[Cite as *Engintec Corp. v. Miller,* 2010-Ohio-3680.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ENGINTEC CORP., etc., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-T-0091**
- vs -	:	
CHRISTOPHER MILLER, et al.,	:	
Defendants,	:	
VINCENT MARINO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2004 CV 1103.

Judgment: Affirmed.

Robert R. Melnick, Melnick & Melnick, Federal Building, Suite 300, 18 North Phelps Street, Youngstown, OH 44503 (For Plaintiffs-Appellants Engintec Corp., Dr. David A. Brys, and Dr. Franklin H. Johnson).

Reggie D. Huff, pro se, 856 Youngstown-Kingsville Rd., N.E., Vienna, OH 44473 (Plaintiff-Appellant).

Douglas W. Ross, Roux, Chaney & Ross, Ltd., 305 Chase Tower, 106 East Market Street, Warren, OH 44481 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Engintec Corp., Reggie D. Huff., Dr. David A. Brys, and Dr. Franklin H. Johnson, appeal the judgment entered by the Trumbull County Court of

Common Pleas. The trial court awarded sanctions against appellants and in favor of appellee, Vincent Marino.

{¶2} Prior to 2002, Huff resided in Oregon, where he operated a company known as Acro-Tech, Inc. Acro-Tech marketed engine valve products, one of which is called the Smart Valve, a product intended to make motorcycle engines more fuel-efficient. Vincent Marino was affiliated with Acro-Tech. Huff entered into a contract with Marino, which gave Marino a right of first refusal related to the distribution of the Smart Valve.

{¶3} While at Acro-Tech, Huff offered his personal, unregistered shares of Acro-Tech to certain large investors at no cost, resulting in a lower per-share cost to those investors. This and other conduct resulted in a cease and desist order being filed against Huff and Acro-Tech, which prohibited Huff from selling any securities in the state of Oregon. In addition, a similar cease and desist order was filed against Huff in the state of Washington.

{¶4} In 2002, Huff moved to Ohio. Shortly thereafter, Engintec Corp. was formed. Robert W. Harris, Mark J. Endre, Chris Miller, Matthew K. Napier, Brys, and Johnson each agree to invest $30,000 in Engintec. They, along with Huff, were the shareholders of the corporation. Huff received a monthly salary and ran the day-to-day operations of Engintec. The goal of Engintec was to market the Smart Valve. However, at that time, the patent to the Smart Valve had not been transferred to Engintec.

{¶5} In 2003, the Smart Valve was still in the design phases. No units were being produced or distributed, and Engintec was not generating any revenue.

{¶6} Endre, Miller, and Napier became concerned about the lack of revenue and started questioning Huff's activities. Thereafter, they entered into a contract with Huff and Engintec entitled, "Consideration for Assignment of Patent Application." This agreement gave Huff an additional 200 nonvoting shares of Engintec stock and required Huff to assign the patent for the Smart Valve to Engintec.

{¶7} Harris, Endre, Miller, and Napier filed a complaint against appellants alleging seven counts, including: breach of a fiduciary duty; improper accounting; conversion and/or diversion of assets; fraud; tortious interference with business; and breach of contract.[1] In addition, Harris, Endre, Miller, and Napier sought a declaration of shareholders' rights regarding a February 20, 2004 board meeting. This matter was assigned case No. 2004 CV 648.

{¶8} In May 2004, appellants filed a complaint against Harris, Endre, Miller, and Napier, as well as Marino, setting forth 13 claims for relief, including: three federal RICO claims; three state RICO claims; using a sham legal process; fraud; breach of contract; interference with business and economic relations; intentional infliction of emotional distress; and breach of fiduciary duty. In addition, appellants sought declaratory relief. This matter was assigned case No. 2004 CV 1103. The plaintiffs in the first case were the defendants in the second, and the defendants in the first case were the plaintiffs in the second, with one exception. Appellee Vincent Marino was named as a defendant by appellants in case No. 2004 CV 1103.

1. In their initial complaint, Engintec was named as a plaintiff, but later removed. Also, Lisa G. Huff was designated as a defendant; however, Lisa was dismissed as a party at the trial court level and is not a party in this appeal or the appeal in case No. 2008-T-0090.

{¶9} Upon joint motion of the parties, the trial court consolidated case Nos. 2004 CV 648 and 2004 CV 1103 for all purposes.

{¶10} In April 2008, only days before the scheduled trial, appellants dismissed their claims against the defendants, which included Marino, in case No. 2004 CV 1103.

{¶11} The matter proceeded to a combined bench and jury trial in April 2008 in case No. 2004 CV 648. The jury was to decide the majority of the issues; however, the trial court stated it would rule on the equitable issues based on the evidence presented at the trial. Again, Marino was not a party to that case.

{¶12} On May 8, 2008, Marino filed a motion for sanctions against appellants for maintaining the action in 2004 CV 1103. The trial court held a hearing on Marino's motion in July 2008.

{¶13} Appellants have filed two appeals to this court. In case No. 2008-T-0090, appellants appeal the trial court's judgment in relation to trial court case No. 2004 CV 648. In the instant matter, case No. 2008-T-0091, appellants appeal the trial court's judgment entry in regard to the sanctions it imposed in relation to case No. 2004 CV 1103.[2] We also decide case No. 2008-T-0090 today.

{¶14} Appellants filed a motion to stay the trial court's judgment in both appellate cases. This court granted appellants' motion to stay; however, the stays were conditioned upon the posting of supersedeas bonds. A review of the dockets reveals

2. These cases were initially consolidated by this court; however, upon further review, this court determined that the cases should proceed independently.

that appellants have not posted the requisite supersedeas bonds. Accordingly, the stays issued by this court have not gone into effect.

{¶15} Marino filed a motion to dismiss case No. 2008-T-0091. He argued that the case was moot because the trial court had garnished funds from a bank account of Brys, thus satisfying the judgment. This court overruled Marino's motion to dismiss, holding that the garnishment of the funds did not constitute a "voluntary" payment of the judgment.

{¶16} Appellants raise the following assignment of error:

{¶17} "The trial judge erred to the prejudice of appellants in granting sanctions & transforming the hearing of July 18, 2008 into a post-dismissal trial since appellants had voluntarily dismissed action 04 CV 1103 and since appellees failed to provide all discovery to appellants."

{¶18} Appellants argue the trial court did not have jurisdiction to conduct the sanctions hearing because they voluntarily dismissed the case pursuant to Civ.R. 41(A). However, as Marino notes, a Civ.R. 41(A) dismissal does not divest the trial court of jurisdiction to consider a motion for sanctions. *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler* (1994), 97 Ohio App.3d 782, 785. This court has previously held, "[i]t is well-established that a request for sanctions is collateral to the underlying proceedings and, thus, even after a case has been dismissed, a trial court retains jurisdiction to conduct a hearing and render a decision on a motion for sanctions." *Cic v. Nozik* (July 20, 2001), 11th Dist. No. 2000-L-117, 2001 Ohio App. LEXIS 3291, at *3, citing *Lewis v. Celina Fin. Corp.* (1995), 101 Ohio App.3d 464, 470; *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler*, 97 Ohio App.3d at 785; and *Schwartz v. Gen. Acc. Ins. of Am.* (1993), 91

Ohio App.3d 603, 606. As the Third Appellate District stated, "the trial court therefore retains jurisdiction for the limited purpose of applying Civ.R. 11 and R.C. 2323.51." *Lewis v. Celina Fin. Corp.*, 101 Ohio App.3d at 470. (Citations omitted.) As the Second Appellate District observed, to hold otherwise would permit a party to "force a defendant to expend significant time and money to defend against an arguably frivolous action and then dismiss that action just prior to trial with little if any consequence." *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler*, 97 Ohio App.3d at 785. We agree with this analysis.

{¶19} Further, we note that R.C. 2323.51(B) provides, in part:

{¶20} "[A]t any time not more than thirty days after the entry of final judgment 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. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section."

{¶21} In this matter, Marino's motion for sanctions was filed on May 8, 2008, which was approximately 21 days after appellants filed their notices of dismissal pursuant to Civ.R. 41(A). The trial court retained jurisdiction to rule on Marino's motion for sanctions even though it was filed after the Civ.R. 41(A) dismissals. See *Cic v. Nozik*, 2001 Ohio App. LEXIS 3291, at *2-3 (motion for sanctions filed 13 days after case was dismissed) and *Lewis v. Celina Fin. Corp.*, 101 Ohio App.3d at 468-470 (motion for sanctions filed 10 days after case was dismissed).

{¶22} This court has held that there is more than one standard of review for cases involving sanctions under R.C. 2323.51 and Civ.R. 11. *Stevenson v. Bernard*, 11th Dist. No. 2006-L-096, 2007-Ohio-3192, at ¶37. The determination depends on the underlying reasons the trial court imposed sanctions. "'The question of what constitutes frivolous conduct may be either a factual determination, e.g. whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether a claim is warranted under existing law.'" *In re Loube*, 11th Dist. No. 2007-L-147, 2008-Ohio-4975, at ¶10. (Citation omitted.) Appellate courts use a de novo standard when reviewing legal conclusions but use the abuse of discretion standard when reviewing factual determinations. Id.

{¶23} In this matter, the trial court concluded that appellants had no evidence to support their allegations and that they filed and maintained the action against Marino "merely to harass or maliciously injure" him. In addition, the trial court found that appellants continued the action for the purpose of causing unnecessary delay and expense for Marino.

{¶24} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶25} Frivolous conduct is defined in R.C. 2323.51(A)(2), which provides, in part:

{¶26} "'Frivolous conduct' means either of the following:

{¶27} "(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

{¶28} "(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.

{¶29} "(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.

{¶30} "(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.

{¶31} "(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."

{¶32} The trial court found that appellants maintained this matter against Marino for the purposes of delay and to cause Marino unnecessary expense. The trial court was particularly troubled with Appellant Huff's statement at the sanctions hearing that he had a right to threaten defendants to try to induce a settlement.

{¶33} Appellants claim they did not have evidence in support of their claims because Marino did not produce the requested discovery. Appellants have not produced any evidence of what this purported evidence might have been. The trial court found that offering appellants additional time for discovery would not likely have produced any substantive evidence to support their claims.

{¶34} In this matter, the trial court was in the best position to evaluate the credibility of the witnesses and evaluate whether appellants' conduct throughout this

matter was frivolous. After reviewing the record, we conclude the trial court did not abuse its discretion in granting appellee's motion for sanctions pursuant to R.C. 2323.51 and Civ.R. 11.

{¶35} Appellants' assignment of error is without merit.

{¶36} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.