[Cite as *In re Sanctions for Amato*, 2010-Ohio-67.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92609

SANCTIONS RE: ANTHONY AMATO

APPELLANT

In the Matter Styled:
Norman Borowski, Plaintiff
vs.
Showtime Builders, Inc., et al., Defendants-Appellees

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-635369

BEFORE: Gallagher, A.J., Celebrezze, J., and Sweeney, J.

RELEASED: January 14, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Anthony Amato, appeals from the judgment of the Cuyahoga County Court of Common Pleas that granted the motion of appellee, Showtime Builders, Inc., for sanctions and attorney's fees for frivolous conduct. For the reasons that follow, we reverse.

{¶ 2} A summary of the facts follows:

{¶ 3} Attorney Amato filed a complaint on behalf of his client, Norman Borowski, for alleged violations of the federal Telephone Consumer Protection Act (TCPA), Section 227, Title 47, U.S. Code, and its state counterpart, the Ohio Consumer Sales Practices Act, R.C. 1345. The complaint alleged that Borowski received an unauthorized prerecorded telephone solicitation call from a home remodeling company. Showtime Builders, Inc., Coventry Rehab Inc., Charles Zuchowski, as well as ten John Does were named as defendants.

{¶ 4} Answers were filed, and discovery began; however, after Borowski's deposition, Amato, with his client's consent, dismissed the complaint with prejudice because Borowski's deposition testimony was inconsistent with some of the allegations set forth in the complaint.

{¶ 5} Thereafter Zuchowski filed a motion pursuant R.C. 2323.51 for frivolous conduct, requesting sanctions and attorney's fees from Amato.

{¶ 6} A hearing was held. Amato testified on his own behalf. Borowski also testified on behalf of Amato. The trial court granted the motion by journal entry, which stated the following:

> **"Charles Zuchowski motion pursuant to O.R.C. 2323.51. Frivolous Conduct, filed 08/11/2008, is granted. Sanctions ordered against defendant attorney Anthony Amato in the total amount of $27,012.56 as follows: to attorney David Corrado the sum of $16,037.56, to attorney A. Steven Dever the sum of $5,175.00 and to Attorney Jerry Emoff in the amount of $5,800.00."**

{¶ 7} Amato appeals, advancing three assignments of error for our review.

{¶ 8} "I. The trial judge erred in finding that defendant-appellee Zuchowski had met his burden of demonstrating that defendant-appellant willfully filed and pursued a civil claim which lacked good grounds in support."

{¶ 9} Amato argues that the trial court erred when it granted Zuchowski's motion pursuant to R.C. 2323.51 for frivolous conduct and attorney's fees.

{¶ 10} R.C. 2323.51 provides for an award of attorney's fees to a party harmed by "frivolous conduct" in a civil action. Zuchowski alleged that Amato filed a lawsuit knowing that it had no basis in law or fact. The statute defines frivolous conduct, in relevant part, as:

> **"(a) Conduct of [a] party to a civil action * * * or [the] party's counsel of record 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.

"* * *"

"(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." R.C. 2323.51(A)(2)(a).

{¶ 11} A trial court is required to engage in a two-part inquiry when presented with an R.C. 2323.51 motion. *Cleveland Indus. Square, Inc. v. Dzina*, Cuyahoga App. Nos. 85336, 85337, 85422, 85423, and 85441, 2006-Ohio-1095. Initially, the court must determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. Id. Second, if the conduct is found to be frivolous, the trial court must determine what amount, if any, of reasonable attorney's fees necessitated by the frivolous conduct is to be awarded to the aggrieved party. Id., citing *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 232-233.

{¶ 12} What constitutes frivolous conduct may be a factual determination or a legal determination. On review, a trial court's findings of fact are given substantial deference and are reviewed under an abuse of discretion standard, while legal questions are subject to de novo review by an appellate court. Id., citing *State Farm Ins. Cos. v. Peda*, 11th Dist. No. 2004-L-082, 2005-Ohio-3405, at ¶28. The ultimate decision whether to impose sanctions for frivolous conduct, however, remains wholly within the trial court's discretion. *Wheeler v. Best Emp. Fed. Credit Union*, Cuyahoga App. No. 92159, 2009-Ohio-2139. See, also, *Riston v. Butler*, 149 Ohio App.3d 390, 397-398, 2002-Ohio-2308.

{¶ 13}Zuchowski argued that the lawsuit filed by Amato was frivolous because his client was a forgetful, elderly gentleman who admitted that he was not harmed or annoyed by the prerecorded telephone message he received. Zuchowski alleged that Amato filed the lawsuit without speaking with his client or getting his client's permission.

{¶ 14} The TCPA restricts the use of automated telephone equipment. *Charvat v. Ryan*, 116 Ohio St.3d 394, 397-398, 2007-Ohio-6833. It was intended to stop prerecorded voice messages from being sent to private residential telephones. Section 227(b)(1)(B), Title 47, U.S.Code, states that it is unlawful for any person to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message

without the prior express consent of the called party." The TCPA also provides in Section 227(b)(3)(B) for a private right of action "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater."

{¶ 15} Anyone who receives a prerecorded telemarketing call at home, without first consenting to the call, may sue and recover damages. *Charvat*, supra. A residential customer may also sue for treble damages under Section 227(b)(3)(C), which provides for a private right of action: "If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph."

{¶ 16} At the hearing, Borowski testified that he received a prerecorded telemarketing call at his home, without his consent, for home remodeling services. In need of some remodeling, Borowski called back and left a message. A return telephone call occurred, and an appointment was set up. Zuchowski and another person went to Borowski's home for the scheduled appointment. Zuchowski represented that he was the owner of Showtime Builders and gave Borowski an estimate for the remodeling of his kitchen and bath. Zuchowski left his business card with Borowski.

{¶ 17} Amato testified that, while speaking with Borowski regarding another case, he learned about the prerecorded solicitation call and was shown Zuchowski's business card. Amato testified that Borowski agreed to file suit to recover the penalties authorized by federal and state law, and that Borowski reviewed and signed the interrogatory responses. Amato testified that because of Borowski's confusion during his deposition, which jeopardized his credibility, Amato, with Borowski's permission, dismissed the lawsuit.

{¶ 18} Borowski testified that he authorized the lawsuit and reviewed the interrogatories. Borowski explained that he was confused during the deposition and that is why his deposition testimony is inconsistent with the allegation in the complaint.

{¶ 19} After reviewing the record, we find that the trial court erred in finding that Amato filed a frivolous lawsuit. Borowski explained to Amato the events leading up to Zuchowski's leaving his business card with Borowski, which provided a prima facie case of a violation of the federal TCPA. Amato filed suit based on his conversations with his client, which were corroborated by Zuchowski's business card. The record supports Amato's contention and Borowski's admission that he was confused during his deposition. We find no credible evidence in the record to support Zuchowski's argument that Amato filed the lawsuit without his client's permission or based on fictitious facts.

{¶ 20} Therefore, Amato's first assignment of error is sustained.

{¶ 21} Because we find that Amato's conduct was not frivolous, and reverse the decision of the trial court, the remaining assignments of error are rendered moot.[1]

Judgment reversed.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR

[1] "II. The trial judge erred in concluding that defendant-appellee Zuchowski had necessarily incurred reasonable attorney fees of $27,012.56 in defending a lawsuit seeking specified damages of $1,500.00."

"III. The lower court erred, as a matter of law, in entering a judgment in favor of defense attorneys who had not moved for sanctions in their own capacities and were not the real parties in interest in the proceedings."