19-P-1454 Appeals Court

CORINNA von SCHÖNAU-RIEDWEG & another[1] vs. CONTINUUM ENERGY TECHNOLOGIES, LLC, & others.[2]

No. 19-P-1454.

Suffolk. July 15, 2020. - September 30, 2020.

Present: Blake, Sacks, & Ditkoff, JJ.

Rules of Civil Procedure. Practice, Civil, Costs, Attorney's fees, Affidavit.

Civil action commenced in the Superior Court Department on December 27, 2012.

Following review by this court, 95 Mass. App. Ct. 471 (2019), a motion for fees, costs, and expenses was heard by Mitchell H. Kaplan, J.

A. Neil Hartzell for the defendants.
Philip A. O'Connell, Jr., for the plaintiffs.

SACKS, J. A Superior Court judge ruled that the defendants had waited too long to file their motion for an award of

[1] Ebur Investments, LLC.

[2] John Preston; C Change Investments, LLC; and Michael Porter.

sanctions against the plaintiffs, in the form of fees, costs, and expenses, pursuant to Mass. R. Civ. P. 11 (a), as amended, 456 Mass. 1401 (2010) (rule 11 [a]), and Mass. R. Civ. P. 56 (g), 365 Mass. 824 (1974) (rule 56 [g]). The judge concluded that the motion, filed more than a year after the defendants obtained a fifty-three page summary judgment ruling against the plaintiffs, would unreasonably require him to reimmerse himself in "the details of the extraordinarily prolix summary judgment record" in order to determine the defendants' entitlement to sanctions. On the defendants' appeal, and without addressing whether the motion was otherwise meritorious, we conclude that the judge did not abuse his discretion in denying the motion on this ground.

Background. The circumstances giving rise to the underlying litigation are described in Von Schönau-Riedweg v. Rothschild Bank AG, 95 Mass. App. Ct. 471 (2019), and need not be repeated here. It suffices to say that in June of 2016, after reviewing a "massive record," id. at 498, the judge issued a "thoughtful and exhaustive" summary judgment decision, id. at 497, which resolved in the defendants' favor all claims against them with the exception of certain claims against one defendant, John Preston, id. at 473. After those remaining claims were resolved in Preston's favor through a supplemental summary judgment motion, and a jury trial before a different judge, the

plaintiffs appealed. They challenged the June 2016 summary judgment ruling, as well as an earlier order dismissing another defendant. Id. We vacated the earlier dismissal but otherwise affirmed the judgment. Id. at 498-499.

More than a year after the judge had issued the summary judgment ruling, and while the plaintiffs' appeal was pending, the defendants filed a motion for sanctions under G. L. c. 231, § 6F (§ 6F); rule 11 (a); and rule 56 (g).[3] The motion asserted that the plaintiffs' claims "were wholly insubstantial, frivolous and were not advanced in good faith." The motion was supported by a twenty-page memorandum and an affidavit attaching nearly 600 pages of exhibits.[4] The judge denied the motion on a variety of grounds, of which we need discuss only one: timeliness.

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[3] The sanctions motion was directed primarily against the claims resolved on summary judgment, but it also discussed certain claims dismissed by a different judge in 2013. In ruling on the sanctions motion, the judge declined to address those earlier-dismissed claims. On appeal, the defendants make no separate argument as to those claims, and we do not discuss them further.

[4] The voluminous exhibits all related to the merits of the sanctions motion; they did not include documentation of the amounts of fees and costs the defendants would seek to recover if the motion were granted. We make this observation to indicate only the complexity of the motion's merits, not to suggest that in these circumstances the motion also should have addressed the amounts sought prior to obtaining a decision that sanctions were warranted.

Discussion. The judge's ruling relied on our decision in Powell v. Stevens, 69 Mass. App. Ct. 87 (2007), which affirmed the denial on timeliness grounds of a sanctions request under § 6F. In Powell, the defendants had waited for more than one year after the plaintiff's claims were dismissed, and until after resolution of the defendants' counterclaim, before filing their § 6F sanctions motion for the costs of defending against the plaintiff's assertedly frivolous claims. Id. at 88. We affirmed a judge's denial of that motion based on "his discretionary conclusion that conducting a G. L. c. 231, § 6F, hearing so unconscionably long after the fact was impractical." Id. at 92.

