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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000420-MR

ALLIED COLLECTION SERVICES, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-007234

CHARLES E. BYRD AND JOHN T. BYRD — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: In August 2004, Charles E. Byrd, a resident of Louisville, brought suit against several debt collection agencies alleging that the agencies had violated consumer protection provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692a-o, and the Kentucky Consumer Protection Act, KRS 367.110 to 367.300. According to Charles, the agencies had mistakenly attributed to him the Sears debt of a different Charles E. Byrd and had wrongfully dunned him for payment even after he had pointed out the mistake. Among the agencies named in Charles's

complaint was Allied Collection Services, Inc., of Columbus, Indiana (Allied-Indiana). The complaint was served, however, on Allied Collection Services, Inc., of Las Vegas, Nevada (Allied-Nevada), a completely separate entity. Shortly after receiving the complaint, Allied-Nevada's president contacted Charles's attorney, John T. Byrd (Charles's distant relative), and informed him that Allied-Nevada had never communicated with or attempted to collect a debt from Charles, and asked, therefore, that Allied-Nevada be removed from Charles's suit. Although Attorney Byrd promised to investigate, in the ensuing thirteen months he instead served two amended complaints on Allied-Nevada and threatened it with motions for default judgment unless Allied-Nevada paid a designated settlement amount which eventually escalated from $500.00 to $3,000.00. Allied-Nevada declined the Byrds' settlement offers and finally in about September 2005 engaged counsel, who moved for the dismissal of Charles's suit against Allied-Nevada and for sanctions against the Byrds for unreasonably necessitating Allied-Nevada's participation. The trial court granted the motion to dismiss, but by order entered January 17, 2006 denied the motion for sanctions. Allied-Nevada has appealed the denial of sanctions. It contends that sanctions are warranted under either Kentucky Rule of Civil Procedure (CR) 11 or § 1692k(a)(3) of the FDCPA and that the trial court abused its discretion by disregarding these provisions designed to protect parties such as Allied-Nevada from abusive suits. We agree with Allied-Nevada that it has raised a *prima facie* violation of CR 11, and so must vacate the trial court's January 17, 2006 order and remand for a show cause hearing on the requested sanctions.

Turning first to Allied-Nevada's federal claim, the FDCPA, as noted above, is fundamentally a consumer protection statute designed to discourage and to protect against abusive debt collection practices. The Act creates a private cause of action for the violation of its protective provisions and allows for the recovery of statutory damages and attorney fees. Lest this cause of action be abused, however, the Act also accords protection to debt collectors. 15 U.S.C. § 1692k(a)(3) provides that "on a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." The fact that the defendant was subjected to a meritless claim does not alone entitle it to recover under this statute. "[T]here must be evidence that the Plaintiff both knew that his claim was meritless and pursued it with the purpose of harassing the defendant." *Jacobson v. Healthcare Financial Services, Inc.,* 434 F. Supp. 2d 133, 141 (E.D.N.Y. 2006). The bad faith, moreover, must be that of the plaintiff, not that of the plaintiff's attorney. *Id.* (citing *Kahen-Kashani v. National Action Financial Services, Inc.,* 2004 WL 1040384 (W.D.N.Y. 2004)). Allied-Nevada claims an entitlement to fees and costs under this statute. It alleges that the Byrds knew that it was not a proper party but pursued it anyway in retaliation for Allied-Nevada's having recently collected an unrelated debt from Attorney Byrd. Although this allegation is certainly disturbing with respect to Attorney Byrd's conduct, Allied-Nevada has failed to proffer proof of the plaintiff's, *i.e. Charles* Byrd's, bad faith, and thus the trial court did not abuse its discretion by denying sanctions under the FDCPA.

Civil Rule 11, however, is expressly addressed to litigation abuses by counsel and parties. The rule requires that all pleadings, motions, and other papers filed on behalf of a represented party shall be signed by at least one attorney of record, who thereby certifies that he or she has made an inquiry "reasonable under the circumstances," *Clark Equipment Company, Inc. v. Bowman,* 762 S.W.2d 417, 420 (Ky. 1988), and has determined that the filing is well-grounded in both fact and law.

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction.

CR 11 (emphasis supplied). As emphasized, unlike the Federal Rule of Civil Procedure 11, which was amended in 1993 to make the imposition of sanctions discretionary with the trial court, Kentucky's rule continues to mandate sanctions for pleadings that are signed in violation of the rule. Sanctions may include an award of costs and/or attorney fees incurred because of the pleading or other filing. Although CR 11 is not a substitute for an abuse of process cause of action and does not apply to pleadings the merits of which are merely doubtful, *Clark Equipment Company, Inc. v. Bowman, supra,* this Court has held that signing a complaint against the wrong party and thus subjecting that party to the costs of defense when a reasonable investigation would have revealed the mistake could indeed violate the rule. *Louisville Rent-A-Space v. Akai,* 746 S.W.2d 85 (Ky. 1988) (CR 11 sanctions focus on the attorney's duty to make a "reasonable inquiry into the facts"; the attorney's good faith or lack thereof is not the issue). *Cf. Albright v. Upjohn Company,* 788 F.2d 1217 (6th Cir. 1986) (sanctions mandated against attorney for signing

and filing complaint against defendants when reasonable prefiling investigation would have shown that they could not possibly be liable).

The record in this case is limited both because Attorney Byrd did not file a written response to Allied-Nevada's sanctions motion and because the trial court summarily dismissed that motion without an evidentiary hearing or an explanation. As it stands, the record is seemingly devoid of any evidence or proffer of evidence refuting Allied-Nevada's proffers tending to show (1) that Allied-Nevada never contacted Charles E. Byrd about a debt and (2) that even a cursory investigation would have established Allied-Nevada's independence from Allied-Indiana. Nevertheless, Attorney Byrd pressed the claim against Allied-Nevada for thirteen months, through two amended complaints, until the company was obliged to incur substantial defense costs. These proffers, together with the proffered evidence that Attorney Byrd had threatened suit for Allied-Nevada's collection efforts against him, establish a *prima facie* violation of CR 11. Consequently, it was an abuse of discretion to dismiss Allied-Nevada's CR 11 motion without further inquiry.

The Byrds respond by attempting to shift their duty to inquire to Allied-Nevada. In the face of their three complaints, they contend, it was Allied-Nevada's burden to exonerate itself and to prove to them, the Byrds, that it did not belong in the lawsuit. The Byrds simply misconstrue CR 11. To be sure, a reasonable ground to believe that Allied-Nevada was liable and that discovery would provide evidence of its liability is all that was required to justify the complaint and the demand that Allied-

Nevada respond to discovery. Under CR 11, however, the Byrds were obliged to establish that initial "reasonable ground" for bringing Allied-Nevada into the litigation before they filed suit, and to reassess that "reasonable ground" before including Allied-Nevada in their amended complaints. As noted, we have been referred to nothing in the record before us (aside from Attorney Byrd's alleged vendetta) suggesting any reason whatsoever for involving Allied-Nevada in Charles Byrd's suit. Accordingly, we must vacate the January 17, 2006 order of the Jefferson Circuit Court denying Allied-Nevada's sanctions motion and remand so that the Byrds may show cause why they should not be sanctioned for signing and filing a complaint and two amended complaints that appear not to be "reasonable under the circumstances." If, following the hearing, the trial court finds that CR 11 has indeed been violated, then pursuant to the rule it *shall* impose an appropriate sanction.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

John T. Byrd
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