IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1126

Filed: 3 July 2018

Orange County, No. 15 CVS 1475

KENNETH I. MOCH, Plaintiff,

v.

A. M. PAPPAS & ASSOCIATES, LLC, ART M. PAPPAS, FORD S. WORTHY, Defendants.

Appeal by plaintiff's counsel from Order entered 2 June 2017 by Judge A. Graham Shirley in Orange County Superior Court. Heard in the Court of Appeals 19 April 2018.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by Eric M. David, Gary S. Parsons, and Jessica B. Thaller-Morgan, for Plaintiffs-Appellants Jeffrey Patton and Spilman, Thomas & Battle PLLC.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell, Christopher G. Smith, and Clifton L. Brinson, and Tharrington Smith, L.L.P., by Wade M. Smith, for Defendants-Appellees.

INMAN, Judge.

Jeffrey Patton and Spilman, Thomas & Battle, PLLC (collectively "Plaintiff's Counsel"), counsel for Kenneth I. Moch[1] ("Plaintiff"), appeal from a trial court's imposition of sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure in an order awarding A. M. Pappas & Associates, LLC, Art M. Pappas, and Ford S. Worthy (collectively "Defendants") $269,054.77 in attorneys' fees and costs. Plaintiff's Counsel argue that the trial court erred in concluding that their complaint was not well grounded in fact and law and was filed for an improper purpose. Plaintiff's Counsel further argue that the trial court was not justified in awarding the amount it did and that the trial court is barred from imposing sanctions under N.C. Gen. Stat. §§ 1A-1, Rule 26(g), 6-21.5, and 75-16.1.

After careful review, we hold the trial court's award of sanctions based upon the improper purpose prong of Rule 11 is supported by the evidence. We further hold that the trial court did not err in calculating the amount of the award. Because we affirm the trial court's order on this basis, we need not address the factual or legal sufficiency of the complaint or the trial court's authority to impose sanctions based on other provisions of the Rules of Civil Procedure or of the Unfair and Deceptive Trade Practices Act.

Facts and Procedural History

[1] Mr. Moch entered into a settlement agreement with Defendants and filed a motion to withdraw his appeal, which was granted by this Court on 14 December 2017.

This is the second appeal to this Court in this matter. Facts relevant to this appeal follow, but additional procedural and factual history are included in our prior decision regarding the merits of the dispute and underlying litigation. *See Moch v. A.M. Pappas & Assocs., LLC*, __ N.C. App. __, __, 794 S.E.2d 898, 899-902 (2016) (*Moch I*).

This dispute arose out of a string of email messages sent between October 2014 and March 2015 and the "John Doe" defamation lawsuit filed by Defendants in Durham County, North Carolina, (the "Durham County Lawsuit") which attempted to uncover the source of the email campaign.

On 12 October 2015, after the Durham County Lawsuit was filed, Defendants through counsel sent a letter to Plaintiff (the "October 2015 Letter"), stating that Defendants had "obtained evidence demonstrating that [Plaintiff was] responsible for the defamatory and malicious emails . . . described in the [Durham County Lawsuit] . . . ." The letter explained that Defendants would amend the Durham County Lawsuit to name Plaintiff as the source of the emails unless Plaintiff agreed to settlement terms including the following:

> - A written retraction and apology;
>
> - Payment of $10 million, which is a figure discounted for settlement purposes of the net present value of the economic harm done to our clients. At trial, we will seek at least $25 million;
>
> - Complete disclosure and sharing of information that

> identifies anyone else involved with you in the defamatory emails. Based on the nature and quality of this information, we may be willing to compromise the financial settlement demand; and
>
> - Our clients will refrain from reporting you to law enforcement authorities or regulatory agencies for violation of [N.C. Gen. Stat. §] 14-196.3 and all other potential criminal violations, including federal violations.

The October 2015 Letter enclosed subpoenas for Plaintiff to produce documents and testify in a deposition. The letter instructed Plaintiff that he "*may not destroy or alter any evidence* identified in the subpoena or that is relevant to this matter. You [Plaintiff] are *obligated by law* to preserve all relevant evidence. Failure to comply with this obligation is a criminal offense." (Emphasis in original). The October 2015 Letter sought a response by the end of that week.

Plaintiff objected to the subpoenas for document production and retained Plaintiff's Counsel.

On 6 November 2015, Defendants, again through counsel, sent a second letter (the "November 2015 Letter") seeking to resolve the matter. The November 2015 Letter extended the time for settlement to 30 November 2015, and opened the door to negotiating a reduced damages settlement. The letter also outlined an alternate path through litigation indicating that Defendants would amend the Durham County Lawsuit and report Plaintiff to the appropriate authorities for cyberstalking in violation of N.C. Gen. Stat. § 14-196.3. The parties were unable to settle the dispute

and, on 18 November 2015, Defendants amended their Durham County Lawsuit naming Plaintiff as a defendant.

On the same day, a few hours after Plaintiff was named in the Durham County Lawsuit, Plaintiff's Counsel filed the complaint initiating the case before us (the "Orange County Lawsuit"). The complaint alleged that by sending the two settlement letters, issuing subpoenas, and naming Plaintiff in the Durham County Lawsuit, Defendants had engaged in unfair and deceptive trade practices and an abuse of process. Plaintiff's complaint sought compensatory and punitive damages.

Plaintiff's Counsel then filed a notice of designation of the Orange County Lawsuit attempting to transfer the case to the North Carolina Business Court as a mandatory complex business case. Defendants wrote a letter to the Chief Justice of the North Carolina Supreme Court opposing the designation, and the Chief Justice referred the issue to the Chief Business Court Judge. The parties started discovery and agreed on a briefing schedule to address the case's designation.

In November and December 2015, while the case designation was pending, Plaintiff's Counsel served discovery requests on Defendants and issued subpoenas to several third-party companies. Among those served were the National Venture Capital Association, the Wistar Institute of Anatomy and Biology, and the North Carolina Biotechnology Center. These companies had pre-existing and ongoing business relationships with Defendants.

On 25 November 2015, Defendants filed a motion to dismiss the lawsuit. A hearing was scheduled for 11 January 2016, due to the disputed Business Court designation.

On 28 December 2015, Chief Judge James Gale of the Business Court concluded the lawsuit did not qualify as a mandatory complex business case. On 6 January 2016, Chief Justice Mark Martin of the North Carolina Supreme Court entered an order remanding the case to the Orange County Superior Court.

On 7 January 2016, days before the hearing on Defendants' motion to dismiss, Plaintiff's Counsel filed an amended complaint which renamed A. M. Pappas & Associates, LLC as "Pappas Capital, LLC (formerly known as A. M. Pappas & Associates, LLC)." Defendants responded the next day with an amended motion to dismiss and a motion for a hearing on shortened notice, arguing that the changes made in the amended complaint were "minor factual changes to the original Complaint that do not affect the substance of Plaintiff's claims." The trial court continued the hearing by one week, to 13 January 2016.

The trial court issued its order granting Defendants' motion to dismiss on 25 February 2016. On 23 March 2016, Plaintiff's Counsel filed a notice of appeal. On 12 April 2016, Defendants filed motions for sanctions and for attorneys' fees.

This Court heard Plaintiff's appeal, and on 20 December 2016 issued its opinion in *Moch I* affirming the trial court's dismissal of the lawsuit. Our Court held

that "plaintiff's complaint failed to allege facts that, if true, would establish that the acts complained of were 'in commerce' as the term is defined in N.C. Gen. Stat. § 75-1.1(b) . . . ." *Moch I*, __ N.C. App. at __, 794 S.E.2d at 905. We concluded that a plaintiff may not bring an unfair and deceptive trade practices act claim "based upon letters sent by defendants' counsel . . . ." *Id.* at __, 794 S.E.2d at 904. We also affirmed the trial court's dismissal of Plaintiff's abuse of process claim. *Id.* at __, 794 S.E.2d at 905.

Defendants filed an amended motion for attorneys' fees on 21 March 2017. The matter was heard, and on 2 June 2017, the trial court entered an order awarding Defendants $269,054.77 in attorneys' fees and costs pursuant to Rule 11. The trial court's order specifically held "Kenneth I. Moch, Jeffrey Patton and the firm of Spilman, Thomas & Battle, PLLC (the "Sanctioned Parties") jointly and severally [liable] . . . ."[2]

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[2] The trial court imposed sanctions against attorney Jeffrey Patton and his law firm, Spilman, Thomas & Battle, PLLC, even though Defendants did not seek sanctions against Mr. Patton in his individual capacity. Rule 11(a) provides: "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that 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." N.C. Gen. Stat. § 1A-1, Rule 11(a) (2017). Rule 11 further explains that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or *upon its own initiative, shall impose upon the person who signed it, a represented party, or both*, an appropriate sanction . . . ." *Id.* (emphasis added). Here, Jeffrey Patton signed the complaint, the business court designation, the amended complaint, and the third-party subpoenas. By signing each document, Mr. Patton subjected himself to the requirements of Rule 11 and conferred jurisdiction to the trial court to enter an order holding him personally liable for, *inter alia*, "the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." N.C. Gen. Stat. § 1A-1, Rule 11(a).

Plaintiff and Plaintiff's Counsel timely appealed. Before this Court heard the appeal, Plaintiff reached a settlement with Defendants and withdrew his appeal.

Analysis

1. Standard of Review

In North Carolina, we have a bifurcated standard of review when examining a trial court's order imposing Rule 11 sanctions against a party. "The trial court's decision to impose or not to impose mandatory sanctions under [N.C. Gen. Stat. §] 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). When employing *de novo* review, we must determine "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by sufficient evidence." *Id.* at 165, 381 S.E.2d at 714. If we decide all three issues in the affirmative, we must uphold the trial court's decision. *Id.* at 165, 381 S.E.2d at 714.

The appropriateness of a particular sanction is reviewed only for an abuse of discretion. *Id.* at 165, 381 S.E.2d at 714. The North Carolina Supreme Court has explained that "[t]he rule's provision that the court shall impose sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Id.* at 165, 381 S.E.2d at

714 (internal quotation marks and citations omitted) (emphasis and alterations in original).

2. Basis for Sanctions

Plaintiff's Counsel contend that the trial court erred in ordering Rule 11 sanctions. Because we agree with one of the grounds identified by the trial court for imposing sanctions, we affirm.

There are three grounds upon which a trial court may justify the imposition of Rule 11 sanctions: "(1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994) (citing N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990); *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)). A violation of any of these prongs requires the imposition of sanctions. *Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 367.

When determining the factual sufficiency of a claim, this Court must decide "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (internal quotation marks and citation omitted).

To determine the legal sufficiency of a claim, this Court examines "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge,

information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999) (internal quotation marks and citation omitted).

An improper purpose subject to Rule 11 sanctions is "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (internal quotation marks and citation omitted). "[A] party 'will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay.' " *Id.* at 382, 477 S.E.2d at 238 (quoting *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337). We apply "[a]n objective standard . . . to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose." *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*, 213 N.C. App. 236, 241, 713 S.E.2d 162, 166 (2011) (internal quotation marks and citation omitted).

Here, in addition to concluding that Plaintiff's complaint was not based in fact or in law, the trial court held that the pleadings "were filed and signed by Plaintiff's counsel for improper purposes, to wit: (1) increase the costs of Defendants; (2) delay the dismissal of this action; and (3) drive a wedge between Defendants and their counsel in the Durham County Lawsuit." This conclusion is supported by the following findings of fact:

17. Moch's counsel believed that Smith Anderson would have to recuse itself from this case because Mr. Chris Smith might be a witness. If Mr. Patton had been correct, such a result would have created unnecessary cost and delay for the Defendants.

. . .

19. Moch served discovery on Defendants on November 25, 2015. Moch also served third-pary subpoenas for records on the following entities, among others:

- National Venture Capital Association (served November 30, 2015)

- The Wistar Institute of Anatomy and Biology (served December 7, 2015)

- North Carolina Biotechnology Center (served November 20, 2015).

20. Moch used the filing of this lawsuit as a vehicle to issue third-party subpoenas to the entities listed above to attack the Defendants' professional reputations.

> a. A review of the subpoenas to National Venture Capital Association, The Winstar Institute of Anatomy and Biology, and the North Carolina Biotechnology Center shows that the documents requested in those subpoenas were not likely to lead to the discovery of admissible evidence in this case.
>
> b. Moch has conceded in the Durham County Lawsuit case that those third parties were unlikely to have relevant knowledge about that case.

. . .

24. No inquiry into Business Court designation could have led to an objectively reasonable belief that this case would

fall properly within such a designation.

. . .

29. Moch used the filing of the Amended Complaint—only days before the hearing on the motion to dismiss—in order to avoid a hearing on the motion.

> a. A comparison of the original Complaint against the Amended Complaint shows no material difference that would justify an amendment.
>
> b. The letter that accompanied the Amended Complaint revealed the purpose for the amendment—to moot the motion to dismiss.
>
> c. The amendment did not cure any pleading deficiencies in the original Complaint.
>
> d. Moch's opposition to the motion to dismiss the Amended Complaint at the hearing on January 13, 2016, reveals a persistence in pursing the claims despite the benefit of Defendants' brief in support of the motion to dismiss the original Complaint.

. . .

43. Plaintiff's Amended Complaint sought to hold Defendants liable for the conduct of their attorneys in the Durham County Lawsuit. In doing so, Plaintiff was setting up a likely scenario where the Defendants and their attorneys would become adverse to each other, as defendants would now be subject to damages, including punitive damages, solely as a result of their attorneys' conduct. Such a situation, if not resolved in Defendants' favor quickly, would likely result in counsel for Defendants having to withdraw from representation of Defendants in the Durham County Lawsuit. This would certainly have delayed the Durham County Lawsuit and increased the cost to Defendants in prosecuting the Durham County

Lawsuit.

Plaintiff's Counsel challenge the sufficiency of the evidence to support Findings of Fact 17, 24, 29, and 43, and assert that Findings 24 and 29 are mischaracterized conclusions of law subject to *de novo* review. A review of the record reflects evidence supporting the trial court's determination that Plaintiff's lawsuit, when considered in its entirety, was not maintained for a proper purpose. The trial court's findings are supported by evidence including an email message that Plaintiff's Counsel sent to defense counsel on 24 November 2015 in response to a request that all communications to Defendants related to the lawsuit be made through counsel: "I am not aware of any representation in Orange County, and *I cannot imagine that once counsel enters an appearance it could be your firm given your role as a material witness*." (Emphasis added). The email message supports the trial court's finding and conclusion that Plaintiff's lawsuit was filed for the improper purpose of driving a wedge between Defendants and their counsel in a separate lawsuit and to increase Defendants' litigation costs. The record likewise provides ample evidentiary support for the trial court's remaining challenged findings of fact, including Findings of Fact 24 and 29. To the extent Findings of Fact 24 and 29 apply legal principles, we hold those conclusions are supported by the trial court's other findings of fact and otherwise survive *de novo* review.

These supported findings, along with the unchallenged findings of fact[3]—such as Plaintiff's concession that the third-party companies subpoenaed were unlikely to have relevant information—support the trial court's conclusion that this action, including Plaintiff's Counsel's pre-trial discovery and procedural motions, was pursued for an improper purpose in violation of Rule 11. We are therefore compelled to uphold the trial court's order imposing Rule 11 sanctions. *See Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

Because we affirm the trial court's sanctions based on the improper purpose prong of Rule 11, we need not address Plaintiff's Counsel's challenges to the trial court's findings and conclusions that Plaintiff's lawsuit was both factually and legally baseless. *Brown*, 124 N.C. App. at 382, 477 S.E.2d at 238 ("Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11.").

3. Appropriateness of Award

Plaintiff next argues that the trial court erred in calculating the appropriate amount for the sanctions award. We disagree.

We note that the amount of sanctions imposed by a trial court will not be disturbed on appeal absent a conclusion that the trial court abused its discretion. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. When awarding sanctions pursuant to

[3] Unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal. *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012).

Rule 11, a trial judge "must explain why the chosen sanction is appropriate and also *why the amount of such is appropriate*." *Dalenko v. Collier*, 191 N.C. App. 713, 723, 664 S.E.2d 425, 431 (2008) (emphasis added) (citing *Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708, 711 (1995)). In *Dalenko*, this Court held that the trial court there "satisfied these demands in his order, which stated that he had considered 'all available sanctions.' " *Id.* at 723, 664 S.E.2d at 431. This Court explained that "[t]he order further found as fact that the amount of attorney's fees awarded to [the] defendant was appropriate based upon the amount of work required by the case and the experience of [the] defendant's attorneys." *Id.* at 723, 664 S.E.2d at 431.

Here, the trial court explained, in exercising its discretion to impose appropriate sanctions, that "the appropriate sanctions *based upon the facts are the payment of counsel fees and costs resulting from filing of this Action*." (Emphasis added). The trial court in arriving at $269,054.77, noted that $123,186.61 and $35,152.50 "represent fees incurred on trial level work other than work for the Motion for Sanctions by Smith Anderson and Tharrington Smith respectively[,]" and that $95,640.66 and $14,875.00 represent fees incurred "for trial level work on the Motion for Sanctions by Smith Anderson and Tharrington Smith respectively." These numbers were based on various affidavits of participating attorneys in the litigation and billing invoices presented to the trial court with Defendants' "Amended Motion for Attorneys' Fees and Costs."

The record does not reflect that Plaintiff's Counsel presented any evidence to contest the reasonableness of the affidavits or invoices submitted by Defendants to support the trial court's calculation of the sanctions award, despite having had the opportunity to do so. Because the trial court's conclusions were based on properly found facts supported by competent evidence, we cannot now conclude that its decision amounted to an abuse of discretion. Moreover, because we affirm the trial court's imposition of sanctions pursuant to Rule 11, we do not address Plaintiff's Counsel's additional arguments related to the appropriateness of sanctions that could be imposed pursuant to other statutes.

Conclusion

For the foregoing reasons, we affirm the trial court's order awarding sanctions in favor of Defendants pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).