In Powell we agreed with the judge's rationale that § 6F "contemplates a separate evidentiary hearing held promptly after the relevant finding, order, verdict, ruling, or judgment, as is inferable from the language of the statute, which, although not requiring the motion to be made within a particular time, does require the judge to state 'specific facts and reasons' on which any finding that the claims were 'wholly insubstantial, frivolous, and not advanced in good faith' is based." Id. at 92 n.7. We quoted with approval the judge's further analysis:

> "[T]he necessary time for such a hearing procedure comes immediately after the primary event of a verdict, ruling, or order. At that moment, the total circumstances of the case are full and fresh in the mind of the judge. The hearing can proceed efficiently and in continuity with the

> underlying proceeding. The judge can enter the [required] findings promptly. However, the [defendants] did not request the trial judge (who directed a verdict in their favor) to conduct a prompt § 6F hearing. They cannot reasonably or feasibly do so now more than fourteen months later [and before a different judge]. Such a request would place an unreasonable burden upon the judge and the litigation process. It would utterly defeat the purpose and means contemplated by the statute."

Id.

In the present case, the judge concluded that much of the reasoning in Powell applied to the defendants' sanctions request. The judge of course recognized that (unlike in Powell) he had earlier issued the ruling on the merits of the claims at issue. He thus recounted that he had issued a fifty-three page summary judgment decision in June of 2016. He stated:

> "To issue that decision, the court reviewed literally hundreds of pages of statements of purportedly undisputed facts and tens of thousands of pages of supporting evidentiary materials, as well as multiple memoranda of law. This task was made more difficult by the . . . [d]efendants['] decision to file separate, stand alone motions, statements of fact and memoranda of law, although they were all represented by the same defense counsel. The pending § 6F/Rule 11 motions were filed with the court on July 28, 2017, more than a year after the . . . [d]efendants received the [summary judgment d]ecision. By that time, the circumstances of the case, including the details of the extraordinarily prolix summary judgment record, were no longer 'full and fresh' in the mind of this judge."

He concluded that "[t]his is adequate reason in itself to deny the [defendants'] motion." He noted that although Powell had addressed only § 6F motions, its timeliness reasoning was

"equally applicable to motions filed under [r]ule 11 and [r]ule 56(g)."

In this appeal, although the defendants do not and could not seek review of the judge's § 6F ruling,[5] they contend that his timeliness rationale does not properly extend to requests for sanctions under either rule 11 (a) or rule 56 (g). We are not persuaded.

1. Rule 11 (a). We review a judge's decision on a rule 11 (a) sanctions motion for abuse of discretion. Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 417 (1998). A judge faced with a motion under rule 11 is "entitled to consider the untimeliness of the motion[,] . . . [its] effect upon the reasonable expectation of a party to have a case efficiently adjudicated, and the imposition on the court . . . ." LoCicero v. Hartford Ins. Group, 25 Mass. App. Ct. 339, 344 (1988) (upholding denial of motion on these grounds as within judge's discretion). Although LoCicero involved a motion to withdraw an attorney's appearance under Mass. R. Civ. P. 11 (c), as amended, 456 Mass. 1401 (2010), rather than a motion for sanctions under

[5] An appeal from a Superior Court judge's decision on a § 6F motion lies to a single justice of this court, not to a panel. See G. L. c. 231, § 6G; Danger Records, Inc. v. Berger, 444 Mass. 1, 8 (2005). The defendants did not seek review from a single justice.

rule 11 (a), similar considerations apply in the sanctions context.

Rule 11 contains no express time limitations on sanctions motions, and -- like the other rules of civil procedure -- the rule "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Mass. R. Civ. P. 1, as amended, 474 Mass. 1402 (2016). Those principles support a judge's authority to consider whether a request for rule 11 (a) sanctions has been so delayed as to impose an unreasonable burden on the court.[6] Cf. Society of

[6] In the absence of additional decisions under our rule 11, we would ordinarily look to "the construction given to the pre-1983 version of Fed. R. Civ. P. 11," the text of which was "virtually identical" to our own rule. Van Christo Advertising, Inc., 426 Mass. at 414. But the parties have not cited, nor have we found, any Federal decisions from the relevant period discussing time limits on requests for rule 11 sanctions. We note that under the Federal rule as amended in 1983, it was held that "a party should make a Rule 11 motion within a reasonable time." Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988), abrogated on other grounds, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405-409 (1990). That a rule 11 sanctions motion may be resolved "after the principal suit has been terminated," Metrocorps, Inc. v. Eastern Mass. Jr. Drum & Bugle Corps Ass'n, 912 F.2d 1, 3 (1st Cir. 1990), quoting Cooter & Gell, supra, hardly suggests that a court is obliged to consider defendants' sanctions motion more than one year after they obtain summary judgment on nearly all claims against them. Although no language in the 1983 amendments to the Federal Rules of Civil Procedure required it, the drafters stated their expectation that "[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." Advisory Committee Note to 1983 Revision to Fed. R. Civ. P. 11, 97 F.R.D. 165, 200 (1983). The current

