IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DR. ROBERT VILLARE and VANGUARD GROUP, LLC,	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. 08C-10-061 PLA
JAY KATZ, ESQUIRE, and JAY KATZ LL.M. TAXATION, INC.,	)	
Defendants.	)	

COURT'S FINDINGS UPON ORDER TO SHOW CAUSE
RULE 11 SANCTIONS IMPOSED

Submitted: May 25, 2010
Decided: June 9, 2010

Kevin William Gibson, Esquire, GIBSON & PERKINS, P.C., Wilmington, DE, Attorney for Plaintiffs.

Patrick M. McGrory, Esquire, and Paul Cottrell, Esquire, TIGHE & COTTRELL, P.A., Wilmington, DE, Attorneys for Defendants.

ABLEMAN, J.

This case involves an extremely unfortunate circumstance in which counsel for Plaintiffs, apparently dissatisfied with a decision against his clients, propounded false statements of fact in an attempt to get the Court to revisit its ruling. Plaintiffs' counsel's "tangled web" has now unraveled as a result of the usual difficulties in maintaining a counterfactual version of events under scrutiny, but only after considerable time and effort on the part of opposing counsel and the Court.

Plaintiffs brought this legal malpractice suit against Defendants Jay Katz, Esquire, and Jay Katz LL.M. Taxation, LLC (collectively, "Katz"), alleging that Katz caused Plaintiffs to lose a professional negligence suit against their former real estate broker. The Court granted summary judgment in favor of Defendants. After the Court issued its opinion, Plaintiffs moved for relief from judgment on the basis that Plaintiff's counsel had inadvertently responded to the incorrect summary judgment motion. In response to Plaintiffs' motion for relief, Katz presented information to suggest that the motion violated Superior Court Civil Rule 11(b)(3). The Court denied Plaintiffs' motion and ordered Plaintiffs' counsel to show cause as to why certain statements in the motion did not violate Rule 11(b)(3). After reviewing the record and Plaintiffs' counsel's response, the Court finds that Plaintiffs' counsel received and answered the

correct summary judgment motion, contrary to the assertions made in Plaintiffs' motion for relief. The Court considers Rule 11 sanctions wholly appropriate in light of Plaintiffs' counsel's conduct.

Plaintiffs' argument for relief from judgment was premised on the fact that Katz had filed multiple summary judgment motions that were supplanted by a single consolidated motion prior to the Court's request for Plaintiffs' response. On February 19, 2010, Katz filed three motions for summary judgment. It appears that staff in the Prothonotary's office designated the first of these three motions as "accepted" in LexisNexis File & Serve shortly after it was filed. However, that first filing was soon followed by two additional summary judgment motions. The Court was alerted, and the remaining two motions were held as "pending" in the File & Serve system until the Court could evaluate the situation. The Court reviewed Katz's three February 19 filings and determined that the multiple motions for summary judgment violated the spirit of the length limitations imposed on motions by the Superior Court's Civil Case Management Plan. In addition, all of the motions violated the Court's rules regarding font size. Accordingly, the Court instructed that all three filings should be rejected as deficient and that Katz's attorney should be permitted an opportunity to provide a single, consolidated motion that complied with the page and font

rules. The Court's decision was communicated to Katz's counsel. On February 23, Court staff changed the File & Serve status of all three February 19 filings to "rejected," and Katz filed a consolidated motion replacing them on February 24. The replacement motion was accepted. At the direction of the Court, Plaintiffs filed a response in opposition to summary judgment on April 1. On May 10, the Court granted summary judgment on grounds set forth in Katz's consolidated motion.

In their motion for relief from the Court's opinion granting summary judgment, Plaintiffs contended that their counsel never received Katz's electronically-filed consolidated motion. Plaintiffs' counsel asserted that he filed the April 1 summary judgment response with the belief that the first February 19 motion, which concerned whether Plaintiff Vanguard Group, LLC was a valid entity, was the sole motion pending before the Court. Plaintiffs therefore urged that they had not had an opportunity to respond to two additional grounds raised in Katz's consolidated motion.

The Court denied relief from judgment on the basis that, even accepting Plaintiffs' counsel's version of events, Plaintiffs had not demonstrated excusable neglect. As the Court explained,

> Plaintiffs' attorney had been informed in advance that Katz would be submitting a consolidated motion in lieu of his previous filings. When that motion was filed on February 24, it included a cover letter reiterating that it consolidated and

> subsumed the three earlier summary judgment motions, which had all been rejected. Consistent with the explanation from Plaintiffs' counsel that he has a staff member channel motions in his cases to the proper "paperless" files, File & Serve confirms that the correct February 24 motion was electronically accessed by personnel in his firm on March 17. Because Katz's three earlier summary judgment motions had been rejected, the February 24 consolidated motion was the sole summary judgment motion visible in the File & Serve docket for this case [after it was filed]. Plaintiffs' counsel bore responsibility for ensuring that his staff did not erroneously discard electronic filings.[1]

Thus, the Court held that if he truly had not seen the February 24 motion, Plaintiffs' counsel did not act reasonably under the circumstances in choosing to respond to the first February 19 motion without ascertaining whether it was the correct filing.

In addition, the Court examined an allegation made by Katz that Plaintiffs' counsel had responded to the *correct* consolidated summary judgment motion, and that the motion for relief from judgment was thus an impermissible attempt to gain a second "bite at the apple" after the Court's ruling against Plaintiffs. The Court noted that Katz's claim found support in the existing record and in additional documents provided in response to Plaintiffs' motion for relief. First, the consolidated motion was both electronically served to Plaintiffs' counsel *and* e-mailed directly to him by

[1] *Villare v. Katz*, C.A. No. 08C-10-061, at 5-6 (Del. Super. May 18, 2010) (footnote omitted).

defense counsel, who explained that the February 24 motion completely replaced the three February 19 filings because they had been rejected by the Court. Furthermore, Katz's counsel pointed out that Plaintiffs' April 1 filing appeared structured to respond to the correct summary judgment motion.

In view of these facts, Katz sought to recover the attorneys' fees and costs arising from his response to Plaintiffs' motion for relief on the basis that Plaintiffs' motion violated Superior Court Civil Rule 11(b)(3). The Court ordered Plaintiffs' counsel to show cause "as to why his assertion that he was ignorant of the existence and content of Katz's February 24, 2010 motion for summary judgment was not in violation of Rule 11(b)(3)"[2] such that fees and costs should be imposed as a sanction.

Plaintiffs' counsel has raised two main points in response to the Court's order to show cause. First, Plaintiffs' counsel disputes the Court's characterization of the first February 19 motion as "rejected." Counsel emphasizes that because the first February 19 motion was accepted in File & Serve before the Prothonotary's office discovered that Katz was attempting to file two additional motions, he received an electronically-served copy that bore transaction information and the Court's seal to confirm that it was

[2] *Id.* at 8.

"accepted and therefore filed of record."[3] Plaintiffs' counsel states that after the Court denied Plaintiffs' motion for relief from judgment, he spoke with a Prothonotary employee, who advised him that the pleading "that appeared in . . . counsel's email traffic was an 'accepted filing' as otherwise [LexisNexis File & Serve] would not have served the pleading."[4]

Second, Plaintiffs' counsel argues that "custom and practice of the Delaware bar should have prompted defense counsel to alert Plaintiff's counsel that the Motion for Summary Judgment he filed on February 19, 2010 was a mistake. . . . [I]t should be remembered that it was defense counsel who created this dilemma by trying to file several Motions . . . ."[5] Plaintiffs' counsel states that when he called defense counsel to "inquire which Motions needed to be responded to," defense counsel advised that "he would be filing a new motion" and that "[w]hat followed next was counsel[']s filing *of February 19, 2010*."[6]

Under Rule 11(b)(3), an attorney's submission of a written motion or other paper to the Court constitutes a certification that "to the best of the

[3] Pls.' Answer to Rule 11(b)(3) Query (May 25, 2010), at 1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1-2 (emphasis added).

person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation." Pursuant to Rule 11(c), an attorney may be subject to sanctions for violations of Rule 11(b)(3) following notice and a reasonable opportunity to respond. Any sanctions are to be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[7]

The Court finds that sanctions are merited under Rule 11(c), based upon the lack of evidentiary support for Plaintiffs' counsel's contentions that he was unaware of the content of the February 24 motion for summary judgment and inadvertently answered only the first February 19 motion. In providing that sanctions must be proceeded by either a "safe harbor" period to withdraw filings (when sanctions are sought upon motion) or an order to show cause (when the Court acts *sua sponte*), Rule 11 is designed to afford attorneys a chance to clarify, correct, or retract challenged statements. Plaintiffs' counsel did not avail himself of this opportunity. Rather,

[7] Super. Ct. Civ. R. 11(c)(2).

counsel's "answer" to the Court's order to show cause was essentially non-responsive to the Court's inquiry.

