

FILED

IN THE COURT OF COMMON PLEAS
2016 MAR - 11 P 2:39
CUYAHOGA COUNTY, OHIO

Noel Cummings,

Plaintiff,

v.

Harvey Abens Iosue Co., LPA

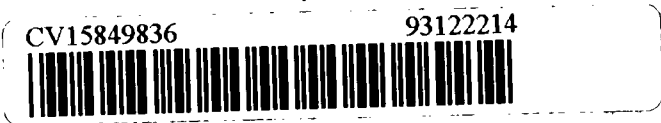
Defendant

WINDOW 3)
CLERK OF COURTS)
CUYAHOGA COUNTY)
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CASE NO. CV-15-849836

JUDGE PAMELA A. BARKER

OPINION AND JOURNAL ENTRY
ON DEFENDANT'S MOTION FOR
SANCTIONS



This matter is before the Court on Defendant's Motion for Sanctions Under Civ.R. 11 & R.C. 2323.51 against Plaintiff and her counsel ("Defendant's Motion"), and Plaintiff's Brief In Opposition thereto ("Plaintiff's Brief"). A hearing was held on February 22, 2016. Despite having been notified of the hearing, Plaintiff did not appear. David L. Harvey, III, testified on behalf of the Defendant, and Plaintiff's counsel, Lawrence Mays testified on his own behalf and on behalf of Plaintiff.

Defendant asserts that Plaintiff and her counsel engaged in "frivolous conduct" as that phrase is used in Civ.R. 11 and R.C. 2323.51 by making the allegations set forth in paragraphs 25 through 32 of Plaintiff's proposed amended complaint. The evidence adduced at the hearing and the actual argument of Defendant focused upon the allegations that Plaintiff was not aware that her separation from, or termination by, GCRTA was discussed as a component of settlement, and that she was "blindsided" by the revelation that termination of her employment with, or retirement from, GCRTA was being discussed as a component of the settlement. Actually, these allegations are only included in paragraphs 25, 30, and 32, and not in paragraphs 26, 27, 28, 29 and 31 of the proposed amended complaint.

Mr. Harvey testified that he had multiple discussions with Plaintiff concerning GCRTA's insistence that any resolution included Plaintiff's separation from employment with it and that Plaintiff provided him with access to her online OPERS account for this purpose, as evidenced by Exhibit 5 attached to Defendant's Motion, and authenticated by Mr. Harvey during the hearing. Mr. Harvey also

authenticated a December 14, 2014 e-mail from Plaintiff to him, attached as Exhibit 6 to Defendant's Motion, wherein Plaintiff stated in relevant part that she was "amenable to separating from service of the RTA under the following conditions...." Mr. Harvey testified that he e-mailed Mr. Mays and provided these documents to Plaintiff's counsel to support his request that Plaintiff withdraw her motion to amend the complaint because "the new allegations contained in it [i.e., paragraphs 25-32], are patently false."¹ Defendant also offered testimony authenticating the mediation or position statement prepared by him in anticipation of a federal court mediation before Magistrate Judge White,² that included the representations or statements that "[t]he primary sticking point in the parties' settlement talks has been that GCRTA is conditioning any settlement on Ms. Cummings's resignation", and "any deal requiring Ms. Cummings to resign will be contingent on Ms. Cummings's ability to obtain 30 service years with OPERS" ("the position statement").

Lawrence Mays, one of the attorneys for Plaintiff, testified that he received Mr. Harvey's e-mail with a copy of the December 14, 2014 e-mail from Plaintiff to Mr. Harvey and a copy of the e-mail from Plaintiff providing Mr. Harvey with her online access code for OPERS, and took action to evaluate Defendant's request or position. Mr. Mays testified that he issued a Public Records Request to GCRTA and upon receipt of documents in response thereto, specifically the position statement and an Attorneys' Fees Itemization filed with the federal court, communicated with Plaintiff through e-mail and met with her. According to Mr. Mays, Plaintiff told him that she had never seen the position statement or the Attorneys' Fees Itemization, and Plaintiff pointed out discrepancies in these documents to him. Mr. Mays testified that Plaintiff never denied writing the December 14, 2014 e-mail, and advised him that she had some recollection of some mention of GCRTA insisting upon Plaintiff's separation from it. Plaintiff's counsel testified that he reasonably relied upon his client representing that she had not seen the position statement and the Attorneys' Fees Itemization, and that Plaintiff did not agree with some of

¹ The December 3, 2015 e-mail is attached as Exhibit 8 to Defendant's Motion.

² The position statement is attached as Exhibit 7 to Defendant's Motion.

the information contained therein. When inquiry was made by the Court, Mr. Mays acknowledged that just because Plaintiff claimed not to have seen these two documents previously, did not mean that she did not know, independent of these documents and through communications with Mr. Harvey, that her separation from GCRTA was being discussed as a component of the settlement. Mr. Mays also testified that even though Plaintiff acknowledged writing the December 14, 2014 e-mail, that e-mail also included a list of her terms for settling her case against GCRTA if separation from or termination by GCRTA was a condition thereof.

Civ.R. 11 states that "every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name ***." The attorney's signature constitutes certification by the attorney of the following: (1) that he or she has read the pleading, motion, or document; (2) that to the best of the attorney's knowledge, information, or belief, the pleading, motion or document is supported by good grounds; and (3) that the pleading, motion, or document is not interposed for delay. (Civ.R. 11.) If the rule is willfully violated, or if a scandalous or indecent matter has been inserted, the attorney can be subject to sanctions, including attorney fees. *Id.* Any violation must be willful; negligence is insufficient to invoke Civ.R. 11 sanctions. "Civ.R. 11 applies a subjective bad faith standard." *Riston v. Butler*, 149 Ohio App.3d 390, ¶12, citing *Ceol v. Zion Indus., Inc.* (1992), 81 Ohio App.3d 286, 290, 610 N.E.2d 1076. Thus, it was Mr. Mays' actual intent or belief that is relevant to the determination of willfulness. Based upon the evidence adduced at the hearing, the Court finds that Plaintiff's counsel did not willfully violate Civ.R. 11.

R.C. 2323.51(B)(1) proscribes "frivolous conduct in civil actions" and allows a court to assess "reasonable" attorney fees against a party and/or his attorney for such frivolous conduct. Under R.C. 2323.51(A):

(1) "Conduct" means ***:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a

civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action[.]

Under R.C. 2323.51(A):

(2) "Frivolous conduct" means ***:

(a) Conduct of [a] *** party to a civil action *** that satisfies any of the following:

(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.

The frivolous conduct statute requires individual examination of each claim or defense, rather than examination of the complaint as a whole, to determine whether frivolous conduct exists. *Williams Creek Homeowners Ass'n v. Zweifel* (10th App. No. 07AP-689), 2008-Ohio-2434, at ¶183.

Although Plaintiff's counsel included in paragraphs 25, 30, and 32 the allegations that Plaintiff had no knowledge that her separation from GCRTA was being discussed as a component of the settlement and that she was "blindsided" by the revelation to this effect, they did so based upon their client's representations to them. When Defendant questioned Plaintiff's counsel regarding the truthfulness of these allegations, Plaintiff's counsel did inquire further of Plaintiff and, arguably reasonably relying upon her representations, chose to keep those allegations in the proposed amended complaint.

Plaintiff herself did not appear at the hearing, despite having received notice of it. Therefore, she was not present to dispute the testimony of Mr. Harvey, based upon his first-hand interactions and discussions with Plaintiff, as well as the e-mail communications, that she was well aware that her termination by, or separation from GCRTA, was part of the settlement discussions. Accordingly, this Court finds that Defendant submitted credible evidence, in the form of Mr. Harvey's testimony and exhibits, to demonstrate that Plaintiff did know that her separation from GCRTA was part of the settlement discussions. Therefore, this Court finds that Plaintiff did engage in "frivolous conduct" as