Jesus of New England v. Boston Landmarks Comm'n, 411 Mass. 754, 756-757 (1992) (absent any "specific Massachusetts procedural rule regarding the timely filing of a petition for attorneys' fees," determination of timeliness was "within the discretion of [the] court"); Tilman v. Brink, 74 Mass. App. Ct. 845, 855 n.22 (2009) (same).

In determining here that the defendants' delayed motion imposed an unreasonable burden, the judge did not abuse his discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion consists of "clear error of judgment in weighing" factors relevant to decision, such that decision falls outside range of reasonable alternatives [citation omitted]). The defendants' motion asked the judge to find, as to numerous pleadings, motions,[7] and other papers filed with the court, that plaintiffs' counsel had no "subjective good faith belief that the [filings were] supported in both fact and law." Van Christo Advertising, Inc., 426 Mass. at 416. Despite their arguments to the contrary, the defendants' motion called on the

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Federal rule contains procedural requirements that effectively make a sanctions motion after the claim has been decided ineffective. See Fed. R. Civ. P. 11(c)(2).

[7] "The provisions of rule 11 (a) are also applied to motions and other papers by virtue of Mass. R. Civ. P. 7 (b) (2), 365 Mass. 748 (1974)." Van Christo Advertising, Inc., 426 Mass. at 414.

judge to review substantial portions of the plaintiffs' verified third amended complaint -- a ninety-page, 286-paragraph document -- as well as 500 pages of other exhibits.

The defendants' argument that the judge would have been required to undertake only "a discrete analysis narrowly focused" on the question of counsel's good faith is belied by the volume of the summary judgment record, the complexity of the judge's fifty-three page, "thoughtful and exhaustive" summary judgment ruling, and the heft of the defendants' motion and attachments.[8] Von Schönau-Riedweg, 95 Mass. App. Ct. at 497. We owe substantial deference to the judge's eminently reasonable determination that by the time the defendants moved for sanctions, the circumstances of the case were no longer "full and fresh" in his mind, Powell, 69 Mass. App. Ct. at 92 n.7, and that the defendants' delay had prejudiced his ability to resolve the issue efficiently, necessitating a major commitment of judicial resources with limited benefit to the administration of justice, and risking an erroneous resolution in light of the passage of time.

[8] The defendants' intimation that their case for sanctions was clearcut is also belied by the judge's determination, as an alternative ground for denying the § 6F portion of the defendants' motion, that plaintiffs' counsel had not acted in bad faith by advancing certain arguments in opposition to the defendants' statute of limitations defense.

Although not every request for rule 11 (a) sanctions will necessitate an evidentiary hearing and detailed findings, compare Powell, 69 Mass. App. Ct. at 92 n.7 (discussing § 6F requirements), there are some circumstances in which such a hearing (if requested) and findings are required. See Psy-Ed Corp. v. Klein, 459 Mass. 697, 722 (2011). In a complex and long-running dispute like this one, the interests of justice would not be served by the simple entry of a summary finding of bad faith, such as the defendants here suggest would have sufficed.[9] Compare Cahaly v. Benistar Prop. Exch. Trust Co., 85 Mass. App. Ct. 418, 419-420, 428 (2014) (after second trial of long-running dispute, judge conducted eight-day evidentiary hearing on sanctions motion, adopted most of parties' stipulated facts, and made comprehensive additional findings of fact; on appeal, court remanded for resolution of additional factual issues related to nonmoving party's good faith). The judge acted within his discretion in considering these factors.

The defendants nevertheless assert that their sanctions motion filed more than a year after the summary judgment ruling was indeed filed "within a reasonable time," because in the

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[9] The defendants insist that the relief they seek would not "require any court to make new factual findings based upon a reevaluation of the summary judgment record. . . . The only additional factual findings necessary concern the amount of fees and costs to be recovered by the . . . [d]efendants."

interim their counsel had been busy dealing with the remaining claims against Preston. Assuming arguendo that this argument was presented to the judge and thus not waived,[10] he did not abuse his discretion in rejecting it. The summary judgment ruling came in June of 2016; the claims against Preston were resolved by November of 2016. We are doubtful that ongoing proceedings regarding nonfrivolous claims[11] made it reasonable for the defendants to delay their sanctions motion regarding assertedly frivolous claims. To the contrary, the prompt filing of such a motion, if sufficiently well-grounded, might deter future frivolous claims or positions in the litigation. In any event, even if the judge had agreed that the defendants were simply too busy to seek sanctions until after the Preston claims were resolved, the defendants offer no explanation of why, once that occurred and final judgment entered, they waited six additional months to serve their sanctions motion.

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[10] Although the plaintiffs' opposition to the sanctions motion began with a detailed argument that it was untimely, nothing in the record indicates that the defendants responded, or sought to respond, to this point before the judge ruled on the motion.

[11] The sanctions motion did not focus particularly on the eight claims against Preston that survived the June 2016 summary judgment ruling, two of which were disposed of by a subsequent motion and six of which went to trial. The defendants do not argue that they waited to file their sanctions motion so that it could encompass the plaintiffs' assertion and pursuit of these ultimately unsuccessful claims.

The defendants do not argue that they were led to believe that they could or should so delay their motion, or that they were unfairly surprised by the judge's determination that the motion was untimely. We nevertheless observe as a general matter that if a party contemplating a request for sanctions in a complex, multiphase case such as this one is uncertain whether sanctions should be sought promptly after the offending conduct, or whether instead it would be more efficient to seek them at some later stage of the litigation, the party may seek the judge's guidance on the matter.

2. Rule 56 (g). For similar reasons, we see no abuse of discretion in the judge's conclusion that the request for sanctions under rule 56 (g) was untimely. That rule provides:

> "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt" (emphasis added).

The few reported decisions discussing our rule 56 (g) have not addressed what time limits, if any, apply to a request for sanctions under the rule.[12]

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[12] See Vaught Constr. Corp. v. Bertonazzi Buick Co., 371 Mass. 553, 562 (1976); Allen v. Selectmen of Belmont, 58 Mass. App. Ct. 715, 716 n.4 (2003); Miaskiewicz v. Le Tourneau, 12 Mass. App. Ct. 880, 881 (1981); Community Nat'l Bank v. Loumos,

The defendants contend that the rule's use of the phrase "at any time" indicates that there is no time limit on assessing sanctions. This literal interpretation cannot be correct. Surely the rule does not envision a request for sanctions, or their sua sponte imposition by a judge, years after the entry of final judgment. The principles of interpretation from Mass. R. Civ. P. 1 apply here as well: rule 56 (g) "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Mass. R. Civ. P. 1. The phrase "at any time" recognizes that it may not be immediately apparent that an affidavit was presented in bad faith or solely for the purposes of delay. If, for example, this became apparent only when the affiant testified at trial, the judge would have the authority to take remedial action at that point.[13] The phrase cannot be

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6 Mass. App. Ct. 830, 831-832 (1978). Cases interpreting the analogous Federal rule, Fed. R. Civ. P. 56(h), do not provide clear guidance, as that rule does not contain the "at any time" language relied upon by the defendants here, and, since the 2010 amendments to that rule, sanctions are explicitly discretionary. See Advisory Committee Note to 2010 Amendments to Fed. R. Civ. P. 56.

[13] Sanctions were awarded in just this scenario in Rogers v. AC Humko Corp., 56 F. Supp. 2d 972, 979-981 (W.D. Tenn. 1999). In another Federal case, after a motion for summary judgment was initially denied and discovery was reopened, key affidavits were determined to be false, the judge reconsidered his earlier ruling and ordered summary judgment and, in the same decision, he imposed sanctions for filing the affidavits in bad faith. See Trustees of Plumbers & Steamfitters Local Union No. 43

interpreted to permit an adverse party to sit on its claim that an affidavit was sanctionable under rule 56 (g), without explanation, all the while allowing the judge to expend needless effort.

Moreover, the phrase "[s]hould it appear to the satisfaction of the court at any time" necessarily implies that a judge has some discretion in determining whether affidavits meet the rule's standard for sanctions. A judge who is or has just been immersed in the process of ruling on a motion for summary judgment may more efficiently and accurately "satisf[y]" himself whether affidavits meet rule 56 (g) standards than a judge who -- like the judge here -- has not reviewed the summary judgment record, or issued any other substantive ruling in the case, for more than a year. A judge who is presented with an inexplicably delayed motion, and who is not satisfied upon an initial review of the motion that sanctions are warranted, is not required to undertake a deep dive into the motion's hundreds of pages of supporting materials.

In addition, rule 56 (g) directs that, if affidavits submitted in connection with a summary judgment motion are presented in bad faith or solely for the purpose of delay, sanctions be imposed "forthwith." This suggests that, for the

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Health & Welfare Fund v. Crawford, 573 F. Supp. 2d 1023, 1027, 1033, 1036, 1039-1040 (E.D. Tenn. 2008).

rule to function as intended, sanctions should follow closely upon the discovery of the offending conduct. A similar implication may be drawn from the rule's language limiting sanctions to the injured party to "the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees." Determining what portion of a party's costs and fees are attributable to the filing of particular affidavits, as distinct from the costs of the summary judgment and any subsequent proceedings as a whole, can most efficiently be done close in time to those proceedings, and may become more difficult as those proceedings recede into the past.

It was therefore within the judge's discretion to determine that the request for rule 56 (g) sanctions had not been made within a reasonable time. The defendants nevertheless protest that, even if a reasonable time limit may be imposed, they did move, promptly upon receiving the plaintiffs' summary judgment opposition materials, to strike portions of two of plaintiffs' affidavits on various grounds. The judge determined that some of the defendants' objections were well-founded. Had those motions to strike asked the judge to award sanctions under rule 56 (g), or even to determine that the affidavits in question were "presented in bad faith or solely for the purpose of delay," matters might stand differently now. But the motions to

strike did neither of these things.[14] Nor did the judge, at the summary judgment stage or in denying the defendants' sanctions motion, ever make the finding of bad faith or delay necessary to support rule 56 (g) sanctions.[15]

Indeed, the defendants' sanctions motion did not even ask the judge to make such a determination. Their motion mentioned rule 56 (g) only in passing, lumping it together in one sentence with § 6F and rule 11 (a), and referring to it in fragments of two other sentences in the course of a twenty-page memorandum. Nearly all of the rule 56 (g) arguments they make on appeal were

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[14] Although cases under the analogous Federal rule 56(h) are not controlling, see note 12, supra, it is nevertheless instructive that under that rule, sanctions for affidavits submitted in bad faith or for delay have typically been sought before, and awarded together with, the ruling on the summary judgment motion to which the affidavits relate, rather than at some later stage of the litigation. In some of those cases, sanctions were sought as part of a motion to strike. See Nuzzi v. St. George Community Consol. Sch. Dist. No. 258, 688 F. Supp. 2d 815, 831-835 (C.D. Ill. 2010); United States v. Nguyen, 655 F. Supp. 2d 1203, 1208-1210 (S.D. Ala. 2009). Even absent a motion to strike, sanctions are typically awarded at the same time as the summary judgment ruling. See Mifflinburg Tel., Inc. v. Criswell, 277 F. Supp. 3d 750, 759, 762, 807-808 (M.D. Pa. 2017); SMS Assocs. v. Clay, 868 F. Supp. 337, 344 (D.D.C. 1994), aff'd without opinion, 70 F.3d 638 (D.C. Cir. 1995); Warshay v. Guinness PLC, 750 F. Supp. 628, 640-641 (S.D.N.Y. 1990), aff'd without opinion, 935 F.2d 1278 (2d Cir. 1991); Barticheck v. Fidelity Union Bank/First Nat'l State, 680 F. Supp. 144, 150 (D.N.J. 1988); Acrotube, Inc. v. J.K. Fin. Group, Inc., 653 F. Supp. 470, 475, 477-478 (N.D. Ga. 1987).

[15] Nor, despite the defendants' repeated assertions to the contrary in their brief and reply brief, did the judge ever find that the affidavits were "false." Such mischaracterizations of the decision at issue hinder the appellate process.

never made to the judge. In these circumstances, although we need not decide the point, we could easily conclude that the defendants "did not sufficiently raise the issue below and [are] therefore barred from raising it on appeal." Boss v. Leverett, 484 Mass. 553, 562 (2020).

Order denying motion for sanctions affirmed.