Plaintiffs' counsel's claim that the first February 19 motion was filed *after* defense counsel informed him that he had filed multiple summary judgment motions that were being consolidated due to the Court's rejection is belied by the record. February 19 was a Friday, and the issues that arose regarding defense counsel's multiple motions were not addressed until the following week, when the Court received and reviewed chambers copies. On February 23, Katz's attorney e-mailed Plaintiffs' counsel to state that "I was told by the Court to put it all in one motion so I will do so and refile hopefully today. Although you'll get notice of the filing, I'll send you that motion in PDF when it's accepted."[8] Plaintiffs' counsel sent a reminder e-mail on March 10, and Katz's attorney followed up the next day by e-mailing a copy of the consolidated motion.[9] The File & Serve transaction information for the consolidated motion further indicates that it was electronically received by Plaintiffs' counsel's firm on March 17.

While Plaintiffs' counsel quibbles with the Court's referring to the first February 19 motion as "rejected," neither the Court nor Katz disagree

[8] Defs.' Resp. in Opposition to Pls.' Mot. for Relief from J., Ex. B.

[9] *Id.*, Ex. C.

that the motion was initially designated as accepted, as a result of which Plaintiffs' counsel was automatically served with that filing prior to its rejection.[10] However, service of the incorrect motion neither explains nor excuses Plaintiffs' counsel's alleged failure to respond to the correct motion—and still less could it justify presenting a counterfactual version of events to this Court. All three February 19 motions were eventually rejected, and Plaintiffs' counsel was *repeatedly* informed that they would be replaced with a new, consolidated motion, which was provided to him by electronic service and by a separate e-mail from Katz's counsel.[11] Indeed, defense counsel's e-mail was prompted by Plaintiffs' counsel's requesting the correct motion. Whatever "dilemma" Katz's counsel might have

[10] *See Villare*, C.A. No. 08C-10-061, at 2 n.1 (Del. Super. May 18, 2010).

[11] Along similar lines, Plaintiffs' counsel indicates that he contacted the Prothonotary's office following the Court's denial of Plaintiffs' motion for relief from judgment and confirmed that the red transaction information and seal printed on the copy of the first February 19 motion he received by electronic service conveyed that the filing was accepted. As the Court has explained, it considers the initial acceptance and service of the February 19 motion essentially irrelevant, as Plaintiffs' counsel was on clear notice that the filing was subsequently rejected and that the February 24 motion replaced it. In addition, the Court has no way of knowing what context Plaintiffs' counsel provided during this conversation. The individual he named is not this judge's case manager, and thus would have had no reason to be familiar with the transactional history of this case; it appears she simply gave accurate general information regarding what occurs when a filing is accepted in File & Serve. Had Plaintiffs' counsel checked the File & Serve history himself or asked the Prothonotary staffer with whom he communicated to do so, it would have confirmed what he already knew: that the February 19 motion was not part of the File & Serve docket because it had been supplanted by the consolidated February 24 motion, which was attached to a cover letter stating that Katz's attorney had "consolidated the three previously filed motions for summary judgment into the enclosed single motion" at the Court's direction.

generated by his February 19 filings, he took appropriate steps to dispel any potential confusion and to ensure that Plaintiffs' counsel received the consolidated February 24 motion and could identify it as the matter pending before the Court.

Furthermore, Plaintiffs' counsel's argument regarding whether the first February 19 motion should be called "rejected" does nothing to allay the Court's concerns that Plaintiffs' motion for relief from judgment blatantly misrepresented the nature of Plaintiffs' April 1 summary judgment response. In the absence of a credible explanation from Plaintiffs' counsel, the Court concludes from the record and the surrounding circumstances that Plaintiffs' April 1 summary judgment response actually responded to the consolidated motion, such that Plaintiffs' motion for relief from judgment was based upon a false assertion of fact. Not only does the record demonstrate that the correct motion was submitted to Plaintiffs' counsel via two different channels, but the very content and structure of Plaintiffs' April 1 response address the consolidated motion, and not the February 19 filing.

One cogent example of the correspondence between Plaintiffs' April 1 response and the consolidated motion for summary judgment should illuminate the basis for the Court's conclusion. Plaintiffs' April 1 response

described the content and location of a particular allegation in the summary judgment motion it purported to address:

> *Contrary to the allegation in paragraph 7* [of Katz's summary judgment motion] that the contract evidenced the true intent of Vanguard, the attached Affidavit of Dr. Villare evidences that the intent of Vanguard was to purchase a minimum of 39 acres from the Richards.[12]

Paragraph 7 of Katz's first February 19 summary judgment motion addressed the formation of Plaintiff Vanguard Group. In its entirety, it stated as follows:

