

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

NOSWORTHY TELECOMMUNICATION)	
DISTRIBUTOR, INC., (NTY), a Washington)	No. 66595-2-I
corporation, and AMIR BASHIR, a married)	
man)	
)	
Appellants,)	DIVISION ONE
)	
v.)	
)	
SAMSUNG TELECOMMUNICATIONS)	UNPUBLISHED OPINION
AMERICA, LLC, a Delaware Limited)	
Liability corporation, f/k/a SAMSUNG)	
TELECOMMUNICATIONS AMERICA, L.P.,)	
joint and severally,)	
Respondents.)	FILED: <u>April 2, 2012</u>
_____)	

Spearman, J. — Nosworthy Telecommunication Distributor, Inc. and Amir Bashir (collectively “Nosworthy”, unless otherwise specified) appeal from the award of CR 11 sanctions to Samsung Telecommunications America, LLC and Samsung Telecommunications America, LP (collectively “Samsung”). Nosworthy filed a lawsuit against Samsung, alleging various causes of action. Samsung filed a motion for summary judgment and requested attorney’s fees under CR 11 in the same motion. Nosworthy did not file a timely response. The trial court granted Samsung’s motion for summary judgment and its request for CR 11 sanctions in the entire amount of its attorney’s fees. The trial court granted CR

11 sanctions, stating only that Nosworthy's lawsuit was "totally frivolous and without merit." Nosworthy argues that the trial court abused its discretion in awarding CR 11 sanctions for several reasons. We conclude the record is inadequate for review and remand for entry of specific findings of fact.

FACTS

Nosworthy is a Washington-based telecommunications products distributorship. Bashir purchased Nosworthy in 2008 and is the company's owner and chief executive officer. Samsung, an affiliate of a Korean industrial group, researches, develops, and markets personal and business communication products in North America. It relies on independent distributors to sell its products to end users.

In early 2009, Nosworthy approached Samsung about the possibility of serving as a distributor of Samsung products in the Pacific Northwest. Negotiations followed, culminating in a distributor agreement (Agreement) entered on or about March 24, 2009 under which Nosworthy agreed to purchase and Samsung agreed to sell certain telecommunications products.¹ The

¹ Among the terms of the Agreement were the following:

- Nosworthy "assume[d] full responsibility for the marketing, sale and support" of the relevant products.
- Nosworthy could cancel an order at any time, provided that "cancellation of an Order after shipment shall incur a cancellation and restocking charge of 20% of the Order value."
- "[Samsung] will not be liable to [Nosworthy] for any damages or liabilities whatsoever, including without limitation, damages for lost profits or loss of business, arising out of the termination of this Agreement for any reason, with or without cause."
- "No alteration, amendment, waiver, cancellation or any other change in any term or condition of this Agreement shall be valid or binding upon [Samsung] unless the same shall have been specifically set forth in writing and signed by a duly authorized officer of [Samsung]."

Agreement contained an integration clause. The parties discussed Samsung's Distributor "Marketing Development Funds" program (MDF program). Samsung provided Nosworthy with a written copy of the program guidelines, though this document was not integrated into the Agreement.

On or about March 30, 2009, Samsung agreed in writing to modify the terms of the Agreement with regard to the opening order. Specifically, while Samsung's invoices were ordinarily due and payable within 30 days of the date of the invoice, Samsung agreed to 60-day terms with the opening order. Samsung also agreed to waive the restocking charge for the opening order with certain conditions.² That day, Nosworthy placed its first and only order for \$150,000 worth of Samsung products.

Nosworthy was unable to sell any Samsung equipment during the 60-day period after placing its opening order. Payment of the invoice became due on May 30. Communications took place between Nosworthy and Samsung concerning payment of the invoice through the first week of June. Nosworthy

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- The Agreement provided for an initial one-year term, but also provided that "[e]ither party may terminate this Agreement at any time, without cause, upon 30 days written notice to the other party, but such termination shall not affect orders placed and accepted prior to the effective date of termination."

² Specifically, Samsung agreed:

At the completion of 60 days you will have the option to return any unopened equipment from your opening order without re-stocking charges. This provision is agreed to with the understanding that [Nosworthy] will pay all shipping costs for return. At the same time, [Nosworthy] will place a replacement order for the equal amount that is being returned, thus not creating a reduction in total purchases from Samsung. The new replacement order will be at standard terms and conditions and discount level per the agreed contract.

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wanted to return the entire opening order minus the items it opened for its own use or for display, but Samsung protested. This led to discussion about the terms of the Agreement. On June 9 and 10, Samsung representatives spoke by phone with Bashir and Robert Sutter, Nosworthy's vice president of operations, to address the unpaid invoice and the issues involved. These discussions resulted in a decision to terminate the Agreement. Nosworthy contends the decision was made unilaterally by Samsung, while Samsung maintains it was mutual. On June 15, Samsung's senior vice president of sales and marketing Bart Kohnhorst sent Bashir a letter to memorialize the parties' phone conversations and to provide "written confirmation of our mutual agreement to terminate the Distribution Agreement. . . ." The letter stated that Nosworthy was to return all products from its opening order and pay for all shipping and insurance costs. In return, Samsung agreed to forgive the order payment and restocking charges, and waive the re-ordering obligations. Nosworthy did not return a signed copy of Kohnhorst's letter, but repackaged and shipped the products back to Samsung. Business dealings between Samsung and Nosworthy ceased.

Nosworthy consulted with attorney Justin Osemene. On October 5, 2009, Osemene sent a demand letter to Samsung, alleging that Samsung had terminated the Agreement in a "unilateral, arbitrary and capricious manner" and requesting \$100,000 to compensate Nosworthy for expenses incurred in the three months it attempted to serve as Samsung's distributor. Samsung rejected

the demand, asserting that there was “no basis for [Nosworthy] to recover its expenses from Samsung.”

On May 3, 2010 Nosworthy filed suit against Samsung, alleging breach of contract, intentional misrepresentation, unjust enrichment, and conversion. In an amended complaint, it added claims for breach of the covenant of good faith and fair dealing, loss of business opportunities and goodwill, and violation of the Washington State Consumer Protection Act. The crux of Nosworthy’s lawsuit was that Samsung wrongfully terminated the Agreement and refused to compensate Nosworthy for marketing, training, and promotional expenses owed under the MDF program.

Samsung answered the amended complaint on May 28, 2010. The parties proceeded to conduct written discovery, though no depositions were held.³ During discovery, Nosworthy produced a memorandum authored by Sutter. The memorandum recounted the June 10, 2009 phone conversation between representatives from both companies and stated that the decision to terminate the Agreement was mutual:

There followed several days of email exchanges between Mr. Bashir, Mr. Bloom [of Samsung], and Mr. Kohnhorst [of Samsung] about what the distributor agreement actually said. On June 10 there was a conference call in the late afternoon, comprised of the three men and also Mr. Sutter. During the course of this call it became apparent that there were irreconcilable differences existing between the positions occupied by Samsung and by NTD. It was therefore decided by Mr. Kohnhorst that the best resolution for all parties was to end the distributorship, and have NTD return all of

³ Nosworthy sent improper deposition subpoenas to Samsung employees, which resulted in sanctions against Bashir and Nosworthy. Those sanctions are reflected in a separate line for \$4,500 in the judgment, and are not at issue in this appeal.

the Samsung items it had purchased. He said that Terry Bloom would work with Mr. Sutter in the collection of the data needed to create a Return Authorization. Mr. Kohnhorst would have a Letter of Termination Agreement drawn up and sent to Mr. Bashir for his signature. The conference call ended with the verbal agreement of all four parties to these terms.

On October 27, 2010 Samsung moved for summary judgment. In the same motion, Samsung requested CR 11 sanctions, arguing that Nosworthy's claims were not well grounded in fact or law. Samsung claimed that Nosworthy's allegations were contradicted by the undisputed evidence, including Sutter's memorandum. Osemene wrote to counsel for Samsung on November 9, expressing surprise at being served with a motion for summary judgment given that discovery was ongoing. He asked Samsung to stay its motion to permit additional discovery. Samsung's counsel refused but conveyed Samsung's willingness to explore the possibility of negotiating a settlement with Nosworthy. Bashir and a Samsung representative promptly began engaging in settlement discussions but did not reach a resolution before the scheduled summary judgment hearing. On November 18, 2010, the representative emailed Bashir that while Samsung was interested in exploring ways to resolve the dispute, it would not agree to stay the ongoing litigation: "There are motions already pending which, if nothing else, should clarify what issues remain for resolution."

Nosworthy ultimately did not file a timely response to Samsung's motion for summary judgment and request for CR 11 sanctions. Samsung filed a reply in support of its motion on November 19, noting that Nosworthy had not filed a response. Later that day, four days after its response was due, Nosworthy

submitted an “emergency response,” requesting the trial court to either deny the motion for summary judgment or continue summary judgment proceedings. The brief cited the ongoing discovery and disputed that the parties had agreed to terminate the Agreement. Nosworthy also argued that the request for CR 11 sanctions was brought in bad faith because Samsung and Nosworthy were concurrently engaged in settlement negotiations.

The trial court struck Nosworthy’s untimely response and noted, “[t]here is nothing in the court record from the plaintiff that responds to the underlying motion for summary judgment showing an issue of material fact.” The court granted Samsung’s motion for summary judgment and dismissed Nosworthy’s lawsuit with prejudice on November 24, 2010. The court awarded Samsung “reasonable attorneys’ fees and expenses because of the filing of plaintiffs’ claims pursuant to CR 11.” It did not enter written findings of fact in support of the CR 11 award.

Samsung filed its motion to set the amount of CR 11 sanctions on December 3, noting it for hearing on December 15. Also on December 3, Nosworthy filed a motion for reconsideration and to set aside summary judgment, attempting to note the motion for hearing on December 17. The motion for reconsideration was accompanied by declarations from Osemene, Sutter, and Bashir. On December 8, Osemene filed a response and objection to the motion for monetary sanction. This response referred to the “sworn affidavits” that accompanied Nosworthy’s motion for reconsideration.

A hearing to set the amount of CR 11 sanctions was held on December 15. The trial court noted that it was making its decision without considering the Bashir and Sutter affidavits. It explained:

The basis for the sanctions is that the Court found and continues to find today, before reviewing any of the materials on motion to reconsider, that the lawsuit is totally frivolous and without merit.

I have reviewed the fees incurred by the defendants in defending this lawsuit and bringing the matter on for a summary judgment motion. There was no response to the summary judgment motion and no basis shown to the Court for filing this lawsuit.

I find the fees incurred by the defendants to be reasonable. I have looked at what's been done and the amounts incurred. Several different attorneys and legal assistants and paralegals have worked on this. I don't find that is overlapping work. Everybody appears to have done something a little different in that respect.

So I do find that the requested amount of \$51,164.89 has been incurred in defending this lawsuit. The lawsuit is frivolous and without merit [sic], and those are reasonable fees.

The trial court entered a judgment that same day, and denied the motion for reconsideration on December 29, 2010. Nosworthy appeals the award of CR 11 sanctions.

DISCUSSION

Among other reasons for claiming that the trial court erred in entering judgment on CR 11 sanctions, Nosworthy argues that the court did not create an adequate record for review by entering detailed findings of fact.⁴ We agree.

⁴ Nosworthy also makes the following arguments:

- (1) The sanctions were equivalent to Samsung's total attorney's fees and costs, but not all of Nosworthy's claims were frivolous.
- (2) The trial court improperly turned CR 11 into a fee-shifting mechanism by imposing \$51,164.89 in sanctions when there is no evidence in the record that Samsung ever alerted Nosworthy that it intended to seek sanctions for a

An award of fees under CR 11 is reviewed for abuse of discretion.

Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp., 122

Wn.2d 299, 338, 858 P.2d 1054 (1993). CR 11 requires attorneys to date and sign all pleadings, motions, and legal memoranda. CR 11(a). The rule provides, in part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) 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; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). If a filing is signed in violation of the rule, the court "may 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 legal memorandum, including a reasonable attorney fee." CR 11(a).

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- frivolous or improper complaint prior to filing its motion for summary judgment.
- (3) The trial court improperly turned CR 11 into a fee shifting mechanism by imposing \$51,164.89 in sanctions when there is no evidence it considered the propriety of a lesser sanction.
 - (4) The trial court imposed sanctions on Bashir and Nosworthy when the CR 11 violations, if any, were the responsibility of Osemene.
 - (5) The trial court made decisions regarding the quantity of sanctions and on whom to impose them without considering the previously filed affidavits of Bashir and Sutter.
 - (6) The trial court did not alert Nosworthy that Osemene had a conflict of interest on the issue of who should be liable for any sanctions, or provide Nosworthy an opportunity to secure new counsel.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (Biggs II)). Because CR 11 sanctions may have a chilling effect, a trial court should impose them “only when it is patently clear that a claim has absolutely no chance of success.” Skimming, 119 Wn. App. at 755 (citing, In re Cooke, 93 Wn. App. 526, 529, 969 P.2d 127 (1990)). A perceived violation of CR 11 must be brought to the offending party’s attention as soon as possible; without such notice, CR 11 sanctions are unwarranted. Biggs II, 124 Wn.2d at 198 (citing Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 224, 829 P.2d 1099 (1992)). As for the amount, a court awarding attorney’s fees as a CR 11 sanction must award only what is reasonably expended in responding to the sanctionable filing. “Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly.” Biggs II, 124 Wn.2d at 201. CR 11 sanctions should not be used as a fee-shifting mechanism. Id. at 197 (citing Bryant, 119 Wn.2d at 220).

A trial court imposing CR 11 sanctions must specify the sanctionable conduct in its order. Biggs II, 124 Wn.2d at 201. “The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” Id. We remand for further proceedings where the record is not adequate to review a fee award under CR 11. Id. at 202; Just Dirt, Inc. v.

Knight Excavating, Inc., 138 Wn. App. 409, 415-17, 157 P.3d 431 (2007).

Here, the record does not provide an adequate basis to review the award of CR 11 sanctions. Other than its conclusory statement that Nosworthy's lawsuit was frivolous and without merit, the trial court made no record of its findings in support of the decision to award CR 11 sanctions. There is no indication of what specific conduct was deemed sanctionable, who the responsible party was, or why the amount awarded was appropriate in light of the purposes of the rule.

Samsung relies on Johnson v. Jones, 91 Wn. App. 127, 136, 955 P.2d 826 (1998) to argue that even where the court's written findings are inadequate, its oral ruling may still be sufficient for review. But in that case the trial court's comprehensive oral ruling detailed its specific reasons for concluding that sanctions were warranted. Here, the court's written order imposing sanctions was not supplemented by an oral record. And the oral record of the subsequent hearing reflects only that the court considered Nosworthy's lawsuit totally frivolous and without merit and found no basis for filing the lawsuit.

The record regarding sanctions in this case is similar to that in Biggs II, where the trial court granted a motion for CR 11 sanctions and explained:

'Well, I was appalled at the frivolity of Mr. Biggs' second, third and fourth claims, and they were shocking to this Court. In fact I was appalled at his initial claim, because it really, common sense would have demonstrated that he was wrong. And the Supreme Court has concurred, and the Court of Appeals concurred in all of my-'

'I think that there ought to be some compensation paid by Mr. Biggs for his involving the defendant, Vail, in all this litigation. I really do, Counsel, in all fairness, justice. And if I have the authority to grant relief to Mr. Vail, under CR 11, I will do it.'

Biggs II, 124 Wn.2d at 196. In its written order, the trial court did not mention the specific conduct warranting sanctions. On such a record, our supreme court concluded that appropriate findings were lacking and remanded for (1) entry of specific findings as to which filings, if any, violated CR 11 and how they violated CR 11, and (2) imposition of an appropriate sanction. Id. at 202. Based on the record before us, we are compelled to reach the same result.

Remanded.

WE CONCUR:






