[Cite as *Poindexter v. Grantham*, 2011-Ohio-1576.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95825

ROBERT POINDEXTER

PLAINTIFF-APPELLEE

vs.

ESSIE GRANTHAM, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-733524

BEFORE: Jones, J., Blackmon, P.J., and Keough, J.

RELEASED AND JOURNALIZED: March 31, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Essie Grantham ("Grantham") and Kathryn Kelso ("Kelso") ("collectively referred to as "Grantham" or "the sisters"), appeal the trial court's denial of their motion for attorney fees. Finding merit to the appeal, we reverse and remand for a hearing on attorney fees.

Procedural History and Facts

{¶ 2} In September 2009, plaintiff-appellee, Robert Poindexter ("Poindexter"), filed a complaint in Cuyahoga Common Pleas Court against his two sisters, Grantham and Kelso, requesting a temporary restraining order and alleging misdeeds by the sisters relating to rental property the three siblings inherited. See *Poindexter v. Grantham,* Cuyahoga Common Pleas Case No. CV-703587. The trial court appointed an agreed upon receiver and Grantham filed a notice of appeal on July 14, 2010. See *Poindexter v. Grantham*, Cuyahoga App. No. 95413.

{¶ 3} On August 5, 2010, Poindexter filed a second complaint and request for temporary restraining order, which was designated as Cuyahoga Common Pleas Case No. CV-733524 and assigned to a different judge. On the designation form, Poindexter referenced Case No. CV-703587 and also attached affidavits to the complaint from himself and counsel, in which he requested for an immediate restraining order. Poindexter alleged that the sisters were attempting to circumvent the receiver appointed in Case No. CV-703587 by continuing to collect rent from tenants in the commonly-owned property. Importantly, the complaint mirrored that of the one filed in Case No. CV-703587.

{¶ 4} The trial court set the matter for hearing for August 9, 2010. On August 6, a law clerk for plaintiff's counsel faxed a cover letter to the sisters' counsel indicating that a hearing had been scheduled on the restraining order, but the clerk did not indicate the date of hearing and failed to attach a copy of the newly filed complaint. Grantham's attorney

subsequently learned from another judge that the hearing had been set for August 9.[1]

{¶ 5} On August 12, 2010, Poindexter voluntarily dismissed Case No. CV-733524. Grantham subsequently filed a motion for attorney fees in the case, alleging that Poindexter had engaged in frivolous conduct by filing a second complaint that was identical to the first. In his affidavit in response to Grantham's motion for fees, Poindexter's attorney avers that he dismissed the case after finding out from the trial court's staff attorney that the judge was going to dismiss the complaint. The trial court denied the motion for attorney fees, without hearing or opinion.

{¶ 6} Grantham now appeals, raising the following assignment of error for our review:

{¶ 7} "I. Appellant's R.C. 2323.51 motion for attorney fees demonstrated arguable merit, thus the trial court abused its discretion when denying such motion without a hearing."

R.C. 2323.51 Sanctions

{¶ 8} R.C. 2323.51 governs the award of attorney's fees as a sanction for frivolous conduct and outlines the requirements for such an award. R.C. 2323.51(B) provides that "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." R.C. 2323.51(A)(2)(a) defines frivolous conduct as conduct by a party to a

[1] In pleadings and on appeal, both Grantham and Poindexter reference a conference or hearing held with the trial court on August 9, but there is no transcript in the trial court record nor any docket entries referencing that conference.

civil action when:

> "(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.
>
> "(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."

{¶ 9} Unlike a Civ.R. 11 sanction, an award pursuant to R.C. 2323.51 does not require a subjective finding that the attorney's actions were "willfull" and determined without reference to what the attorney or client knew or believed. *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 289, 291, 610 N.E.2d 1076. Instead, a R.C. 2323.51, or statutory analysis "boils down to a determination of whether an action taken by a party or attorney to be sanctioned constitutes 'frivolous conduct,' and what amount, if any, of reasonable attorney's fees necessitated by the frivolous conduct is to be awarded to the aggrieved party." Id. at 291. Accordingly, one applies an objective standard in determining frivolous conduct under the statute. See *Bikkani v. Lee*, Cuyahoga App. No. 89312,

2008-Ohio-3130, ¶22. R.C. 2323.51 is also broader in scope than Civ.R. 11, and provides a court with the discretion to levy sanctions against "a party, the party's counsel of record, or both." R.C. 2323.51(B)(4). *Burrell v. Kassicieh* (1998), 128 Ohio App.3d 226, 229, 714 N.E.2d 442.

{¶ 10} Our review of a trial court's decision on a motion for sanctions is reviewed for an abuse of discretion. *Mitchell v. W. Res. Area Agency on Aging*, Cuyahoga App. Nos. 83837 and 83877, 2004-Ohio-4353, citing *Cook Paving & Constr. Co. Inc. v. Treeline Inc.*, Cuyahoga App. No. 77408, 2001-Ohio-4235; *Pisani v. Pisani* (1995), 101 Ohio App.3d 83, 654 N.E.2d 1355.

{¶ 11} This court has determined that R.C. 2323.51 requires the trial court to hold a hearing before it can make an award of attorney's fees as a sanction for frivolous conduct, but the same is not required when the court declines to award attorney fees. See *First Place Bank v. Stamper*, Cuyahoga App. No. 80259, 2002-Ohio-3109.

{¶ 12} In other words, the trial court in this case would have had to hold a hearing before it granted attorney fees. But the trial court was not mandated to hold a hearing before denying Grantham's motion. That being said, Ohio courts have recognized that a trial court abuses its discretion when it "arbitrarily" denies a request for attorney fees. *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 589 N.E.2d 462; *Mitchell* at ¶27. An arbitrary denial occurs when (1) the record clearly evidences frivolous conduct and (2) the trial court

nonetheless denies a motion for attorney fees without holding a hearing. *Bikkani* at ¶31.

{¶ 13} Grantham argues that Poindexter's initiation of a second court action identical to an existing court action constituted frivolous conduct because it caused them to hire their attorney to defend two identical actions. Poindexter maintains that he only filed the second complaint because the trial court judge in the first case was on vacation for the first two weeks of August and he needed an immediate restraining order to stop his sisters from collecting rent. According to Poindexter's attorney, the judge's staff attorney in the first case advised him to file another complaint and request for a temporary restraining order; thus, he argues, he was just following the suggestion of the trial court's staff. He also points out as evidence of his good intention that he designated that the new case was related to a case in another courtroom.[2]

{¶ 14} It is well established that the pendency of a prior action between the same parties and involving the same subject matter in another court of concurrent jurisdiction requires dismissal of the second lawsuit. *Konicek v. Elyria* (1987), 37 Ohio App.3d 43, 523 N.E.2d 516; *Devito v. Univ. Hosp.* (Feb. 20, 1992), Cuyahoga App. No. 62626. It is also well settled that once a court acquires jurisdiction over a cause, its authority continues until the matter is completely and finally disposed of, and no court of concurrent jurisdiction is at liberty to interfere with its proceedings. *Knowlton Co. v. Knowlton* (1992), 63 Ohio St.3d 677, 590 N.E.2d 1219. Although the second action was filed in the same court as the first, we find that

[2]We do note that neither the case designation, the complaint, nor the affidavits attached to the

the law as stated above is instructive in this case.

{¶ 15} The record in this case is replete with evidence that the filing of the second case could constitute frivolous conduct. First, Poindexter's attorney claims he filed the second action in order to secure his client an immediate restraining order because the judge in the first action was on vacation. But Grantham had already filed their notice of appeal in Case No. CV-703587. Therefore, the trial court may not have had jurisdiction to rule on the restraining order even if the trial court had been available. Although Poindexter's attorney claims that he was just following the advice of the trial court's staff attorney in filing the action, that claim is merely an unsupported assertion. Poindexter and his counsel both submitted affidavits in response to Grantham's motion for attorney fees, but neither of those affidavits referenced the attorney's allegation that it was the trial court's staff attorney that recommended Poindexter file a new complaint. And even if the staff attorney did give such advice, that may not excuse counsel's filing of a duplicitous action when the first action was under appeal, just because the judge in the first case could not act as quickly as Poindexter would have liked him to. Moreover, when looking at Poindexter's actions objectively, it does not matter whether his intentions were just.

{¶ 16} Second, the sisters allege that because the receiver appointed in Case No. CV-703587 had not filed his bond as of the date Poindexter filed his second complaint, the

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second complaint indicated or explained that Case No. CV-703587 was a current and pending case.

receiver did not have the authority to collect rent; thus, the sisters acted correctly in continuing to collect the rent.

{¶ 17} Finally, Grantham argues that opposing counsel's failure to notify them of the filing of the complaint and the date and time of the hearing on the temporary restraining order constituted frivolous conduct. Poindexter's counsel claims that the failure to notify Grantham of the hearing date was a clerical mistake as his law clerk inadvertently forgot to put the hearing date on the cover letter of a facsimile sent to Grantham's attorney and that failure was not with the intent to deceive them. It is up to the trial court whether this action also constituted frivolous conduct.

{¶ 18} Although we are cognizant that our review in this case is for an abuse of discretion, which is a high threshold to overcome, we find that it has been met in this case. In a case such as this, where the record contains substantial evidence that frivolous conduct may have occurred, the trial court erred when it did not hold a hearing to determine whether Poindexter's actions in filing the second case constituted frivolous conduct as defined by the statute. On remand, the trial court is to hold a hearing.

{¶ 19} Therefore, the sole assignment of error is sustained.

{¶ 20} Accordingly, judgment is reversed.

It is ordered that appellants recover of appellee their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR