STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * * *

PATRICK BULLIS and **BECKY BULLIS,**
Plaintiffs,

v

PRIVAMD, INC., and **PRIVAMD OF GRAND HAVEN, INC.,**
Defendants.
_____/

File No. 21-006661-CB

OPINION AND ORDER ON MOTION FOR DISMISSAL AND ATTORNEY FEES

Hon. Jon A. Van Allsburg

Plaintiffs were investors in PrivaMD, Inc. (Priva 1.0), which was operated by Mark and Heidi Naperala (the majority stockholders, who are no longer with the company and who have filed for bankruptcy). Defendant PrivaMD of Grand Haven, Inc. (hereinafter referred to as Priva 2.0), was named as a co-defendant in plaintiffs' attempt to recover damages for their lost investment. Defendant has moved for this Court to dismiss PrivaMD 2.0 from this case and award attorney fees in its favor. Plaintiffs do not contest the motion to dismiss Priva 2.0, so the Court will grant that request. Plaintiffs oppose the motion for attorney fees.

Defendant Priva 2.0 cites MCR 1.109 and MCL 600.2591 in support of sanctions against plaintiffs. MCR 1.109(E) states in part:

> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
> (a) he or she has read the document;
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, 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; and
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, 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, including reasonable attorney fees. The court may not assess punitive damages.
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> (7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, 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.

MCR 2.625(A)(2) applies the statute.

> (2) Frivolous Claims and Defenses. 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 reads 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.
>
> (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.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (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.
>
> (b) "Prevailing party" means a party who wins on the entire record.

Defendant Priva 2.0 has alleged two separate theories by which plaintiffs could be ordered to pay attorney fees. Under the MCR 1.109 theory, defendant Priva 2.0 must show that the documents signed and filed by plaintiffs' counsel were not well grounded in fact, to the best of plaintiffs' counsel's knowledge, information, and belief formed after reasonable inquiry.[1] Under

[1] There is no claim here that plaintiffs failed to read the documents or that plaintiffs' documents were unwarranted by existing law or a good-faith argument for its modification. Defendants do make a claim that the documents were filed for an improper purpose, but they offer no evidence or argument to support the bare assertion.

the MCL 600.2591 theory, defendant Priva 2.0 must show that plaintiffs' entire action was frivolous in that plaintiffs had no reasonable basis to believe that the facts underlying plaintiffs' legal position were in fact true.[2]

Looking first at the complaint as a whole, it is not clear that this action was frivolous. "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted."[3] At the time plaintiffs brought their initial claim, plaintiffs believed that the assets previously owned by PrivaMD ("Priva 1.0") had been transferred to defendant Priva 2.0. While this proved to be incorrect, the claim is not made frivolous as a result. Plaintiffs allege that Mr. Bullis met with Adam Sobczak and the Naperalas after the Priva 1.0 assets were purportedly transferred. At that meeting, Mr. Bullis learned that an entity controlled by Mr. Sobczak had taken control of Priva 1.0. He became aware that Priva 2.0 was an entity controlled by Mr. Sobczak with a name similar to Priva 1.0. This provided plaintiffs with a reasonable basis to believe, at the time the action was filed, that Priva 2.0 was the entity in possession of the Priva 1.0 assets. This was prior to any communications from defendant denying that Priva 2.0 was the proper party.

Defendant Priva 2.0 cites to a letter included in plaintiffs' initial complaint as Exhibit I. Defendant essentially argues that by entering evidence mentioning Premier MD Plus, the entity that eventually purchased the Priva 1.0 assets, plaintiffs admit that they were aware that Priva 2.0 never possessed the Priva 1.0 assets. This argument fails to negate the reasonable basis that plaintiffs had to believe the facts underlying their case were true at the time the complaint was filed. The evidence therefore does not show the action to have been frivolous when filed.

Having failed to show that plaintiffs' claim was frivolous at the time it was filed, defense counsel points to an email he received from plaintiffs' counsel. In that email, sent March 2, 2022, plaintiffs' counsel stated that plaintiffs had learned from discovery in a related case that at least some Priva 1.0 assets ended up owned by a different entity, W.M. Medical Supplies, LLC (WMMS). Defendant argues that documents filed after that date might therefore be in violation of

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[2] Again, defendant Priva 2.0 makes the assertion that all three of the statutory definitions of "frivolous" apply, but defendant only supports the "no reasonable basis" definition with evidence or argument.

[3] *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

MCR 1.109(E)(5)(b). The court file contains five documents submitted by plaintiffs after March 2, 2022. These documents are plaintiffs' brief in partial opposition to defendant's motion for summary disposition and sanction, filed March 4, 2022; proof of service of a subpoena on Adam Sobczak, filed May 17, 2022; plaintiffs' response to defendant's first requests to admit, filed June 2, 2022; plaintiffs' witness and exhibit lists for trial, filed August 12, 2022; and plaintiffs' brief in partial opposition to defendant's motion for summary disposition and sanction, filed November 14, 2022. Each of these documents is well grounded in fact. Neither of the plaintiffs' briefs regarding summary disposition disputes the summary dismissal without prejudice of Priva 2.0. Both of the briefs concede that plaintiffs obtained evidence suggesting that the Priva 1.0 assets were transferred to WMMS and only oppose the sanctions proposed by defendant. Plaintiffs' admissions similarly concede that they had no written evidence tying Priva 2.0 to any Priva 1.0 assets. The subpoena, witness list, and exhibit list are appropriate in light of this Court's denial of defendant's previous motion for summary disposition.

In support of its position, defendant Priva 2.0 relies on an unpublished case, *Vale v Saul,*[4] in which the Court of Appeals stated, "[w]here a plaintiff fails to dismiss the action after he was aware he sued the wrong party, the trial court can properly award attorney fees pursuant to MCR 2.114."[5] However, the facts in *Vale* are fundamentally different from the instant case. In *Vale*, the plaintiff intended to sue a real estate agent over a property deal but instead sued the agent's brother, a factory worker who was a tenant of plaintiff and was never involved in the disputed transaction. The plaintiff was also a real estate agent who could easily have obtained the correct name of his intended defendant. The purchase agreement for the transaction in question listed the correct defendant by name. Once the plaintiff learned that he had sued the wrong party, the plaintiff failed to dismiss the action against the factory worker.

Here, Priva 2.0 was an entity that was only created because Mr. Sobczak intended at one point to buy the assets in question. Priva 2.0 was a plausible owner of the assets prior to defendant's eventual discovery disclosures. Plaintiffs were not able to determine the correct owner of the assets

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[4] *Vale v Saul*, unpublished opinion of the Court of Appeals, issued August 16, 2002 (Docket No. 231474); 2002 WL 1897954.

[5] *Id.* at *4. The rule cited here has since been renumbered to MCR 1.109.

except through discovery, which defendants resisted.[6] Plaintiffs also offered multiple times to dismiss defendant Priva 2.0, but the earlier negotiations stalled in the same place they stalled now, over the payment of attorney fees.

The Court cannot conclude that plaintiffs' position was frivolous, nor can it conclude that plaintiffs' filings were not well grounded in fact – only that the pleadings were grounded in facts. Defendant's motion for sanctions under MCR 1.109 and MCL 600.2591 is DENIED. As plaintiffs do not oppose dismissal, defendant's motion for dismissal is GRANTED.

IT IS SO ORDERED. This is a final order and resolves all pending claims.

Date: March 15, 2023

Hon. Jon A. Van Allsburg, Circuit Judge

[6] It is now known that Mr. Sobczak was the principal of all the potentially relevant entities which acquired or may have acquired Priva 1.0 assets: Priva 2.0, WMMS, and Premier MD Plus, Inc. (which ultimately acquired at least some of the Priva 1.0 assets) Defendants' counsel is also Sobczak's counsel and assisted in organizing these entities.