

STATE OF MICHIGAN
COURT OF APPEALS

JEANNINE P. ANSLEY,

Plaintiff-Appellee/Cross-Appellee,

v

CONSECO FINANCIAL SERVICING CORP.
and CONSECO SECURITIES, INC., a/k/a/
CONSECO,

Defendants-Appellants,

and

NICOLETTI & ASSOCIATES, P.C.,

Cross-Appellant.

UNPUBLISHED

December 17, 2002

No. 232266

Wayne Circuit Court

LC No. 00-000978-PD

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Defendants Conseco Financial Servicing Corporation and Conseco Securities, Inc. (“Conseco”) appeal as of right the orders granting summary disposition and judgment for plaintiff in the amount of \$2,217 on her claims of trespass to chattels, claim and delivery and conversion. The Conseco defendants also appeal from the order granting plaintiff’s motion for attorney fees and costs as sanctions in the amount of \$25,598.24. In addition, defendant Nicoletti & Associates, P.C. (“Nicoletti”), counsel for Conseco, cross-appeals from the order awarding sanctions. We affirm.

On December 7, 1996, Charles Sutton Ansley purchased a mobile home through a retail installment contract that was subsequently assigned to Conseco. On November 9, 1999, Ansley was killed in an automobile accident while at work and died intestate. At the time of Ansley’s death, plaintiff, who was his former wife, had reconciled with him and was his fiancée. As a result, plaintiff had a substantial amount of her personal property and effects in Ansley’s mobile home at the time of his death. However, scarcely one week after Ansley’s death, Conseco took possession of his mobile home on November 15, 1999, securing the premises by changing the locks on the mobile home. According to Conseco, Ansley was in default on the installment contract because he missed the previous month’s rent. In taking possession of the mobile home, Conseco seized control of all personal property found inside the mobile home, including

plaintiff's personal property. Conseco also denied plaintiff access to the home, and failed to return her belongings, renegeing on an agreement to allow her access to the mobile home to reclaim her personal property.

Plaintiff filed a complaint against Conseco on January 11, 2001 to regain possession of her belongings, requesting a preliminary injunction and claiming damages based upon trespass to chattels, claim and delivery, and conversion. After a preliminary examination hearing on January 14, 2000, the trial court granted plaintiff's motion to allow her access to the mobile home to retrieve her personal property. Upon gaining entry to the mobile home, plaintiff discovered that various articles of her personal property were missing, prompting her to file a police report. Thereafter, plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) as to her claims for trespass to chattels and claim and delivery. Following a hearing on June 30, 2000, the trial court granted plaintiff's motion and ordered Conseco to pay her \$2,217 in damages. Specifically, the trial court, finding that Conseco's seizure of the mobile home and retention of plaintiff's personal property were unlawful, noted that Conseco's defense, as put forward by Nicoletti, was frivolous and encouraged plaintiff to file a motion for sanctions against both Conseco and Nicoletti.

Subsequently, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) with regard to her conversion claim; she also filed a motion for sanctions against Conseco and Nicoletti pursuant to MCR 2.114, MCR 2.625(A)(2) and MCL 600.2591. After a hearing on December 1, 2000, the trial court, in an order entered on January 2, 2001, granted plaintiff's motion for summary disposition on her conversion claim based upon the fact that Conseco did not have the legal right to seize the mobile home or the personal property found therein. The trial court also granted plaintiff's request for sanctions in the amount of \$25,598.24, finding that Conseco's defense as presented by its counsel Nicoletti was frivolous under MCR 2.114 and MCR 2.625(A)(2) because it was devoid of a legal or factual basis and was intended to harass plaintiff.

On appeal, Conseco first contends that the trial court erred in granting summary disposition in favor of plaintiff with respect to her claims of trespass to chattels, claim and delivery and conversion. We disagree.

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto, supra*, 451 Mich 362.

To establish a claim for trespass to chattels, also known as trespass to personalty, a plaintiff must show a wrongful exercise of dominion or control over the plaintiff's property. See *Burns v Kirkpatrick*, 91 Mich 364; 51 NW 893 (1892).

An action for claim and delivery, formerly the common-law action of replevin, is statutorily defined by MCL 600.2920(1) in pertinent part as follows:

A civil action may be brought to recover possession of any goods or chattels, which have been unlawfully taken or unlawfully detained, and to recover damages sustained by the unlawful taking or unlawful detention. . . .

See *Jay Dee Inc v Fattore Constr Co*, 96 Mich App 519, 522; 293 NW2d 620 (1980) (noting that the statute “permits recovery of personal property unlawfully taken or detained”).

The tort of conversion is defined as “any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” *Head v Phillips Camper Sales*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Because conversion is an intentional tort, good faith is not a defense. *Mich Nat’l Bank v Mich Livestock Exch*, 432 Mich 277, 282; 439 NW2d 834 (1989), citing *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 349; 311 NW2d 776 (1981).

In this case, the trial court did not err in granting summary disposition to plaintiff on her claims of trespass to chattels, claim and delivery, and conversion because Conesco wrongfully exercised dominion and control over plaintiff’s personal property and wrongfully denied her the right to possession of her property. Specifically, there was no genuine question of material fact that Conesco established the right of self-help repossession.

In Michigan, a secured party to a retail installment contract may avail itself of self-help repossession provided that it does not breach the peace. Section 9-503 of the UCC, MCL 440.9503,¹ which was in effect at all relevant times during these proceedings, provides in pertinent part:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . .

Section 9-501(1) of the UCC, MCL 440.9501(1), provides that a default is determined by the terms of the security agreement. Generally, a party is deemed in default for failure to make payments as provided in a security agreement. White and Summers, *Uniform Commercial Code*, (4th ed 1995), § 25-2, p 902.

In this case, Conesco failed to offer any proof establishing that it was a secured party or that Ansley was in default when Conesco seized his mobile home. Specifically, Conesco never offered into evidence the retail installment contract so as to establish that it was a secured party. Further, although Conesco alleged that Ansley was in default prior to his death, Conesco offered no documentation in support, conceding that, at most, Ansley’s account was “approaching” or

¹ Effective July 1, 2001, this section was recodified as MCL 440.9609.

“getting ready to be referred” for a claim and delivery action. Therefore, Conseco failed to raise a genuine issue of material fact that it had a legal right to repossess the mobile home.

Contrary to Conseco’s claim, the trial court did not err in awarding damages to plaintiff in the amount of \$1,700 for her loss of possession, use and enjoyment of her personal property during the period of sixty-eight days in which defendant retained her property. The trial court also did not err in ordering Conseco to pay damages in the amount of \$517 for the property that was missing from the mobile home. Here, the damage award was reasonably supported by the evidence, and did not represent remote, contingent, or speculative damages. See *Hoffman v. Auto Club Ins*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

Finally, the trial court did not err in granting sanctions pursuant to MCR 2.114(D) and MCR 2.114(F). “This Court will not disturb a trial court’s finding that a claim was frivolous unless the finding is clearly erroneous.” *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). In addition “[a] trial court’s decision regarding whether a party or attorney has violated the signature requirements of MCR 2.114(D) . . . is reviewed for clear error.” *Hog Producers v Consumers Power*, 234 Mich App 72, 91; 592 NW2d 112 (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.” *In re Attorney Fees, supra*, 233 Mich App 701. Pursuant to MCR 2.114(E), the court may sanction either the attorney or represented party for violations of MCR 2.114(D). Moreover, attorney fees may be awarded if a defense is frivolous pursuant to MCR 2.114(F). An action is frivolous if one 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. [MCL 600.2591(3)(a).]

In this case, the trial court did not err in sanctioning Conseco and Nicoletti for violations of the signature requirements under MCR 2.114(D) and for making a frivolous defense under MCR 2.114(F) because defendants failed to provide either a factual basis for the claim that Ansley was in default or a legal basis that Conseco had a right or title to plaintiff’s personal effects.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper