

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Resources for Healthy Living, Inc.

Court of Appeals No. WD-10-073

Appellant

Trial Court No. CVF 0900656

v.

Dianne Haslinger

DECISION AND JUDGMENT

Appellee

Decided: April 22, 2011

* * * * *

Erik G. Chappell and Jonathan M. Hanna, for appellant.

Diane J. Knoblauch, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the judgment of the Perrysburg Municipal Court awarding frivolous conduct sanctions against a plaintiff in a suit on an oral contract. For the reasons that follow, we reverse.

{¶ 2} Appellee, Dianne Haslinger, is a licensed psychotherapist. At some point prior to 2008, appellee entered into an oral agreement with appellant, Resources for

Healthy Living, Inc., to use office space and other amenities provided to appellee and other psychological professionals.

{¶ 3} Although there is some discrepancy in the language they employ, the parties generally agree that the agreement was that, in return for the use of appellant's facilities, appellee would pay to appellant 40 percent of what appellant's principal Tim Johnson called her "receivables." This term is clarified by the actual procedure the parties used.

{¶ 4} At the end of the work day, appellee submitted her time sheets to Melody Lloyd dba Medical Office Management Services, a billing service under contract with appellant. Lloyd would create a statement to bill insurers or other appropriate payors.

{¶ 5} Payment on these statements came to appellant's office where the check received would be given to appellee. The accompanying "Explanation of Benefits" statement ("EOB") went to Lloyd. Lloyd then posted the amount paid along with any insurer adjustments to the correct client's account. At the end of the month, Lloyd created a summary of money received and provided this to appellant. Appellant calculated 40 percent of this figure and prepared a statement which was sent to appellee for payment. This was the amount appellee paid.

{¶ 6} Toward the end of 2008, appellee became dissatisfied with the arrangement and elected to leave. Prior to her departure, Johnson requested from Lloyd the balance of appellee's outstanding receivables. At the end of October, Lloyd provided a figure of \$14,015.96. On November 13, 2008, appellee left appellant to open her own practice. Records admitted at the hearing in this matter show that appellee paid appellant's invoices

for \$248.06 for collections of \$620.16 in October and \$1,356.37 for \$3,390.93 in collections in November.

{¶ 7} In December, Lloyd did not report any receipts for appellee and appellant issued no invoice to appellee. Appellee represents that this was, in part, due to appellant's failure to forward to her some payments received and to deliver EOB statements to Lloyd. Appellant points out that Lloyd withdrew from appellant's employ at about the same time as appellee, but later began to provide the billing services to appellee. Whatever the case, appellant's principal, Tim Johnson, came to suspect that appellee was concealing payments.

{¶ 8} The record is unclear as to the next events. Presumably, appellant made some demand on appellee, and counsel for both parties became involved. By April 9, 2009, counsel for appellee wrote to appellant's counsel requesting, for what she characterizes as the third time, an itemized invoice for any sums appellant believes is due. Appellant's counsel responded on April 13, 2009, complaining of a lack of responsiveness to appellant's request for documentation from Lloyd's billing service and advising appellee's counsel that he had informed the billing service that, absent its cooperation, "our only choice would be to commence litigation against your client and compel production * * *."

{¶ 9} On April 23, 2009, appellant sued appellee on contract or, alternatively, for unjust enrichment, seeking "forty percent (40%) of [appellant's] patient billings," which appellant claimed amounted to \$5,606.38. Attached to appellant's complaint was a

statement showing receivables outstanding as of "2/19" as \$14,015.96: the amount due, \$5,606.38.

{¶ 10} Appellee responded to the complaint with a motion for a more definitive statement, noting appellant had failed to attach a copy of the contract at issue to the complaint and requesting an itemized invoice of the "receivables" underlying the amount sought. Appellant responded with a memorandum in opposition to appellee's motion. In that memorandum, appellant explained that there was no contract attached because the agreement at issue was an oral agreement between the parties that appellee would "give forty percent (40%) of her billings to [appellant]" in return for appellant's provision of office space. Moreover, appellant stated, it could not provide a more definitive itemization because Lloyd's billing service, inferentially at appellee's request, refused to provide such data.

{¶ 11} Appellee's motion to have the admissions contained in appellant's memorandum in opposition deemed a supplemental pleading to the complaint was granted. On July 1, 2009, appellee filed her answer, generally denying the allegations in appellant's complaint. In October, appellee took the deposition of appellant's principal, Tim Johnson. Trial was set for March 17, 2010. On March 16, 2010, appellee filed Johnson's deposition with the court. On the same day, appellant filed a notice of dismissal pursuant to Civ.R. 41(A).

{¶ 12} On April 13, 2010, appellee moved for Civ.R. 11 and R.C. 2323.51 sanctions against appellant and its attorneys, asserting that it had filed its complaint

without any evidence to support the allegations contained therein, then dismissed the complaint on the eve of a trial it knew it could not win. Appellee sought attorney fees and costs related to defending against what appellee characterized as a frivolous lawsuit. Appellant filed a memorandum in opposition and the trial court set a hearing on the motion.

{¶ 13} At the hearing, the court heard testimony from appellee and Melody Lloyd. The deposition of Tim Johnson, the statements and payments associated with the parties' arrangement through its history, correspondence between counsel and an accounting of appellee's attorney fees and costs up to that point were also introduced into evidence.

{¶ 14} On October 8, 2010, the trial court found that the lawsuit at issue was filed without sufficient evidence that money was owed, even though counsel and both parties understood that appellee would pay any amounts that appellant could properly establish were due. The court concluded that this constituted frivolous conduct within the meaning of R.C. 2323.51 and assessed defense costs in the amount of \$12,027.26 against appellant and its counsel. It is from this judgment that appellant now brings this appeal. Appellant sets forth the following five assignments of error:

{¶ 15} "A. The trial court erred when it granted Haslinger's motion for sanctions for frivolous conduct pursuant to R.C. 2323.51, because Haslinger admitted in her motion hearing testimony that she has breached the contract and thus plaintiff's complaint was well-founded and non-frivolous.

{¶ 16} "B. Even leaving aside Haslinger's admitted breach of contract, the trial court erred when it granted Haslinger's motion for sanctions for frivolous conduct pursuant to R.C. 2323.51, because the evidence produced at the motion hearing established that Resource's claims had evidentiary support, or would have evidentiary support through discovery.

{¶ 17} "C. Even if the trial court could properly disregard the evidence in support of Resource's claims, the imposition of sanctions for frivolous conduct was in error because such sanctions are inappropriate where only after discovery is the complaint found to be unsupported by the evidence.

{¶ 18} "D. To the extent it based its imposition of sanctions on Civ.R. 11 the trial court erred, because it made no finding that Resources or its counsel violated the requirements of the rule, let alone any that any violation was made willfully.

{¶ 19} "E. To the extent it based its imposition of sanctions on the fact that Resources dismissed its claim prior to trial or that Haslinger expended substantial attorney fees defending the action, the trial court erred because these factors do not justify an award of sanctions for frivolous conduct."

{¶ 20} In assignment of error "A" appellant mischaracterizes appellee's testimony at the sanctions hearing that she had received \$1,034.78 from her receivables as an admission of a breach of the contract. Appellee testified that she had received the money, but was never given an invoice, as was the parties' practice. The parties' course of conduct over the length of the agreement invariably involved an invoice from appellant.

Absent such a document, we cannot say that appellee was in breach of the agreement.

Appellant's assignment of error "A" is not well-taken.

{¶ 21} We shall discuss the remainder of appellant's assignments of error together.

{¶ 22} In material part, Civ.R. 11 provides:

{¶ 23} "* * * 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. * * * For a willful violation of this rule, an attorney or pro se party * * * 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. * * *"

{¶ 24} "When ascertaining if sanctions should be imposed pursuant to Civ.R. 11, a court determines whether 'the attorney filing the pleading or motion (1) read the document; (2) possesses good grounds for filing it, and; (3) did not file the document with a purpose to delay the proceedings.' If one of these requirements is not satisfied, the court must then decide whether the violation was willful rather than simply negligent.

When a trial court determines that a violation of Civ. R. 11 was willful, it may impose an appropriate sanction." *Gallagher v. AMVETS*, 6th Dist. No. E-09-008, 2009-Ohio-6348,

¶ 32. (Citations omitted.)

{¶ 25} With respect to a party, " * * * 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(B)(1). "Frivolous conduct" includes filing a complaint which contains " * * * 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." R.C. 2323.51(A)(1)(2)(a)(iii).

{¶ 26} An R.C. 2323.51 determination involves a mixed question of law and of fact. On appeal, legal questions will be considered de novo, while a trial court's factual determinations will not be disturbed if supported by competent, credible evidence. *Grine v. Sylvania Schools Bd. of Edn.*, 6th Dist. No. L-06-1314, 2008-Ohio-1562, ¶ 41. Ultimately, the decision as to whether to impose sanctions under either Civ.R. 11 or R.C. 2323.51 rests in the sound discretion of the court and will not be reversed absent an abuse of that discretion. *Gallagher*, supra. An abuse of discretion is more than a mistake of law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 27} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the

contract." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. (Citation omitted.) An oral contract may be enforceable if there is sufficient particularity to form a contract. The terms of the contract may be ascertained by the words, deeds, acts and silence of the parties. *Id.* at ¶ 15.

{¶ 28} There is little doubt in this matter that there was an oral contract. As to the terms of the contract, it may be part of the misunderstanding that appellant's principal, Tim Johnson, used the terms "billings, receivables and receipts" essentially interchangeably. It does not appear that at any point appellant's counsel disabused him of the notion that these terms were the same. A "receipt" is "something received." Merriam Webster's Collegiate Dictionary (10 Ed.1996) 975. A "receivable" is something "capable of being received." *Id.*

{¶ 29} The testimony and documentary evidence presented, however, show a clear course of conduct between the parties. Appellee paid appellant 40 percent of her *receipts*, that is, the money *collected* during the month. Throughout the relationship of the parties, their practice entailed the outside billing company determining appellee's monthly receipts and providing that figure to appellant. Appellant would then compute 40 percent of the receipts and generate a statement which was given to appellee. It was from this statement that appellee paid.

{¶ 30} The imprecise use of the terms "billings" and "receivables" and "receipts" carried forward into appellant's complaint and into its memorandum which was deemed a supplemental complaint. From this, the complaint misstated the terms of the contract.

And from this, flowed the invoice and demand for 40 percent of the outstanding "billings" figure supplied to Johnson by Lloyd in October 2008. Notwithstanding this state of affairs, it emerges undisputed that there was an agreement. It was also a matter of some probability that appellee owed or would owe some amount in satisfaction of that agreement.

{¶ 31} This last point is dispositive in this appeal, because it is threshold as a matter of law that, before a court may impose Civ.R. 11 or R.C. 2323.51 sanctions in a case like this, the material allegations in the complaint must be without evidentiary support and be " * * * not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." R.C. 2323.51(A)(1)(2)(a)(iii). Filing a complaint without evidentiary support, however, does not become frivolous conduct under the law when no evidentiary support is uncovered by investigation or discovery. The conduct is frivolous only when the expectation of finding such evidence is not reasonable.

{¶ 32} In this matter, there was a contract. It is undisputed that an agreement existed. With an undisputed \$14,000 in receivables outstanding when appellee left, it is not unreasonable that appellant might expect to uncover evidence of some amount due during discovery or investigation. Consequently, appellant's suit was not frivolous within the meaning of R.C. 2323.52 and appellant's counsel was not without good grounds for filing the complaint. Accordingly, appellant's assignment of error "B" is well-taken. The remainder of appellant's assignments of error are moot.

{¶ 33} On consideration whereof, the judgment of the Perrysburg Municipal Court is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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