the notice, to foreclose by advertisement on plaintiff's property. Plaintiff also argued that Miller and Canvasser committed professional negligence in their provision of non-legal services to US Bank, which violated independent duties that they owed to plaintiff and ultimately resulted in the loss of his property. Plaintiff briefly mentioned his bankruptcy filing and opined that the automatic stay had some effect on the proceedings, but did not fully brief the merits of this issue.

Defendants moved for summary disposition, which was scheduled for hearing on December 12, 2011. In relevant part, Canvasser and Miller argued that they only owed professional duties to US Bank, while US Bank argued that plaintiff lacked standing to sue because he failed to timely challenge the foreclosure until two days before the redemption period expired. Canvasser also sought sanctions against plaintiff for filing frivolous claims against him.

On December 8, 2011, plaintiff raised the issue of the bankruptcy stay for the first time by submitting a letter to the court and the parties, arguing that the instant proceedings were stayed and that defendants violated the automatic stay by defending themselves in these

proceedings. In support, plaintiff noted that the bankruptcy court previously denied US Bank's motion to lift the stay over the property.[1] Defendants responded by arguing that: (1) the automatic stay was not in effect because plaintiff received a discharge from bankruptcy on October 12, 2011; (2) the automatic stay only stays proceedings against the debtor, not actions commenced by the debtor; and (3) plaintiff lost standing to assert claims against defendants when he filed for bankruptcy.

Plaintiff asserts, with some support in Canvasser's response to plaintiff's letter, that court staff told plaintiff's counsel that because the case was under an administrative stay, the motion hearing would not be held on December 12, 2011. Therefore, plaintiff's counsel did not appear for the motion hearing or the pretrial conference. The trial court held the motion hearing as if there were no administrative stay on the case. After hearing oral arguments from defendants, the court granted summary disposition to defendants on both counts. While the lower court implicitly held that plaintiff lacked standing when it granted defendants' summary disposition pursuant to MCR 2.116(C)(1), it is unclear whether this was because plaintiff filed for bankruptcy or whether he lost title to the property when the redemption period expired. The trial court also imposed sanctions on plaintiff as follows: (1) $4,000 in attorney fees to Canvasser for filing frivolous claims against him; and (2) $2,000—$1,000 apiece to US Bank and Miller—for failing to appear for the pretrial conference. Although plaintiff moved for reconsideration in part because the court purportedly mislead plaintiff on the status of the case, the court failed to consider the argument or address plaintiff's supporting evidence.[2]

II. PLAINTIFF'S STANDING

Although plaintiff raises several issues, the initial, and pivotal issue in this case is whether plaintiff has standing to sue. Whether a party has standing to pursue a cause of action is a question of law that is reviewed de novo by this Court. *Young v Independent Bank*, 294 Mich App 141, 143; 818 NW2d 406 (2011).

> [S]tanding requires more than having a personal stake in the outcome of litigation sufficient to ensure vigorous advocacy. It requires one to have in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. Thus, to have standing, a plaintiff must demonstrate that his or her substantial interest will be detrimentally affected in a matter different from the citizenry at large. [*Moses Inc v SEMCOG*, 270 Mich App 401, 414; 716 NW2d 278 (2006) (citations and quotation marks omitted).]

[1] It is unclear why the bankruptcy court denied the motion to lift the stay; the order only mentions that the court found "good cause" to not approve the motion.

[2] Plaintiff claimed to have an audio recording of the court clerk who notified him that the case was under an administrative stay.

When a debtor files a bankruptcy petition, "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the bankruptcy estate, which is vested with the trustee and held for the benefit of the debtor's creditors. 11 USC 541(a). Property interests of the debtor include causes of action and potential causes of action. *Young*, 294 Mich App at 144, citing *Bauer v Commerce Union Bank*, 859 F2d 438, 441 (CA 6, 1988). Unless the trustee in bankruptcy abandons the property, the bankruptcy court grants permission, or the property is otherwise exempted from the estate, a debtor lacks standing to pursue claims against parties that arose pre-petition because the right to pursue causes of action that previously belonged to the debtor vest in the trustee for the benefit of the estate. *Young*, 294 Mich App at 144; *Szyszlo v Akowitz*, 296 Mich App 40, 47-50; 818 NW2d 424 (2012).

While the parties discuss, at great length, plaintiff's standing to sue defendants based on Michigan foreclosure law, the crucial question in determining plaintiff's standing is whether the instant lawsuit against defendants is property vested with the bankruptcy estate. By filing for bankruptcy, all of plaintiff's property—including his wrongful foreclosure claim and negligence claim against defendants—became property of the estate. This case is comparable to *Young*, where because the debtor was aware of the potential claims against the bank stemming from the foreclosure proceedings and failed to either obtain permission from the bankruptcy court or have the trustee abandon the claim, this Court determined that the debtor lacked standing to sue its bank. *Young*, 294 Mich App at 146-148. Here, plaintiff was clearly aware of his potential cause of action against defendants, as the complaint was filed slightly more than two months after he filed for bankruptcy and several months after the sheriff's sale was finished. As it is the trustee, not plaintiff, who has standing to bring suit against defendants, plaintiff lacked standing to sue defendants unless he received permission or exempted the suit from the bankruptcy estate.

This standing issue was not explicitly addressed below, and neither party offered any evidence of record to establish whether the trustee abandoned this asset or whether the bankruptcy court granted him permission. While defendants presented a document purporting to establish that plaintiff exempted, pursuant to 11 USC 522(*l*), a lawsuit for wrongful foreclosure against "Indy Mac Bank," this document is not part of the lower court record, and neither party moved to supplement the record. Accordingly, it cannot be considered on appeal. MCR 7.210(A). Further, although the form did not list Miller or Canvasser as potential parties to the lawsuit, it is unclear whether plaintiff's stated claim against Indy Mac Bank is the same claim as that against US Bank. As the record is inadequate to resolve this dispositive issue, we must remand to the trial court to consider it. Because a finding that plaintiff had no standing could render most of plaintiff's remaining issues moot, we conclude it is premature and unnecessary for this court to address those issues now, with the exception of plaintiff's challenge to the court's imposition of sanctions.

III. SANCTIONS

Plaintiff challenges all the sanctions the trial court imposed on him. We agree in part and disagree in part with the trial court's decision. This Court reviews for abuse of discretion the trial court's decision to impose sanctions under MCR 2.401(F) and (G) for failing to attend a pretrial conference. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998). Further, a court's decision to grant or deny a motion for reconsideration is also reviewed for abuse of discretion. MCR 2.119(F)(3); *People v Walters*, 266 Mich App 341, 350; 700

NW2d 424 (2005) (noting that the palpable error standard "is not mandatory and only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration"). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). While this Court reviews for abuse of discretion a court's decision to impose sanctions for filing a frivolous action, the court's factual finding that a party's position was indeed frivolous is reviewed for clear error. MCR 2.613(C); *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010).

Plaintiff first argues that the trial court erred in imposing sanctions on plaintiff in the amount of $4,000 for filing frivolous claims against Canvasser. MCL 600.2591(1) and MCR 2.625(A)(2) require a trial court to award an adverse party reasonable attorney fees when the court finds an action or defense is "frivolous." A claim or defense is frivolous if one of the following conditions is satisfied:

> (*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 600.2591(3)(a); see also *Keinz*, 290 Mich App at 141.]

The trial court did not explicitly state why plaintiff's claims against Canvasser were frivolous; however, in context it appears that the court found plaintiff's position to be devoid of arguable legal merit. This was the position Canvasser presented during the motion hearing. Our Supreme Court in *Friedman v Dozorc*, 412 Mich 1, 20-30; 312 NW2d 585 (1981), unambiguously held that an attorney owes no legal duties to an adverse party. "We agree . . . that an attorney owes no actionable duty to an adverse party." *Id.* at 20. "[T]he public policy of maintaining a vigorous adversary system outweighs the asserted advantages of finding a duty of due care to an attorney's legal opponent." *Id.* at 25. Therefore, it is legally impossible to hold an attorney liable in negligence for conduct towards an adverse party. Further, because Canvasser was not the foreclosing entity, he could not be held liable for wrongful foreclosure. Plaintiff's attempt to color Miller and Canvasser's services as non-legal and professional—merely because they were completing forms that would not subject lay people to liability for engaging in the unauthorized practice of law—is similarly frivolous. To the contrary, "a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge." *Dressel v Ameribank*, 468 Mich 557, 566; 664 NW2d 151 (2003). Plaintiff does not dispute that when Miller and Canvasser completed these documents, they were retained to assist their client in foreclosing on plaintiff's property. Patently, Miller and Canvasser used "legal discretion and profound legal knowledge" in assisting their client to comply with all the statutory foreclosure requirements. Because Miller and Canvasser were indisputably providing legal services to their client, plaintiff's claims were meritless.

Because plaintiff's claims were "devoid of arguable legal merit," MCL 600.2591(3)(a), the trial court did not commit clear error in finding them frivolous.[3] Since plaintiff does not challenge the amount of the penalty, $4,000, as being unreasonable or excessive, he abandons any challenge to the court's ultimate decision to impose this penalty.

Plaintiff next contests the trial court's imposition of sanctions totaling $2,000, consisting of $1,000 in attorney fees to both Miller and US Bank, for failing to appear for the pretrial conference. Pursuant to MCR 2.401(G), a party who fails to appear at a pretrial conference may be sanctioned with, among other things, having to pay the other party's attorney fees as stated in MCR 2.313(B)(2), "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." The court's scheduling order provided that all parties were required to attend the pretrial conference on December 12, 2011, at 11:00 am. Although plaintiff's counsel admits that he did not attend the conference, he asserts that his failure was excusable because he reasonably believed, based on statements the court's clerk made that all proceedings were under an administrative stay due to the bankruptcy filing. In deciding the motion for reconsideration, the trial court did not address plaintiff's argument or his supporting evidence. The court merely denied plaintiff's motion for failing to establish a palpable error. But as noted earlier, the court is not obligated to find palpable error in order to grant relief. By failing to examine plaintiff's evidence, determine whether plaintiff was misinformed by court staff, and decide whether this was a sufficient excuse to preclude sanctions, the trial court erred by failing to exercise its discretion. Therefore, we reverse the imposition of sanctions for failing to appear for the pretrial conference and on remand, direct the trial court to reconsider, based on the evidence of record, whether plaintiff's counsel's failure to appear was "substantially justified."

Defendant Canvasser also argues that plaintiff should be sanctioned for filing a frivolous appeal. While Canvasser presents some legal authority on this issue, he nevertheless failed to move for sanctions as required by MCR 7.216(C)(1) and MCR 7.211(C)(8). *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900, (2005) ("a brief on appeal is insufficient to request sanctions"). Accordingly, Canvasser is not entitled to sanctions in this appeal.

IV. CONCLUSION

Because the record is inadequately developed to properly determine whether plaintiff has standing to sue defendants, we reverse the trial court's grant of summary disposition to defendants and remand for consideration of this issue. We also affirm the trial court's imposition of $4,000 in sanctions against plaintiff for filing frivolous claims against Canvasser; however, because the trial court failed to consider plaintiff's argument, we reverse the court's imposition of $2,000 in sanctions against plaintiff for failing to appear at the pretrial conference.

[3] Although the trial court could have also imposed sanctions against plaintiff for filing frivolous claims against Miller, on appeal Miller does not cross-appeal that decision.

We affirm in part, reverse in part, and remand for further proceedings consistent with our opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

Court of Appeals, State of Michigan

ORDER

Michael J. Gorbach v US Bank National Assocation

Docket No. 308754

LC No. 11-014294-CZ

David H. Sawyer
Presiding Judge

Jane E. Markey

Michael J. Kelly
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, because the record is inadequately developed to properly determine whether plaintff has standing to sue defendants, and the lower court never expressly addressed the matter, we remand to the trial court for consideration of the crucial issue. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 29 2013
Date

Chief Clerk