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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000398-MR
&
NO. 2010-CA-000530-MR

LINDA D. JOHNSON — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 07-CI-00453

DENNIS WILLIAMS d/b/a
WILLIAMS COMFORT AIR — APPELLEE/CROSS-APPELLANT

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Linda D. Johnson appeals from the February 24, 2010 order, of the Russell Circuit Court that granted Dennis Williams' (d/b/a Williams Comfort Air) motion to dismiss her law suit. The trial court, however, denied the portion of Williams' motion that asked for Kentucky Rules of Civil Procedure (CR) 11 sanctions and costs. Williams cross-appeals the portion of the order that

denied sanctions and costs. Furthermore, Williams cross-appeals from the February 4, 2009 court order, which denied his motion to dismiss, and the court's verbal order at a pretrial conference on January 12, 2010, which denied his motion to file a third-party complaint. Upon review, we vacate the February 24, 2010 order, which dismissed the action, and remand for procedures consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson filed this action almost five years after the installation of a fuel-oil burning furnace in her home. The basis of her lawsuit was that at some time during the five-year period, her property had been contaminated by an oil leak, which affected her soil and water supply. In the complaint, Johnson alleged that the installation of the fuel-oil burning furnace was the source of the oil leak. Furthermore, she claims that oil leak was the result of negligence, breach of contract, breach of implied warranty of fitness for a particular purpose, and gross negligence.

The facts leading up to the filing of this action began in March 2003. Johnson hired Williams, a licensed Heating, Ventilating, and Air Conditioning ("HVAC") installer, to put a new furnace in her home. The parties entered into a contract wherein Johnson agreed to pay Williams $2,200, parts and labor, for the installation of the furnace. The contract required Williams to install an oil-fired furnace with venting to chimney, oil/electric hook-up, ductwork transitions, and thermostat. Significantly, the contract did not include an agreement to install a

new oil line, but rather the parties agreed to hook the new furnace to the existing oil line.

Around December 2004, Johnson said that she began to smell fuel oil. She contacted Williams, and he sent his employees to check out the furnace. At the first visit to test the furnace Williams' employees re-ignited the furnace because it had lost its prime. Nevertheless, Johnson continued to smell fuel, and on January 11, 2005, Williams' employees returned. They found that the original oil line was leaking around an improper compression fitting, which apparently, had been installed by Allan Antle not Williams. To remedy the problem, Williams' employees removed the original oil line and replaced it with a two-line system. At that time, Williams' employees reported that they saw some oil under Johnson's home.

From January 2005 until June 2005, Johnson claimed that she continued to smell fuel oil but did not contact anyone. Then, in June 2005, Pam Pierce, Johnson's daughter, was watering flowers on her mother's property with a hose attached to the house's plumbing. The water coming from the hose became reddish in color and smelled like fuel oil. Johnson's water supply was from a well on her property. Pierce then called Williams who went to the home to examine the furnace again. The furnace is actually located inside the home. After investigating the situation, he advised that there was nothing more he could do.

Subsequently, Pierce contacted the Kentucky Environmental and Public Protection Cabinet ("Cabinet"). The Cabinet's inspection of Johnson's

property showed that fuel oil had been released onto the property. The inspectors also obtained a sample of the water from the well. This sample showed that a petroleum product had contaminated the well. Personnel from the Cabinet informed Johnson that she was responsible for cleaning the oil spill on her property and subject to penalty if she does not do so.

Meanwhile, Rickey Pierce, Johnson's son-in-law, and Johnny Brandt, a friend of Johnson's grandson, went under the house to look for the source of the oil leak. Allegedly, they removed the fuel-oil line installed by Williams' employees. In a witness statement, provided by Johnson, it said that they had discovered a hole with oil coming out. The fuel line, however, was thrown away.

Johnson filed a complaint against Williams on November 26, 2007. After several years of litigation, the case was scheduled for trial on March 2, 2010. On February 6, 2010, however, Williams filed a motion for CR 11 sanctions, a motion for dismissal and/or for costs and attorney fees. He contended that Johnson had committed fraud on the court by providing witness statements that were false and forged.

On February 18, 2010, Johnson filed a response to Williams' motion. In the two attached affidavits from Johnson and her daughter, Pam Pierce, it was stated that Johnson had nothing to do with obtaining the statements or the signatures on the statements. Thereafter, on February 24, 2010, the trial court, without holding a hearing or issuing findings of fact, entered an order dismissing

Johnson's lawsuit but denying Williams' motions for sanctions, including attorney fees and cost. Johnson filed a notice of appeal, and Williams filed a cross-appeal.

ISSUES

Johnson argues that the trial court abused its discretion when it dismissed the case because under CR 11 a dismissal is only appropriate under exceptional circumstances. In addition, Johnson contends that the trial court abused its discretion when it dismissed her case because it did not conduct a hearing or provide findings of fact. And finally, Johnson claims that the trial court abused its discretion when it dismissed the case by failing to take into account the distinction between conduct by an attorney and conduct by a party.

Williams in the cross-appeal counters that all the claims against him should be dismissed because the applicable statute of limitations has lapsed, and further, no proof has been provided to show that oil on Johnson's property was caused by Williams or his employees. Second, if the matter is returned for trial, the appellate court should permit Williams to file his third-party complaint. Finally, with regard to the trial court granting the motion for dismissal, Williams asserts that because Johnson supplied verified answers to interrogatories and verified responses to requests for production of documents that were favorable to her, but ultimately were discovered to have been forged, that the dismissal was appropriate as a CR 11 sanction. In essence, he reasons that the trial court properly dismissed the case because Johnson acted unreasonably when she presented the trial court with false, forged affidavits.

STANDARD OF REVIEW

An appellate standard of review is not elucidated in CR 11. The resulting appellate standard of review, however, has been explained by *Clark Equipment Co., Inc., v. Bowman*, 762 S.W.2d 417(Ky. App. 1988). Therein our Court noted that while some courts use an abuse of discretion standard to review all CR 11 judgments, when sanctions are imposed, the Court must use a multi-standard approach. *Id*. at 421. The multi-standard approach consists of applying "a clearly erroneous standard to the trial court's findings in support of sanctions, a de novo review of the legal conclusion that a violation occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed." *Id.* (footnote omitted); *Lattanzio v. Joyce*, 308 S.W.3d 723, 726 (Ky. App. 2010).

Furthermore, as discussed in *Walters v. Moore*, 121 S.W.3d 210, 215 (Ky. App. 2003), "[a]n abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." (quoting *Romstadt v. Allstate Insurance Co.,* 59 F.3d 608, 615 (6th Cir.1995)). And "A [ ] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Id*. Since the trial court issued no findings of fact, we will review any applicable legal conclusions *de novo* and the actions of the trial court under an abuse of discretion standard of review. Keeping this standard of review in mind, we turn to the case at hand.

ANALYSIS

The discussion of the case begins with CR 11, which states:

> The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment.

Clearly, CR 11 allows sanctions to be imposed upon counsel, a party, or both, when an offending verified pleading or paper has been proffered in a case.

In the case at hand, Johnson provided verified answers to interrogatories and verified answers to requests for production of documents, which contained signed statements that were favorable to her case. During discovery it became evident that two submitted items are questionable and one of the items was apparently forged.

One item under scrutiny is a prepared and written estimate, which sets an amount of $1,600 to repair and replace Johnson's kitchen floor. It purports to have been prepared and signed by George Mann. The statement says that Mann, a

remodeling contractor, came to Johnson's home to make the estimate. Mann, however, testified that he made the proposal over the phone without viewing the damaged floor. Moreover, Mann thought perhaps his wife wrote the estimate and could not definitely identify the signature as his own. Nonetheless, he expressed that the signature might have been his because it resembled his signature.

The other item is the previously mentioned signed statement by Rickey Pierce and Johnny Brandt. The statement alleges, among other things, that Brandt, with Rickey Pierce's help, removed a fuel-oil line, which had a hole in it where oil was leaking. Both witnesses testified that they did not write or sign the statement. Further, Brandt states that he never made the alleged remarks in the statement. In sum, it appears that Johnson gave the trial court statements that under the plain meaning of the rule would permit CR 11 sanctions.

Nonetheless, it is difficult to ascertain whether the trial court granted the motion to dismiss based on CR 11. The language of the order is confusing. It states:

> This comes before the Court on Defendant's Motion for Rule 11 Sanctions, Motion to Dismiss and/or Motion for Costs. The Court after reading said Motions, reviewing the file herein and being otherwise sufficiently advised, to wit:
>
> It is hereby [Ordered] that Defendant's Motion to Dismiss be granted. Motions for Sanctions and Costs are hereby denied.

To read the order literally, it appears that the trial court is dismissing the case and denying the motions for sanctions and costs. Yet, in the order the trial court never specifically references CR 11 as the basis for the dismissal.

Williams' motion to dismiss is labeled as "Motion for Rule 11 Sanctions Against the Plaintiff, Motion to Dismiss, and/or Motion for Costs." Again, even though no other civil rule or rationale is provided by Williams, it is not clear if the motion to dismiss relies on CR 11. An answer may be gleaned from the actual language supporting the motion. Therein are outlined Johnson's alleged misconduct and the improper discovery. Since no other civil rule is cited to support the motion to dismiss or motion for costs and by citing CR 11 in the heading of the motion, we assume arguendo that CR 11 is the basis for the motion, and necessarily, the rationale underlying the trial court's grant of the motion to dismiss.

Having determined that the motion to dismiss herein is rendered under CR 11, we now turn to whether the dismissal was appropriate. Williams cites several cases to support that a motion for dismissal is appropriate under CR 11. Williams, however, offers no Kentucky cases that allow for dismissal of an action prior to final adjudication as a CR 11 sanction.

But Williams states that because CR 11 was based on Federal Rules of Civil Procedure (Fed. R. Civ. P.) 11, federal case law is persuasive. To support this proposition, he cites *Hines v. Barnett Bank of Tampa*, N.A., not reported in S.W.3d, 2008 WL 820903)(Ky. App. 2008)(Nos. 2006-CA-000216-MR, 2006-

CA-000217-MR) and *Taylor v. Morris*, 62 S.W.3d 377, 379 (Ky. 2001). As far as *Taylor*, this case references the similarity between CR 35.01 and Fed R. Civ. P. 35(a) and makes no reference to CR 11 and Fed R. Civ. P. 11.

Notwithstanding *Taylor* being inapposite here, our more significant concern is the use of *Hines* by both parties. And particularly vexing is the fact that Williams relies heavily on this case. First, this case is an unpublished case. CR 76.28(4)(c) provides that:

> Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

Moreover, while the Kentucky Supreme Court denied discretionary review of *Hines*, it also ordered that it not be published. Clearly, *Hines* has no precedential value. Furthermore, we will not consider it in light of the fact that a published case, *Bowman*, has adequately addressed the issue. Unpublished opinions are not to be cited or used as authority when a published case adequately addresses the issues. CR 76.28(4)(c). We admonish the parties to be more careful in the use of authority and precedent in future appellate practice.

Having indicated that CR 11 mirrors Fed. R. Civ. P. 11, and therefore, federal cases are persuasive, Williams initially also mentions an unpublished

federal case, *Bradbury v. Township of Plymouth*, 107 F.3d 870, 1997 WL 76187, (6th Cir. 1997). The circumstances however, are quite different in that case. The district court entered a motion to dismiss because of the party's failure to answer the defendants' interrogatories, failure to respond to the defendants' motion to compel, failure to comply with the court's order to compel, failure to respond to the defendants' motion to dismiss, and finally, failure to appear at the dismissal hearing. Not only were the circumstances quite different, the motion for dismissal was not made as a CR 11 sanction but under Fed. R. Civ. P. 37(b).

Williams then alludes to several federal cases wherein dismissal was allowed under Fed. R. Civ. P. 11(b). But considering that no Kentucky case has been provided allowing a motion to dismiss based on CR 11 and that, although the rules are similar, they are not exactly the same; we remain unpersuaded by these federal cases. And it is vital to realize that even in the federal system, a motion to dismiss is an extreme measure that is only to be used in extraordinary circumstances. For example, in *Marina Management Services, Inc. v. Vessel My Girls*, 202 F.3d 315, 325 (D.C. Cir. 2000), the Court held that dismissal is only an appropriate sanction under Rule 11 "for serious misconduct when lesser sanctions would be ineffective or are unavailable."

Besides the obvious factor that dismissal as a sanction should be used only when absolutely necessary, we observe another significant difference between CR 11 and Fed. R. Civ. P. 11. The last sentence of CR 11, states that "[t]he Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry

of a final judgment." The federal rule contains no such language. Here, when the court entered the order of dismissal, no final judgment had been rendered. Hence, under the plain meaning of CR 11, the trial court should have postponed an order of sanctions until the conclusion of the litigation.

In the case at hand, we are troubled for several reasons by the trial court's dismissal of the case. First, as observed above, the actual language of CR 11 provides that "[t]he Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment." But the question becomes, is the granting of a motion to dismiss a viable sanction under CR 11 since such a dismissal would render the decision final?

Early in his brief, Williams addresses this question by noting that the language of CR 11 does not provide an exhaustive list of sanctions, and therefore, it is possible that a dismissal is an appropriate sanction under CR 11. But, as we pointed out, dismissal of an action is an extraordinary measure that should only be granted in extreme cases. As provided in *Bowman:*

> Rule 11 does not provide substantive rights to litigants but is a procedural rule designed to curb abusive conduct in the litigation process. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir.1988); *Gaiardo v. Ethyl Corp*., 835 F.2d 479, 483 (3rd Cir. 1987); *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790 (6th Cir. 1988). It is intended for "exceptional circumstances." *Gaiardo, supra* at 483.

Bowman, 762 S.W.2d at 420. Thus, even the listed sanctions in CR 11 are intended for "exceptional circumstances." And again, Kentucky's civil rule never specifically cites to dismissal as a proper sanction but only says that the other party

pays "reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." CR 11. Thus, we do not think that CR 11 allows for dismissal except for possibly the most egregious situation.

Second, we are concerned by the trial court's dismissal of this action because it gives no explanation for its decision. Although we are cognizant that CR 52.01 does not require trial courts to make findings when ruling on motions; in certain circumstances, especially when granting relief, it has been indicated that it is incumbent upon the trial court to make findings on matters raised by motion. *See Burnett v. Burnett*, 516 S.W.2d 330 (Ky. 1974). Given "the punitive nature of sanctions and 'the impact sanctions may have on a party or an attorney's career and personal well-being,' a trial court should not impose sanctions without a hearing and without rendering findings of fact." *Bowman*, 762 S.W.2d at 421. This prescription is bolstered by federal law. *See Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir. 1988).

The purpose of CR 11 is deterrence and compensation, and of these two, deterrence is the principal goal. But "deterrence, not compensation, is the principal goal of Rule 11, [and] courts should impose the least severe sanction that is likely to deter." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). So, since sanctions are to be imposed subject to the principle that the sanction should not be more severe than reasonably necessary to deter repetition of the conduct, here the trial court gave no basis for

the granting of the motion to dismiss. And without understanding the reason for the dismissal, we are unable to discern whether the trial court correctly used its discretion in granting the motion to dismiss.

Thus, we vacate this case and remand for a determination by the trial court of the appropriateness of granting the motion to dismiss under CR 11. And, since we are vacating, the decision is not final. Therefore, the other issues on cross-appeal are interlocutory, and we are not able to address them at this time.

CONCLUSION

For the foregoing reasons, the order granting Williams' motion to dismiss is vacated and remanded to the Russell Circuit Court for further proceedings consistent with this Opinion.

LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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