

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 19, 2021

Christopher M. Wolpert
Clerk of Court

EMILY BOSCOE CHUNG,

Plaintiff - Appellant,

v.

TIMOTHY J. LAMB; TIMOTHY J.
LAMB, P.C.,

Defendants - Appellees.

No. 20-1278
(D.C. No. 1:14-CV-03244-DDD-KLM)
(D. Colo.)

KAREN A. HAMMER,

Attorney - Appellant.

ORDER AND JUDGMENT*

Before **HARTZ, PHILLIPS**, and **EID**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Attorney Karen Hammer filed this lawsuit against Timothy Lamb,¹ naming Emily Boscoe² as the plaintiff. But it turns out that Ms. Boscoe had assigned her claims against Mr. Lamb to Ms. Hammer. After the assignment came to light, the district court found that Ms. Hammer had misled the court and Mr. Lamb about the identity of the real party in interest. As a sanction for this conduct, the district court awarded Mr. Lamb attorney fees under 28 U.S.C. § 1927, a statute that “targets the vexatious and unreasonable multiplication of proceedings,” *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006). Ms. Hammer appeals the sanctions order.³ Although the district court properly found her conduct sanctionable under § 1927, we vacate the order because the court erred in determining the amount of the sanctions.

I. Background

Mr. Lamb, an attorney, filed a case in state court against Ms. Boscoe. Ms. Hammer represented Ms. Boscoe in that case. After the case resolved, Ms. Hammer and Ms. Boscoe reached an agreement, set out in an engagement letter, containing two relevant details. First, Ms. Boscoe assigned to Ms. Hammer “the right to pursue all claims against Tim Lamb.” Aplt. App. vol. 12 at 3054. Second,

¹ We refer to the defendants collectively as Mr. Lamb.

² Although the caption identifies the plaintiff as Emily Boscoe Chung, we refer to her as Ms. Boscoe, as did the district court.

³ Ms. Boscoe is also a named appellant. But we describe Ms. Hammer as the party taking this appeal because it centers on her conduct.

Ms. Hammer's representation of Ms. Boscoe concluded when they "reached the agreement." *Id.* at 3056.

After reaching the agreement with Ms. Boscoe, Ms. Hammer filed this lawsuit against Mr. Lamb, identifying Ms. Boscoe as the plaintiff and herself as Ms. Boscoe's attorney. More than three years later, the district court ordered Ms. Hammer to give Mr. Lamb an unredacted copy of the engagement letter outlining her agreement with Ms. Boscoe.

Armed with the engagement letter, Mr. Lamb moved for summary judgment on the theory that Ms. Boscoe lacked standing as the real party in interest because she had assigned her claims to Ms. Hammer. The district court agreed. It granted summary judgment to Mr. Lamb and refused to let Ms. Hammer ratify the action after her "four-year crusade to hide the real party in interest." *Id.* vol. 13 at 3259. The court listed four examples showing the "extraordinary energy Ms. Hammer has expended in attempting to conceal herself as the real party in interest." *Id.* at 3257. First, she "attempted to strike Mr. Lamb's affirmative defense that Ms. Boscoe was not the real party in interest." *Id.* at 3257–58. Second, she objected to Mr. Lamb's motion to disqualify her as Ms. Boscoe's attorney. Third, she resisted Mr. Lamb's attempt to obtain the engagement letter "even though she knew the letter was relevant to the identity of the real party in interest." *Id.* at 3258. Fourth, she delayed Ms. Boscoe's deposition.

After obtaining summary judgment, Mr. Lamb sought attorney fees under § 1927 and the district court's inherent powers. The court denied the motion without

prejudice, allowing Mr. Lamb to renew the motion after Ms. Hammer appealed the judgment. We ultimately dismissed her appeal for lack of jurisdiction because she filed a late notice of appeal. *Chung v. Lamb*, 794 F. App'x 773, 774–75 (10th Cir. 2019) (*Lamb I*).⁴

Mr. Lamb renewed his motion for attorney fees. He sought fees related to the four examples the district court had identified as showing Ms. Hammer's efforts to conceal herself as the real party in interest. He also sought fees for his attorneys' trial preparation.

The district court found Ms. Hammer's conduct warranted sanctions under § 1927, pointing to conduct mentioned in the summary-judgment order:

She moved to strike [Mr. Lamb's] affirmative defense that Ms. Boscoe wasn't the real party in interest, while knowing that was the case. She opposed [Mr. Lamb's] motion to disqualify her as counsel without revealing that Ms. Boscoe had fully assigned Ms. Hammer her rights. Ms. Hammer delayed producing the letter agreement to [Mr. Lamb] and the court. And she resisted allowing [Mr. Lamb] to depose Ms. Boscoe.

Aplt. App. vol. 14 at 3611. The court found that “this conduct represents an intentional effort to mislead the court and [Mr. Lamb] in violation of Ms. Hammer's ethical duties.” *Id.* Each act of deception, the court concluded, caused Mr. Lamb “to incur additional litigation expense [he] wouldn't have absent Ms. Hammer's dishonesty.” *Id.* The court granted Mr. Lamb's request for “fees incurred related to

⁴ Ms. Hammer separately appealed an order denying her request to extend the deadline to file a notice of appeal. We affirmed that order after consolidating her appeals. *Lamb I*, 794 F. App'x at 774.

the four instances of dishonesty” identified in the summary-judgment order, *id.* at 3613, but it denied the request for fees incurred preparing for trial.

II. Discussion

A. The Scope of Our Review

Several of Ms. Hammer’s arguments assail the district court’s summary-judgment rulings. But the merits judgment is not properly before us for at least three reasons. First, it is too late to appeal the merits judgment. *See* Fed. R. App. P. 4(a)(1)(A); *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016) (recognizing “Rule 4(a)(1)(A)’s 30-day filing deadline” is jurisdictional). Second, Ms. Hammer’s notice of appeal does not designate the merits judgment as one she seeks to appeal. *See* Fed. R. App. P. 3(c)(1)(B); *Williams*, 837 F.3d at 1078 (recognizing “Rule 3(c)(1)(B)’s designation requirement is jurisdictional”). Third, we already decided in *Lamb I* that we lack jurisdiction to review the merits judgment. *See Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (explaining that “when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal”).

Ms. Hammer does not persuade us that we should—or, for that matter, even that we could—exercise pendent jurisdiction to review the merits judgment. The doctrine of pendent appellate jurisdiction recognizes our discretion, in narrow circumstances, to “exercise jurisdiction over an otherwise nonfinal and nonappealable lower court decision.” *Cox v. Glanz*, 800 F.3d 1231, 1255–56

(10th Cir. 2015) (internal quotation marks omitted). But the merits judgment became final and appealable long ago; Ms. Hammer just failed to properly appeal it when she had the chance. And she does not direct us to a single case in which an appellate court has exercised pendent jurisdiction in these circumstances.

We dismiss for lack of jurisdiction Ms. Hammer’s attempt to appeal the summary-judgment rulings. Our review reaches only the sanctions order.

B. The Sanctions Order

“Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” § 1927. To impose sanctions under § 1927, a court need not find the attorney subjectively acted in bad faith; “any conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court is sanctionable.” *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015) (brackets and internal quotation marks omitted). But “there must be a causal connection between the objectionable conduct of counsel and multiplication of the proceedings, such that the conduct resulted in proceedings that would not have been conducted otherwise.” *Id.* (brackets and internal quotation marks omitted). A court imposing sanctions under § 1927 “must identify the extent of the multiplicity resulting from the attorney’s behavior and the costs arising therefrom.” *Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987) (en banc).

We review § 1927 sanctions for an abuse of discretion. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008). A district court abuses its discretion if it applies the wrong legal standard or if it enters an order that is arbitrary, capricious, whimsical, or manifestly unreasonable. *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 535 (10th Cir. 2016). We will not disturb a district court’s factual findings about an attorney’s conduct unless they lack a reasonable basis. *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1169 (10th Cir. 2003).

Ms. Hammer attacks the sanctions order from many angles. Having considered each attack, we can focus our analysis on two questions. First, did the district court err when it found Ms. Hammer’s conduct sanctionable under § 1927? If not, second, did the court err when it determined the amount of the sanctions?

1. Sanctionable Conduct Under § 1927

Taking up first Ms. Hammer’s arguments that the district court erred in finding her conduct sanctionable under § 1927, we can easily reject them. Many of these arguments amount to innocent explanations for her sanctioned conduct. She tells us, for example, that even though the district court disagreed, she thought Ms. Boscoe was a real party in interest. And, to take another example, she suggests that she had no reason to think the engagement letter was relevant to the identity of the real party in interest. She gave similar explanations to the district court, but the court rejected them: “If these isolated instances weren’t part of the larger pattern of dishonest conduct, Ms. Hammer’s individualized arguments might have more traction. But as [the district court] found, each one fit into [an] unmistakable pattern.” Aplt. App.

vol. 14 at 3612. The record supports the findings that, in committing the four sanctioned actions, Ms. Hammer acted dishonestly, unreasonably, and vexatiously. So we will not disturb those findings. *See Butler*, 348 F.3d at 1169.

Ms. Hammer does not persuade us that the district court's sanctions order simply adopted the summary-judgment analysis rather than independently assess the merits of sanctions. The judge who ordered sanctions was not the judge who ruled on summary judgment. Contrary to Ms. Hammer's argument, however, the sanctions order displays an independent assessment of the sanctions motion; the judge who ordered sanctions simply agreed with the prior judge that Ms. Hammer acted dishonestly.

Nor does the finding that Ms. Hammer acted dishonestly show that the district court applied the wrong standard to conclude her conduct was sanctionable. Ms. Hammer argues that the district court imposed sanctions based merely on a finding that she had been dishonest. She is correct, of course, that § 1927 does not explicitly target dishonest conduct; it targets unreasonable and vexatious conduct that multiplies the proceedings. But the district court found not only that Ms. Hammer's conduct was dishonest but also that it was "undoubtedly unreasonable and vexatious," *Aplt. App.* vol. 14 at 3608 (brackets and internal quotation marks omitted), and that it caused Mr. Lamb "to incur additional litigation expense [he] wouldn't have absent Ms. Hammer's dishonesty," *id.* at 3611.

We see no error in the court's finding the conduct sanctionable without first holding a hearing. Due process requires notice that "sanctions are being considered

by the court and a subsequent opportunity to respond.” *Braleley*, 832 F.2d at 1514. Ms. Hammer had an opportunity to respond in writing to the renewed motion for fees. In her response, she requested a hearing, labelling it impracticable “within the word limits” governing her response “to point to specific billing entries that do not qualify for relief.” Aplt. App. vol. 14 at 3586. As to whether her conduct was sanctionable, she provided no reason to conclude that a hearing was necessary.⁵ *See Braleley*, 832 F.2d at 1515 (recognizing that “the sanction inquiry may properly be limited to the record in most instances”).

2. The Amount of Sanctions

Although the district court properly found Ms. Hammer’s conduct sanctionable under § 1927, we conclude it applied the wrong standard to determine the amount of the sanctions. The sanctions compensated Mr. Lamb for “fees incurred related to the” sanctioned conduct. Aplt. App. vol. 14 at 3613. But § 1927 does not authorize sanctions to compensate fees merely *related to* unreasonable and vexatious conduct. The statute is narrower, authorizing sanctions to compensate excess fees incurred *because of* the offending “attorney’s sanctionable action,” *Baca*, 806 F.3d at 1278.

By applying a standard broader than § 1927 allows, the court imposed sanctions that exceed the fees incurred because of Ms. Hammer’s sanctionable conduct. For example, the sanctions compensate Mr. Lamb for time spent drafting

⁵ In the next section, we conclude that we must vacate the sanctions order because the district court applied the wrong standard to determine the amount of sanctions, a conclusion making it unnecessary for us to consider whether the court also erred by determining the amount of sanctions without holding a hearing.

his answer, work completed before Ms. Hammer’s sanctionable conduct in moving to strike a defense raised in the answer. Similarly, the sanctions compensate Mr. Lamb for time spent drafting his motion to disqualify Ms. Hammer, work completed before her sanctionable conduct in opposing the motion. As these examples show, in awarding Mr. Lamb fees related to—rather than only fees incurred because of—Ms. Hammer’s sanctionable actions, the district court abused its discretion under § 1927.

The district court also failed to “identify the extent of the multiplicity resulting from” Ms. Hammer’s sanctionable conduct. *Braley*, 832 F.2d at 1513. And the extent of that multiplicity is not obvious from the record. So we are left to wonder whether certain billing entries reflect work completed because of sanctionable conduct. Take, for example, the fees compensating Mr. Lamb for time his attorney spent attending Ms. Boscoe’s deposition (and traveling to it). Is the deposition a proceeding that would not have occurred absent Ms. Hammer’s sanctionable conduct? We have no reason to think so from Mr. Lamb’s motion or the court’s order.

The proper remedy is to vacate the sanctions order and “remand to the district court for it to make a new determination under the correct law.” *United States v. Hasan*, 609 F.3d 1121, 1129 (10th Cir. 2010). Mr. Lamb does not suggest an alternative reason to affirm. That is not surprising: “With respect to a matter committed to the district court’s discretion, like the propriety of § 1927 sanctions, we cannot invoke an alternative basis to affirm unless we can say as a matter of law that

it would have been an abuse of discretion for the trial court to rule otherwise.” *Baca*, 806 F.3d at 1278 n.17 (internal quotation marks omitted). Ms. Hammer, however, urges us not only to vacate the order but also to prevent the district court from ordering any fees under § 1927. We decline to do so, because we cannot say the district court could not properly award any fees under § 1927. *See id.*

III. Conclusion

We dismiss Ms. Hammer’s attempt to appeal the merits judgment, vacate the sanctions order, and remand the case for further proceedings consistent with this decision.

Entered for the Court

Gregory A. Phillips
Circuit Judge