[Cite as *Bullock v. Miller Logging, Inc.*, 2009-Ohio-2845.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENNIS RICHARD BULLOCK

Plaintiff-Appellant

-vs-

MILLER LOGGING, INC., ET AL.

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 08CA000024

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Knox County Common Pleas Court, Case No. 05OT070300
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 15, 2009

APPEARANCES:

For Plaintiff-Appellant

WILLIAM PAUL BRINGMAN
13 East College Street
Fredericktown, Ohio 43019-1192

For Defendant-Appellee

GRANT A. MASON
Miller, Mast & Mason, Ltd.
88 South Monroe Street
P.O. Box 1008
Millersburg, Ohio 44654

Hoffman, J.

{¶1} Plaintiff-appellant Dennis Richard Bullock, by and through counsel Attorney William Paul Bringman, appeals the September 15, 2008 Judgment Entry of the Knox County Court of Common Pleas ordering Attorney Bringman to pay sanctions to Defendant-appellee Ivan E. Keim for attorney fees incurred in defending the within action.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 26, 2005, Dennis Richard Bullock filed a lawsuit in the Knox County Court of Common Pleas against Miller Logging, Inc. and Levi Miller for the unlawful timbering of his property. Bullock was represented at all times by Attorney William Bringman. Bullock filed a second amended complaint on April 2, 2007. The amended complaint added Ivan Keim as a party defendant, whose address was listed as 6005 C.R. 77, Millersburg, Ohio 44654. Ivan E. Keim was served at the address on April 5, 2007.

{¶3} Upon receipt of the summons and complaint, Ivan E. Keim contacted Attorney Bringman to inform him he was not the proper party defendant. Ivan E. Keim then provided an address for Ivan A. Keim, indicating he was the proper party. On May 1, 2007, Attorney Bringman served Ivan A. Keim with a copy of the summons and complaint.

{¶4} Ivan E. Keim did not file an answer to the complaint in anticipation of being dismissed from the action.

{¶5} On May 10, 2007, Attorney Bringman filed a motion with the trial court, captioned “Motion for Leave” purportedly seeking an order from the trial court granting

him leave to dismiss a party, but in actuality requesting the trial court conduct a hearing to determine which of the Keims was the proper defendant. The motion did not cite Civil Rule 41; rather, the motion reads:

{¶6} "Plaintiff believes that Ivan A. Keim is the proper party defendant herein, but does not wish to dismiss Ivan E. Keim as a party herein until a response from Ivan A. Keim is received if a response from him is forthcoming."

{¶7} The trial court denied Attorney Bringman's motion on May 29, 2007.

{¶8} Ivan A. Keim filed an answer to the complaint on May 16, 2007. On June 29, 2007, in response to Plaintiff's First Set of Interrogatories and Admissions, Ivan A. Keim admitted to cutting the trees at the location and time as set forth in the complaint, but denied acting on his own behalf. On July 17, 2007, Ivan A. Keim filed a motion for partial summary judgment.

{¶9} Ivan E. Keim hired Attorney Mast to represent his interests. He signed an attorney fee agreement in which counsel's hourly rate was listed as $175.00 per hour, plus expenses. Ivan E. Keim's attorney fees incurred in defending this action total $3,467.40.

{¶10} On November 13, 2007, Ivan E. Keim filed an answer to the complaint, and a motion for summary judgment. The trial court granted the motion for summary judgment, via Judgment Entry of November 26, 2007.

{¶11} On December 5, 2007, Ivan E. Keim moved the trial court to impose sanctions against Attorney Bringman, pursuant to R.C. Section 2323.51. On July 1, 2008, the magistrate issued findings of fact and conclusions of law ordering Attorney Bringman pay said sanctions. Attorney Bringman objected to the magistrate's decision.

Via Judgment Entry of September 15, 2008, the trial court overruled Attorney Bringman's objections.

{¶12} Attorney Bringman filed a Civil Rule 41(A) notice of voluntary dismissal, without prejudice, on November 27, 2007, the day on which the jury trial was to commence.

{¶13} Attorney Bringman now appeals, assigning as error:

{¶14} "I. THE TRIAL COURT ERRED IN AFFIRMING THE MAGISTRATE'S DECISION OF JULY 1, 2008.

{¶15} "II. TRIAL COURT ERRED IN DENYING THE MOTION OF APPELLANT FOR LEAVE TO DISMISS APPELLEE, IVAN E. KEIM, AS A PARTY TO THE CASE."

{¶16} Both of the assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶17} Ohio Revised Code Section 2323.51 reads:

{¶18} "(A) As used in this section:

{¶19} "(1) "Conduct" means any of the following:

{¶20} "(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

{¶21} "***

{¶22} " (2) "Frivolous conduct" means either of the following:

{¶23} “(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

{¶24} “(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶25} “(ii) It 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.

{¶26} “(iii) The conduct 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.

{¶27} “(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶28} “***

{¶29} “(4) “Reasonable attorney's fees” or “attorney's fees,” when used in relation to a civil action or appeal against a government entity or employee, includes both of the following, as applicable:

{¶30} “(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant

attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

{¶31} "***

{¶32} "(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section."

{¶33} Civil Rule 41(A) reads:

{¶34} "(A) Voluntary dismissal: effect thereof

{¶35} "*(1) By plaintiff; by stipulation.* Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶36} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

{¶37} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶38} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{¶39} "*(2) By order of court.* Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice."

{¶40} Upon review of the statement of the facts and case, supra, Appellant knew Ivan E. Keim was not the proper party defendant on June 29, 2007, at which time Ivan A. Keim admitted in his responses to interrogatories and requests for admissions he cut the trees in question, but was not acting on his own behalf.

{¶41} While Appellant claims to have moved the trial court for leave to dismiss Ivan E. Keim as a party on May 10, 2007, a review of said motion indicates the motion is actually a request for a hearing to obtain further discovery as to the proper party. Civil Rule 41(A), provides Appellant could have dismissed Ivan E. Keim by filing a notice of

dismissal any time after June 29, 2007 and before the commencement of trial without leave of the trial court.

{¶42} Further, the record indicates counsel for Ivan E. Keim contacted Appellant by phone on October 25, 2007 and by letter of October 27, 2007 requesting Appellant dismiss Ivan E. Keim in a manner not prejudicial to his case.

{¶43} As Appellant knew Ivan A. Keim was the proper party defendant on June 29, 2007, Appellant's not dismissing Ivan E. Keim from the action, which necessitated his obtaining counsel and incurring legal fees, amounts to frivolous conduct. Accordingly, the trial court did not err in ordering Appellant pay sanctions in the amount of Ivan E. Keim's reasonable attorney fees.

{¶44} Ivan E. Keim testified at the hearing on sanctions he obtained counsel to secure his dismissal from the within action, and necessarily incurred legal fees as a result. He testified paying said fees would amount to financial hardship for him. Attorney Harlow H. Walker testified at the hearing as to the reasonableness of the fees. Accordingly, the trial court did not abuse its discretion in rendering the award of attorney fees in this matter.

{¶45} The November 27, 2008 Judgment Entry of the Knox County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENNIS RICHARD BULLOCK	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MILLER LOGGING, INC., ET AL.	:	
Defendant-Appellee	:	Case No. 08CA000024

For the reasons stated in our accompanying Memorandum-Opinion, the November 27, 2008 Judgment Entry of the Knox County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Scott Gwin
W. SCOTT GWIN