STATE OF MINNESOTA
IN COURT OF APPEALS
A11-767

Franklin National Bank of Minneapolis,
Respondent,

vs.

Stephen A. Frenz, et al.,
Defendants,

Kenneth Hertz, et al.,
Appellants.

Filed January 9, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-10-1305

Joshua A. Hasko, Christopher Ferreira, Messerli & Kramer, P.A., Minneapolis, Minnesota (for respondent)

Kenneth R. Hertz, Hertz Law Offices P.A., Columbia Heights, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a judgment awarding attorney fees as a sanction, appellants (counsel for the defendants in the district court proceedings) argue that (1) the district court (a) erred in finding that pleadings prepared by appellants were procedurally deficient and (b) abused its discretion in imposing a sanction; and (2) if a fee award is appropriate, the amount awarded is excessive. We affirm.

FACTS

Defendants Stephen A. Frenz and Jennifer J. Frenz had ownership interests in JAS Apartments, Inc. (JAS), which owned and managed a commercial property. The property was subject to two mortgages held by respondent Franklin National Bank of Minneapolis (the bank). One mortgage secured a loan with a principal balance of approximately $1.7 million (mortgage 1) and one secured a loan with a principal balance of approximately $250,000 (mortgage 2). The loan secured by mortgage 2 was guaranteed by the Frenzes under a guarantor agreement executed in April 2009.

JAS defaulted on both mortgages, and the bank foreclosed on mortgage 1 and purchased the property at the sheriff's sale. In November and December 2009, the bank commenced two suits, one against the Frenzes, (the Frenz action) which is the subject of this appeal, and another against JAS (the JAS action). In the JAS action, the bank sought the appointment of a receiver to manage the property during the redemption period. In the Frenz action, the bank alleged breach of the guarantor agreement and sought damages

from the Frenzes. Appellants Kenneth Hertz and Hertz Law Offices, P.A., represented JAS in the JAS action and the Frenzes in the Frenz action.

In the JAS action, JAS served and filed an answer and counterclaim, ultimately alleging counterclaims for equitable and promissory estoppel, conversion, tortious interference with contract, and seeking an accounting. In May 2010, JAS filed a motion to amend its answer and counterclaim. On June 28, 2010, the district court denied JAS's motion to amend to add counterclaims, and on July 9, 2010, discharged the receiver and concluded that the bank was the fee owner of the property.

On July 1, 2010, appellants served four pleadings on the bank in the Frenz action: (1) a counterclaim of JAS against the bank; (2) the Frenzes' cross-claim against JAS; (3) a third-party summons of JAS directed to the Hennepin County Sheriff; and (4) a third-party complaint of JAS alleging claims against the Hennepin County Sheriff. The scheduling order in effect on July 1, 2010, required that "[j]oinder of any and all additional parties shall be completed by July 1, 2010." In the cover letter that accompanied the pleadings, appellants stated, "In accordance with the scheduling order, JAS Apartments, Inc. has been added as a Defendant in this matter."

On July 15, 2010, counsel for the bank sent appellants a letter stating that (1) because JAS is not a party to the Frenz action, (a) JAS's counterclaim against the bank is improper; (b) the Frenzes' cross-claim against JAS is improper; (c) JAS's third-party summons and complaint against the Hennepin County Sheriff is improper; and (2) even if JAS was a party, it could not assert the counterclaims asserted in the pleadings.

On August 3, 2010, the bank served a notice of motion and motion for sanctions pursuant to Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2010), seeking sanctions on the bases that the Frenzes and appellants had asserted claims that were not warranted by existing law and fact and that the pleadings were procedurally deficient. Appellants did not withdraw their claims or respond to either the July 15 letter or the motion for sanctions within the 21-day safe-harbor period. *See* Minn. R. Civ. P. 11.03, subd. (a)(1).

At the hearing on the motion for sanctions, the bank asserted that Minn. R. Civ. P. 14.01 controlled the July 1, 2010 pleadings, that appellants failed to comply with rule 14.01, and that the counterclaims were not warranted by existing law and fact. Appellants argued that Minn. R. Civ. P. 13.08 and 20.01 provided authority for the joinder of JAS as a defendant and that even if Rule 14.01 controlled, appellants' actions were not taken in bad faith. Appellant Hertz asserted that "[p]rior to joining these parties . . . I not only researched the rules, read them thoroughly, spoke with several other attorneys. We've all concluded the actions that I've taken are proper."

The district court issued an order striking the July 1 pleadings, imposing sanctions, and directing the bank to file an affidavit attesting to attorney fees and costs incurred in connection with the July 1 pleadings. The district court reasoned that rule 14.01 provided the proper procedure to bring JAS into the action, and JAS's counterclaims were not warranted by existing law and the factual record.

The bank submitted an affidavit attesting to attorney fees and costs incurred in responding to the July 1 pleadings and attached billing records generated by its counsel's timekeeping and billing software. The district court found that the affidavit contained a

> complete description of each item of work performed, the date on which it was performed, the amount of time spent on each item of work, the identity of the person performing the work, and the hourly rate sought for the work performed, together with a complete description of each cost, disbursement and expense,

and that the fees and costs were reasonably and necessarily incurred "for the benefit of [the bank], necessary for the proper representation in this matter, and incurred in connection with the July 1, 2010 pleadings." Judgment in the amount requested was entered against appellants. This appeal followed.

D E C I S I O N

I.

Appellants argue that the district court erred in concluding that rules 13.08 and 20.01 do not apply and that rule 14.01 exclusively controls the July 1 pleadings. "Questions of civil procedure are issues of law, and an appellate court owes no deference to the district court's decision thereon." *Carter v. Anderson*, 554 N.W.2d 110, 112 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996).

Minn. R. Civ. P. 13.08 states, "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." JAS was not a party to the original Frenz action. Appellants contend that JAS may be made a party in accordance with Minn. R. Civ. P. 20.01, which states the following:

> All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief with respect to or arising out of the same transaction, occurrence, or series of transactions or

> occurrences and if any question of law or fact common to all defendants will arise in the action.

Appellants contend that, as the representative of the Frenzes, who were the personal guarantors of the loan secured by mortgage 2, appellants believed that JAS, the obligor of the loan, was also a proper party in the matter, and the bank's desire to obtain relief from JAS was not relevant to whether JAS could be joined as a party. But appellants' argument fails to recognize that the July 1 pleadings identify JAS as a defendant in the bank's suit against the Frenzes even though the bank did not assert any claim against JAS. The July 1 pleadings do not assert any right to relief against JAS as a defendant, which is what rule 20.01 permits. Instead, the pleadings simply identify JAS as a defendant and then assert JAS's counterclaims against the bank, the Frenzes' cross-claim against JAS, and JAS's claims against the Hennepin County Sheriff. Also, appellants do not explain what authority they had, as counsel for the Frenzes, to assert JAS's claims against the bank and the sheriff.[1]

As defendants, the Frenzes could have asserted a claim against another person who may be liable to them for all or part of the bank's claim against them. *See* Minn. R. Civ. P. 14.01. But to do so, the Frenzes needed to comply with rule 14.01, which states the following:

> Within 90 days after service of the summons upon a defendant, and thereafter either by written consent of all

[1] When appellants filed the July 1 pleadings in the district court, they also filed a certificate of representation indicating that they represented JAS. Thus, if the district court had not granted the motion to strike the July 1 pleadings, appellants would have been representing JAS on it claims against the bank and the sheriff while also representing the Frenzes on their claim against JAS.

> parties to the action or by leave of court granted on motion upon notice to all parties to the action, a defendant as a third-party plaintiff may serve a summons and complaint, together with a copy of plaintiff's complaint upon a person, whether or not the person is a party to the action, who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff and after such service shall forthwith serve notice thereof upon all other parties to the action. Copies of third-party pleadings shall be furnished by the pleader to any other party to the action within 5 days after request therefor. The person so served, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed in accordance with this rule against any person who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

With respect to rule 14.01, commentators have explained that a

> defendant in a case may want or need to add another party as a defendant. The plaintiff initially decides whom to sue. . . . Another defendant may only be added if that party "is or may be liable" to the original defendant.
>
> . . . .
>
> Third party practice does not permit a defendant to add any party it wants. The "is or may be liable" standard limits its use. There are parties that are or may be liable to the plaintiff, whom the plaintiff does not sue. A defendant can

> only add these parties if they are liable to the defendant as well.

1 David F. Herr and Roger S. Haydock, *Minnesota Practice* § 14:1 (5th ed. 2009).

In the July 1 pleading asserting their cross-claim against JAS, the Frenzes asserted that, if they were found liable to the bank under the loan guaranty, JAS, as the borrower on the loan and the entity that actually received the loan funds, was obligated to reimburse them. Under the plain language of rule 14, the Frenzes, as defendants in this action, could have asserted this claim as third-party plaintiffs by serving a summons and complaint, together with a copy of the bank's complaint, upon JAS. But to do so, the Frenzes needed to complete service within 90 days after the bank served its summons on the Frenzes or, if service was not accomplished within 90 days, obtain the written consent of all parties or leave of court granted upon notice to all parties.

The bank served its summons on the Frenzes in 2009. Therefore, to serve a summons and complaint asserting a third-party claim against JAS on July 1, 2010, the Frenzes needed to first obtain either the written consent of all parties or leave of court. Instead of obtaining consent or leave of court, the Frenzes attempted to assert their claim against JAS by simply identifying JAS as a defendant and then asserting a cross-claim against JAS. But, as commentators have explained, "[t]he third-party action does not permit a defendant to identify an additional party who may be liable to plaintiff." 1 *Minnesota Practice* § 14:4.

The sole claim alleged in the bank's complaint in the Frenz action was against the Frenzes for breach of the guarantor agreement. JAS was not a party to the guarantor

agreement, and the bank did not sue JAS. If appellants' reasoning in identifying JAS as a defendant was that JAS is or may be liable to the bank, it is the bank that decides who it wishes to sue. If appellants' reasoning was that JAS is or may be liable to the Frenzes, that situation is governed by rule 14.01. Thus, the district court did not err in concluding that rules 13.08 and 20.01 are inapplicable and that rule 14.01 governs the July 1 pleadings.

II.

The district court imposed sanctions against appellants based on its conclusion that sanctions were warranted under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11. An attorney presenting pleadings or motion papers to the district court certifies that the claims are not being presented for an improper purpose, such as harassment; that they are supported by existing law or a nonfrivolous argument to change the law; and that factual allegations or their denials have evidentiary support. Minn. Stat. § 549.211, subd. 2; Minn. R. Civ. P. 11.02. A district court may impose sanctions against an attorney or a party who violates these requirements. Minn. Stat. § 549.211, subd. 3; Minn. R. Civ. P. 11.03. These provisions impose on counsel "an affirmative duty . . . to investigate the factual and legal underpinnings of a pleading." *Uselman v. Uselman,* 464 N.W.2d 130 142 (Minn. 1990). This court reviews the district court's award of sanctions under either provision for an abuse of discretion. *Id.* at 139-45 (interpreting rule 11 and predecessor statute to Minn. Stat. § 549.211); *Radloff v. First Am. Nat'l Bank of St. Cloud*, 470 N.W.2d 154, 156 (Minn. App. 1991), *review denied* (Minn. July 24, 1991).

Appellants argue first that the district court erred in awarding sanctions because the issue was not whether appellants' attempted joinder under rules 13.08 and 20.01 was improper, but whether it was so improper that no competent attorney could consider it proper. "A Rule 11 sanction should not be imposed . . . when a competent attorney could form a reasonable belief a pleading is well-grounded in fact and law." *Uselman*, 464 N.W.2d at 143. Appellants contend that their belief that they could join JAS as a defendant under rule 20.01 was reasonable because the rule does not specify that only a plaintiff can join a defendant. But appellants fail to recognize that, even though the rule does not state that only a plaintiff can join a defendant, it is a plaintiff's assertion of a claim against a person that makes the person a defendant. There is no rule that permits a person to choose to become a defendant when the plaintiff has not asserted a claim against the person. Appellants do not explain how a competent attorney could form a reasonable belief that JAS could become a defendant in the bank's action against the Frenzes if the bank was not asserting a claim against JAS.

Appellants next argue that, as a basis for awarding sanctions, the district court held that JAS's counterclaims could not survive summary judgment. Appellants misconstrue the portion of the district court's memorandum that they cite in support of this argument. The bank moved to strike the July 1 pleadings. The district court granted the motion to strike based on its determination that the pleadings did not comply with rule 14.01, and separately concluded that the pleadings could not withstand a motion for summary judgment. The district court addressed sanctions in a separate section of its memorandum, and appellants do not cite anything in that section of the memorandum that

suggests that, as a basis for awarding sanctions, the district court relied on its determination that JAS's counterclaims could not survive summary judgment. In awarding sanctions, the district court expressly relied upon its determination that "[i]n addition to the procedural deficiencies, JAS's counterclaims are unwarranted by existing law and on the factual record," which is the applicable standard.

Appellants also argue that they were not on notice that the July 1 pleadings might be sanctionable on the merits of the asserted claims. But the bank's July 15 letter to appellants states that even if the July 1 pleadings complied with the rules of civil procedure, "this is a case about the guaranties of Stephen and Jennifer Frenz and does not involve ownership issues regarding the subject properties." Also, the bank's memorandum in support of its motion for sanctions states that "since this case involves the Guaranties and will not decide ownership of the Property (Franklin Bank has already been found to be the owner of the Property by this Court pursuant to its July 9, 2010, Order), there is no legal basis for the counterclaims." And the bank's notice of motion and motion for sanctions states that the case "involves the contractual guaranties of Stephen and Jennifer Frenz in favor of Franklin Bank as consideration for loans it provided. The action does not involve ownership of real property, as is the focus of Defendant's pleadings." Thus, all three documents put appellants on notice that they could be sanctioned for the July 1 pleadings based on the merits of the asserted claims.

The district court set forth the correct standard in determining whether sanctions should be imposed, found that appellants failed to comply with the applicable rule of civil procedure, and determined that the claims asserted by procedurally deficient pleadings

were not warranted by existing law and the factual record. Appellants do not dispute that they failed to comply with rule 14.01 or that the claims asserted were not warranted by existing law or the factual record. The record supports the district court's findings and conclusion regarding sanctions for the July 1 pleadings. The district court did not abuse its discretion in awarding sanctions.

III.

The standard of review for an appellate court examining an award of attorney fees and costs is whether the district court abused its discretion. *Radloff*, 470 N.W.2d at 156. Attorney fees awarded pursuant to sanctionable conduct must be reasonably based on the expenses a party incurs by opposing the misconduct. *See Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 426 N.W.2d 214, 219-20 (Minn. App. 1988) (upholding approximately $30,000 in attorney fees as sanction for unfounded pleadings). "As long as the record reflects a reasonable correlation between the final amount of the sanctions imposed, the expenses incurred by the party defending the unfounded claims, and the basis of the court's imposition of sanctions, there will be no abuse of discretion by the [district] court." *Id.*

The bank's affidavit supports the district court's findings that the hours claimed were reasonable and incurred in responding to the July 1 pleadings. The affidavit is a line-by-line description of the work performed, and the descriptions demonstrate the relationship of the claimed work to the July 1 pleadings. Thus, the record reflects a reasonable correlation between the amount of sanctions imposed and the expenses incurred by the bank litigating the July 1 pleadings. The record supports the district

court's conclusion that the bank incurred $12,962.72 in attorney fees and costs in responding to the July 1 pleadings. The district court did not abuse its discretion.

Affirmed.