

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Charlie Asmus Family Farm, Inc., et al.

Court of Appeals No. WD-08-050

Plaintiffs

Trial Court No. 06 CV 597

v.

Village of Haskins, et al.

Appellees

and

Dold Development Co.

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2009

* * * * *

Timothy C. James and Shannon J. George, for appellees Michael and Carol Repass.

Steven R. Smith and Janine T. Avila, for appellee Thomas R. Hays.

Stephen R. Serraino, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which determined the scope of a settlement agreement between plaintiffs-appellees, Michael and Carol Repass, and defendant-appellant, Dold Development Company, and denied a motion for damages and sanctions filed by Dold against the Repasses and their attorney, appellee Thomas R. Hays.

{¶ 2} This case was initiated when the Repasses filed a complaint against Dold and the village of Haskins which alleged that the village operated an outdated and ineffective sewage system and that Dold "tied in" houses it built to the village's outdated sewage system. The Repasses also alleged that the defendants, through the sewer system, created "illegal discharges and acts of pollution and trespasses" that harmed their property. The complaint asserted claims of battery and negligence, and requested temporary and permanent injunctive relief and punitive damages.

{¶ 3} Dold responded with an answer and counterclaim which alleged in relevant part:

{¶ 4} "27. The Plaintiff's amended complaint against Dold is wholly frivolous and without merit and the Plaintiff's and their counsel were aware of this fact prior to filing. There is no factual basis to support the allegations of Plaintiff's amended claims against Dold. The Plaintiff's alleged 'conspiracy theory' which accuses Dold and the Village of Haskins of a covert scheme to pollute the property of the Plaintiff is a fabrication and an outright wanton, malicious and intentional false misrepresentation of the facts by both the Plaintiffs and their counsel. Therefore the Plaintiffs and their

counsel are guilty of both malicious use of process and abuse of process in the filing of this action against Dold. Their filing of litigation without reasonable or probable cause has resulted in monetary damages to Dold which impact adversely its business reputation and profits.

{¶ 5} "* * *

{¶ 6} "29. Dold demands compensatory damages f[or] the Plaintiff's and their counsel's wanton and malicious misconduct in an amount in excess of twenty five thousand dollars (\$25,000.00) and punitive damages for their intentional, malicious and wanton actions along with attorney fees and court costs incurred in defense of this action."

{¶ 7} Subsequently, the lower court granted Dold's motion for summary judgment on all of the claims raised in the complaint. Then, on January 10, 2008, Dold filed a motion against the Repasses and their counsel, appellees herein, for damages pursuant to R.C. 2323.51 due to appellees' alleged frivolous conduct in filing and prosecuting the action against Dold and for damages and sanctions against the Repasses' counsel pursuant to Civ.R. 11. The next day, the parties filed a joint notice of voluntary settlement of the counterclaim that Dold had filed against the Repasses and their counsel, Thomas R. Hays. The notice reads in relevant part:

{¶ 8} "Defendant and Counterclaimant, Dold Development Co., together with Plaintiffs, Michael Repass and Carol Repass, and Attorney Thomas R. Hays, jointly and severally, advise the Court that all matters and issues in dispute and controversy between

them, regarding the Counterclaim asserted in this action by Dold Development Co., have been compromised and settled.

{¶ 9} "THEREFORE, Defendant and Counterclaimant, Dold Development Co., hereby voluntarily dismisses, with prejudice, its Counterclaim against Plaintiffs, Michael Repass and Carol Repass, and Attorney Thomas R. Hays."

{¶ 10} In exchange for Dold's voluntary dismissal, the Repasses filed a waiver of their right to appeal any issues in the case. Subsequently, however, Dold pursued its motion for R.C. 2323.51 damages and Civ.R. 11 sanctions. When Dold pursued that motion, appellees filed a motion to enforce the settlement agreement, arguing that the settlement agreement's dismissal of the counterclaim encompassed Dold's motion.

{¶ 11} The trial court agreed with appellees and denied Dold's motion for sanctions and damages without a hearing. The trial court held that the language of Dold's counterclaim was "sufficient to encompass Dold's claims pursuant to Civ.R. 11 and R.C. 2323.51. Both statutes permit recovery in cases that are deemed frivolous and/or filed with a malicious or wanton intention, as Dold alleges in its counterclaim." It is from that judgment denying its motion for damages and sanctions that Dold appeals. Dold has assigned five assignments of error, all challenging the trial court's denial of its motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51. Because they are related, we will address the five assignments of error together.

{¶ 12} Pursuant to R.C. 2323.51(B)(1), a court may award court costs, reasonable attorney fees, and other reasonable expenses to any party in a civil action adversely

affected by frivolous conduct. Such awards may be made "against a party, the party's counsel of record, or both." R.C. 2323.51(B)(4). "Frivolous conduct" which can be sanctioned pursuant to R.C. 2323.51 includes any of the following:

{¶ 13} "(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.

{¶ 14} "(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.

{¶ 15} "(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.

{¶ 16} "(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." R.C. 2323.51(A)(2).

{¶ 17} In contrast to R.C. 2323.51, Civ.R. 11 sanctions are imposed upon an attorney or pro se party for the willful violation of the rule. The rule provides in relevant part:

{¶ 18} "The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party had read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it;

and that it is not interposed for delay. * * * For willful violation of this rule an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule."

{¶ 19} A motion for sanctions pursuant to Civ.R. 11 is "collateral and independent of the primary action." *Stevens v. Kiraly* (1985), 24 Ohio App.3d 211, 214. Likewise, a motion filed pursuant to R.C. 2323.51 is a request for an "award" for expenses incurred by a party "adversely affected" by frivolous conduct. R.C. 2323.51(B)(1).

{¶ 20} In denying appellant's motion for damages and sanctions and enforcing the settlement agreement, the lower court examined the wording of the January 11, 2008 settlement agreement and of appellant's counterclaim. The court determined that it was clear that through the settlement agreement, appellant dismissed with prejudice any claim for frivolous conduct and attorney fees, including its January 10, 2008 claim for such. Relying on *Jones v. Billingham* (1995), 105 Ohio App.3d 8, the lower court held that the language appellant used in its counterclaim, that Mr. and Mrs. Repass and their counsel filed a frivolous and baseless complaint for which appellant seeks damages and attorney fees, was sufficient to encompass appellant's claims pursuant to Civ.R. 11 and R.C. 2323.51.

{¶ 21} In *Jones*, supra, the defendant-appellant filed a counterclaim against appellees which included the following allegations:

{¶ 22} "27. The complaint and other pleadings personally filed herein by plaintiffs lack probable cause, set forth no legitimate theory at law or argument for future modification of the law in full or part, and otherwise was designed simply to harass, embarrass and damage the defendant-counterclaimant personally and professionally.

{¶ 23} "28. The aforementioned actions of plaintiffs were undertaken willfully, maliciously and wrongfully.

{¶ 24} "29. The aforementioned actions by plaintiffs abused the process of the court.

{¶ 25} "30. As a direct and proximate result of the conduct of plaintiffs, defendant-counterclaimant has suffered severe emotional distress, loss of reputation, professional expense, attorney fees, costs and other assorted losses, thereby damaging defendant-counterclaimant in the amount of not less than \$200,000."

{¶ 26} Subsequently, the lower court filed an agreed order of dismissal at the joint request of both parties, dismissing the complaint and counterclaim without prejudice. Shortly after that dismissal was entered, the defendant-appellant filed a motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51, alleging that the complaint filed against her was frivolous. The trial court overruled the motion for sanctions, finding that appellant's counterclaim embraced her claims pursuant to Civ.R. 11 and R.C. 2323.51. The Second District Court of Appeals agreed, holding:

{¶ 27} "When both parties, by an agreed entry, dismissed their claims without prejudice, they both abandoned the claims they had pled in this action, without prejudice

to those claims being refilled in a future action. In our view, one of those claims abandoned without prejudice by the agreed entry was Billingham's claim that the plaintiffs-appellees had made a frivolous claim against her."

{¶ 28} We agree with the rationale in *Jones* and find that the present case presents an even more compelling argument for denial of the motion for damages and sanctions. The language the parties used in their joint dismissal evidences a clear intention to dismiss "all matters and issues in dispute and controversy between them, regarding the Counterclaim[.]" That is, appellant, by the language it chose to use, dismissed all allegations that appellees *and their counsel* had engaged in frivolous conduct in the filing of their complaint against appellant, had filed litigation without a factual basis and without reasonable or probable cause, and were liable for damages, attorney fees and court costs as a result of their actions. These are the same matters and issues that appellant raised in its motion for damages and sanctions when it alleged that appellees engaged in frivolous conduct by initiating, prosecuting and maintaining the present action.

{¶ 29} Finally, we note that we previously relied on *Jones* in the case of *Buettner v. Bader* (Jan. 9, 1998), Lucas App. No. L-97-1106. In that case, we held that although the defendants did not file a separate motion for attorney fees pursuant to R.C. 2323.51, by filing a counterclaim which alleged frivolous conduct, the defendants set forth a claim within the ambit of R.C. 2323.51 and the trial court, therefore, had jurisdiction to award attorney fees on the basis of frivolous conduct.

{¶ 30} In light of our discussion herein, we find that the lower court did not err in denying appellant's motion for damages and sanctions and all five assignments of error are not well-taken.

{¶ 31} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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