> 7. In answer to Katz's interrogatories propounded in this case, the Plaintiffs state that The Vanguard Group, LLC was formed on Nov. 14, 2001, for the purpose of real estate development. During the deposition of Dr. Villare, he stated that he may have formed the corporation himself.[13]

This paragraph bears no relation whatsoever to the description of "paragraph 7" contained in Plaintiffs' April 1 response. By contrast, the seventh paragraph of the February 24 consolidated motion begins with assertions about the contract at issue in the underlying suit:

> 7. As for the success of the Engel Case, Vanguard cannot show Engel negligently drafted the agreement because *the contract, as written, actually represented Vanguard's intended*

[12] Pls.' Resp. to Defs.' Mot. for Summ. J. (Apr. 1, 2010), at 3 (emphasis added).

[13] *See* Defs.' Mot. for Summ. J., LexisNexis File & Serve Transaction No. 29655253 (Feb. 19, 2010) (internal citations omitted).

> *offer* and specifically disclaimed any reliance on representations made by Engel. . . .[14]

The Court can discern no other explanation but that Plaintiffs' counsel read and responded to the correct, consolidated summary judgment motion filed on February 24. It necessarily follows that Plaintiffs' counsel's assertions that he did not receive the correct February 24 motion and inadvertently drafted a response to the first February 19 motion were without evidentiary support.

Plaintiffs' counsel was free to challenge the Court's summary judgment decision by a timely motion for reargument, an appeal, or both. The alternative avenue counsel chose in suggesting that he did not receive the correct motion despite stark evidence to the contrary—the most convincing of which is drawn from *Plaintiffs' filings*—was simply unacceptable. Not only did counsel's allegations and factual contentions violate Rule 11, but they caused opposing counsel and the Court to expend significant time and resources. Indeed, to the extent Plaintiffs' counsel's position regarding the inadequate scope of Plaintiffs' summary judgment response evinces a belief that he has new or additional arguments in response to the Court's decision, his own energies would have been far

[14] Defs.' Mot. for Summ. J. (Feb. 24, 2010), at ¶ 7.

better directed to developing the merits of those positions, rather than to presenting an unwarranted motion for relief.

Thus, upon review of the record, the Court finds that Plaintiffs' motion for relief from judgment violated Rule 11(b)(3).[15] As to the proper sanction, the Court cannot grant Katz's request for fees and costs associated with his response to the Rule 60(b) motion. Although the Court raised the possibility of imposing attorneys' fees in its order to show cause, it is without authority to do so under the auspices of Rule 11. The Court can direct payment of attorneys' fees and expenses to a party as a Rule 11 sanction only when the party has pursued sanctions "on motion."[16] Katz's fee request cannot be considered a "motion" for sanctions under the strictures of Rule 11(c)(1)(A). That provision articulates the process by which a party may file for Rule 11 sanctions, and includes requirements that a motion for sanctions be filed "separately from other motions or requests" and that the party against whom sanctions are sought be afforded a "safe

[15] Although Katz did not raise the issue, the Court observes that because the allegations and factual contentions at issue were highly material to Plaintiffs' position in the Rule 60(b) motion, the motion itself would likely constitute a violation of Rule 11(b)(1), which states that an attorney's filing of a written motion certifies that "it is not being presented for any improper purpose."

[16] Super. Ct. Civ. R. 11(c)(2).

harbor" period to withdraw the challenged filing.[17] Neither requirement is satisfied by Katz's fee request, which was contained within his opposition to Plaintiffs' motion for relief.

Nevertheless, when the Court acts upon its own initiative following the issuance of an order to show cause, Rule 11(c)(2) permits an order directing payment of a penalty into Court. Accordingly, the Court hereby imposes a sanction of $500.00 upon Plaintiffs' counsel, to be paid into Court. The Court considers this amount to be minimally sufficient as a deterrent to future violations by Plaintiffs' counsel, as well as others similarly situated.

Finally, because the allegations and factual contentions at issue in Plaintiffs' Rule 60(b) motion touched upon matters fully within Plaintiffs' counsel's knowledge and implicated the duty of candor towards this tribunal,[18] the Court finds itself in the regrettable position of having to refer another opinion in this litigation to the Office of Disciplinary Counsel. The

[17] Super. Ct. Civ. R. 11(c)(A) ("A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the Court unless, within 21 days after service of the motion (or such other period as the Court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the Court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.").

[18] *See, e.g.*, *In re Amberly*, 2010 WL 2184031 (Del. June 1, 2010).

Court sincerely hopes that disciplinary counsel is afforded no additional opportunities to gain familiarity with this case.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Office of Disciplinary Counsel