NO. COA09-1678

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

VINTAGE CONDOMINIUMS
ASSOCIATION, INC., et al.,
Plaintiffs,

v. Union County
No. 07 CVS 1890

LISA ANN RICHARDSON and
PAUL RICHARDSON, et al.,
Defendants.

Appeal by defendant Paul Richardson from order entered 30 June 2009 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 27 May 2010.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr. and Fenton T. Erwin, Jr., for plaintiffs-appellees.

Paul Richardson, pro se, defendant-appellant.

GEER, Judge.

Defendant Paul Richardson[1] appeals from the trial court's order denying his motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and concluding that Mr. Richardson had himself violated Rule 11 by filing the motion for sanctions. We hold that Mr. Richardson has failed to demonstrate

[1]We note that the notice of appeal indicated that defendant Lisa Ann Richardson, Mr. Richardson's daughter, was also appealing. Ms. Richardson did not, however, sign the appellant's brief — it was only signed by Mr. Richardson. Ms. Richardson, therefore, abandoned any appeal.

on appeal that the trial court erred in its findings of fact or conclusions of law, and, therefore, we affirm.

Facts

This appeal arises out of litigation between two warring factions in the Vintage Condominiums Homeowners Association ("the Association"), a non-profit corporation incorporated in 2002 to provide for the management, maintenance, and operation of Vintage Condominiums in Union County, North Carolina. The history of this case begins with a special meeting of the Association on 1 August 2006, during which the existing members of the Association's Executive Board ("the Board") were ousted and four new members, including Lisa Richardson, were elected.

The impetus for the ouster was a disagreement over the financial management of the condominiums. Lisa Richardson, who was named chair of the 1 August 2006 Board, immediately began making changes to the way the Association's finances were handled. One of those changes involved terminating the management company handling the Association's business affairs and appointment of her father, Paul Richardson, as business manager.

Conflict and disagreement over the management of the condominiums continued and intensified, and in May 2007, unit owners representing the required percentage of ownership under the Association's Bylaws requested a special meeting of the Association. At a special meeting held on 31 May 2007, Lisa Richardson and the other Board members were themselves ousted, and a new slate of Board members was installed. The 31 May 2007 Board

began taking actions to transfer management and financial oversight from Lisa Richardson and the 1 August 2006 Board to itself.

On 12 June 2007, the Association's attorney, Kenneth T. Davies, sent a letter to the 31 May 2007 Board challenging the election of the 31 May 2007 Board. Mr. Davies contended the 31 May 2007 election was invalid because notice of the special meeting was not sent out by the secretary of the Board, and there was no evidence that a quorum had been present at the meeting or that the required percentage of voting members had approved the removal of the 1 August 2006 Board. Mr. Davies threatened to seek injunctive relief, damages, and attorneys' fees if the 31 May 2007 Board did not stand down.

Faced with the threat of litigation, the 31 May 2007 Board ceded control to Lisa Richardson and the 1 August 2006 Board. On 12 July 2007, the Association, the 31 May 2007 Board members, and other unit owners (collectively "plaintiffs") filed a verified complaint against the Richardsons. Plaintiffs alleged that the 1 August 2006 Board was invalid, that the 31 May 2007 Board was valid, and that Lisa Richardson had refused to step aside, but rather continued to assert control over the Association's affairs. Plaintiffs included a claim for intentional infliction of emotional distress, contending that the Richardsons had attempted to control the Association through the use of threats and intimidation. Plaintiffs also requested punitive damages, that a receiver be appointed to take control of the Association's finances, and that

the Richardsons be required to provide copies of all financial records relating to the Association.

The trial court granted a preliminary injunction and appointed a receiver. On 26 July 2007, the Richardsons filed a verified answer, each asserting a counterclaim for defamation. In September 2007, Lisa Richardson sold her unit and resigned from the Board. The receiver's report, when completed, found that the Association's financial books had been well kept, updated, and organized and that expenditures were supported by receipts or other documentation. On 2 October 2007, the receiver presided over a special meeting at which the 31 May 2007 Board was again elected.

The Richardsons filed a motion for attorneys' fees, arguing that the request for the receiver's appointment was frivolous, but that motion was denied. Paul Richardson dismissed his counterclaim on 29 January 2008, and Lisa Richardson dismissed her counterclaim on 25 September 2008. Mr. Davies withdrew as counsel for the Richardsons on 17 June 2008.

On 27 October 2008, plaintiffs voluntarily dismissed all but one of their claims for relief. On 3 December 2008, the Richardsons filed a motion for Rule 11 sanctions. Plaintiffs subsequently voluntarily dismissed their final claim for relief on 31 December 2008, leaving no claims pending in this action.

On 26 June 2009, the Richardsons filed *pro se* a revised motion for sanctions against plaintiffs and their counsel, Fenton T. Erwin. After a hearing, the trial court denied the Richardsons' motion, finding that the Richardsons had presented no credible

evidence of any wrongdoing by either Mr. Erwin or plaintiffs. The trial court further concluded that the Richardsons had themselves violated Rule 11 by filing their motion for sanctions. The trial court, however, left open the issue whether sanctions should be imposed on the Richardsons "for further consideration by any judge of the superior court in the event that other such violations re-occur." Mr. Richardson timely appealed to this Court.

I

"'[U]nder Rule 11, the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose.'" *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009) (quoting *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 322, 438 S.E.2d 471, 476 (1994)). A violation of any one of these requirements "mandates the imposition of sanctions under Rule 11." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

Mr. Richardson argues primarily that plaintiffs violated Rule 11 by alleging in the complaint that the 31 May 2007 meeting was duly noticed and convened and that the 31 May 2007 Board was properly elected. Mr. Richardson also argues that Jo Holbrook, one of the individual plaintiffs, violated Rule 11 by submitting to the trial court an affidavit in connection with the Richardsons'

summary judgment motion in which she asserted that the Board "has never conceded that the May 31, 2007 election was not proper."

When examining the legal sufficiency of a claim pursuant to Rule 11 the Court must first determine "'the facial plausibility of the paper.'" *Johns*, 195 N.C. App. at 209, 672 S.E.2d at 40 (quoting *Ward v. Jett Props., LLC*, 191 N.C. App. 605, 608, 663 S.E.2d 862, 864 (2008)). "'If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper.'" *Id.* (quoting *Ward*, 191 N.C. App. at 608, 663 S.E.2d at 864). "If, however, the paper is not facially plausible, 'the second issue is whether, based on a reasonable inquiry into the law, the alleged offender formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed.'" *Id.* (quoting *Ward*, 191 N.C. App. at 608, 663 S.E.2d at 864).

"In other words, 'Rule 11 sanctions are appropriate where the offending party either failed to conduct reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law.'" *Id.* (quoting *Ward*, 191 N.C. App. at 608, 663 S.E.2d at 864). In *Ward*, 191 N.C. App. at 608, 663 S.E.2d at 865, this Court stressed that "assuming a reasonable inquiry, the dispositive question is whether a reasonable person in plaintiff's position . . . after having read and studied the applicable law, would have concluded the complaint was warranted by existing law."

Mr. Richardson contends that plaintiffs, after conducting a reasonable inquiry, could not have reasonably believed the 31 May 2007 election was legitimate. In support of this contention, Mr.

Richardson relies upon (1) statements by the individual plaintiffs composing the 31 May 2007 Board that they believed it would be necessary to repeat the removal process because of a technical defect in the procedure followed in calling the 31 May 2007 special meeting; and (2) the individual plaintiffs' decision, because of the procedural defect, to step down as Board members.

The potential procedural defect involved the question whether notice of the meeting was properly given. Bylaw 2.5 of the Association's Bylaws provides that special meetings may be called upon the written request of at least 20% of the unit owners. The petition for the 31 May 2007 special meeting was signed by 14 owners, which is more than 20% of the 30 total owners. Bylaw 2.6 provides that written notice of any meeting shall be delivered or mailed "at the direction of the Board, the Chairman or Unit Owners calling the meeting . . . ." The unit owners calling the meeting personally delivered and mailed the notice of the meeting to the unit owners. Thus, the notice for the special meeting complied with the Association's Bylaws.

N.C. Gen. Stat. § 47C-3-108(a) (2009), part of the North Carolina Condominium Act, provides, however:

> Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the unit owner.

Mr. Richardson argues that because notice of the 31 May 2007 meeting was not delivered by the secretary or another officer of the Association as required by N.C. Gen. Stat. § 47C-3-108, it was invalid.

Given that the only issue regarding the propriety of the 31 May 2007 meeting was whether it was properly noticed and given that there is no dispute that notice was provided as set forth in the Association's Bylaws, we hold that the claim that the Board was duly elected is facially plausible. Although N.C. Gen. Stat. § 47C-3-108 appears to require that the secretary or other officer deliver notice, plaintiffs have pointed out that, in contrast to other sections of the Condominium Act, N.C. Gen. Stat. § 47C-3-108(a) does not include mandatory language such as "'[n]otwithstanding any provision of the declaration or the bylaws to the contrary . . . .'" *See, e.g.*, N.C. Gen. Stat. § 47C-3-103(b) (2009) ("Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by at least sixty-seven percent (67%) vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than members appointed by the declarant."). We hold that a person, after reading the statute and the Bylaws, could *reasonably conclude* that notice given by the unit owners was valid and that the 31 May 2007 Board was duly elected.[2]

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[2]Because this is an appeal from a Rule 11 decision, we do not decide whether notice in this case was actually proper.

Mr. Richardson, however, contends that plaintiffs' "admissions to the contrary" establish the complaint's lack of factual sufficiency. We, however, read these statements as indicating, at most, (1) that there was some confusion over whether the special meeting and election of the 31 May 2007 Board had been properly noticed, (2) that the Board decided to step down temporarily to avoid a lawsuit, and (3) that they then decided to hold another meeting that was noticed and conducted according to the strict language in the statute. Based upon our review of the record, we hold that the trial court properly determined that there was no basis for concluding that the complaint violated the factual sufficiency prong of Rule 11.[3]

Finally, Mr. Richardson asserts that plaintiffs' complaint was filed for an improper purpose. "It is well established that '[a]n improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.'" *Johns*, 195 N.C. App. at 211, 672 S.E.2d at 41 (quoting *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996)). In *Hill v. Hill*, 181 N.C. App. 69, 75-76, 638 S.E.2d 601, 606 (internal citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 427, 648 S.E.2d 502, 503 (2007), *cert. denied*, ___ U.S. ___, 172 L. Ed. 2d 620, 129 S. Ct. 633 (2008), this Court explained:

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[3]For this reason, we also conclude that plaintiff Jo Holbrook did not violate Rule 11 by submitting an affidavit stating that "[t]he Board of Directors has never conceded that the May 31, 2007 election was not proper."

> Whether a paper was filed for an improper purpose is reviewed under an objective standard, with the moving party bearing the burden of proving an improper purpose. [T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. A movant's subjective belief that a paper has been filed for an improper purpose is immaterial. There must be a strong inference of improper purpose to support imposition of sanctions.

Mr. Richardson asserts plaintiffs filed this lawsuit to "achieve the removal of a democratically elected Executive Board." This is, however, a proper purpose. Plaintiffs, unhappy with the current leadership of the Association, believed the current leadership had no authority to control the Association, so they filed a complaint alleging injury caused by that unlawful assertion of authority. By filing their complaint, plaintiffs properly put to the test their claim that they had the right to control of the Association. Mr. Richardson points to no evidence showing any purpose of plaintiffs that would be improper. We, therefore, agree with the trial court that there is no basis for Mr. Richardson's claim that plaintiffs and their attorney violated the improper purpose prong of Rule 11.

Mr. Richardson also argues Mr. Erwin violated Rule 11 in filing motions to quash the Richardsons' notices of deposition and subpoenas. Although Mr. Richardson claims that Mr. Erwin lacked any factual basis for asserting in those motions "undue burden" and "harassment," Mr. Richardson has pointed to nothing in the record supporting that contention. The trial court did not, therefore,

err in not addressing this argument.[4] In sum, we affirm the trial court's denial of Mr. Richardson's motion for sanctions.

II

Mr. Richardson also contends that the trial court erred in concluding that his revised motion for sanctions violated Rule 11. After noting that the Richardsons had moved for sanctions against plaintiffs "and in particular for sanctions against Fenton T. Erwin, Jr., Esq., attorney for the plaintiffs," the trial court made the following pertinent finding of fact:

> 3. The Richardsons have presented no credible evidence of any wrongdoing or violation of any of the Rules of Professional Conduct or violation of law on the part of Attorney Erwin. The allegations by the Richardsons are based on misunderstanding, misinformation, speculation, innuendo, suspicion, spite and animus toward Attorney Erwin as adverse counsel and are without basis in fact or in law. The Richardsons have presented no credible evidence of any act or omission on the part of any of the other plaintiffs that would justify sanctions.

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[4]Mr. Richardson also contends that in filing the motion to quash the notice of deposition and the subpoenas, Mr. Erwin acted as attorney for both Jo Holbrook, a plaintiff, and Ann Anderson and Virginia McNally, who were defendants. We fail to see how this conduct constitutes a violation of Rule 11. In addition, Mr. Richardson has included in the fact section of his brief a discussion of events occurring in connection with an amendment of plaintiffs' complaint. He also asserts in the "Conclusion" of his brief that he was denied a full and fair hearing because the trial judge hearing the motion for sanctions spoke by telephone with the judge who had heard the motion to amend the complaint. Because, however, Mr. Richardson did not argue this issue apart from his conclusory sentence in the "Conclusion" paragraph of his brief, we do not address it.

The trial court, therefore, concluded that "the Richardsons have violated Rule 11 of the North Carolina Rules of Civil Procedure by filing [their sanctions] motion with no basis in law or in fact." The court, however, further provided that "in the discretion of the court, the matter of sanctions against the Richardsons shall be left open and held in abeyance for further consideration by any judge of the superior court in the event that other such violations re-occur."

On appeal, Mr. Richardson, in arguing that the trial court erred, states generally that "[i]n support of Appellant/Defendant's Motion for Sanctions the lower Court accepted and reviewed substantial evidence that would lead a neutral, third party to conclude that the Plaintiffs and their attorney had acted in violation of Rule 11 of the North Carolina Rules of Civil Procedure." Mr. Richardson then quotes at length from the oral argument before the trial court regarding whether the 31 May 2007 special meeting was properly conducted and contends that Mr. Erwin failed to counter Mr. Richardson's argument that the meeting violated the North Carolina Condominium Act. Mr. Richardson makes no other specific argument regarding the trial court's imposition of Rule 11 sanctions against the Richardsons for filing the motion for sanctions.

We have already concluded that plaintiffs and Mr. Erwin did not violate Rule 11 in contending that the 31 May 2007 meeting was properly conducted. That conclusion, however, does not establish that Mr. Richardson himself violated Rule 11 in asserting that

plaintiffs and Mr. Erwin had no legal or factual basis to support their claim. Nevertheless, the Richardsons' motion for sanctions went well beyond the one issue addressed by Mr. Richardson on appeal. The motion sought sanctions and attorneys' fees under Rules 11, 37, 45, and 56 of the Rules of Civil Procedure. It also sought attorneys' fees and costs not only for the "bad faith" original complaint, but also for the "prosecution [of the] fraudulent Amended Complaint for which leave of court had not been granted."

The Richardsons asked for "special sanctions" on Mr. Erwin for "obstructing the judicial process" and "'Special Sanction with Aggravated Specification'" for Mr. Erwin's alleged role in falsifying and filing a "fraudulent Order" with a "falsified signature" of a judge. The Richardsons also contended that Mr. Erwin violated Rules 8, 9, 26, 30, 33, and 34 of the Rules of Civil Procedure and Rules 3.3, 3.4, 4.1, and 8.4 of the Rules of Professional Conduct.

The motion continued by asserting that "[w]hat began as an illegal attempt at removal of a legitimately elected condominium association Board has become a 23-month ordeal characterized primarily by misrepresentation, obstruction, falsification, and contempt for this Court on the part of the Plaintiffs' [sic] and their attorney Fenton T. Erwin, Jr. After failing to conduct any discovery to support claims that they knew were without merit, the Plaintiffs' [sic] willfully engaged in tactics to impede Defendant [sic] discovery, the purpose of which could only have been to delay

the inevitable outcome of this litigation and to increase the costs borne by the Richardsons' [sic] in this matter."

Mr. Richardson has not made any specific argument showing any error by the trial court in finding a Rule 11 violation as to the motion's allegations other than the claim that the special meeting was not properly noticed. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Accordingly, since Mr. Richardson has not demonstrated that the trial court's findings of fact were not supported and since those findings support the trial court's determination that Mr. Richardson violated Rule 11 in filing his motion for sanctions, we affirm the trial court's order.

Affirmed.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).