[Cite as *R & S Roofing Co. v. Mercer-North Am., Inc.*, 2014-Ohio-1763.]

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

R & S Roofing Company	Court of Appeals No. L-13-1161
Appellant	Trial Court No. CVF-09-01264
v.	
Mercer-North American, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: April 25, 2014

* * * * *

Michael D. Portnoy, for appellant.

Thomas E. Cafferty, pro se.

Gregory L. Arnold, for appellee Christopher Napolski.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the imposition of sanctions, pursuant to Civ.R. 11 and R.C. 2323.51, on appellant and its attorney in the Toledo Municipal Court. Because we concur with the trial court's conclusion that appellant's complaint was devoid of

allegations of a cause of action against a corporation's attorney and was similarly devoid of allegations sufficient to impose personal liability on a corporate shareholder, we agree that those portions of the suit were frivolous, properly prompting sanctions. We affirm.

{¶ 2} In 2008, R.W. Mercer Company (denominated as Mercer-North American, Inc. in appellant's original complaint), a Michigan contractor, entered into an agreement with Interstate Roofing Company, Inc., an Ohio Corporation, to provide renovations to a Sunoco station at the corner of Detroit Avenue and the Anthony Wayne Trail in Toledo. Interstate hired appellant, R & S Roofing Company, to perform some of the work.

{¶ 3} Interstate's president and sole shareholder is appellee Christopher Napolski. Interstate's attorney for the part of the time relevant to this appeal was appellee Thomas E. Cafferty.

{¶ 4} Following completion of the job, a dispute developed over the amount of payment due appellant from Interstate. The parties apparently reached an impasse when appellant refused to waive its lien on the property without payment for an unrelated project. Meanwhile, Mercer withheld payment on the Sunoco project absent a lien waiver from both appellant and Interstate.

{¶ 5} On October 31, 2008, attorney Cafferty wrote Mercer explaining the impasse and requesting payment. Attorney Cafferty wrote:

> Interstate believes that because [appellant] is refusing to settle this matter with Interstate by accepting payment and executing the waiver, that [appellant] is giving up any lien rights that [it] may have in this matter. To

that end, Interstate will agree to indemnify R.W. Mercer from any claims arising from [appellant] on this project in exchange for a release of the funds to Interstate.

{¶ 6} On January 23, 2009, attorney Michael D. Portnoy, on behalf of appellant, sued Mercer, Interstate Roofing, Christopher Napolski, personally, and attorney Cafferty, personally. The complaint alleged that the acts of Mercer, Interstate, Napolski and Cafferty "were an attempt to circumvent the legitimate rights of [appellant] for claims to be made against the defendants," constituting a breach of contract. The complaint also alleged that because "Defendants Cafferty, Interstate and Napolski agreed to indemnify Defendant Mercer for any damages that Defendant Mercer may have to pay [appellant]" they were "necessary parties and illegally circumvented" appellant's claims.

{¶ 7} On March 6, 2009, Interstate and appellee Napolski moved to dismiss the complaint against them for failure to state a claim upon which relief can be granted. Appellee Napolski argued that the counts against him should be dismissed because appellee alleged no facts to justify piercing the corporate veil to impose liability on him as a shareholder of Interstate. Additionally, appellee Napolski asserted, appellant had produced no written indemnification agreement applicable to him as required by R.C. 1335.05. Appellee Napolski subsequently moved for sanctions for frivolous conduct, pursuant to Civ.R. 11 and R.C. 2323.51.

{¶ 8} On April 3, 2009, appellee Cafferty moved for summary judgment on the complaint and requested sanctions for frivolous conduct against appellant and attorney

Portnoy, pursuant to Civ.R. 11 and R.C. 2323.51. Appellee Cafferty accompanied his motion with an affidavit in which he averred that he was hired by Interstate to represent it in negotiations with appellant concerning a disputed debt. Appellee Cafferty attached copies of correspondence with attorney Portnoy which, from the outset, advised him of this. Appellee Cafferty denied personally indemnifying debt to anyone and attached a copy of his letter to Mercer relating to that topic.

{¶ 9} The trial court refused to dismiss Interstate, but granted appellee Napolski's motion to dismiss, as well as a similar motion by Mercer. After appellant dismissed appellee Cafferty from the suit pursuant to Civ.R. 41, the court found his summary judgment motion moot. The court set appellees Napolski and Cafferty's motions for sanctions for a hearing.

{¶ 10} At the sanctions hearing, appellee Cafferty testified that the complaint against him was filed without any legal or factual basis, that he had advised opposing counsel of this and offered numerous opportunities for opposing counsel to dismiss the complaint at an earlier stage. Appellee Cafferty requested sanctions in the amount of $2,500, the amount of the deductible on his claim to his professional liability insurer.

{¶ 11} Appellee Napolski requested attorney fees he incurred in the suit and reimbursement for the fees he paid to defend Mercer. In the absence of a stipulation by appellee, appellant Napolski introduced testimony from an attorney as to the necessity and reasonableness of the attorney fees incurred.

{¶ 12} Appellee Napolski also introduced a series of voice messages left on his telephone by attorney Portnoy after attorney Cafferty had withdrawn from representation:

> Mr. Napolski, good afternoon. This is attorney Michael Portnoy. It's about 3:30. I just got off the phone from Tracy at Mercer's, and I don't know what you know about this, but your lawyer has just put you on the hook through [appellant] for all kind [sic] of money. Your lawyer wrote a letter to Mercer saying that if there is any lawsuit filed by appellant to recover moneys against Mercer, you're personally responsible for that, for all the moneys to be recovered.
>
> You need to call me back. Mr. Cafferty is no longer representing you. I would advise that's a good choice on your part. He does not understand what he's doing, what he's put you into. So, therefore, give me a call back. * * *

{¶ 13} In a second call, a few minutes later, Mr. Portnoy says:

> Mr. Napolski, attorney Mike Portnoy again. It's 3:45. I'm letting you know what insurance you have for your business. And, of course, after we get a judgment against you for lying and stealing all that stuff that you know you've done, we'll be collecting all your assets. 419 –any questions, 874-* * *.

{¶ 14} In a third call:

> Attorney Mike Portnoy again. I called you on your telephone twice. Be prepared for a lawsuit. You will be sued in Lucas County Common Pleas Court. Your lawyer has exposed you to significant liability. I can get a fax from your former lawyer Mr. Cafferty stating that he was no longer representing you. I can deal with you directly. I spoke with Tracy at Mercer, and she read me a letter that had been sent by Mr. Cafferty in which you are responsible for any liability against Mercer. And, of course, Mr. Cafferty will be named in the lawsuit, too. Any questions give me a call.

{¶ 15} And finally:

> Mr. Napolski, this is attorney Michael Portnoy. I just spoke to someone who claimed to be your brother, Dominic Napolski. He's making some statements toward me that I think you need to answer to. My phone number is 874-* * *.

{¶ 16} Appellee Napolski testified that he considered these messages harassing, malicious and insulting.

{¶ 17} At the conclusion of the hearing, the court found nothing in the record or any of the pleadings to suggest that attorney Cafferty was acting in any capacity other than counsel for Interstate or that he agreed to personally indemnify any party. The court awarded attorney Cafferty the $2,500 he requested. Similarly, the court found no

evidence to support personal liability for appellee Napolski and no grounds for bringing Mercer into the suit. The court awarded appellee Napolski $6,893.50 for his own defense and $2,000 for the amounts he paid on behalf of Mercer. The court entered judgment against appellant and attorney Portnoy in those amounts.

{¶ 18} From this judgment, appellant now brings this appeal. Appellant[1] sets forth the following two assignments of error:

> 1. The Trial Court committed prejudicial error by failing to apply Ohio Revised Code Section 2323.51 appropriately when ordering sanctions for Attorney Cafferty.
>
> 2. The Trial Court committed prejudicial error by concluding that there was no legal Basis to name Christopher Napolski in the original lawsuit.

{¶ 19} 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. R.C. 2323.51(B)(1). The award may be against a party, the party's counsel of record or both. R.C. 2323.51(B)(4). "Frivolous conduct" includes conduct by a party or the party's counsel that:

> (i) * * * obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper

[1] The trial court imposed the sanctions jointly and severally against R & S Roofing Company and attorney Portnoy. This appeal, however, encompasses only R & S Roofing Company.

purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) * * * 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.

(iii) * * * 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.

(iv) * * * 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)(a).

{¶ 20} Civ.R. 11 sanctions may be imposed upon an attorney or a pro se party only for willful violations of the rule. In material part, Civ.R. 11 provides that all pleadings, motions and other documents must be signed by an attorney of record or a pro se litigant:

The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has 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 a 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. Similar action may be taken if scandalous or indecent matter is inserted.

{¶ 21} Appellate review of an R.C. 2323.51 determination to impose sanctions involves a mixed question of law and fact. Legal questions will be considered de novo, while factual determinations will not be disturbed if supported by competent, credible evidence. *Resources for Healthy Living, Inc. v. Haslinger*, 6th Dist. Wood No. WD-10-073, 2011-Ohio-1978, ¶ 25, quoting *Grine v. Sylvania Schools Bd. of Educ.*, 6th Dist. Lucas No. L-06-1314, 2008-Ohio-1562, ¶ 41. "Ultimately, the decision as to whether to impose sanctions under either Civ.R. 11 or R.C. 2323.51 rests in the sound discretion of the court and will not be reversed absent an abuse of that discretion." *Id.* An abuse of discretion is more than a mistake of law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

I. Attorney Cafferty

{¶ 22} In his first assignment of error, appellant insists that the trial court erred in concluding its suit against attorney Cafferty was frivolous. The allegation was that Cafferty (and Napolski) agreed personally to indemnify Mercer against any loss it might

suffer as the result of appellant's refusal to waive its liens on the Sunoco project. Appellant insists it had a good faith basis for this allegation derived from a telephone call between appellant's counsel and a Mercer representative.

{¶ 23} At the conclusion of the sanctions hearing, the trial court stated, "In the normal course of affairs, attorneys do not agree to personally indemnify claimants against their clients. That just doesn't happen." While we are certain there are rare exceptions, this seems to be an accurate statement. Given this, it would seem reckless for an attorney to act on this perceived information without confirming its veracity.

{¶ 24} More importantly, even if such indemnification existed, it does not give rise to a cause of action between Cafferty, or Napolski, or even Interstate Roofing and appellant. The only party with a cause of action on the indemnification would be Mercer. The fact of the indemnification, whether it is between Cafferty and Mercer or Interstate and Mercer, patently gives rise to no cause of action under the law for appellant and cannot be supported by a good faith argument for an extension of the law or the establishment of new law. Appellant's assertion that the granting of indemnification to Mercer somehow interferes with its contract with Interstate evades understanding.

{¶ 25} We find no misapplication of R.C. 2323.51 by the trial court in determining that the suit against attorney Cafferty was frivolous. Having reached such a conclusion, the court acted within its discretion in imposing sanctions. Appellant's first assignment of error is not well-taken.

II. Napolski

{¶ 26} In its second assignment of error, appellant maintains that the trial court erred in concluding that there was no legal basis for a claim against appellee Napolski, personally. Appellant maintains that appellee Napolski admits to being the sole shareholder of Interstate Roofing, Inc. According to appellant, there is no proof that Napolski did not exercise complete control over the corporation and there is no proof that he held himself out to be acting as president of the company rather than personally. Therefore, appellant insists, appellee Napolski exposed himself to personal liability in his dealings with appellant.

{¶ 27} "A fundamental rule of corporate law is that, normally, shareholders, officers, and directors are not liable for the debts of the corporation." *Belvedere Condominium Unit Owners' Assn. v. R. E. Roark Cos.*, 67 Ohio St.3d 274, 287, 617 N.E.2d 1075 (1993). An exception to the rule is when shareholders use the corporate entity for criminal or fraudulent purposes. Under this exception the corporate veil may be pierced and individual shareholders held liable for corporate misdeeds. *Id.* In order to pierce the corporate veil, the party seeking to disregard the corporate form must prove:

> (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust

loss resulted to the plaintiff from such control and wrong. *Id*. at paragraph three of the syllabus.

{¶ 28} To satisfy the second prong of the *Belvedere* test, the plaintiff must show that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act or a similarly unlawful act. *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, syllabus.

{¶ 29} None of the allegations in appellant's complaint go to any of the *Belvedere* factors. Even in subsequent pleadings appellant asserts no more than that appellee Napolski is the sole shareholder on Interstate Roofing Company, Inc. So, where appellant has the burden of proving the elements of *Belvedere* to bring appellee Napolski personally into the suit, it fails to even allege the elements.

{¶ 30} On this record, we cannot say that the trial court was mistaken when it concluded the suit against appellee Napolski frivolous. Moreover, the recorded telephone calls from appellant's counsel to appellee Napolski are sufficient to support a finding of willfulness. We cannot say that on these conclusions, the trial court abused its discretion in assessing for appellee Napolski his own attorney fees. Since Mercer was a stranger to the contract between appellant and Interstate, there was no cause of action stated against it and appellee Napolski was rightfully compensated for the money he expended in defense of Mercer. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 31} On consideration, the judgment of the Toledo Municipal Court is affirmed. It is ordered that appellant pay the court 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE