STATE OF MICHIGAN

COURT OF APPEALS

G&B II, P.C., Plaintiff-Appellant,	UNPUBLISHED July 15, 2014
V	No. 315607 Oakland Circuit Court
EDWARD J. GUDEMAN and GUDEMAN & ASSOCIATES, P.C., Defendants-Appellees.	LC No. 2011-121766-CK

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

The parties are law firms and lawyers, warring over sanctions. Plaintiff G&B, II, P.C. once represented defendants Edward J. Gudeman and his law firm, Gudeman & Associates, P.C. The representation did not go well. The parties severed their relationship because Gudeman failed to pay G&B's bills. Accusations of professional and personal misconduct, ad hominem attacks, and vitriolic language peppered the subsequent pleadings. Ultimately the attorney-fee dispute landed in arbitration, where the contestants worked out a payment plan.

But the settlement did not quell G&B's ire. G&B returned to the circuit court seeking sanctions against Gudeman's counsel, contending that counsel's defense of Gudeman qualified as frivolous. The circuit court denied the sanction request, ruling that it should have been directed to the arbitrator. We affirm, albeit for reasons slightly different than those stated by the circuit court.

I. BACKGROUND FACTS AND PROCEEDINGS

Attorney C. William Garratt, a member of G&B, undertook representation of Gudeman in the tangle of cases spawned by a protracted bankruptcy proceeding.[1] The allegations against Gudeman flowing from the bankruptcy included fraud, legal malpractice, and wrongful discharge from employment. The details need not be recited here; suffice it to say that the

[1] We use the term "Gudeman" to refer to both defendants: Gudeman individually and his law firm.

matters were complex and the associated litigation promised to be prolonged. Anticipating that Gudeman would have trouble paying his legal bills, G&B required that Gudeman execute a security agreement granting G&B an interest in Gudeman's accounts receivables and other assorted property. But three months after the attorney-client relationship began, it ended. Garratt and G&B withdrew from representation when their bills went unpaid. In May 2011, Gudeman signed a promissory note for $75,652.78, representing Garratt's unpaid attorney fees. In September 2011, G&B filed suit on the note.

With the complaint, G&B served on Gudeman a "motion for possession of collateral pursuant to security agreement." Gudeman's response included an affidavit bitterly disparaging Garratt personally and professionally. G&B countered with a motion for sanctions. The circuit court denied both motions. As to the sanctions motion, the court stated: "That is with prejudice for the . . . issues that were addressed in the motion."

Gudeman then answered G&B's complaint. The answer set forth 50 affirmative defenses. Many were duplicative, others (such as "Unconstitutionality" and "Violation or attempted violation of due process") simply nonsensical. Gudeman also filed an eight-count third-party complaint and counterclaim. These pleadings essentially re-alleged the same transgressions as had been detailed in Gudeman's affidavit.

G&B responded with a motion to compel arbitration of Gudeman's third-party complaint and counterclaim. The arbitration agreement located in the retention agreement between Gudeman and G&B provided:

> Any dispute or disagreement arising between Client and Attorney or its successor or any officer, director, or employee of same whether under, out of, in connection with, or in relation to this Agreement, or otherwise, will be determined and settled by arbitration in Oakland County, Michigan, in accordance with the rules of the American Arbitration Association and, notwithstanding any other provision of this paragraph or said rules, all such disputes and disagreements shall be decided pursuant to the Michigan Arbitration Act (MCLA 600.5001 et seq., as it may hereafter be amended) and a judgment of any court of competent jurisdiction may be rendered upon the decision of the arbitrator(s). Client agrees to sign a Submission to Arbitration form and to pay one half (1/2) of the fees charged by the American Arbitration Association for said arbitration proceeding. There is no third party beneficiary of this Agreement other than the persons described in this paragraph.

The circuit court ordered that *all* claims in the action were subject to arbitration, and stayed the circuit court action "in its entirety pending the outcome of the arbitration." Proceedings then commenced before the American Arbitration Association.

Arbitration eventually yielded a stipulated order of dismissal filed in the circuit court. A November 30, 2012 circuit court order confirmed the arbitrator's summary dismissal of some of Gudeman's counterclaims and third-party claims and dismissed, with prejudice, Gudeman's remaining counterclaims and third-party claims. The order further stated that Gudeman's answer and affirmative defenses were "irrevocably withdrawn and stricken with prejudice," but

dismissed G&B's pleadings without prejudice. The circuit court retained jurisdiction to enter a consent judgment signed by the parties at G&B's request.[2] The final paragraph of the order read: "this Order otherwise resolves the last pending claim and closes the case."

On February 13, 2013, G&B filed a motion seeking sanctions against Glenn Franklin, Gudeman's counsel, under MCR 2.114(D) and MCL 600.2591. G&B's brief asserted that Franklin had interposed "entirely frivolous" claims and had failed to conduct a reasonable inquiry before signing pleadings. On Gudeman's behalf, Franklin opposed the motion, asserting that the circuit court lacked jurisdiction "because this Court ordered the entire case to arbitration . . . and the entire case settled in arbitration." Furthermore, Gudeman argued, the counterclaim and affirmative defenses were neither frivolous nor "sanctionable."

After hearing argument, the circuit court ruled in relevant part:

> [L]et me just put it to you very practically.
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> * * *
>
> How would I have any basis to issue sanctions in this matter? Everything that you're alleging occurred in front of the arbitrator. So if you're talking about just a practical issue of coming in here after all of that went on in front of the -- arbitrator and asking me to make -- so now I've got to go back and what, I have to interview the arbitrator, is there -- was there a record kept; I mean there's -- there's no way for me to make a legitimate decision because none of that occurred on my watch. It all occurred in front of the arbitrator.

G&B's counsel and the circuit court then engaged in the following colloquy:

> *Ms. Tritt:* Well, I think some of the claims filed by Defendants in -- in this lawsuit are blatantly frivolous. For example, their claim for breach of contract. Under Michigan law, there has to be a special contract between an attorney and a client for there to be a breach of contract claim.
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> *The Court:* Okay.
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> *Ms. Tritt:* I don't think there needs to be any research done --
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> *The Court:* And again, how would I know that, having not heard the case? How would I know that a claim was frivolous? I don't know anything about this case. I haven't reviewed the pleadings. I haven't taken testimony. I haven't reviewed documents. I would have no basis upon which to make that decision.

[2] The stipulated order permitted G&B to file a consent judgment if Gudeman failed to timely make the agreed-upon payments. The settlement also envisioned that Gudeman and G&B would execute a mutual release when the last payment, scheduled for August 2015, was received.

> *Ms. Tritt:* Well, the arbitrator granted summary disposition, and this Court confirmed those summary dispositions. So I think that is a record of this Court; those – those orders granting summary disposition --
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> *The Court:* Now, if you were in his place, would you want me to make a call based on that record?
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> * * *
>
> The granting of summary disposition? Summary disposition, I grant summary disposition all the time on perfectly legitimate claims. It's just that as a matter of law, I don't think that there's a question that -- that needs to be resolved.

The circuit court denied plaintiff's motion, ruling:

> Okay. And -- and let me -- let me just say that there was an order that was entered November 30th, 2012. In paragraph three, it says that any and all other claims are hereby dismissed with prejudice. In paragraph number five it says Plaintiff's pleadings in this action are -- are dismissed without prejudice. And in paragraph number seven it says this order otherwise resolves the last pending claim and closes the case. This case was closed to all claims on November 30th of 2012. I didn't retain jurisdiction, and -- and as I've said, just -- my ruling is more practical than the fact that you've shown me no authority for me to make this decision after the matter has been sent to arbitration. If you have a claim to be made, make it in front of the arbitrator.

G&B now appeals.

II. ANALYSIS

G&B contends that the circuit court had "plenary authority" to impose sanctions on Franklin, and erred by refusing to do so. We review de novo a circuit court's determination regarding subject matter jurisdiction. *Biondo v Biondo*, 291 Mich App 720, 724; 809 NW2d 397 (2011). We also apply de novo review to underlying questions involving the interpretation of statutes and court rules. *Bullington v Corbell*, 293 Mich App 549, 554; 809 NW2d 657 (2011). The clear error standard guides this Court's review of a circuit court's decision to deny sanctions. *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 485; 760 NW2d 526 (2008). "Clear error exists when some evidence supports the circuit court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake." *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19; 812 NW2d 793 (2011).

To the extent the circuit court denied sanctions by invoking "jurisdiction," it erred. MCL 600.2591 and MCR 2.114(D), (E) and (F) afforded the circuit court the authority to award sanctions based on a finding that Franklin had interposed frivolous claims and defenses, despite entry of a final judgment. See MCR 7.208(I). Nevertheless, we find no clear error in the circuit court's conclusion that sanctions against Franklin were unwarranted. The circuit court proceedings that followed Franklin's challenged filings consumed 23 days. Thereafter, an

arbitrator presided. Although G&B could have sought sanctions against Franklin in arbitration, there is no indication in the record before us that it did so. Given the brief time the circuit court "conducted" the underlying action, we decline to disturb the circuit court's conclusion that it could not reasonably assess a sanction.

MCL 600.2591 states in relevant part:

> (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 allowed by law or by court rule, including court costs and reasonable attorney fees. [Emphasis added].

Here, the circuit court only briefly "conduct[ed]" the civil action, and thus lacked a factual foundation for finding that certain of G&B's fees or costs were incurred "in connection with the civil action." Essentially, the circuit court had only a snapshot view of a year-long arbitral odyssey. Because the touchstone of any sanction award under MCL 600.2591 is reasonableness, we find no fault in the circuit court's determination that it was unable to make the requisite factual findings to support a sanction award.

Sanctions may be awarded under MCR 2.114(D) and (E) when an attorney asserts claims lacking a reasonable factual or legal basis, fails to conduct a reasonable investigation, or presses allegations for an improper purpose such as harassment, unnecessary delay, or needless increase in litigation costs. Additionally, "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages."[3] As under MCL 600.2591, an award of attorney fee sanctions under MCR 2.114(E) must be reasonable. *Vittiglio v Vittiglio*, 297 Mich App 391, 408; 824 NW2d 591 (2012). In making this determination, a court must "evaluate the claims or defenses at issue at the time" the allegedly frivolous pleading was filed. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). "The factual determination by the trial court depends on the particular facts and circumstances of the claim involved." *Id.* at 94-95. Given the circuit court's unfamiliarity with the substantive issues of the case, it did not clearly err by refusing to levy sanctions against Franklin.

Nor are we persuaded by G&B's argument that the arbitrator lacked the authority to assess sanctions against Franklin because Franklin was not a party to the arbitration agreement. "When parties agree to submit a matter to arbitration, they invest the arbitrator with sufficient

[3] MCR 2.625(A)(2) states 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."

discretion to resolve their dispute in a manner which is appropriate under the circumstances." *Mich Ass'n of Police v Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989). The range of remedies available to an arbitrator is generally broad. *Id.* at 759.[4] The court rules supply the controlling principles that govern arbitration proceedings. MCL 600.5021, as enacted 1961 PA 236.

Here, the arbitration agreement afforded the arbitrator with the authority to resolve "[a]ny dispute or disagreement" between the parties "in connection with, or in relation to this Agreement, or otherwise." The imposition of sanctions in arbitration for attorney misconduct during arbitration proceedings is consistent with the expansive language of this arbitration agreement, the broad powers granted to arbitrators, and the court rules. Moreover, no provision in the Rules of the American Arbitration Association governing commercial arbitration prohibits sanctioning an attorney for mounting a frivolous defense. See *Polin v Kellwood Co*, 103 F Supp 2d 238, 264-265 (SD NY, 2000), aff'd 24 Fed Appx 406 (CA 2, 2002). See also American Arbitration Association, Commercial Arbitration Rules & Mediation Procedures, R-58(a), p 30, available at <https://www.adr.org/aaa/faces/aoe/commercial?_afrLoop=90321574132948&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D90321574132948%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1b2wk7qrkp_401> (accessed June 30, 2014). But regardless of the arbitrator's power to sanction Franklin, the circuit court did not clearly err by refusing to do so.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

[4] We note that in 2012, our Legislature adopted The Uniform Arbitration Act, MCL 691.1681 *et seq*. This Act does not apply to the arbitration proceedings in this case. MCL 691.1701 now defines with specificity an arbitrator's powers to fashion remedies. It provides in relevant part: "[A]n arbitrator may order remedies that the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." MCL 691.1701(3).