

STATE OF MICHIGAN
COURT OF APPEALS

GUY HISSONG and BETHANY HISSONG,

Plaintiffs,

and

JAMES P. O'NEILL,

Appellant,

v

STEWART BRYCE and CAROLYN BRYCE,

Defendants-Appellees,

and

JILANE FENNER, FENNER REAL ESTATE,
INC., a/k/a EXIT REALTY OF GREATER
CADILLAC, COUNTY OF WEXFORD,
WEXFORD COUNTY DEPARTMENT OF
PUBLIC WORKS, and WEXFORD COUNTY
LANDFILL,

Defendants.

UNPUBLISHED
May 14, 2013

No. 311418
Wexford Circuit Court
LC No. 2006-019885-CE

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Appellant appeals by right from an order granting defendants' motion to enforce a mandate of the Michigan Supreme Court. We affirm, but remand with instructions that the sanctions award is subject to a set off in the amount that defendants received in settlement from Mark R. Dancer.

I. FACTS

On September 14, 2006, plaintiffs, represented by attorney Mark Dancer, filed a complaint against defendants. Dancer subsequently ceased representing plaintiffs and was replaced by appellant. Defendants filed a motion for summary disposition and a motion for sanctions and costs, which plaintiffs, now represented by appellant, contested. Following a hearing on defendants' motions, the trial court found that summary disposition was warranted and granted defendants' motion for sanctions and costs. The trial court subsequently clarified that both Dancer and appellant were jointly and severally liable for the sanction award because Dancer had filed a frivolous complaint and appellant had continued to litigate it.

Dancer and appellant appealed. In an unpublished opinion per curiam with one judge dissenting, this Court found that sanctions were justified against Dancer and appellant, and that the failure to provide Dancer with notice and opportunity to be heard was harmless error. *Hissong v Dancer*, unpublished opinion per curiam of the Court of Appeals, decided March 3, 2011 (Docket No. 294956, 294997), slip op at 2-6. However, the dissent would have remanded, reasoning that Dancer could not be made liable for sanctions in the absence of notice or an opportunity to be heard and that a remand was therefore required. *Id.* at 7-8.

Dancer sought leave to appeal to the Michigan Supreme Court, which, in lieu of granting leave to appeal, ordered the following:

[W]e REVERSE the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we REMAND this case to the Wexford Circuit Court for reconsideration of the defendants' motion for sanctions pursuant to MCR 2.114(D), (E), (F) and MCL 600.2591. On remand, if the circuit court again assesses sanctions, we direct the court to determine whether the plaintiffs' co-counsel at the time of the defendants' motion for summary disposition—[appellant] and Robert Charles Davis—should be held jointly and severally liable for the assessment, along with the plaintiffs and their former attorney, Mark R. Dancer. [*Hissong v Bryce*, 490 Mich 868; 802 NW2d 616 (2011).]

On remand to the trial court, defendants filed a motion to enforce the Court's mandate, but then reached a settlement with Dancer and withdrew their motion for sanctions against Dancer with prejudice. Subsequently, the trial court issued an order granting defendants' motion to enforce the mandate and holding appellant solely liable for the sanctions due and owing to defendants. In support of its order, the trial court found that the settlement between defendants and Dancer rendered that portion of the remand moot, and that co-counsel Robert Davis could not be held liable for any sanctions because he did not sign the response to the motion for summary disposition or any other pleading in the underlying case. The trial court also found that appellant's signing of the response to the motion for summary disposition espousing frivolous arguments was a violation of MCR 2.114 and justified finding him liable for the sanctions.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision to award sanctions for clear error. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

III. ANALYSIS

Appellant argues that the trial court erred by awarding sanctions against him without first conducting a hearing to determine what Dancer knew prior to the filing of the complaint against defendants. We disagree. Dancer was not held liable by virtue of being dismissed from the case by stipulation, and Davis was not held liable by virtue of the fact that he did not sign the response to the motion for summary disposition or any other pleading in the underlying case. Accordingly, the trial court complied with the mandate, which required the trial court to reconsider defendants' motion for sanctions and to determine whether appellant and Davis should be held jointly and severally liable with plaintiffs for the assessed sanctions.

Appellant asserts that the mandate requires that the trial court first conduct an inquiry into what Dancer knew at the time of the filing of the original complaint before determining if sanctions should be assessed at all. Appellant also asserts that, in the absence of sanctions against Dancer for initiating the cause of action, no award of sanctions can be sustained against appellant for continuing the litigation. However, the mandate merely requires a reconsideration of the matter of sanctions consistent with this Court's dissenting opinion; in other words, a reconsideration of the matter of sanctions that does not violate Dancer's procedural due process rights.

Further, appellant was not held liable for sanctions because Dancer failed to conduct a reasonable inquiry into the validity of plaintiffs' complaint. Rather, appellant was held liable for sanctions because appellant himself continued with litigation that was frivolous on its face. What Dancer knew prior to filing the complaint was irrelevant to the matter of sanctions against appellant; the record established that the complaint was frivolous and appellant, unlike Dancer, was afforded notice and an opportunity to be heard on the matter of sanctions. Remand was granted to ameliorate the denial of Dancer's procedural due process, not to provide appellant with a second opportunity to contest the assessment of sanctions against him.

The awarding of sanctions was proper because the trial court complied with our Supreme Court's mandate, the complaint litigated by appellant was frivolous on its face, and appellant was given notice and an opportunity to be heard on the matter of sanctions.

Affirmed and remanded with instructions to set off from the sanctions award the amount (if any) defendants received in settlement from Mark R. Dancer. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell