SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2264-14T4

PRIMAVARA INVESTMENT COMPANY,

Plaintiff-Appellant,

v.

JOSEPH J. ROMEI, CPA, LLC
and JOSEPH J. ROMEI,
individually,

Defendants-Respondents.

Argued February 14, 2017 – Decided March 8, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Passaic County, Docket No. DC-015097-13.

Robert J. Stack argued the cause for appellant.

Michael J. Martelo argued the cause for respondents (Post, Polak, Goodsell & Strauchler, P.A., attorneys; John N. Post, of counsel and on the brief).

PER CURIAM

Attorney Robert J. Stack appeals from several trial court orders compelling him to pay fees to defendants Joseph J. Romei,

CPA, and his limited liability company (collectively, Romei), as a sanction under Rule 1:4-8 and Rule 1:10-3. We reverse the award of Rule 1:4-8 sanctions; and, in the exercise of original jurisdiction, modify the award of fees under Rule 1:10-3.

I.

Stack filed a collection action against Romei in the Special Civil Part on behalf of Primavara Investment Co. (Primavara) on November 27, 2013. In a January 9, 2014 "safe-harbor letter" sent in accordance with Rule 1:4-8(b)(1), defense counsel requested that Stack withdraw the action within twenty-eight days. Defense counsel asserted that Primavara was a Nevada-based company that lacked authority to conduct business in New Jersey, and therefore it lacked standing under N.J.S.A. 14A:13-11 to bring a lawsuit. Romei also filed an answer raising, among other defenses, plaintiff's lack of authority and served discovery, demanding disclosures regarding the same issue. Stack did not withdraw the complaint.

Shortly before trial, Romei filed a notice of motion seeking an order (1) dismissing the complaint with prejudice for lack of standing and (2) granting "[f]ees pursuant to R. 1:4-8." The day

before the return date,[1] Stack unsuccessfully sought defense counsel's consent to an adjournment. At 11 p.m. that evening, Stack faxed to the court a stipulation of dismissal. It recited that the parties had resolved the matter, but only he signed it. He also faxed a letter brief, in which he argued the merits of Primavara's substantive claim and referred to the standing issue as a procedural "technicality." Moreover, he contended he was dismissing the complaint. He stated that he would be available by phone if the court wished to hold a conference.

Stack did not appear in court on the return date the next day. His adversary did. The judge granted the motion to dismiss and for fees. With respect to the latter, he stated, "I do believe that you're entitled to legal fees because I can only view this litigation as being frivolous at this point." The court noted that defense counsel served a safe harbor letter, Stack did not respond, and Stack only attempted to dismiss "at the 11th hour." The court also incorporated by reference the reasons for a fee award set forth in Romei's papers.

On March 7, 2014, the court entered defense counsel's proposed form of order, which dismissed the complaint with prejudice and

[1] Romei originally proposed a return date of March 14, 2014, although the trial was scheduled to begin March 10, 2014. As the court declined to delay trial, it sua sponte scheduled the motion for March 7, 2014.

awarded fees without specifying the amount. Instead, the court ordered defense counsel to "submit a computation" of fees within ten days and ordered Stack to pay whatever defense counsel demanded within another ten days. Defense counsel thereafter served a certification of fees and demand of payment of $3626.67 on Stack, with a copy to the court. Stack declined to pay.

Thereafter followed competing letters to the court and motions and cross-motions over an extended period of time. Romei sought to collect fees as set forth in his counsel's certification, and Stack sought to modify the dismissal as one without prejudice and to challenge the award of fees. On June 6, 2014, the court reconsidered its prior order and modified its dismissal to reflect it was without prejudice. In a July 21, 2014 order, the court denied plaintiff's motion to vacate the March 7, 2014 counsel fee award. Whether viewed as a motion to reconsider or a motion for relief under Rule 4:50-1, the court found the request was untimely as it was brought neither within the specific time limits of Rule 4:49-2, nor within a "reasonable time" as required under Rule 4:50-2. The court further found Stack failed to demonstrate extraordinary circumstances under Rule 4:50-1(f).

On the same date, the court entered an order compelling Stack to remit the $3626.67 previously set forth in defense counsel's fee certification. In response to defense counsel's request for

additional fees pursuant to Rule 1:10-3, the court awarded additional unquantified fees incurred in connection with defense counsel's application to enforce the March 7, 2014 order. The order again required Stack to pay whatever defense counsel sought in its additional certification of fees. In early August, defense counsel demanded payment of a combined total of $7050.05, which included the new fees set forth in a July 31, 2014 fee certification. Stack still did not pay.

On December 5, 2014, a new judge entered an order of judgment against Stack for a new sum, $8268.30, which included an additional $1218.25 in fees incurred between August 8 and October 22. This new fee was again based on the court's acceptance of defendant's calculations in an October 23, 2014 fee certification. In order to award the additional fees that defense counsel incurred after October 23, 2014, to enforce the July order, the December 5 order also provided for submission of a proposed form of order under the "five-day rule," see R. 4:42-2(c), for those additional fees along with a certification. On March 30, 2015, in response to defense counsel's subsequent submission, the court awarded additional fees and costs of $4868.50. This was the first instance in which the court calculated a lodestar amount; as a result, the court reduced counsel's requested fee.

This appeal followed.[2] Stack challenges the orders of March 7, July 21, and December 5, 2014, and March 30, 2015.

II.

We review imposition of sanctions under Rule 1:4-8 for an abuse of discretion. United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App. Div.), certif. denied, 200 N.J. 367 (2009). We will find an abuse of discretion when a court "inexplicably depart[s] from established polic[y]," Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002), fails to consider relevant factors, or considers "irrelevant or inappropriate" ones. United Hearts, supra, 407 N.J. Super. at 389 (internal quotation marks and citation omitted). We need not defer to the trial court's interpretation of a court rule, which we review de novo. State ex rel. A.B., 219 N.J. 542, 554-55 (2014).

We strictly interpret the rule authorizing sanctions for frivolous litigation. "[T]o avoid limiting access to the court system," we narrowly define what constitutes frivolous litigation under Rule 1:4-8. First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 433 (App. Div. 2007). We also require strict compliance with the procedural requirements of the rule. State

[2] Stack originally filed a notice of appeal in January 2015. However, our court questioned whether the matter was final, given the pendency of another fee application. After the March 30, 2015 order, Stack filed an amended notice of appeal.

v. Franklin Sav. Account No. 2067, 389 N.J. Super. 272, 281 (App. Div. 2006). Included among these procedural requirements is the mandate that "[a]n application for sanctions . . . shall be by motion made separately from other applications . . . ." R. 1:4-8(b)(1). See Franklin Sav. Account, supra, 389 N.J. Super. at 281.

Furthermore, the principal purpose of the sanction is to deter prohibited litigation practices, not to shift fees between parties. Thus, the Rule states that a sanction against an attorney "shall be limited to a sum sufficient to deter repetition of such conduct." R. 1:4-8(d). The sanction "may consist" of a "payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result" of the frivolous litigation. Ibid. Alternatively, it "may consist" of a penalty paid into court. Ibid. In its order imposing a sanction, the court is required to "describe the conduct determined to be a violation of [the] rule and explain the basis for the sanction imposed." Ibid. (emphasis added). This latter requirement is "a means to ensure that [the Rule] does not simply become an avenue for the routine award of attorneys' fees." LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009).

Applying these principles, we are constrained to reverse the court's initial award of a sanction in its March 7, 2014 order.

We do so notwithstanding that the record reflects that counsel lacked any reasonable factual basis to file or maintain a complaint on behalf of an unregistered business, at least after defense counsel notified him of the issue.[3] We reverse because defense counsel did not comply with the procedural requirements of Rule 1:4-8, and the court did not fulfil its obligation under the rule in fashioning the sanction.

First, defense counsel did not seek a sanction through a separate motion. Having failed to comply with the strict requirements, the court was obliged to deny the request.[4] We reject Romei's argument that the requirement should be relaxed

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[3] Although Stack argues that he unsuccessfully attempted to obtain information from his client regarding Primavara's filing status, such information was a matter of public record. Stack had twenty-eight days to explore the matter. Unable to establish that Primavara had standing within that time, he was obliged to dismiss the complaint until he could.

[4] Although the court is empowered to impose sanctions on its own initiative under Rule 1:4-8(c), we shall not recharacterize the sanction as if the court awarded it on its own initiative. Before the court may impose sanctions on its own initiative, it must issue an order to show cause directed to the attorney. Ibid. A court-initiated sanction must also issue "before a voluntary dismissal." Ibid. Furthermore, if federal practice under Federal Rule of Civil Procedure 11(c) is a guide, court-initiated sanctions "will ordinarily be [imposed] only in situations that are akin to a contempt of court." Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1329 (2d Cir. 1995) (quoting advisory committee notes to the 1993 amendment to Federal Rules of Civil Procedure 11) (internal quotation marks omitted); see also United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1116 (9th Cir. 2001) (affirming the same).

because hearing the sanctions motion separate from the dismissal motion would have been inefficient and impractical. If that were an appropriate consideration, the separate filing requirement would become a nullity.

The drafters of the Rule accepted any inefficiency that might result from separate motions. The separate filing requirement enables an attorney to advocate single-mindedly on his client's behalf on the merits of a substantive motion. Thereafter, he may separately defend his own actions, by presenting evidence of his good faith and the basis in law or fact for his position, which may implicate aspects of the attorney-client relationship. Cf. Savona v. Di Giorgio Corp., 360 N.J. Super. 55, 63 (App. Div. 2003) (when a prevailing party seeks sanctions against an attorney under Rule 1:4-8, and against a party under N.J.S.A. 2A:15-59.1, the court must address "the question of responsibility as between lawyer and client"). Alternatively, in the separate proceeding, the attorney may concede that he lacked a good faith basis for his filing, but present mitigating circumstances regarding the quantum or nature of the sanction needed to deter such conduct in the future. The separate motion requirement may also reduce the volume of sanction practice, as some parties who prevail on a dispositive motion may be satisfied with the victory and decide not to pursue a sanction in a subsequent motion.

Second, the court failed to engage in the required analysis when it awarded as a sanction whatever fees defense counsel later set forth in a certification. The court was obliged to determine what sum would be "sufficient to deter repetition." R. 1:4-8(d). Obviously, the court did not engage in that calculation. Furthermore, the court did not "explain the basis for the sanction imposed." Rather, the court mistakenly treated the sanction as a fee shift. Regardless, even in such contexts, a trial judge is "not [to] accept passively the submissions of counsel" to support a fee request, but must "evaluate carefully and critically the aggregate hours and specific hourly rates." Walker v. Giuffre, 209 N.J. 124, 131 (2012) (quoting Rendine v. Pantzer, 141 N.J. 292, 335 (1995)) (internal quotation marks omitted); see also J.E.V. v. K.V., 426 N.J. Super. 475, 493 (App. Div. 2012) ("In fashioning an attorney fee award, the judge must determine the 'lodestar,' which equals the number of hours expended multiplied by a reasonable hourly rate."). Accordingly, the award of sanctions under Rule 1:4-8 cannot stand.

III.

We recognize we must apply a different analysis to the court's subsequent award of fees that defense counsel incurred in enforcing the court's prior orders pursuant to Rule 1:10-3. Separate from

the original $3626.67 sanction, these totaled $9510.13.[5] Although we have concluded that the March 7, 2014 order was entered in error, a party or an attorney is not free to disobey a court order. Absent a stay, compliance is required. Under Rule 1:10-3, a party may seek enforcement of an unstayed order, and "[t]he court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." R. 1:10-3.

Yet, the decision to award fees under Rule 1:10-3 is not automatic. The Rule "only applies to parties who willfully fail to comply" with a court's order. Hynes v. Clarke, 297 N.J. Super. 44, 57 (App. Div. 1997). The award is a discretionary decision. Chalom v. Benesh, 234 N.J. Super. 248, 262 (Law Div. 1989). Among the factors a trial court may consider are: "the reasons for, and necessity of, making the application; the conduct of the parties; the result achieved; the reasonableness of the fee; and the danger to the integrity of R. 4:42-9 if fees are awarded." Ibid.

The trial court did not apply these factors or a lodestar analysis in awarding fees under Rule 1:10-3 in its July 21, 2014

[5] The $8268.30 amount awarded in the December 2014 order included the original $3626.67 fee assessed against Stack under Rule 1:4-8. Accordingly, the court assessed a $4641.63 fee against Stack under Rule 1:10-3. An additional $4868.50 was awarded in March 2015, for a total of $9510.13 under Rule 1:10-3.

order. The December 5, 2014 order entered by a different judge enforced the fee awards previously granted and similarly confirmed defense counsel's certification of additional cost of services through October 22. Only the March 2015 fee award was based on a lodestar analysis.

Rather than prolong this litigation and add to its expense by remanding for reconsideration of the Rule 1:10-3 awards, we choose to exercise original jurisdiction under Rule 2:10-5. See, e.g., Yakal-Kremski ex rel. Yakal-Kremski v. Denville Twp. Bd. of Educ., 329 N.J. Super. 567, 579 (App. Div. 2000); DeBrango v. Summit Bancorp., 328 N.J. Super. 219, 230-31 (App. Div. 2000); Chestone v. Chestone, 322 N.J. Super. 250, 260 (App. Div. 1999). Without excusing Stack's conduct, nor his failure to make payment pursuant to an unstayed court order, we consider defense counsel's failure to abide by the procedural requirements of Rule 1:4-8. The infirmities in the March 2014 sanctions order also weigh against an award of defense counsel's total fees. Furthermore, over $9510 in fees in repetitive motion practice are disproportionate to the $3628 sanction that Romei sought to enforce, even assuming the time spent attending to the motions and defense counsel's hourly rate were reasonable. Under all these circumstances, we modify and reduce the award of fees under Rule

1:10-3 to $1000. Stack shall pay that amount to defense counsel within thirty days.

To the extent not addressed, Stack's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed in part, and modified in part.