

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CARL S. PAVETTO,	:	
	:	
Plaintiff Below/	:	C.A. No. 03-10-0172AP
Appellant,	:	
	:	
vs.	:	
	:	
KRIS HANSEN, BILL HUFNAL,	:	
BARBARA ZIMMERMAN,	:	
CATHERINE REYNOLDS,	:	
SCOTT HENDERSON, PATRICIA HUFNAL,	:	
SHIRLEY WALLER, ROBERT EBERLY,	:	
LINDA BONTRAGER,	:	
	:	
Defendants Below/	:	
Appellees.	:	

On appeal from the Justice of the Peace Court.

Date submitted: October 27, 2004

Date Decided: October 28, 2004

Affirmed in Part, Reversed in Part and Remanded.

Carl S. Pavetto, 2413 Graystone Lane, Frederick, Maryland 21702, Pro Se Plaintiff Below/Appellant.

Laura A. Yiengst, Esquire, Liguori, Morris & Yiengst, 46 The Green, Dover, Delaware 19901, Attorney for Defendants Below/Appellees.

Trader, J.

In this civil case on remand from the Superior Court and on appeal from the Justice of the Peace Court, I hold that the magistrate was correct in imposing a sanction that required the plaintiff to pay attorney's fees to the defendants. In this *de novo* review, I determined that the complaint in trespass was filed in bad faith. To the extent that the magistrate based his decision on the failure of the plaintiff to file a bill of particulars, he was incorrect, but he was justified in imposing a sanction because the complaint in trespass is groundless. However, I conclude that the amount of the sanction was excessive, and I reduce it to \$500.00.

Background of Case

The plaintiff filed a complaint in trespass and the defendants requested a trial and demanded a bill of particulars. The plaintiff did not file a bill of particulars and he failed to appear for trial. The magistrate dismissed the plaintiff's civil action with prejudice. Thereafter, the defendants' attorney filed a motion for the imposition of a sanction that would require the plaintiff to pay the defendants' attorney's fees. The magistrate awarded the defendants attorney's fees in the amount of \$1,000.00 and entered judgment against the plaintiff for that amount. The plaintiff filed an appeal from the judge's order awarding attorney's fees but he did not appeal from the order of the court that dismissed his complaint. Since the claim on appeal was not identical with the claim brought in the court below, I dismissed the appeal for lack of subject matter jurisdiction because there was a violation of the mirror image rule.

On appeal to the Superior Court it was held that, absent good reason, a violation of the mirror image rule should not result in a dismissal of the case. The decision of this court was reversed and the case was remanded to this court for further proceedings.

Application of the Superior Court Decision

Because of prior Superior Court precedents and the recent decision of the Delaware Supreme Court in *Fossett v. Dalco Construction Co.*, Del. Supr., __ A.2d, __ No. 607, 2003, Steele, J. (Aug. 20, 2004), I limit the application of the Superior Court decision to the particular facts of this case. *See, e.g., McDowell v. Simpson*, Del. Super., 6 Del. 467 (1 Houst.) (Fall Session, 1857); *Dominick v. Harmony Talking Machine Co.*, Del. Super., 88 A. 468 (1913); *Dzedzej v. Prusinski*, Del. Super., 259 A.2d 384 (1969); *Gaster v. Belak*, Del. Super., 318 A.2d 628 (1974); *Panzer v. Farrall*, Del. Super., O'Hara, J. (Mar. 3, 1987) (ORDER); *Sulla v. Quillen*, Del. Super., Ridgely, J. (Sept. 24, 1987) (ORDER); *Wilson v. Eastern Electric & Heating, Inc.*, Del. Supr., 550 A.2d 35 (1988); *Martin v. McDermott*, Del. Supr., __ A.2d __, No. 448, 1991, Horsey, J. (June 5, 1992); *McIlvaine v. Townsend*, Del. Super., No. 96C-02-019, Graves, J. (Aug. 7, 1997) (Letter Op.); *Hicks v. Taggart*, Del. Super., No. 98A-05-002, Ridgely, J. (Apr. 12, 1999) (ORDER). In *Fossett*, the Delaware Supreme Court held that the trial court's ruling was consistent with the Superior Court precedents and the trial court's judgment was affirmed. The trial judge held in *Fossett* that even if the mirror image rule is old-fashioned, and harsh as it is, this is not an attractive opportunity to circumvent it, much less abolish it. Because of the Supreme Court's decision in *Fossett*, I conclude that the Superior Court's decision in the instant case does not have wide application and must be limited to the facts of this case. Since the reviewing court has determined that I have jurisdiction, I must address the merits of the controversy.

***A De Novo* Review of the Decision of the Magistrate**

10 Del. C. Sec. 9571 permits a party to appeal any "final order, ruling or decision and judgments." Sec. 9571(c) provides that an "appeal shall be a trial *de novo*".

Applying the *de novo* concept I held an evidentiary hearing and heard all of the facts pertinent to the appeal and the magistrate's decision.

Imposition of the Sanction was Correct

On July 18, 2003 the magistrate dismissed the plaintiff's claim with prejudice because the plaintiff failed to file a bill of particulars and because he failed to appear at trial. On October 15, 2003, the magistrate imposed a sanction and directed the plaintiff to pay some of the defendants' attorney's fees.

The general rule is that each party bears his or her own attorney's fees and expenses of litigation. Rule 11(c) of the Justice of the Peace Court Civil Rules allows the magistrate to impose a sanction upon a party, where a party files a pleading in bad faith. Rule 11(d), however, provides that sanctions under this Rule do not apply to bills of particulars. Also, under Rule 25 a demand for a bill of particulars is not applicable to a trespass action. To the extent the magistrate imposed a sanction for the failure to file a bill of particulars he was incorrect, but a sanction could be imposed if the complaint in trespass was filed in bad faith.

After the *de novo* hearing, I determined that the plaintiff filed a complaint in bad faith. The test in Delaware in determining whether conduct violated Rule 11 is a subjective good faith test. *Fort Howard Cup Corp. v. Quality Kitchen Corp.*, Del. Super., C.A. No.89C-DE-34, Steele, J. (Feb. 1, 1991) (Letter Op.). Also applying the good faith test was *Delaware Lumber & Milwork, Inc. v. Anecon Const. Co., Inc.*, Del. Super., C.A. No. 93L-06-011, Lee, J. (Apr. 19, 1996). The plaintiff is an attorney of bar of the District of Columbia. In his trespass action, he brought suit against nine defendants. He alleged in his complaint in trespass that defendants destroyed a flower pot, uprooted plants and flowers under plaintiff's window and rifled through the glove compartment of plaintiff's

vehicle. Thereafter, he failed to appear for trial in the Justice of the Peace Court. He testified at the hearing in this court that he did not have any personal knowledge or evidence that any of the nine defendants did the damage described in the complaint or authorized such conduct. I conclude his complaint is without merit and was filed in bad faith.

I therefore hold that it was correct for the magistrate to impose a sanction against the plaintiff. But based on the nature of the case, the time that should have been spent on a case of this nature, and the defendants' mistake in requesting a bill of particulars, I find that the amount of the sanction was excessive. Accordingly, I reduce the amount of the sanction to \$500.00.

The decision of the magistrate concerning the imposition of sanction is affirmed, but the amount of the sanction is reduced to \$500.00. The case is remanded to the Justice of the Peace Court with instructions for the magistrate to impose a sanction against the plaintiff in the amount of \$500.00.

IT IS SO ORDERED.

Merrill C. Trader
Judge