[Cite as *Bergman v. Genoa Banking Co.*, 2015-Ohio-2797.]

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

John Bergman

Plaintiff

v.

Genoa Banking Company

Appellee

[Daniel L. McGookey, Kathryn M. Eyster, Lauren E. McGookey, and McGookey Law Offices, LLC—Appellants]

Court of Appeals No. OT-14-019

Trial Court No. 13CV301

DECISION AND JUDGMENT

Decided: July 10, 2015

* * * * *

Alan R. McKean and Martin D. Carrigan, for appellee.

Justin D. Harris, for appellants.

* * * * *

JENSEN, J.

{¶ 1} Appellants in this case are David McGookey, Kathryn Eyster, Lauren McGookey, and McGookey Law Offices, LLC. They are counsel for John and Kathryn

Bergman, the plaintiffs in the underlying action. Appellee is Genoa Banking Company, the defendant in the underlying action. Appellants appealed the September 2, 2014 judgment of the Ottawa County Court of Common Pleas, which granted sanctions against them under R.C. 2323.51 and Civ.R. 11 for frivolous conduct in connection with their filing of the complaint in the underlying action. For the reasons that follow, we affirm the trial court judgment.

I. Background

A. The Foreclosure Proceedings

{¶ 2} The Bergmans executed a promissory note and mortgage in favor of Genoa Bank on December 21, 2008. They defaulted on their payment obligations and Genoa initiated a foreclosure action against them on January 17, 2012, in the Ottawa County Court of Common Pleas. It was assigned case No. 12-CV-026E.

{¶ 3} Genoa moved for summary judgment on July 18, 2012. The Bergmans filed no opposition. While the summary judgment motion was pending, the parties engaged in settlement discussions. Pursuant to those discussions, the Bergmans were to seek reinstatement assistance from the Ohio Housing Financing Agency ("OHFA") through a program called Save the Dream Ohio, Ohio's Hardest Hit Fund ("HHF"). That program offered funds of up to $25,000 to eligible homeowners facing foreclosure to enable them to become current with their lenders.

{¶ 4} Over the next several months, there was dialogue between the Bergmans, Genoa, and housing counselors from WSOS Community Action, Incorporated, about the

Bergmans' participation in the Save the Dream program. Genoa and the Bergmans engaged in an unsuccessful mediation. On November 12, 2012, the trial court entered a judgment of foreclosure in favor of Genoa. The Bergmans filed a motion for relief from judgment. Two weeks later they appealed to this court.

{¶ 5} Upon the motion of the Bergmans, we granted a stay of execution of the sale of their home pending appeal. That stay dissolved on July 12, 2013, when we affirmed the trial court's November 15, 2012 judgment. *Genoa Banking Co. v. Bergman,* 6th Dist. Ottawa No. OT-12-038, 2013-Ohio-3054.

{¶ 6} On July 19, 2013, an order of sale was issued. The Bergmans moved for a stay of sale on August 30, 2013, and on September 5, 2013, they filed a suggestion of bankruptcy. They initiated a Chapter 13 bankruptcy action in the U.S. District Court for the Northern District of Ohio on September 5, 2013, once again staying the case. Genoa obtained relief from the automatic bankruptcy stay and the foreclosure proceedings went forward.

B. The Lawsuit Giving Rise to This Appeal

{¶ 7} On August 12, 2013, while case No. 12-CV-026E remained pending, the Bergmans filed case No. 13CV301, the case underlying this appeal, alleging common law fraud, fraud in the inducement, breach of contract, and estoppel in connection with the failed attempts to resolve the foreclosure action. They sought punitive damages and preliminary and permanent injunctive relief. The Bergmans claimed that Genoa misrepresented its intention to settle the case while inducing them to work "tirelessly" to

pursue assistance funds from OHFA and to forego discovery. They alleged that Genoa breached a contract with them by refusing to accept the Hardest Hit funds once they obtained them.

{¶ 8} The trial court conducted a hearing on the Bergmans' motion for preliminary injunction on August 29, 2013. Charlene Watkins, a certified housing counselor specialist with WSOS, testified, as did Mr. Bergman, and Joseph Baun, a collections manager with Genoa. Numerous documents were entered as exhibits.

{¶ 9} According to the testimony and exhibits offered at the hearing, on July 5, 2012, Genoa presented a settlement offer to the Bergmans pursuant to which Genoa would consent to reinstatement of the Bergmans' loan if the Bergmans obtained funds through the Save the Dream initiative to pay outstanding principal, interest, and escrow of $14,565.76, their negative escrow balance of $3,076.00, and Genoa's legal fees. Genoa would waive accrued late charges. The proposal provided for the Bergmans to request reimbursement for legal fees through the HHF program. It also required Mrs. Bergman to make bi-weekly deposits of $910.32 to a Genoa account and for the Bergmans to execute a consent judgment entry to be filed should they default on any of the conditions of settlement. No change would be made to their original variable interest rate of 5.25 percent. The proposal specified that approval under the Save the Dream program would need to be granted and funds received within 90-100 days of Genoa's July 5, 2012 letter.

{¶ 10} On July 19, 2012, the Bergmans conveyed a counterproposal expressing that it would apply for funds through the HHF program. They requested, however, that their interest rate be reduced to a fixed rate of 3 percent and inquired whether the deposit required by Mrs. Bergman could be supplemented with funds from Mr. Bergman. They also asked whether the negative escrow balance and late fees could be paid with funds from the HHF program. Further correspondence from the Bergmans indicated concern with structuring the agreement as a reinstatement due to the Bergmans' income situation. Genoa communicated that it would address the request for the lower interest rate upon approval of Hardest Hit funds.

{¶ 11} While Genoa's proposal was dated July 5, 2012, Watkins' testimony and the correspondence offered at the hearing showed that the Bergmans did not apply for the HHF until August 1, 2012. On August 30, 2012, the Bergmans were advised by WSOS that certain financial documents were needed, but they did not supply the requested information to WSOS until October 2, 2012.

{¶ 12} According to Watkins' testimony and the exhibits presented at the hearing, Watkins spoke with the Bergmans in November of 2012 about Genoa's July 5, 2012 settlement offer, and she observed that the 90-100 day-period set forth in the offer had lapsed. Nevertheless, Watkins communicated with Genoa in an effort to reach a resolution to avoid foreclosure. These communications were memorialized in a November 13, 2012 letter from Genoa to Watkins in which Genoa proposed to settle with the Bergmans through reinstatement of the loan requiring payments of $23,669.36 for

payments past due; $703.19 for late fees; $3,076.99 for their escrow shortage; $150 for property inspection fees; and $22,013.86 for attorney fees. The proposal contained many of the same requirements as the July 5, 2012 proposal, but this proposal indicated that Genoa would accept $25,000 from the HHF program, and allow the remaining amounts to be added to the loan's current principal balance. Days later, Genoa was granted summary judgment. It is undisputed that no written settlement agreement was ever executed between Genoa and the Bergmans. Watkins testified that the Bergmans were never approved for the HHF assistance. However, Mr. Bergman claimed that he received a letter notifying him that the funds had been approved. He could not recall who sent the letter and he did not produce a copy of it.

{¶ 13} The trial court denied the Bergmans' motion for preliminary injunction from the bench and issued an order on September 5, 2013. On November 18, 2013, the Bergmans voluntarily dismissed their complaint.

{¶ 14} Genoa moved for sanctions against appellants on December 6, 2013. It claimed that appellants' conduct in filing case No. 13CV301 violated R.C. 2323.51 and Civ.R. 11. The court granted Genoa's motion for sanctions on May 1, 2014, and awarded Genoa attorney fees of $20,374.87, plus costs and interest at 3 percent per annum. Appellants requested findings of fact and conclusions of law, but before the trial court issued them, they filed a notice of appeal. We remanded the matter to the trial court so it could issue appellants' timely-requested findings of fact and conclusions of law. Those findings and conclusions were filed on September 2, 2014. Appellants filed an amended

notice of appeal which we struck on October 21, 2014 for failure to seek leave. We ultimately granted leave on December 9, 2014, and appellants filed an amended notice of appeal on December 16, 2014. They assign the following errors for our review:

> The Trial Court Erred In Finding The Conduct Of Plaintiffs' Attorneys Was Frivolous Pursuant To O.R.C. 2323.51 And Civil Rule 11 And Awarding Attorneys' Fees As Sanctions Against Them.
>
> The Trial Court Lacked Jurisdiction Pursuant To The Sixth District Court Of Appeals Decision Of *Hanson v. Riccardi* To Impose Costs And Attorney Fees As Sanctions Against Appellants After Appellants Voluntarily Dismissed Their Clients' Claims Without Prejudice.

II. Law and Analysis

{¶ 15} In their first assignment of error, appellants contend that the trial court erred in finding that they violated R.C. 2323.51 and Civ.R. 11 by filing the Bergmans' complaint, and that attorneys fees were not warranted. In their second assignment of error, they argue that the trial court lacked jurisdiction to consider Genoa's motion after appellants voluntary dismissed the lawsuit. We address appellants' assignments out of order.

A. The Trial Court's Jurisdiction

{¶ 16} R.C. 2323.51(B)(1) provides, in pertinent part:

> * * * [A]t 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 * * *.

{¶ 17} Civ.R. 11 provides:

> * * * 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. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. 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.

{¶ 18} Appellants filed a Civ.R. 41(A)(1) notice of dismissal on November 18, 2013. Genoa filed its motion for sanctions on December 6, 2013. Appellants argue that

following the November 18, 2013 dismissal, the court was without jurisdiction to consider the December 6, 2013 motion.

{¶ 19} While it is true that a Civ.R. 41(A)(1) dismissal typically divests the trial court of jurisdiction, the court retains jurisdiction to consider collateral issues that are unrelated to the merits of the case. *State ex rel. Ahmed v. Costine*, 100 Ohio St. 3d 36, 2003-Ohio-4776, 795 N.E.2d 672, ¶ 5. The Ohio Supreme Court and other Ohio appellate districts have recognized that motions for sanctions are among the collateral issues that a trial court may consider post-dismissal. *Id.* Quoting the U.S. Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397-398, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), the First District in *Schwartz v. Gen. Acc. Ins. of Am.*, 91 Ohio App.3d 603, 605, 632 N.E.2d 1379 (1st Dist.1993), explained the rationale for permitting post-dismissal consideration of a motion for sanctions:

> Voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully

before serving and filing papers." (Internal citations and quotations omitted.).

See also Stone v. House of Day Funeral Serv., Inc., 140 Ohio App.3d 713, 722, 748 N.E.2d 1200 (6th Dist.2000) (finding R.C. 2323.51 and Civ.R. 11 motion for sanctions filed after voluntary dismissal to have been timely filed).

{¶ 20} In *ABN AMRO Mtge. Grp., Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, ¶ 6, the Eighth District considered the precise issue posed in appellants' second assignment of error, and it specifically held that a motion for sanctions under either Civ.R. 11 or R.C. 2323.51 may be brought after voluntary dismissal of the action, regardless of whether dismissal is without prejudice and is not a final and appealable order. *Id.* at ¶ 13-14.

{¶ 21} Appellants, however, cite our decision in *Hanson v. Riccardi.* 6th Dist. Erie No. E-08-045, 2009-Ohio-2930, ¶ 9, where, relying on the Eighth District's decision in *Dyson v. Adrenaline Dreams Adventures*, 143 Ohio App.3d 69, 71, 757 N.E.2d 401 (8th Dist.2001) and citing to our own decision in *David v. Kaiser*, 6th Dist. No. L-03-1315, 2004-Ohio-3149, we held that that the trial court lacked jurisdiction to consider a post-dismissal motion for sanctions under R.C. 2323.51 and Civ.R. 11. In both *David* and *Dyson*, the parties sought sanctions for discovery abuses under Civ.R. 37(D), but did not file their motions until after dismissal. Both this court and the Eighth District concluded that the trial court lacked jurisdiction to consider those post-dismissal motions. However, the Eighth District clarified in *Evans* that its ruling in *Dyson* was premised on the fact

that sanctions were sought under Civ.R. 37(D). The court drew a distinction between sanctions sought for discovery abuses under Civ.R 37(D), and those sought for frivolous conduct or Civ.R. 11 violations, and explained that *Dyson* should not be applied to motions for sanctions under R.C. 2323.51 and Civ.R. 11. It addressed our reliance on *Dyson* in *Hanson*:

> Relying on *David v. Kaiser,* 6th Dist. No. L-03-1315, 2004-Ohio-3149, and *Dyson,* the Sixth District held that "once appellant dismissed his complaint, the trial court lost jurisdiction to consider [appellant's] postdismissal motion for sanctions." However, its reliance was misplaced, because both *David* and *Dyson* involved postdismissal motions for *discovery costs* under Civ.R. 37(D) and 41(D). *Id.* at ¶ 15. (Emphasis added.)

{¶ 22} *Evans* observed that Civ.R. 11 sets forth no time frame for filing a motion for sanctions, and R.C. 2323.51(B)(1) allows a motion to be filed "anytime not more than thirty days after the entry of final judgment." *Id.* at ¶ 13-14. It concluded that "a Civ.R. 41 voluntary dismissal does not divest the trial court of jurisdiction to consider a subsequently filed motion for sanctions pursuant to Civ.R. 11 or R.C. 2323.51. To hold otherwise would effectively leave an alleged aggrieved party without a remedy to pursue a claim for frivolous conduct." *Id.* at ¶ 21.

{¶ 23} We agree with the distinction drawn by the Eighth District and adopt its reasoning.[1] We find that the trial court retained jurisdiction to consider Genoa's Civ.R. 11 and R.C. 2323.51 motion for sanctions. We find appellants' second assignment of error not well-taken.

B. The Trial's Court's Decision to Impose Sanctions

{¶ 24} We now turn to appellants' first assignment of error. Appellants claim that they were exercising professional judgment and demonstrated, at most, a mere misjudgment or tactical error in filing case No. 13CV301. Genoa urges that appellants acted in bad faith by pleading facts and submitting evidence that had no factual or legal basis whatsoever.

1. R.C. 2323.51

{¶ 25} "R.C. 2323.51 employs an objective standard in determining whether sanctions should be imposed." *Stone,* 140 Ohio App.3d at 721, 748 N.E.2d 1200. The court must first determine whether the challenged conduct was "frivolous," and, if so, whether any party was adversely affected by that conduct. *Id.* at 722. Any party who has been adversely affected by frivolous conduct may be awarded reasonable attorney fees. R.C. 2323.51(B)(1).

[1] In fact, in *David,* in addition to reviewing the denial of a Civ.R. 37(D) motion for sanctions, we reviewed the denial of a motion for R.C. 2323.51 and Civ.R. 11 sanctions. Although we affirmed the denial of Civ.R. 37(D) sanctions based on the trial court's lack of jurisdiction, we did not apply the same rationale for affirming the denial of R.C. 2323.51 and Civ.R.11 sanctions.

{¶ 26} A decision to impose sanctions under R.C. 2323.51 involves a mixed question of law and fact. *R & S Roofing Co. v. Mercer-N. Am., Inc.*, 6th Dist. Lucas No. L-13-1161, 2014-Ohio-1763, ¶ 21. We review the trial court's legal conclusions de novo, but we will not disturb its factual determinations if supported by competent, credible evidence. *Id.*

{¶ 27} R.C. 2323.51(A)(2)(a) defines "frivolous conduct" to mean:

> (a) Conduct of [a] party to a civil action * * * or [the] party's counsel of record that satisfies any of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action * * * or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (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.
>
> (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.

(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} Genoa argues that appellants acted frivolously and in violation of R.C. 2323.51 because it filed case No. 13CV301 and sought an injunction to prevent the sale of the Bergmans' home despite the fact that case No. 12-CV-026E remained pending and this court had already affirmed the trial court's judgment of foreclosure. It contends that appellants lacked a good faith basis for arguing that a settlement agreement had been reached in case No. 12-CV-026E because the written correspondence offered as evidence of an alleged settlement was marked "for settlement purposes only," was clearly not admissible, established that no agreement had, in fact, been reached, and was previously deemed by this court to be inadmissible.

{¶ 29} Appellants submit that the goal of R.C. 2323.51 of sanctioning egregious conduct must be balanced against the duty to zealously represent one's client. They warn against the chilling effect of sanctions. They claim that they had no intent to harass and that they pursued claims for which they had a reasonable good faith belief. Appellants cite to case law establishing that unsigned settlement agreements have been enforced by courts, as well as case law suggesting that it does not constitute frivolous conduct to file a second suit against a prevailing party. They contend that their client believed a settlement with Genoa "existed in principle," and whether a contract, in fact, existed was a question of law for the court.

{¶ 30} In the Bergmans' complaint, appellants asserted that Genoa breached a contract with the Bergmans by refusing to accept funds to reinstate their loan. Appellants asserted that the Bergmans had been approved for HHF. In paragraph 40 of the Bergmans' complaint, they specifically referenced a November 8 email that purported to attach a letter confirming the approval of HHF. No such letter or email is contained anywhere in the file transmitted to this court. At the preliminary injunction hearing, Mr. Bergman could not produce a copy of it, nor could he recall who sent it. Watkins denied sending the letter or that the Bergmans ever obtained approval of the funds. At the hearing, Mr. Bergman was clear that no one from Genoa represented to him that they had reached a reinstatement agreement:

> Q: Did anyone from Genoa Bank ever tell you, "John, we got a deal on reinstatement"?
>
> A: Never.

{¶ 31} "To assert a claim that a contract existed, a plaintiff must allege facts showing an offer and an acceptance and a meeting of the minds, which is supported by consideration." *Siemaszko v. FirstEnergy Nuclear Operating Co.*, 187 Ohio App.3d 437, 2010-Ohio-2121, 932 N.E.2d 414, ¶ 23, citing *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. The correspondence produced at the preliminary injunction hearing—as well as Mr. Bergman's own testimony— makes clear that no agreement was ever reached. Following Genoa's July 5, 2012 offer, appellants made counterproposals that had not been accepted by Genoa, the Bergmans expressed an

inability to pay Genoa's attorney fees, and HHF was not obtained and remitted to Genoa. No written agreement was signed despite the fact that R.C. 1335.05 would require any such agreement to be in writing. *See FirstMerit Bank, N.A. v. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, 7 N.E.3d 1150, ¶ 23-25 (holding that oral agreement to release mortgage is a transfer of property subject to R.C. 1335.05, even if characterized as a settlement agreement); *U.S. Natl. Bank Assn., N.A. v. Bartholomew*, 5th Dist. Stark No. 2011CA0051, 2012-Ohio-3703, ¶ 18 ("In order to be enforceable, the modification to a contract affecting an interest in land must be in writing and 'signed by the party to be charged therewith or some other person ... authorized.' R.C. 1335.04 and R.C. 1335.05."). No contract existed despite appellants' assertions to the contrary. As such, appellants brought claims that were not warranted under existing law, and made factual contentions that lacked evidentiary support and were not warranted by the evidence.

{¶ 32} We agree that the claims asserted by appellants were legally groundless and we find that there was competent, credible evidence to support the trial court's imposition of sanctions under R.C. 2323.51.

2. Civ.R. 11

{¶ 33} The purpose of Civ.R. 11 is to ensure that a pleading is filed in good faith with adequate supporting grounds. In ruling on a Civ.R. 11 motion for sanctions, the court "'must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay.'" *Stone*, 140 Ohio

App.3d at 720-21, 748 N.E.2d 1200, quoting *Ceol v. Zion Indus., Inc.*, 81 Ohio App.3d 286, 290, 610 N.E.2d 1076 (9th Dist.1992). Expenses and attorney fees are available to the opposing party only for willful, but not merely negligent, violations of Civ.R. 11. *Rindfleisch v. AFT, Inc.*, 8th Dist. Cuyahoga Nos. 84551, 84897, 84917, 2005-Ohio-191, ¶ 16.

{¶ 34} We review a trial court's judgment granting Civ.R. 11 sanctions for an abuse of discretion. *Kreger v. Spetka*, 6th Dist. Lucas No. L-05-1029, 2005-Ohio-3868, ¶ 11. An abuse of discretion is more than a mere error in judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court in reaching its decision. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 35} Genoa contends that appellants violated Civ.R. 11 because there was no legal basis for filing the complaint and the motion for injunctive relief. They maintain that any inquiry into the factual and legal contentions asserted in the complaint would have rendered this obvious to appellants.

{¶ 36} Appellants argue that subjective bad faith and willful misconduct is required to find a violation of Civ.R. 11. They claim that they spent seven hours consulting with their clients, reviewing pertinent file materials, researching case law, and preparing the complaint. They claim that they believed—and still do believe—that there was good ground to support the lawsuit.

{¶ 37} We agree with Genoa and with the trial court's conclusion. Appellants must have been aware that no contract existed to justify their pleading of a breach of contract claim. In fact, it is clear from the documents and the testimony at the preliminary injunction hearing that all were aware that the parties had not moved past the point of settlement negotiations. To plead and represent otherwise was a willful violation of Civ.R. 11. We find no abuse of discretion in the trial court's granting of Genoa's motion for sanctions.

{¶ 38} We find appellants' first assignment of error not well-taken.

III. Conclusion

{¶ 39} We find appellants' assignments of error not well-taken and affirm the September 2, 2014 judgment of the Ottawa County Court of Common Pleas granting Genoa's motion for sanctions. The costs of this appeal are assessed to appellants 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

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE