

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAY R. WINAFELD

Plaintiff-Appellant

-VS-

MAINSOURCE BANK

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2007 CA 00056

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas Court Case No. 2006-CV
04027

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

October 29, 2007

APPEARANCES:

For Plaintiff-Appellant:
CRAIG T. CONLEY
604 Huntington Plaza
220 Market Ave. South
Canton, Ohio 44702

For Defendant-Appellee
CHRISTIAN E. NIKLAS
JOHN A. POLINKO
1500 West Third Street
Suite 400
Cleveland, Ohio 44113

Delaney, J.

{¶1} Appellant Jay R. Winafeld appeals the decision of the Stark County Common Pleas Court to award of a portion of attorneys fees requested in a Motion for Sanctions.

{¶2} On October 19, 2006, appellee filed a complaint in foreclosure against appellant. Appellant answered the complaint.

{¶3} Appellant then filed a Motion to Dismiss, alleging that appellee did not have standing to file a foreclosure.

{¶4} On December 14, 2006, appellant was granted leave to file an Amended Answer Instante. In this Answer, appellant attached a check tendered to the mortgage holder, not appellee, for the full amount of the mortgage dated December 12, 2006.

{¶5} On December 15, 2006, appellee filed an Objection to the Motion to Dismiss, averring that the mortgage was assigned to appellee on October 20, 2006 and recorded with the Stark County Recorder on October 25, 2006.

{¶6} The trial court granted the Motion to Dismiss. Thereafter, appellant filed a Motion for Sanctions. The trial court set the Motion for Non-Oral Hearing. Appellee requested an oral argument on the Motion for Sanctions and filed a Response.

{¶7} On February 5, 2007, the trial court issued a Judgment Entry granting the Motion for Sanctions and awarding attorneys fees. The Judgment Entry stated, "The Court has reviewed the motion for sanctions and the response filed herein. At the time of the filing of the within matter, the plaintiff was not a real party in interest and had no legal right to file the within litigation. This is a pure simple fact in reviewing the pleadings, the documents submitted, and the other matters supplied by the respective

sides. The Court finds that this constitutes a violation of Rule 11 and/or O.R.C. 2323.51. The Court finds no merit in any of the other contentions of the defendant regarding bad faith or frivolous conduct. The Court grants the request for sanctions to the extent that on the date suit was filed plaintiff was not, in fact, a real party in interest in the within litigation. The Court grants sanctions in the amount of Two Hundred Dollars (\$200.00) which shall be paid forthwith to counsel for the defendant. This shall constitute a final, appealable Order.”

{¶8} On February 6, 2007, the trial court denied the oral hearing.

{¶9} Appellant appeals and raises a single Assignment of Error:

{¶10} “I. THE TRIAL COURT ERRED IN AWARDING APPELLANT ONLY A SMALL FRACTION OF THE ATTORNEY’S FEES REQUESTED VIA HIS TIMELY MOTION FOR SANCTIONS.

Standard of Review

{¶11} This Court outlined the standard of review in *Kinnison v. Advance Stores Company*, Richland App. No. 2005CA0011, 2006-Ohio-222. R.C. 2323.51 provides that a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. “Frivolous conduct,” as defined in R.C. 2323.51(A)(2)(a)(ii) and (iii), includes conduct that “is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law” and conduct that “consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified,

are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”

{¶12} As the court found in *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 673 N.E.2d 628, no single standard of review applies in R.C. 2323.51 cases, and the inquiry necessarily must be one of mixed questions of law and fact. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger*, supra, at 51-52, 673 N.E.2d 628. “When an inquiry is purely a question of law, clearly an appellate court need not defer to the judgment of the trial court. *Id.* However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations; accordingly, we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings. *Id.* This standard of review of factual determinations is akin to that employed in a review of the manifest weight of the evidence in civil cases generally, as approved in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.” *Id.* at 51-52, 376 N.E.2d 578.

