[Cite as *Grimes v. Oviatt*, 2017-Ohio-1174.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104491

JEFFREY GRIMES

PLAINTIFF-APPELLEE

vs.

RICHARD A. OVIATT, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-848472

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 30, 2017

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Richard Oviatt, an attorney licensed to practice law in the state of Ohio, appeals, pro se, several decisions of the trial court, including the court's denial of his motion for sanctions against plaintiff-appellee, Jeffrey Grimes. Finding some merit to the appeal, we affirm in part, reverse in part, and remand for further proceedings.

A. Procedural History and Facts

{¶2} Grimes and defendant John Selwyn, who was represented by Oviatt, have a long and arduous history, which this court has previously set forth in *Selwyn v. Grimes*, 8th Dist. Cuyahoga No. 101252, 2014-Ohio-5147 ("*Grimes Appeal I*"). We summarize the facts as follows.

{¶3} In June 1983, Grimes allegedly smashed a beer bottle into Selwyn's face. On June 21, 1985, Selwyn subsequently obtained a default judgment against Grimes in the amount of $50,000 in compensatory damages and $50,000 in punitive damages in Cuyahoga C.P. No. CV-84-082351. Thereafter, on September 19, 1985, Selwyn made a single attempt to execute on the judgment.

{¶4} On March 30, 1987, Grimes filed a petition in bankruptcy court and obtained a stay of all the proceedings. Selwyn subsequently filed an adversary action contesting the discharge of the judgment. On August 17, 1987, the bankruptcy court declared the judgment nondischargeable. On October 29, 1987, Grimes was discharged from bankruptcy and the stay dissolved.

{¶5} On June 4, 2012, Selwyn filed a motion to revive the June 1985 judgment in Cuyahoga C.P. No. CV-84-082351. On that same day, Selwyn's counsel, Oviatt, forwarded an unsigned and nonfiled copy of the motion to revive to Grimes, who forwarded the documents to his attorney. Oviatt did not respond to Grimes's attorney's written or telephonic request for information.

{¶6} Three days later, on June 7, 2012, without service of the summons and motion by the clerk's office, the trial court granted the motion to revive the judgment. On June 18, 2013, Selwyn transferred the revived judgment to the Cleveland Municipal Court and implemented garnishment proceedings of Grimes's bank accounts, recovering approximately $3,000.

{¶7} On July 5, 2013, Grimes filed a motion to vacate the trial court's order reviving the judgment in Case No. CV-84-082351. After a hearing, the court denied Grimes's motion. Subsequently, and ostensibly to effect service of the summons and motion by the clerk's office, the administrative judge vacated the June 2012 order reviving the dormant judgment and directed Selwyn to refile the motion to revive the judgment. On January 16, 2014, Selwyn refiled the motion, Grimes was duly served, and the matter was again heard.

{¶8} On March 24, 2014, the trial court granted Selwyn's January 16, 2013 motion to revive and ordered that the judgment shall date back to June 7, 2012, resulting in a judgment with interest that amounted to $383,430. In rejecting Grimes's claim that the motion to revive was untimely, the trial court expressly found that Selwyn's adversary

action in the bankruptcy court constituted an execution on the judgment and, therefore, the 21-year statute of limitations began to run from the date of the bankruptcy court's order denying discharge of the judgment, namely, August 17, 1992. Utilizing the date the bankruptcy court declined to discharge the judgment and construing the bankruptcy court's decision as an execution on that judgment, the trial court found Selwyn's June 2012 motion to revive timely.

{¶9} Grimes timely appealed the trial court's decision but failed to post a supersedeas bond to stay execution of the judgment. While the appeal was pending, Selwyn pursued garnishment efforts and filed a foreclosure action against Grimes.

{¶10} In November 2014, this court ultimately reversed the trial court's decision to revive the dormant judgment, finding that the trial court erroneously applied the plain meaning of R.C. 2329.07(A)(1). *See Grimes Appeal I*, 8th Dist. Cuyahoga No. 101252, 2014-Ohio-5147. We explained as follows:

> Under the plain meaning of R.C. 2329.07(A)(1), we find no way of construing the bankruptcy court's decision not to discharge the judgment as an execution. Of note, Selwyn's adversarial action in the bankruptcy court was not an attempt at execution on Grimes's property. The record reveals that Selwyn knew that Grimes was not collectable. At the hearing, counsel represented that Selwyn waited patiently until the death of Grimes's parents and the prospect that Grimes would receive an inheritance to initiate the action. Rather, the adversarial action was an attempt to prevent the discharge in the event that the bankruptcy court was inclined to discharge the judgment.
>
> Further, in refusing to discharge the judgment, the bankruptcy court did not issue a new judgment, but merely indicated what debts would be discharged and what debts remained Grimes's responsibility. It is conceivable that the bankruptcy court would have declined to discharge the judgment without Selwyn filing an adversarial action. Consequently, we decline to

construe the bankruptcy court's decision as an execution.

> As such, pursuant [to] R.C. 2329.07(A)(1), the judgment went dormant on August 19, 1990, five years after Selwyn made the aforementioned single attempt at executing on the judgment. Pursuant to R.C. 2325.18, Selwyn had 21 years from August 19, 1990, to seek revival of the judgment. To be timely, Selwyn's motion to revive had to be filed prior to August 19, 2011. Because it was purportedly filed in June 2012, it was untimely, and the trial court erred in reviving the judgment.

Id. at ¶ 19-21.

{¶11} This court further noted that when Selwyn refiled the motion in January 2014 to cure his earlier failure to comply with Civ.R. 4, he was outside the 21-year statute of limitation and, therefore, the trial court should have granted the motion to vacate. *Id.* at ¶ 24.

{¶12} Selwyn appealed the decision to the Ohio Supreme Court, which declined to hear the discretionary appeal. *See Selwyn v. Grimes*, 142 Ohio St.3d 1477, 2015-Ohio-2104, 31 N.E.3d 655.

{¶13} Grimes commenced the underlying action in July 2015 against both Oviatt and Selwyn in Cuyahoga C.P. No. CV-15-848472, asserting claims for malicious prosecution, third-party legal malpractice, and intentional infliction of emotional distress. Grimes alleged that "Oviatt and Selwyn wrongly initiated the revival of the 1985 judgment knowing that the time had passed and that the judgment was worthless and there was no probable cause or reasonable basis for the motion to be filed." He further alleged that Oviatt "willfully failed to give notice as required" under Civ.R. 4(F), that "Oviatt and Selwyn willfully harassed Grimes" and "pursued Grimes' son for money he

did not owe causing Grimes to be sued yet again," and "forced Grimes to pay $12,290.00 in legal fees." According to Grimes, defendants "improperly filed an untimely motion to revive a judgment and then once the motion was granted entered into a course of conduct designed to inflict the most pain on Grimes possible."

{¶14} Oviatt moved to dismiss the action on behalf of himself as well as Selwyn, whom he represented, and moved to depose the three appellate judges who decided *Grimes Appeal I*. The trial court denied both motions.

{¶15} Grimes moved to disqualify Oviatt from representing Selwyn, and the trial court ultimately granted that motion on October 21, 2015.

{¶16} In December 2015, Grimes filed an amended complaint, reasserting claims for malicious civil prosecution, third party legal malpractice, intentional infliction of emotional distress, and adding a new claim for unjust enrichment. In support of his unjust enrichment claim, Grimes alleged that, through defendants' misconduct, they "were unjustly enriched having seized money from bank accounts and paychecks" totaling almost $5,000.

{¶17} Defendants moved to dismiss the amended complaint. Prior to the trial court ruling on defendants' motion, Grimes voluntarily dismissed the case without prejudice on February 29, 2016.

{¶18} On March 25, 2016, Oviatt moved for sanctions pursuant to Civ.R. 11 and R.C. 2323.51 and requested an oral hearing. The trial court subsequently denied the motion without a hearing.

{¶19} Oviatt appeals,[1] raising the following four assignments of error:

> I. When the record contains substantial evidence that frivolous conduct may have occurred, the trial court errors [sic] when it does not hold an evidentiary hearing pursuant to R.C. 2323.51 and afford Defendants a fair opportunity to present evidence that frivolous conduct occurred.
>
> II. The trial court erred by overruling Defendants' motion to dismiss for failure to state a claim upon which relief can be granted.
>
> III. The trial court erred by disqualifying Defendant Attorney Oviatt from representing his co-defendant Selwyn.
>
> IV. The trial court erred by not allowing Defendants to depose and call appellate judges to testify.

B. Abandonment of Appeal

{¶20} Initially, we note that Selwyn, who was granted leave to file an appellant brief after this court sua sponte removed Oviatt as counsel, failed to comply with this court's order to obtain new counsel and file an appellant brief. On November 30, 2016, this court expressly warned Selwyn that his failure to comply with the order before the oral argument date would result in dismissal of his appeal. Given Selwyn's failure to file an appellant's brief and his clear abandonment of his appeal, we dismiss Selwyn's appeal.

C. Hearing on Motion for Sanctions

{¶21} In his first assignment of error, Oviatt argues that the trial court erred in

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[1] Although Oviatt filed the appeal and appellate brief on both his and Selwyn's behalf, this court on November 30, 2016, sua sponte removed him as counsel for Selwyn pursuant to the Cuyahoga County Common Pleas order dated October 21, 2015. We further note that Oviatt failed to appear for the oral argument.

failing to hold an evidentiary hearing. We agree.

{¶22} Ohio law provides two separate mechanisms for an aggrieved party to recover attorney fees for frivolous conduct: R.C. 2323.51 and Civ.R. 11. *Sigmon v. S.W. Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 88276, 2007-Ohio-2117, ¶ 14. Although both authorize the award of attorney fees as a sanction for frivolous conduct, they have separate standards of proof and differ in application. *Id.*

{¶23} Civ.R. 11 governs the signing of pleadings, motions, and other documents and provides in pertinent part that:

> 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.

{¶24} In deciding whether a violation was willful, the trial court must apply a subjective bad faith standard. *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶ 12 (1st Dist.).

{¶25} R.C. 2323.51, conversely, applies an objective standard in determining frivolous conduct, as opposed to a subjective one. *Bikkani v. Lee*, 8th Dist. Cuyahoga No. 89312, 2008-Ohio-3130, ¶ 22. The finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed. *Ceol v. Zion*

Industries, Inc., 81 Ohio App.3d 286, 289, 610 N.E.2d 1076 (9th Dist.1992).

{¶26} "Frivolous conduct" is defined under the statute as 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.

R.C. 2323.51(A)(2)(a)(i)-(iv).

{¶27} The decision to grant sanctions under R.C. 2323.51 and Civ.R. 11 rests with the sound discretion of the trial court. *Bikkani* at ¶ 30, citing *Taylor v. Franklin Blvd. Nursing Home, Inc.*, 112 Ohio App.3d 27, 677 N.E.2d 1212 (8th Dist.1996). A reviewing court will not reverse a trial court's decision to deny or grant sanctions absent an abuse of discretion. *Id.*; *see also Jurick v. Jackim*, 8th Dist. Cuyahoga No. 89997, 2008-Ohio-2346.

{¶28} Although ordinarily a trial court does not have to hold a hearing if it denies a

motion for attorney fees and costs under R.C. 2323.51 or Civ.R. 11, Ohio courts have recognized that a trial court abuses its discretion when it "arbitrarily" denies a request for attorney fees. *Bikkani* at ¶ 31, citing *Turowski v. Johnson*, 68 Ohio App.3d 704, 589 N.E.2d 462 (9th Dist.1990); *Mitchell v. W. Res. Area Agency on Aging*, 8th Dist. Cuyahoga Nos. 83837 and 83877, 2004-Ohio-4353, ¶ 27. *Compare Pisani v. Pisani*, 101 Ohio App.3d 83, 654 N.E.2d 1355 (8th Dist.1995) (recognizing that a hearing is not required when the court determines, upon consideration of the motion and in its discretion, that the motion lacks merit). 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. *Id.* Similarly, if an arguable basis exists for an award of sanctions under Civ.R. 11, a trial court must hold a hearing on the motion. *Fitworks Holdings, L.L.C. v. Pitchford-El*, 8th Dist. Cuyahoga No. 88364, 2007-Ohio-2517, ¶ 14, citing *Capps v. Milhem*, 2d Dist. Franklin No. 03AP-251, 2003-Ohio-5212.

{¶29} Based on the record before us, we find that the trial court should have at least held a hearing on Oviatt's motion for sanctions. The thrust of Grimes and his attorney's defense to the motion for sanctions was that Oviatt "fraudulently" procured the revival of a stale judgment and then engaged in ruthless tactics to collect on the judgment. We fail to find any evidence in the record to support this claim. Although the revived judgment was ultimately found to be defective, the trial court initially granted the motion to revive the dormant judgment and found Oviatt's failure to comply with

Civ.R. 4(F) not to be fatal. Notably, Oviatt provided actual notice of his intent to file the motion to revive to Grimes, who in turn forwarded to his attorney. The act of providing notice severely undermines Grimes's theory of malice and intent to defraud.

{¶30} We likewise cannot say that the timing of Oviatt's execution of the judgment is evidence of fraud. An attorney's strategy on collecting on a judgment should not be second-guessed by a reviewing court, especially when the record contains some evidence that earlier collection efforts would have been futile. The record further reflects that Oviatt raised the deficiencies in Grimes's complaint from the inception of the case. Also, as for Grimes's claim that Oviatt intentionally waited for over a year to execute on the judgment as a means to avoid a Civ.R. 60(B) motion, we note that Civ.R. 60(B)(5) allows for motions filed beyond a year, including allegations of fraud upon the court by an attorney. *See U.S. Bank NA v. Metzger*, 7th Dist. Mahoning No. 14 MA 63, 2015-Ohio-839, ¶ 29, citing *Coulson v. Coulson*, 5 Ohio St.3d 12, 448 N.E.2d 809 (1983).

{¶31} While the record is abundantly clear of the disdain between the parties and that Oviatt aggressively pursued collection efforts to recover on the judgment, we struggle to find how these actions support a colorable claim, especially since Grimes failed to avail himself of obtaining a stay of the judgment while the matter was on appeal. Accordingly, we find that Oviatt's motion set forth sufficient grounds to warrant a hearing in this case.

{¶32} We emphasize, however, that our resolution of this assignment of error should not be construed as commenting on the ultimate issue of whether Oviatt is entitled

to recover attorney fees and costs.

{¶33} This first assignment of error is sustained.

D. Interlocutory Orders

{¶34} In his second and final assignments of error, Oviatt challenges the trial court's denials of his motion to dismiss and motion to depose appellate judges. When an entire action is voluntarily dismissed without prejudice, however, any interlocutory orders made by the trial court are dissolved and are not appealable. *Cleveland Indus. Square, Inc. v. Dzina*, 8th Dist. Cuyahoga Nos. 85336, 85337, 85422, 85423, and 85441, 2006-Ohio-1095; *see also Charles Gruenspan Co., L.P.A. v. Thompson*, 8th Dist. Cuyahoga No. 77276, 2000 Ohio App. LEXIS 4783 (Oct. 12, 2000) (recognized a voluntary dismissal, without prejudice, dissolves all interlocutory orders). The orders that Oviatt challenges are interlocutory orders, and such orders therefore are nonappealable. *First Sentry Bank v. Rose*, 4th Dist. Gallia No. 13CA2, 2014-Ohio-594, ¶ 15; *see also Littleton v. Holmes Siding Contr.*, 10th Dist. Franklin No. 13AP-138, 2013-Ohio-5602, ¶ 6 (denial of motion to dismiss is interlocutory); *Miklovic v. Shira*, 5th Dist. Knox No. 04-CA-27, 2005-Ohio-3252, ¶ 26 ("Discovery orders are generally interlocutory and, as such, are neither final nor appealable, especially those that deny discovery.").

{¶35} The second and fourth assignments of error are dismissed as non-appealable.

E. Disqualification of Counsel

{¶36} In his third assignment of error, Oviatt argues that the trial court erred by

disqualifying him from representing his codefendant Selwyn. This court, however, does not have jurisdiction to review this claim because Oviatt failed to timely appeal from the final judgment issued on October 21, 2015.

{¶37} A decision granting a motion to disqualify opposing counsel is a final, appealable order and one that "must be appealed immediately or its effect will be irreversible." *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 10; *see also Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 39, 472 N.E.2d 695 (1984) ("in the civil context, the grant of a motion to disqualify counsel * * * constitutes a final appealable order under R.C. 2505.02"). Oviatt filed his notice of appeal well beyond 30 days. We therefore lack jurisdiction to consider his claim and dismiss it. *See* App.R. 4(A).

{¶38} Judgment affirmed in part, reversed in part and remanded for the trial court to hold a hearing on Oviatt's motion for sanctions.

It is ordered that appellee and appellants share the 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 common pleas 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
EILEEN A. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR