

[Cite as *Greater Ohio Leasing Corp. v. Open Container, Ltd.*, 2011-Ohio-1258.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Greater Ohio Leasing Corp.,	:	
Plaintiff-Appellee,	:	
v.	:	
Open Container, Ltd.,	:	No. 10AP-629
Defendant-Third-Party	:	(C.P.C. No. 06CVH08-11353)
Plaintiff-Appellant,	:	(REGULAR CALENDAR)
CB Richard Ellis, Inc.,	:	
Third-Party Defendant-	:	
Appellee.	:	

D E C I S I O N

Rendered on March 17, 2011

Law Offices of Marcell Rose Anthony, LLC, and Marcell Rose Anthony, Golden & Meizlish Co., LPA, Adam H. Karl, and Keith E. Golden, for appellant.

Baker & Hostetler, LLP, John H. Burtch, and Robert J. Tucker, for appellee CB Richard Ellis, Inc.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Open Container, Ltd. ("Open Container" or "appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas striking its third-party complaint asserting claims against appellee, CB Richard Ellis, Inc. ("CBRE" or "appellee") pursuant to Civ.R. 11. For the reasons that follow, we reverse.

{¶2} This action arose from a lease agreement whereby Open Container leased property located at 93-95 Liberty Street ("the property") from Greater Ohio Leasing Corp. ("Greater Ohio"), the owner of the property. The lease was initially entered into on November 1, 1997 and was subsequently amended on November 5, 1998. The period of the lease was six years, with two five-year renewal options. Open Container operated a restaurant on the property until 2001 when the restaurant closed.

{¶3} In 2003, Open Container exercised its first option to renew the lease. Subsequently, Andrew Cohodes, Open Container's president, entered into an Offer to Purchase Agreement with Charles Natoli, Greater Ohio's president, whereby Open Container was given 45 days to obtain financing to purchase the property. The agreement provided that if Open Container failed to obtain financing within the 45-day period, the agreement could be declared null and void. Open Container did not obtain the financing necessary to purchase the property.

{¶4} On February 2, 2006, Open Container, acting through Cohodes, entered into a listing agreement with CBRE whereby CBRE agreed to list the property for sale. Because Open Container was the lessee of the property, not the owner, CBRE requested documentation showing that Open Container had authority to sell the

property. Cohodes indicated that his authority to sell the property came from the Offer to Purchase agreement with Greater Ohio, but did not provide a copy of that agreement to CBRE.

{¶5} On February 21, 2006, Greater Ohio terminated the lease due to Open Container's failure to pay rent. Greater Ohio also informed Open Container that it was formally declaring the Offer to Purchase Agreement to be null and void.

{¶6} Subsequently, CBRE was contacted by counsel for Greater Ohio regarding a "for sale" sign CBRE had placed on the property. Upon being informed that Open Container had no authority to sell the property on Greater Ohio's behalf, CBRE cancelled the listing agreement. On May 1, 2006, CBRE entered into a new listing agreement with Greater Ohio to list the property for sale. The property has not been sold.

{¶7} In August 2006, Greater Ohio filed an action in the Franklin County Municipal Court seeking to evict Open Container from the property. Open Container filed an answer asserting counterclaims against Greater Ohio. Because the amount sought in damages in the counterclaims exceeded the municipal court's jurisdiction, the case was transferred to the Franklin County Court of Common Pleas. Open Container filed a motion seeking leave to add CBRE as a third-party defendant, which was ultimately granted on May 4, 2009. While the motion was pending, CBRE and Open Container engaged in discovery, including production of documents and conducting a deposition of the CBRE employee responsible for the listing agreement.

{¶8} New counsel began representing Open Container in April 2009. The trial court held a status conference on June 30, 2009 and set the case for trial on

October 19, 2009. In August 2009, Open Container filed a motion seeking to continue the trial date for the purpose of conducting additional discovery. After a status conference held on September 16, 2009, the trial court issued a journal entry in which the court discussed the discovery that had already been conducted. In the entry, the court denied Open Container's request for a continuance of the October 19, 2009 trial date, and also sustained objections made by Greater Ohio and CBRE to Open Container's requests for additional discovery, as the discovery cutoff date had passed.

{¶9} On September 30, 2009, CBRE filed a motion to strike Open Container's third-party complaint pursuant to Civ.R. 11, and for attorney fees pursuant to Civ.R. 11 and R.C. 2323.51. In the motion, CBRE argued that after being informed that Open Container had no authority to sell the property on behalf of Greater Ohio, it had no choice but to cancel the listing agreement with Open Container. CBRE further argued that sanctions were appropriate because Open Container continued to pursue its third-party complaint against CBRE even after being informed of this fact.

{¶10} On October 19, 2009, prior to the commencement of trial, the trial court held a hearing on CBRE's motions. At the hearing, the trial court heard testimony from Cohodes regarding the listing agreement between Open Container and CBRE. Open Container argued that the listing agreement covered not only the real property, but also the fixtures, furniture, and other property that had been placed in the building by Open Container as part of the restaurant operation. Open Container further argued that there had been a number of oral agreements between Cohodes and Natoli regarding, among other things, acceptance of late rental payments.

{¶11} At the conclusion of the hearing, the trial court concluded that there was no legal basis supporting Open Container's third-party claims against CBRE. The court concluded that, in the absence of any conveyable interest owned by Open Container in the real property, the listing agreement was void. The court further concluded that any oral agreements between Cohodes and Natoli had no bearing on Open Container's claims against CBRE. In reaching its decision, the court stated:

Counterclaim regarding C.B. Richard Ellis and brought by Open Container, I won't say that it was frivolous when it was brought because I think that there were some facts that were up in the air, were not fully understood or were not fully appreciated in the light of what has occurred since that time, so I'm not gonna do 20/20 hindsight there. But by the time that we held a pretrial in August 2009, it became evident, or at least it - - it was formally brought to Open Container's attention through counsel that there was no basis upon which to proceed against third-party defendant C.B. Richard Ellis, Inc.

* * *

This Court has heard, this Court has read, this Court has seen nothing that would indicate in any way that third-party defendant has done anything other than what it was supposed to do, even under the contract with Open Container or with the later agreement with Greater Ohio Leasing or Mr. Natoli.

(Tr. 100-02.)

{¶12} The court then sustained CBRE's motion to strike Open Container's third-party complaint, and directed CBRE to submit an affidavit regarding its attorney fees incurred in preparing the motion to strike as a financial sanction. The parties then agreed that Greater Ohio's complaint and Open Container's counterclaim would be voluntarily dismissed without prejudice to allow Open Container to immediately appeal

the court's decision striking the third-party complaint. Subsequently, the court issued a judgment entry sustaining the motion to strike and dismissing the third-party complaint with prejudice as a sanction under Civ.R. 11. The court further awarded CBRE \$6,500 as a financial sanction under Civ.R. 11 and R.C. 2323.51.

{¶13} Open Container filed this appeal, and asserts the following assignments of error:

I. THE TRIAL COURT ERRED WHEN IT DISMISSED THE THIRD-PARTY COMPLAINT BASED UPON RULE 11, O.R.C.P. AND O.R.C., SECTION 2323.51 BY NOT CONSIDERING THE LAW OF PRINCIPAL-AGENCY, IN THAT OPEN CONTAINER, LTD., APPELLANT, AND GREATER OHIO LEASING CORP. WERE AGENTS FOR EACH OTHER'S INTEREST IN THE PROPERTY AND BUSINESS TO BE SOLD, OR OPEN CONTAINER WAS A THIRD-PARTY BENEFICIARY OF THE ELLIS LISTING CONTRACT WITH PLAINTIFF, ALL KNOWN BY C.B. RICHARD ELLIS, INC., APPELLEE.

II. THE TRIAL COURT ERRED WHEN IT CONSIDERED AND HELD A HEARING ON THE MOTION OF THIRD-PARTY DEFENDANT UNDER RULE 11, O.R.C.P. AND O.R.C., SECTION 2323.51, WHEN IT WAS ACTUALLY A MOTION FOR SUMMARY JUDGMENT, OR THE COURT SHOULD HAVE PROCEEDED TO TRIAL AND CONSIDERED A MOTION FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE ON THE THIRD-PARTY COMPLAINT. MOREOVER, THERE WERE NUMEROUS JURY QUESTIONS OF FACT.

III. THE TRIAL COURT ERRED WHEN GRANTED (sic) THE MOTION TO STRIKE WHEN IT FOUND THAT AT THE PRE-TRIAL CONFERENCE, BUT NOT AT THE FILING OF THE THIRD-PARTY COMPLAINT, THIRD-PARTY PLAINTIFF KNEW THERE WAS SOMETHING "FISHY" AND SHOULD HAVE DISMISSED THE THIRD-PARTY COMPLAINT. FURTHERMORE, THE TRIAL COURT REFUSED TO FIND THAT THE THIRD PARTY-COMPLAINT WAS FRIVOLOUS AS REQUIRED BY RULE 11, O.R.C.P.

IV. THE TRIAL COURT ERRED IN CUTTING OFF DISCOVERY, INCLUDING SUPPLEMENTAL DISCOVERY OFFERED BY DEFENDANT AND THIRD-PARTY PLAINTIFF.

{¶14} We begin with Open Container's third assignment of error, as that assignment is dispositive. By that assignment, Open Container argues that the trial court erred when it struck the third-party complaint against CBRE as a sanction pursuant to Civ.R. 11 and R.C. 2323.51.

{¶15} Civ.R. 11 requires that all pleadings filed in an action must be signed either by the counsel of the party on whose behalf the pleading is filed or, if the party is acting pro se, by the party. The rule provides, in relevant part, that:

The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.

{¶16} R.C. 2323.51(B)(1) provides that, in a civil action or appeal, "any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." R.C. 2323.51(A)(2)(a) defines frivolous conduct as conduct that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another

improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶17} In this case, the trial court's judgment entry states that the third-party complaint was being stricken as a sanction for violating Civ.R. 11. The entry does not set forth the trial court's reasoning for finding that the filing of the third-party complaint constituted a Civ.R. 11 violation, but instead incorporates the reasoning set forth during the hearing on the motion to strike.

{¶18} During that hearing, the trial court specifically concluded that the complaint was not "frivolous when it was brought because I think that there were some facts that were up in the air, were not fully understood or were not fully appreciated in the light of what has occurred since that time." (Tr. 100.) Later in the hearing, the court repeated this point, stating, "it wasn't until quite recently that Open Container was put on notice that there actually - - that a third-party complaint did not have any legal merit to it." (Tr. 103.)

{¶19} Nothing in the trial court's discussion indicates that the trial court was finding that the third-party complaint was a sham or false pleading at the time it was filed. Instead, the trial court's conclusion was that, by the time of the September 16 status conference, Open Container had sufficient information obtained during the course of the litigation to know that there was no legal basis for its claims against CBRE. This conclusion directly contradicts the standard for granting Civ.R. 11 sanctions, i.e., that Open Container's counsel knew at the time the pleading was signed that there were no grounds to support it or was only filing the pleading for the purposes of delay. The trial court's conclusion that continuing to assert the claims after it should have known that there was no legal basis for the claims constituted a finding of frivolous conduct by Open Container, but this conduct could not support a finding that filing the third-party complaint constituted a violation of Civ.R. 11.

{¶20} Because the conduct found to be sanctionable by the trial court could not have constituted a Civ.R. 11 violation, striking the third-party complaint was not an appropriate sanction. Striking a pleading is an available sanction for a Civ.R. 11 violation, but is not set forth in R.C. 2323.51 as one of the sanctions available for a finding that a party has engaged in frivolous conduct. Consequently, we sustain Open Container's third assignment of error to the extent that Open Container argues that the trial court erred in striking the third-party complaint as a sanction under Civ.R. 11. We emphasize that nothing in this decision constitutes a finding regarding the merits of appellant's third-party complaint or of the trial court's finding of frivolous conduct.

{¶21} Having sustained Open Container's third assignment of error, it is not necessary for us to consider the first, second, and fourth assignments. Consequently, those assignments are overruled as moot.

{¶22} Finally, CBRE filed a motion seeking sanctions against Open Container pursuant to App.R. 23. Because we sustained appellant's third assignment of error, the appeal was not frivolous. Thus, we deny CBRE's motion for sanctions.

{¶23} Accordingly, we deny appellee's motion for sanctions, sustain appellant's third assignment of error, overrule appellant's first, second, and fourth assignments of error as moot, and reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with this decision.

*Motion for sanctions denied;
judgment reversed and cause remanded.*

BROWN and KLATT, JJ., concur.