{¶13} Where a trial court has found the existence of frivolous conduct, the decision whether or not to assess a penalty lies within the sound discretion of the trial court. *Id.* at 52, 376 N.E.2d 578, 110 Ohio App.3d 46, 673 N.E.2d 628. Abuse of discretion requires more than simply an error of law or judgment, implying instead that the court's attitude is unreasonable, arbitrary or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875. Furthermore, R.C. 2323.51 employs an objective standard in determining whether sanctions may be

imposed against either counsel or a party for frivolous conduct. *Stone v. House of Day Funeral Serv., Inc.* (2000), 140 Ohio App.3d 713, 748 N.E.2d 1200.

I.

{¶14} Appellant argues that the trial court abused its discretion in awarding only a portion of the attorneys fees requested.

{¶15} R.C. 2323.51 further outlines the procedure that a trial court must follow prior to making an award of attorney fees for frivolous conduct under the statute. Specifically, according to R.C. 2323.51(B)(2), a trial court must:

{¶16} “(a) [Set] a date for a hearing to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

{¶17} “(b) [Give] notice of the date of [that] hearing * * * to each party or counsel of record who allegedly engaged in frivolous conduct and to each party allegedly adversely affected by frivolous conduct; [and]

{¶18} “(c) [Conduct] the hearing described in division (B)(2)(a) of this section, allow[ing] the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct in question was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made.”

{¶19} R.C. 2323.51(B)(5) provides that any party who may be awarded reasonable attorney's fees, and such party's counsel, may submit an itemized list or other evidence of the legal services necessitated by the conduct at issue, as well as evidence of the time so spent and the fees incurred for those services.

{¶20} Therefore, as long as the trial court follows the procedures outlined by R.C. 2323.51, its judgment finding appellant's conduct to be frivolous and awarding attorney fees as sanctions under the statute will not be disturbed if it is supported by the evidence.

{¶21} The issue in the case sub judice is that the trial court failed to follow the procedure of R.C. 2323.51 (B)(2) by holding a hearing. The trial court held a non-oral hearing and denied appellee's request for an oral hearing. This is contrary to law. Pursuant to the statute, this must be an evidentiary hearing.

{¶22} "[T]he trial court may award attorney fees only after conducting a hearing that allows the parties to present evidence in support [of] or opposition to such award." *Shaffer v. Mease* (1991), 66 Ohio App.3d 400, 409, 584 N.E.2d 77, citing *Dreger v. Bundas* (Nov. 15, 1990), Cuyahoga App. No. 57389. The hearing is required so that the trial court can make a determination of whether there existed frivolous conduct and whether the party bringing the motion was adversely affected by such conduct. *Id.* See also *Pisani v. Pisani* (1995), 101 Ohio App.3d 83, 654 N.E.2d 1355.

{¶23} The trial court failed to hold a hearing as required by statute; therefore, appellant's assignment of error is sustained. Accordingly, the case is reversed and remanded for a hearing on the frivolous conduct and attorneys fees.

{¶24} The judgment of the Stark County Court of Common Pleas is reversed
and this matter is remanded for proceedings in accordance with this opinion.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concurs in part,

dissents in part

JUDGES

Hoffman, J., concurring in part and dissenting in part

{¶25} I concur in the majority's decision to reverse and remand this matter, but would do so only with respect to the amount of attorney fees awarded. I specifically dissent from the majority's decision to remand for a hearing on whether there was frivolous conduct.

{¶26} Although I agree R.C. 2323.51(B) provides for a hearing, Appellee did not file an appeal or cross-appeal claiming trial court error in finding frivolous conduct nor error in failing to hold a hearing. Appellee has waived the right to challenge both the finding of frivolous conduct and the procedure used by the trial court in arriving at that finding. The majority opinion provides Appellee relief which it has not requested.

{¶27} Likewise, Appellant has not alleged trial court error for failing to hold a hearing on his fee request, but rather alleged the trial court abused its discretion in only ordering a small portion of attorney fees incurred. Based upon the time necessitated to respond to Appellee's complaint and successfully prosecute his motion to dismiss, I believe the trial court abused its discretion in only awarding Appellant \$200.00. That is not to say the trial court is required to award Appellant the full amount requested. I cannot help but wonder what Appellee's counsel billed Appellee for its counsel's service in this case.

HON. WILLIAM B. HOFFMAN

PAD:kgb9/24/07

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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JUDGMENT ENTRY

CASE NO. 2007 CA 00056

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed and remanded. Costs assessed to appellee.

JUDGES