STATE OF MICHIGAN

COURT OF APPEALS

MARTIN ANUMBA and DIABATE FASIRI,

Plaintiffs,

and

GBENGA ANJORIN,

Appellant,

v

CENTRAL STATES TRUCKING COMPANY,

Defendant-Appellee,

and

AIR FRANCE,

Defendant.

UNPUBLISHED
March 6, 2012

No. 300711
Wayne Circuit Court
LC No. 09-009595-CB

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

GLEICHER, P.J. (*dissenting*).

This case began as a dispute about cola nuts. Subsequent events transformed it into a case involving only sanctions. It now involves a fundamental due process question: may an attorney be ordered to pay a sanction without being afforded notice and an opportunity to be heard? The majority concludes that the trial court properly sanctioned Gbenga Anjorin, one of plaintiffs' several attorneys, despite that Anjorin had no warning that he would be personally sanctioned and was given no chance to argue that he had acted in good faith. Because basic constitutional principles require notice and an opportunity to be heard before an individual is parted from his property, I respectfully dissent.

In April 2009, attorney Paschal Ukpabi filed a complaint on behalf of plaintiffs Martin Anumba and Diabate Fasiri, averring that defendant Central States Trucking Co. damaged five shipments of plaintiffs' cola nuts while transporting them. Central States moved for summary disposition, contending that plaintiffs failed to provide timely notice of the alleged damage to

their cola nuts. Approximately 90 days after Central States filed its summary disposition motion, Anumba and Ukpabi filed a document titled "Attorney Withdrawal," advising that Ukpabi had withdrawn as "as Plaintiff's attorney in the above case." Anumba's coplaintiff, Diabate Fasiri, did not sign the withdrawal notice.

On December 9, 2009, attorney Gbenga Anjorin filed a motion to amend plaintiffs' complaint along with a proposed amended complaint. On the same day, Anjorin filed a "Motion to Extend Time for Reply," seeking two additional weeks in which to "digest" the "issues of facts and laws" presented by the Central States' summary disposition motion. Nine days later, the trial court heard the motion and granted Central States' summary disposition.

On January 4, 2010, Anjorin filed a pleading entitled "Motion To Set Aside An Order Of Summary Judgment." Central States responded with a 20-page brief in opposition, attaching 15 exhibits. At a January 22, 2010 hearing, Anjorin appeared along with attorney Guy Sohou, who identified himself as representing "Diabate Fasiri who's not an actual plaintiff on this case yet."[1] Sohou continued, "I'm here to give the Court notice with regards to these proceedings." The following colloquy immediately ensued:

> THE COURT: What are you talking about? There is no case here. I granted summary disposition.
>
> MR. SOHOU: Judge, all I'm doing today is last time I was here I did inform the Court that there are some issues in this case where the attorney and Mr. Anumba filed complaint [sic] on behalf of my client who didn't know about these proceedings. When we file the actual lawsuit, these issues would be raised so he would have to pay defense counsel's attorney fee for the entire case, or if you preclude us from proceeding, we have to take action against them. I have to preserve on the record at this point.
>
> MR. ANJORIN: Our client relationship in this matter has completely broken down. As a matter of fact, this morning I'm just handing opposing counsel an attorney withdrawal motion in this matter.
>
> Your Honor, I could not possibly proceed in this matter. I love being properly briefed concerning the facts in this case. And as such, I'll be making withdraw [sic].
>
> [DEFENDANT'S COUNSEL]: I just received the attorney withdrawal slip. There's no motion.
>
> THE COURT: There's no motion. You just do things apparently. Not one thing did you put in this motion is true; not one single word is true. You've

[1] Contrary to Sohou's representation, the original complaint identifies Diabate Fasiri as a plaintiff.

> falsified documents. And frankly, sir, I think I need to report you, and I haven't done that in the 24 years I have been on this bench. Your motion is denied. I need to take a break.

After the break, counsel for Central States argued that her client was entitled to sanctions "related to this motion." The trial court granted her request for $2,000 in attorney fees and costs. An order entered the same day recites in relevant part:

> IT IS HEREBY ORDERED that Plaintiffs' Motion to Set Aside an Order of Summary Judgment is DENIED for the reasons stated on the record.
>
> IT IS HEREBY ORDERED that Defendant Central States Trucking Co.'s request for sanctions against Plaintiffs is granted in the amount of $2,000.00.

On February 5, 2010, plaintiff Martin Anumba filed on his own behalf a "Motion for a Case Suspension Due To Criminal Matter Outstanding." One week later, Anumba filed on his own behalf a motion to set aside the $2,000 in sanctions. The trial court record contains no proof that Anjorin received notice of Anumba's motions.

Central States filed a brief in response to the motions, identifying only Anumba as counsel of record. In its brief, Central States argued that Anumba's motion qualified as "frivolous," contained "numerous factual misstatement[s]," and justified "additional sanctions." Central States contended that "[u]nder MCR 2.114, ***a party pleading a frivolous claim is subject to costs and attorney's fees."*** (Emphasis in original). The brief continues:

> Furthermore, Plaintiffs [sic] claim that attorney Anjorin's actions were the cause of this Court dismissing Plaintiffs' claims is without any merit as Plaintiff Anumba was present when this Court made its ruling based on the merits of this case. Plaintiffs' current claims are frivolous and Central States MUST be awarded reasonable costs and attorney's fees expended in the defense of this motion in the amount of $2,000.00.

The "Proof of Service" appended to the last page of Central States' brief states that it was served "upon all parties to the above cause herein at their respective addresses as disclosed on the pleadings on February 24, 2010[.]" Anjorin's name does not appear on any pleadings filed after January 22, 2010. The majority agrees that "Anjorin was not provided notice of Anumba's February 12, 2010, in propria person motion to set aside the sanctions or defendant's February 25, 2010, motion for entry of judgment." *Ante* at 3.

On March 5, 2010, the trial court conducted a hearing concerning Anumba's motions. Anjorin was not present. Before Anumba could commence argument, the trial court stated, "I assessed sanctions the last time you and your attorney were here. I guess I didn't make myself clear, because I didn't want the sanctions against you, I want the sanctions against his [sic] lawyer." On March 5, 2010, the trial court entered judgment in favor of Central States and against attorney Anjorin in the amount of $2,000.

The majority dismisses Anjorin's due process claim on two grounds. First, the majority characterizes the March 5, 2010 order as merely a correction of an erroneous order. According

to the majority, "[b]ecause an order entered under MCR 2.612(A)(1) merely involves the correction of an order previously entered, due process is satisfied if there was notice and an opportunity to be heard before entry of the original order, as occurred in this case." *Ante* at 4. Second, the majority holds that even had Anjorin been afforded procedural due process, no basis exists "for concluding that the outcome would have been different if he had been provided notice and an opportunity to be heard before the trial court entered the March 5, 2010, order." *Id.* I respectfully disagree with both propositions.

A court's imposition of monetary sanctions implicates fundamental notions of due process and thus requires "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc v Piper*, 447 US 752, 767; 100 S Ct 2455; 65 L Ed 2d 488 (1980). "At the very least, due process requires the court (1) to offer to hold a hearing before it deprives the litigant of a property interest and (2) to provide notice of the hearing to the litigant. In other words, [t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re Estate of Adams*, 257 Mich App 230, 234; 667 NW2d 940 (2003) (quotation marks omitted), citing *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976). Under federal law, "[w]henever the district court imposes sanctions on an attorney, it must at a minimum afford the attorney notice and an opportunity to be heard." *Weissman v Quail Lodge, Inc*, 179 F3d 1194, 1198 (CA 9, 1999). The due process clause of the Fifth Amendment requires that an attorney facing sanctions in federal court proceedings receive notice and an opportunity to be heard. *GJB Assocs, Inc v Singleton*, 913 F2d 824, 830 (CA 10, 1990). "[P]rior to imposing fees and costs upon an attorney for whatever reason, the district court should provide the attorney with an opportunity to fully brief the issue." *Id.*

The majority posits that the order sanctioning Anjorin merely "involve[d] the correction" of the previous order sanctioning plaintiffs personally. *Ante* at 4. The trial court prefaced its "correction" with the statement, "I guess I didn't make myself clear . . . ." Given the trial court's admitted lack of clarity in rendering the January 22, 2010 order, it stretches credulity to label the court's subsequent order as merely a "correction" of an otherwise obvious ruling. The March order did more than set right a clerical error or record some previously unrecorded action; it fundamentally altered the prior order's meaning. "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). Regardless of any opinions about Anjorin expressed by the trial court during the hearing, the order signed by the court assessed sanctions only against "plaintiffs."[2]

Moreover, the pleadings filed by the parties who actually attended the March 5, 2010 hearing lack even the barest suggestion that the January order required correction. To the

[2] The majority's flawed reasoning falls into focus when the facts are flipped. Suppose the court initially entered an order sanctioning Anjorin, that Anjorin subsequently moved to "correct" the order by substituting plaintiffs for himself, and failed to give the plaintiffs notice of the motion hearing. I find it incomprehensible that the majority would affirm the entry of a "corrected" order under those circumstances.

contrary, Central States' counsel argued vigorously that the trial court had *properly* sanctioned Anumba and Diabate personally. None of the parties or attorneys contemplated that Anjorin would be the object of a new sanctions order until the trial court announced it had intended to sanction the attorney rather than his clients.[3] In my view, basic notions of fairness mandated affording Anjorin a chance to defend against a sanctions order that he could not have reasonably foreseen.

I find even more troubling the majority's conclusion that the trial court's violation of Anjorin's due process rights made no difference. A constitutional error qualifies as harmless only if it appears clear beyond a reasonable doubt that the same result would have obtained absent the error. *Neder v United States*, 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Indisputably, the trial court focused its anger on Anjorin. But the record lacks any evidence concerning Anjorin's knowledge of the true facts underlying plaintiffs' claim, or whether he conducted a reasonable inquiry into facts provided by Anumba and Diabate. Anjorin did not sign plaintiffs' complaint. By signing the "Motion To Set Aside An Order Of Summary Judgment," he certified that "to the best of [his] knowledge, information, and belief formed after reasonable inquiry," the pleading was "well grounded in fact" and "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 2.114(D)(2). Whether he violated that certification requirement or was instead provided incorrect, misleading, or flatly untruthful information by his former clients remains an open question.[4] At the March 2010 hearing, Anjorin laid the groundwork for a defense to an assessment of sanctions by asserting: "I love being properly briefed concerning the facts in this case. And as such, I'll be making withdraw." Without affording Anjorin an opportunity to testify concerning his knowledge of the facts underlying the relationship with his clients, the trial court lacked any basis for sanctioning him.

One of the core purposes of the due process clause is to protect against the arbitrary deprivation of an individual's property rights. "The goal is to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful

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[3] It bears mention that Central States prepared an order in advance of the March 5, 2010 hearing, and brought it to court on the hearing date. The prepared order, like the order signed by the court on January 22, 2010, provided for an award of sanctions against "Plaintiffs." After the hearing, defendant's counsel edited the order by hand to state that the sanctions were awarded "against Plaintiffs' attorney Gbenga Anjorin."

[4] Central States' brief in response to plaintiffs' "motion to set aside an order of summary judgment" asserts that plaintiffs filed a late response to Central States' summary disposition motion, attaching five "highly suspect" letters signed by Anumba. The trial court accused Anjorin of "falsif[ing] documents" despite that the letters were actually signed by Anumba. Additionally, plaintiffs' response to Central States' summary disposition motion is absent from the trial court record. The register of actions does not include an entry documenting that the response was ever actually filed with the court.

manner.'" *Howard v Grinage*, 82 F3d 1343, 1349 (CA 6, 1996). Given that the trial court never offered Anjorin a chance to defend against the trial court's allegations of misconduct, I cannot join the majority in avoiding these important constitutional considerations by sweeping them under the harmless error rug.

/s/ Elizabeth L. Gleicher