[Cite as *Cawrse v. Melvin Banchek Co., L.P.A.*, 2015-Ohio-5149.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102765

IN RE SANCTIONS: RONALD APELT

[Appeal by Jeffrey F. Slavin, Defendant-Appellant]

In the matter styled:

CHARLES CAWRSE, Plaintiff

vs.

MELVIN BANCHEK CO., L.P.A., ET AL., Defendants

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-815498

BEFORE: Boyle, J., Celebrezze, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: December 10, 2015

FOR APPELLANT

Jeffrey F. Slavin, pro se
26727 Fairmount Boulevard
Beachwood, Ohio 44122

FOR APPELLEE

Ronald A. Apelt, pro se
Apelt Law Firm, L.L.C.
20600 Chagrin Boulevard, Suite 400
Shaker Heights, Ohio 44122

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Jeffrey F. Slavin, appeals from the trial court's denial of his motion for sanctions against appellee, Ronald Apelt, attorney for plaintiff, Charles Cawrse. In his sole assignment of error, Slavin argues that the trial court abused its discretion in denying his motion for sanctions. Finding no merit to Slavin's appeal, we affirm.

I. Procedural History and Factual Background

{¶2} In October 2013, Cawrse filed a complaint against Slavin for abuse of process and violations of the Fair Debt Collection Practices Act ("FDCPA"). Slavin, an attorney, represented Cawrse's ex-wife in an attempt to collect pension money owed to her by Cawrse from their divorce. The facts that led to Cawrse filing the complaint against Slavin are as follows.

{¶3} Cawrse and his ex-wife entered into an agreed judgment entry in August 2010, where Cawrse agreed to pay his ex-wife $150,000 over a period of seven years, beginning with a $5,000 payment and then making eight installment payments of $18,125 by a specific date once per year through 2017. Cawrse agreed to sign a cognovit note reflecting the agreed payment amount. At this time, Cawrse's ex-wife was represented by a different attorney; she did not hire Slavin until later. Cawrse was also represented by someone other than Apelt at this time.

{¶4} On January 26, 2012, Slavin (now representing Cawrse's ex-wife) obtained a judgment on the cognovit note against Cawrse in the Cuyahoga County Court of Common Pleas. Slavin then transferred the judgment on the cognovit note to the Cleveland Municipal Court on September 13, 2012, and to the Lyndhurst Municipal Court on October 12, 2012.

{¶5} After transferring the judgment on the cognovit note to the Lyndhurst Municipal Court, Slavin moved to have attorney Melvin Banchek appointed as a receiver in that court to

attempt to collect on the judgment. Cawrse alleged that Slavin requested that a receiver be appointed in Lyndhurst Municipal Court "although being fully aware that Plaintiff Charles Cawrse did not own, live, work or have any personal property within the jurisdictional limits of the Lyndhurst Municipal Court."

{¶6} According to Cawrse's complaint, Slavin further requested "that the Lyndhurst Municipal Court grant the receiver authority to 'sell the business assets' of a limited liability company that did not owe any debt to [Cawrse's ex-wife], was not a party to any action, and was certainly not within the jurisdiction of the Lyndhurst Municipal Court." Slavin also requested authority for the receiver to take possession of the premises and "the goods, wares, chattels, merchandise, and all other assets of [Cawrse]" at his personal residence located at an address in Ashland, Ohio. Cawrse asserted in his complaint that "at all times relevant," he did not own the Ashland residence. The Lyndhurst Municipal Court granted Slavin's motion and appointed Banchek as the receiver.

{¶7} In May 2013, Cawrse and his ex-wife (represented by Slavin) entered into a stipulated joint motion to vacate cognovit judgment pursuant to Civ.R. 60(B)(4) in the Cuyahoga County Court of Common Pleas. In the joint motion, the parties stated that "the judgment was taken by cognovit in violation of R.C. 2323.13(E), as the underlying matter was based upon a consumer transaction and the court did not have jurisdiction to render a judgment."

{¶8} In Cawrse's October 2013 complaint, he also brought claims against Banchek for breach of fiduciary duty and violations of the FDCPA. Cawrse and Banchek settled their dispute through mediation in November 2014. Cawrse's claims against Slavin were not settled.

{¶9} Just prior to the scheduled trial date, Cawrse filed a notice of voluntary dismissal without prejudice pursuant to Civ.R. 41(A) on December 8, 2014. Subsequently, Slavin moved

for sanctions against Apelt, which the trial court denied. It is from this judgment that Slavin appeals.

II. R.C. 2323.51 and Civ.R. 11

{¶10} Slavin argues that Apelt is subject to sanctions under R.C. 2323.51 and Civ.R. 11 based solely on Count 1 of Cawrse's complaint, which alleged that Slavin violated the FDCPA.

{¶11} R.C. 2323.51 governs the award of attorney fees as a sanction for frivolous conduct. R.C. 2323.51(A)(2)(a) defines "frivolous conduct" to mean conduct that satisfies any of the following:

> (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.

{¶12} Although Slavin does not explicitly state what frivolous conduct Apelt committed under R.C. 2323.51(A)(2)(a), it is clear from his arguments that he is asserting that Apelt is liable under R.C. 2323.51(A)(2)(a)(ii) (the claim is not warranted under existing law).

{¶13} In *Hickman v. Murray*, 2d Dist. Montgomery No. CA15030, 1996 Ohio App. LEXIS 1028 (Mar. 22, 1996), the court explained:

> [R.C. 2323.51] is to be applied carefully so that legitimate claims are not chilled. *Beaver Excavating Co. v. Perry Twp.* (1992), 79 Ohio App.3d 148, 606 N.E.2d 1067. A party is not frivolous merely because a claim is not well-grounded in fact. *Richmond Glass & Aluminum Corp. v. Wynn* (Sept. 5, 1991), 1991 Ohio App. LEXIS 4195, Columbiana App. No. 90-C-46, unreported at 2. Furthermore, the statute was not intended to punish mere misjudgment or tactical error. *Turowski v. Johnson* (1991), 70 Ohio App.3d 118, 123, 590 N.E.2d 434, quoting *Stephens v. Crestview Cadillac* (1989), 64 Ohio App.3d 129, 134, 580 N.E.2d 842. Instead, the statute was designed to chill egregious, overzealous, unjustifiable, and frivolous action. *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 706, 589 N.E.2d 462.
>
> Whether a claim is warranted under existing law is an objective consideration. *Lewis v. Celina Fin. Corp.* (1995), 101 Ohio App.3d 464, 473, 655 N.E.2d 1333, citing *Ceol v. Zion Indust. Inc.* (1992), 81 Ohio App.3d 286, 291, 610 N.E.2d 1076. The test, we find, is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim.

Hickman at *13-14.

{¶14} The question of whether conduct is frivolous is a question of law that an appellate court independently reviews. *Burchett v. Larkin*, 192 Ohio App.3d 418, 2011-Ohio-684, 949 N.E.2d 516, ¶ 22 (4th Dist.). If a reviewing court finds, however, that the trial court's frivolous conduct finding is substantiated, the decision to award attorney fees as a sanction for that conduct rests within the trial court's sound discretion. *Id*. "Consequently, we will not reverse a trial court's decision to award attorney fees for frivolous conduct under R.C. 2323.51 absent an abuse of that discretion." *Id*., citing *Riley v. Langer*, 95 Ohio App.3d 151, 159, 642 N.E.2d 1 (1st Dist.1994), *overruled on other grounds, Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶ 22 (1st Dist.), fn. 16; *see also Blackburn v. Lauder*, 4th Dist. Lawrence No. 96CA5, 1996 Ohio App. LEXIS 5108, *3 (Nov. 12, 1996) ("A decision to impose sanctions pursuant to this statute rests with the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion.").

{¶15} Civ.R. 11 provides that for pleadings, motions, and other documents signed by attorneys representing parties in a case, the signature of an attorney "constitutes a certificate by the attorney * * * that the attorney * * * has read the document; that to the best of the attorney's * * * knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." The rule further provides that "[f]or a willful violation of this rule, an attorney * * *, 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."

{¶16} "Civ.R. 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation must be willful." *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 19, citing *Riston* at ¶ 9, and *Ransom v. Ransom*, 12th Dist. Warren No. 2006-03-031, 2007-Ohio-457, ¶ 25. Thus, "[a]ny violation must be willful; negligence is insufficient to invoke Civ.R. 11 sanctions." *Oakley v. Nolan*, 4th Dist. Athens No. 06CA36, 2007-Ohio-4794, ¶ 13.

{¶17} In *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994, the Ohio Supreme Court stated:

> The power to sanction attorneys who file baseless actions is the power to punish and deter. The United States Supreme Court has observed that the purpose of Fed.R.Civ.P. 11, which is analogous to Civ.R. 11, is to curb abuse of the judicial system because "[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Cooter & Gell v. Hartmarx Corp.* (1990), 496 U.S. 384, 398, 110 S.Ct. 2447, 110 L.Ed.2d 359. The court noted that the specter of Rule 11 sanctions encourages civil litigants to "'stop, think and investigate more carefully before serving and filing papers.'" *Id.*, quoting Amendments to Federal Rules of Civil Procedure (1983), 97 F.R.D. 165, 192 (March 9, 1982 letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules).

Moss at ¶ 21.

{¶18} We will not reverse a court's decision on a Civ.R. 11 motion for sanctions absent an abuse of discretion. *State ex rel. Fant v. Sykes*, 29 Ohio St.3d 65, 65, 505 N.E.2d 966 (1987). An abuse of discretion occurs when there is no sound reasoning process that would support the decision. *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶19} Thus, we must determine under R.C. 2323.51 and Civ.R. 11(1) whether a reasonable attorney would have brought the FDCPA claim against Slavin, and (2) whether Apelt brought the FDCPA claim against Slavin knowing that there was not good grounds to support it. To answer this question, we must look to the FDCPA.

III. Fair Debt Collection Practices Act

{¶20} The United States Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. 1692a.

{¶21} Under the FDCPA, a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. A debt collector is also prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. The FDCPA includes a list of these prohibited practices under each of these sections. *See* 15 U.S.C. 1692e and f.

{¶22} The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5). As the

plain language of the statute indicates, not all obligations to pay are considered debts subject to the FDCPA. Rather, the FDCPA may be triggered only when an obligation to pay arises out of a consumer transaction. *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992) (holding that the FDCPA applies only to "consumer debts" incurred "primarily for personal, family, or household purposes").

{¶23} A "debt collector" includes "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Within this context, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. 1692a(3).

{¶24} In this case, Slavin makes two arguments as to why the FDCPA claim is frivolous and Apelt knowingly filed it in bad faith: (1) the underlying collection matter was not a "consumer transaction," and (2) that he does not "regularly" practice collection law.

A. Consumer Loan and Consumer Transaction

{¶25} Slavin maintains that the underlying collection matter was not a consumer transaction (and therefore the FDCPA does not apply) because it involved a collection action of pension funds in a divorce case.

{¶26} Apelt contends that the FDCPA claim was warranted under Ohio law because the underlying collection matter — Slavin's actions in attempting to collect owed pension funds from Cawrse to his ex-wife — was a consumer transaction. In arguing that the underlying collection matter involved a consumer transaction, Apelt relies on this court's decision in *Dodick v. Dodick*, 8th Dist. Cuyahoga Nos. 67385 and 68588, 1996 Ohio App. LEXIS 208 (Jan. 25, 1996), which involved an invalid cognovit note under R.C. 2323.13(E)(1).

{¶27} R.C. 2323.13(E) states in pertinent part: "A warrant of attorney to confess judgment * * *, arising out of a consumer loan or consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant." R.C. 2323.13(E) sets forth the following definitions:

> (1) "Consumer loan" means a loan to a natural person and the debt incurred is primarily for a personal, family, educational, or household purpose. The term "consumer loan" includes the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor; the creation of a debt by a credit to an account with the lender upon which the debtor is entitled to draw; and the forebearance [sic] of debt arising from a consumer loan.
>
> (2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, to an individual for purposes that are primarily personal, family, educational, or household.

{¶28} In *Dodick*, when appellee-husband and appellant-wife divorced, the parties agreed that husband would transfer his "beneficial rights" to property over to wife and wife would sign an installment cognovit note to secure payment for the $33,000 encumbrance owed to husband on the property. After wife failed to make the installment payments on the cognovit note, husband obtained a judgment against wife in the amount of the cognovit note. Wife moved for relief from judgment, arguing that the trial court did not have jurisdiction on the cognovit note because the money owed to husband arose from a consumer transaction. The trial court denied wife's motion (as relevant to this issue) and she appealed.

{¶29} This court agreed with wife in *Dodick* that the money owed to husband arose out of a consumer loan, and therefore, the cognovit judgment entered against her was void. *Id*. at *10. We relied on the Supreme Court's decision in *Shore West Constr. Co. v. Sroka*, 61 Ohio St.3d 45, 572 N.E.2d 646 (1991), which held that "a loan obtained for purposes of purchasing real

estate may be a 'consumer loan.'" *Id.* at paragraph two of the syllabus. In *Shore West*, the Supreme Court stated that under R.C. 2323.13(E)(1), there are four elements to the definition of consumer loan: "(1) there must be a 'loan'; (2) to a 'natural person'; (3) by which a debt is incurred; (4) for primarily personal, family, educational or household purposes." *Id.* at 48. In analyzing the four "consumer loan" elements in *Dodick*, we explained:

> In the case at bar, wife has established the four elements necessary for a consumer loan. The first element is that there must be a "loan." At the time of the divorce, the parties agreed that the husband had a "beneficial ownership" in the property which he transferred to the wife for $ 33,000. She initially paid him $ 5,000. For the remainder husband extended credit with a cognovit note, thus giving the wife the opportunity to pay over time. As a loan to pay for an encumbrance on the property, this transaction satisfies the first element. The second element, that the loan be to a natural person, is also satisfied: wife is a natural person as opposed to a corporate or other business entity. As to the third element, it is uncontroverted that a $ 28,000.00 debt was incurred by defendant. Finally, the fourth element requires that the debt be incurred for primarily "personal, family, educational or household purposes." This debt was incurred so that defendant could have a home for herself and her children. One could not think of a better example of family or household purpose. The elements of a consumer loan having been satisfied, the cognovit judgment entered against defendant is void.

Id. at *10.

{¶30} This case is directly on point with *Dodick*, 8th Dist. Cuyahoga Nos. 67385 and 68588, 1996 Ohio App. LEXIS 208, for purposes of R.C. 2323.13(E)(1). Cawrse initially paid his ex-wife $5,000. For the remainder, Cawrse's ex-wife extended credit to him with a cognovit note, thus giving Cawrse the opportunity to pay $145,000 over a period of seven years. As to the remaining three elements of whether there was a "consumer loan," Cawrse is a natural person; he incurred a $150,000 debt; and the debt, which arose from Cawrse's ex-wife's portion of Cawrse's pension, was certainly for "personal, family, educational or household purposes."

{¶31} Therefore, under *Dodick*, it was reasonable for Apelt to assert that because the underlying collection matter involved Slavin attempting to collect on a "consumer loan," that it also fell within the ambit of the FDCPA. We note, however, that our conclusion does not mean that Cawrse would necessarily succeed on his FDCPA claim if it actually went to trial. But we are saying that Apelt's conduct in filing the FDCPA claim on Cawrse's behalf was not frivolous under R.C. 2323.51(A)(2)(a)(ii). Nor can we say that Apelt knowingly filed the claim in bad faith; there is simply no evidence that he did.

B. Debt Collector

{¶32} Slavin further argues that the FDCPA claim is frivolous, and Apelt did not file it in good faith because Slavin does not "regularly" practice collection law, and therefore, the FDCPA does not apply to him.

{¶33} In order to be covered by the FDCPA's definition of "debt collector," debt collection must be Slavin's principal purpose of his business or he must regularly engage in debt collection. There is no argument that Slavin's principal practice involved debt collection, and thus, we are only addressing the second prong, i.e., whether there is evidence that Slavin regularly engaged in debt collection.

{¶34} "[R]egularly" engaging in debt collection activity under the FDCPA means having more than "occasional" involvement. *Schroyer v. Frankel*, 197 F.3d 1170, 1174 (6th Cir.1999). "[F]or a court to find that an attorney or law firm 'regularly' collects debts for purposes of the FDCPA, a plaintiff must show that the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice." *Id*. at 1176. "Whether a party 'regularly' attempts to collect debts is determined by the volume or frequency of its debt-collection activities." *Stamper v. Wilson &*

Assoc., P.L.L.C., E.D.Tenn. No. 3:09-cv-270, 2010 U.S. Dist. LEXIS 31770, *21 (Mar. 31, 2010).

{¶35} In order to identify whether an attorney is acting as a debt collector, courts look to the volume of the attorney's collection activities, the frequent use of a particular debt collection document or letter, whether there exists a steady relationship between the attorney and the collection agency or creditor represented, what portion of the overall caseload debt collection cases constitute, and what percentage of revenues are attributable to debt collection activities. *Schroyer* at 1176. Even where debt collection constitutes a minor portion of a law practice, liability may still lie where the defendant has a continuing relationship with a client who is substantially involved in debt collection. *Id.*, citing *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F.Supp. 319 (E.D. Mich.1992).

{¶36} In this case, the facts as to whether Slavin regularly practices debt collection are not very well developed. But we are not trying to decide if there were sufficient facts to find Slavin liable as a debt collector under the FDCPA. Nor are we even trying to determine if there are genuine issues of material fact as to whether Slavin regularly practices debt collection. We just need to determine if Apelt's filing of the FDCPA claim against Slavin was frivolous or brought in bad faith.

{¶37} Apelt filed the FDCPA claim against Slavin on behalf of Cawrse after Slavin attempted to collect money from Cawrse that he owed to his ex-wife, who was a client of Slavin's. Although Cawrse legitimately owed the money to his ex-wife, Slavin wrongly went about trying to collect it.

{¶38} Cawrse filed his complaint against Slavin in October 2013, alleging the FDCPA claim and an abuse-of-process claim. Slavin moved for summary judgment on December 20,

2013, asserting the same arguments that he made in his motion for sanctions (just as in his motion for sanctions, Slavin did not move for summary judgment on the abuse of process claim). In his brief in opposition to Slavin's motion for summary judgment, Cawrse replied that discovery had not yet been conducted at that point to determine the "regularity" of Slavin's debt collection activities. But Cawrse further asserted that "an internet search of [Slavin] under a site Merchantcircle.com, part of [Slavin's] practice is described in part as a 'debt relief agency.'" Cawrse attached a copy of the Merchantcircle.com results to his brief in opposition.

{¶39} The trial court denied Slavin's motion for summary judgment. Although the trial court did not say so, it essentially denied Slavin's motion for summary judgment because it found that there were genuine issues of material fact as to whether the matter was a consumer transaction and as to whether Slavin regularly practiced debt collection.

{¶40} After review, we conclude that Apelt's conduct was not frivolous when he filed the FDCPA claim against Slavin on Cawrse's behalf. Whether an attorney regularly practices debt collection is a question of fact to be determined on a case-by-case basis. It was reasonable for Apelt to file the FDCPA claim with the knowledge he had at the time of filing. We further find that there is no evidence in the record indicating that Apelt acted in bad faith when he filed the FDCPA claim.

{¶41} Accordingly, we overrule Slavin's assignment of error.

{¶42} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
TIM McCORMACK, J., CONCUR