IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NANCY LOWRIE & ASSOC., LLC	)	**CASE NO. CV 12 795979**
	)	
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiff,	)	
	)	
vs.	)	
	)	
DEBORAH ORNOWSKI, *et al.*	)	**JOURNAL ENTRY**
	)	**GRANTING THE DEFENDANTS'**
Defendants.	)	**MOTIONS FOR SANCTIONS**

***John P. O'Donnell, J.*:**

Plaintiff Nancy Lowrie & Associates, LLC filed a verified complaint and motion for a temporary restraining order on November 21, 2012. The motion was granted *ex parte* that same date. The language of the journalized entry was almost entirely provided by the plaintiff, with minor changes by the court. In particular, although the plaintiff suggested a $100 bond, a $15,000 bond was ordered instead. The plaintiff never posted a bond.

The gist of the temporary restraining order against defendant Deborah Ornowski was to prohibit her from providing counseling services in competition with the plaintiff inside of 15 miles from the plaintiff's office.[1] Additionally, Ornowski and defendants Bridget Lind and Gabriel Consulting Group, LLC (Ornowski's company) were enjoined from using or disclosing the plaintiff's confidential information. The temporary restraining order was to last 14 days, until December 5.

On December 4, a joint agreement to extend the temporary restraining order for another 14 days was filed. The stipulation was drafted by plaintiff's counsel Jeffrey W. Krueger and signed by all counsel without changes, then adopted by the court. Besides restating the language

[1] Given that she had opened an office within two miles of the plaintiff's, this effectively prohibited Ornowski from running her business.

of the original temporary restraining order, the December 4 order also said that "plaintiff shall continue to post the existing bond in the amount of $15,000."

After a hearing, the plaintiff's motion for a preliminary injunction was denied January 8, 2013, and the plaintiff voluntarily dismissed the lawsuit on April 12.

On April 25 Ornowski filed a motion to recover damages on the bond on the basis that the temporary restraining order was wrongly granted. Lind filed a similar motion on May 31. The plaintiff has opposed both motions and they are fully briefed.

With her motion to recover damages on the bond Lind also included a motion for sanctions pursuant to Rule 11 of the Ohio Rules of Civil Procedure. The grounds for that request are that the plaintiff and her counsel knew a bond was never posted as required by the temporary restraining order yet, as part of the 14-day extension, they represented that a $15,000 bond would "continue." Ornowski filed a similar motion on June 14 that also cites section 2323.51 of the Ohio Revised Code as a basis for sanctions. The plaintiff has opposed both motions and they too are fully briefed.

A hearing on the pending motions was held on September 4, 2013, and this entry follows.

Civil Rule 65(C)

Civil Rule 65(C) provides that "no temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond" fixed by the court. By virtue of this rule, which is mandatory, an injunction does not become effective until the bond is posted. *Summers v. Moore*, 4th Dist. No. 80 X 19 (July 30, 1981). Since the bond here was never posted, the order was never operative and Ornowski and Lind were never restrained by an enforceable court order. As a result, neither of them could have sustained damages because of a temporary restraining

order that "should not have been granted"[2] and the two motions for damages under Civil Rule 65(C) are denied.

Timeliness of Ornowski's R.C. 2323.51 motion

R.C. 2323.51(B)(1) allows a party adversely affected by frivolous conduct to file a motion for an award of the party's expenses "at any time not more than 30 days after the entry of final judgment in a civil action." The plaintiff argues that Ornowski's motion for sanctions under R.C. 2323.51 is time barred because the lawsuit was voluntarily dismissed on April 12 and the motion was not filed until June 14, more than 30 days later. The Ohio Supreme Court has construed the word "judgment" in the frivolous conduct statute to mean a final appealable order. *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St. 3d 432, 436 (2002). But a Civil Rule 41(A)(1)(a) voluntary dismissal is not a final judgment. See, e.g., *Hensley v. Henry*, 61 Ohio St. 2d 277, 279 (1980). Indeed, that has proven true here: the plaintiff has already refiled the lawsuit.[3] Because there has been no final judgment, the defendant's motion is not late.

I recognize that the Eighth District Court of Appeals reached a different result in *Edwards v. Lopez*, 8th Dist. No. 95860, 2011-Ohio-5173. *Edwards* involved a defendant's motion for sanctions filed more than 30 days after the court dismissed the plaintiff's lawsuit without prejudice for want of prosecution. In holding that the trial court abused its discretion by considering a motion filed beyond the time limit, the appellate court reasoned that otherwise "the party bringing the motion would have an unlimited time to file [a motion for sanctions]" and "the intent of the statute to have a cut-off time for the sanctions" would be undermined. *Id*., ¶12. While that observation might seem accurate, the explicit language of the statute gives a movant for sanctions until 30 days after a "final judgment" to assert the motion. It is not the judicial

[2] Civil Rule 65(C).
[3] Case number CV 13 812226.

branch's prerogative to question the legislature's policy choice to allow an unlimited time to file a motion for sanctions in those few cases that are not eventually resolved by a final judgment.

Moreover, *Edwards* did not involve a voluntarily dismissed lawsuit that was refiled. A case that did is *Merino v. Salem Hunting Club*, 7th Dist. No. 11 CO 2, 2012-Ohio-4553. In *Merino*, the plaintiff's 2003 lawsuit was voluntarily dismissed in 2004 and then refiled in 2005. After a judgment on the merits, the defendant filed a motion for sanctions seeking expenses incurred in the initial filing of the case. The plaintiff argued that the motion for such expenses was untimely under the statute because it was not filed within 30 days of the voluntary dismissal. The trial court and the court of appeals both disagreed with the plaintiff, and the appellate court said:

> When a complaint is refiled under the saving statute, the case relates back to the date of the original complaint for purposes of satisfying any statute of limitations problems. The events being litigated are those that relate to the original filing. When the refiled case terminates, it terminates with respect to both the original filing and the refiled case. We see no reason why a motion for attorney's fees for frivolous conduct under R.C. 2323.51 should not relate back to the original filing, since the cause of action itself relates back to the original filing.
> *Id*., ¶13.

Although this case involves a motion filed more than 30 days after a voluntary dismissal but before a refiling, the same logic applies: namely, where the case has not terminated, a motion for sanctions can be considered timely. Hence, Ornowski's motion is not too late and I will decide its merits.

Sanctionable conduct under R.C. 2323.51 and Civil Rule 11

R.C. 2323.51(A)(2) defines "frivolous conduct" that may justify an award of sanctions to include conduct of the opposing party's counsel of record that is not warranted under existing law and conduct that consists of allegations or other factual contentions that have no evidentiary

support.[4] Sanctions can also be imposed for conduct that serves merely to harass or maliciously injure the other party.[5] Although these provisions encompass a large variety of potential misconduct, the acts sought to be sanctioned must fall within one or more of the statutory categories or I cannot impose a sanction.

Civil Rule 11, on the other hand, is less specific about the range of sanctionable conduct but requires that the conduct must be willful. The rule provides:

> 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. If a document 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 . . ., 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.

Despite the different language of the statute and the rule, both concern frivolous claims, defined as claims that are not supported by facts in which the person making the claim has a good faith belief. *Jones v. Bellingham*, 105 Ohio App. 3d 8, 12 (2d Dist., 1995). Although the statute and the rule are not coextensive they do overlap considerably and, as a practical matter, conduct that violates one will usually violate the other.

The conduct in this case

Krueger, as counsel for the plaintiff, knew full well that the temporary restraining order was never operative. Indeed, the plaintiff's entire defense against the pending motions is based on the argument that every participant in the case should have been aware that the order never took effect because a bond was never posted. Despite his knowledge, Krueger proposed a stipulated temporary order that contained several misrepresentations.

[4] See R.C. 2323.51(A)(2)(ii) and (iii).
[5] R.C. 2323.51(A)(2)(i).

First, he referred to it in the caption as an order "to extend" the temporary restraining order. Second, the initial paragraph in the proposed order reads as follows:

> This matter came on for consideration upon the agreement of the parties **to *extend* the** Temporary Restraining **Order *currently in place* for** a period of **an *additional* fourteen (14) days**. The court considered Plaintiff's Complaint, the Motion for Temporary Restraining Order and Preliminary Injunction, and the Memorandum in Support. It appearing that **justice and equity require that the** temporary restraining **order** requested by Plaintiff **be *extended***. **The** temporary restraining **order is *extended*** as follows:
> (Emphasis in bold and italics added; all other punctuation, spelling and capitalization are *sic*.)

Third, he proposed language that the order "shall remain in full force and effect for an additional 14 days." Finally, and as noted earlier in this entry, he included the assurance that the plaintiff "shall continue to post the existing bond in the amount of $15,000."

Taken together, Krueger included in the proposed entry at least seven explicit or implicit references to extending the order. To extend, in the temporal sense, means to lengthen the duration of, and something that never began cannot be extended: I cannot say I wish my NBA career had been extended. Yet Krueger, knowing this, proposed to "extend" the order aware that an "extension" was impossible because it was never operative. Additionally, he offered that the plaintiff "shall continue to post the existing bond." A bond is a thing: it either exists or it doesn't. Furthermore, a bond cannot be confused with an order to post a bond, and Krueger's proposal refers to the former, not the latter. "Continue" means to keep doing or keep going. An activity that was never undertaken – posting a bond – cannot be "continued." This portion of the proposed entry was clearly intended to convey that a bond had been posted and not, as the plaintiff argues, that the amount of the necessary bond wouldn't be changed. As written, Krueger's proposed order was unsupportable in fact and constitutes frivolous conduct in

violation of R.C. 2323.51. When he signed it he violated Civil Rule 11 because he knew there was no good faith ground to support it.

To sanction that conduct, Ornowski and Lind argue that the plaintiff should pay the damages they sustained while honoring the temporary restraining order and the legal fees incurred by pursuing sanctions. But as noted above, the defendants were never restrained by an order that could be enforced. As the plaintiff correctly points out in opposition to the pending motions, the defendants' lawyers are deemed to have knowledge of the case docket. Given that the case docket revealed that a bond was never posted and the order was never effective, the causal chain between Krueger's conduct and the defendants' lost income was broken – or at least greatly attenuated – by defense counsel's lack of vigilance. That is true even if they were gulled into that lack of vigilance by Krueger's false implications. Because Krueger was not solely responsible for any loss of income to the defendants for honoring an unenforceable order I cannot award lost income.

At a glance, the same conclusion seems apt for the defendants' request to recover their expenses in pursuing sanctions, since they never would have had to seek sanctions if they didn't stipulate to an order that contained false statements. But, unlike the lost income, the legal fees are not sought as damages proximately caused by the frivolous conduct. They are awardable under the express terms of Civil Rule 11 as a sanction, not as damages. By rule, then, the amount of expense incurred to raise a valid claim of frivolous conduct can serve as the basis for calculating the sanction and no evidence of proximate causation of the fees by the conduct is needed. Additionally, under R.C. 2323.51(B)(1), a reasonable attorney's fee can be awarded to a party "adversely affected by" the frivolous conduct. This is a lesser standard than proximate cause since a party can be adversely affected by frivolous conduct in a concrete way – by, for

example, incurring expense to return the litigation to the status quo before the misconduct – or an abstract way through the loss of trust.

It is that abstract effect that occurred here. The civil justice system is undoubtedly adversarial and, as already mentioned, the defendants' lawyers could have been more assiduous in verifying whether the plaintiff had posted a bond. But trust between opposing counsel is a lubricant that allows the proper functioning of the system. That trust might not have been breached if the plaintiff's counsel never told his opponents what they really should have already known – that the bond was never posted – but it was surely broken, and a line crossed, when Krueger presented his opponents with a proposed stipulation that, by unmistakable implication, falsely assured them the bond had been posted.

There is also an adverse effect on the court. The approval of a stipulated order should be essentially a ministerial act that allows a judge to devote the finite resource of time to disputed matters, and any time spent on a stipulated order is less time spent where the judge's efforts are really needed. A judge should be able to sign a stipulated order with confidence that the order is not only correct but enforceable. By extinguishing that confidence, Krueger has caused a loss to the court of the resource of time and a corresponding cost to other litigants and lawyers who require a judge's attention.

So, Krueger's preparation and presentation of the proposed entry constitutes frivolous conduct under R.C. 2323.51 and a willful violation of Civil Rule 11, and should be sanctioned. This leaves only the question of whether the sanctions should be paid by both Krueger and the plaintiff or just one of them. That decision – while by no means pleasant – is easy.

The statute does allow for an award against either a party or counsel (only counsel can be sanctioned under the rule), but there is no evidence that the plaintiff participated in or

encouraged the deception and it is unlikely in any event, given the improbability that Nancy Lowrie, the principal of the plaintiff limited liability company, is conversant with Civil Rule 65. And although Krueger might have shared with Lowrie that the defendants were unaware that they were never really bound by the original order, he pursued the strategy and he is surely the one who wrote the stipulated order. Since it is Krueger's misconduct, the consequences should fall to him alone.

Conclusion

To be concise: Krueger did not have to tell the defendants the TRO was not effective but he couldn't pretend that it was. When he did, he willfully violated R.C. 2323.51 and Civil Rule 11 and adversely affected the defendants. Because of that, Lind's May 31 alternative motion for sanctions and Ornowski's June 14 motion for sanctions are granted. Evidence at the hearing showed that Ornowski and Lind incurred reasonable attorney's fees of $3,442.22 and $1,800, respectively.[6] Accordingly, judgments are hereby entered against Jeffrey W. Krueger in favor of Deborah Ornowski in the amount of $3,442.22 and in favor of Bridget Lind in the amount of $1,800, with interest at the statutory rate beginning on the date this entry is journalized. Krueger is also ordered to pay any court costs assessed in connection with the motions, briefs in opposition and replies, and the September 4 hearing.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

[6] Each defendant also incurred a bill in connection with the hearing that is not included in these amounts. However, each defendant also filed a motion to recover on the bond that was denied, therefore expense attributable to those motions should not be awarded. But, based upon the evidence, I find that the defendants' attorneys' fees for preparation for and attendance at the hearing are roughly approximated by the time spent preparing the unsuccessful Civil Rule 65(C) motions, hence the awards are equal to the amounts presented at the hearing and no additional evidence will be taken to determine the exact amount of the hearing fees.

SERVICE

A copy of this journal entry was sent by email this ____ day of October, 2013, to the following:

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Judge John P. O'Donnell