

CV14821976

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
FILED

AEON FINANCIAL, LLC

Plaintiff,

vs.

ARCHIE S. LEWIS, et al.

Defendants.

2015 MAR 25 P 12: 52

CLERK OF COURTS
CUYAHOGA COUNTY

CASE NO. CV-14-821976

JUDGE MICHAEL E. JACKSON

Magistrate Tracey S. Gonzalez

**Findings of Fact and
Conclusions of Law**

This matter came on for hearing on the 20th day of November, 2014 on the Motion for Sanctions of Defendant Archie S. Lewis [hereinafter Defendant] pursuant to ORC §2323.51 and Civil Rule 11 and the opposition thereto. That hearing was supplemented with a hearing on Attorney Fees on the 12th day of March, 2015. Having duly considered the evidence presented at hearing and the testimony presented, the Magistrate makes the following findings.

FACTS / PROCEDURAL HISTORY

Defendant Archie Lewis was served with a foreclosure complaint in March 2011 in case no CV-11-750255. That complaint was based on certain tax liens that resulted in tax certificates being issued to CapitalSource Bank nka Aeon Financial, LLC. [hereinafter Plaintiff]. Said certificates were identified in the complaint as B2009-1-715 in the principal sum of \$2003.98 and S2010-1-517 in the principal sum of \$1293.56. That case was finalized via settlement and the acceptance of a payment plan. The plan was itemized for a total sum of \$7427.60 to include legal fees and costs, interest, an administrative fee, as well as other unidentified costs. After an initial down payment of \$2000, defendant was to make equal payments of \$277.11 for 24 months. That case was dismissed without prejudice by order of the Court on June 19, 2013. No motion for relief from judgment or appeal followed.

By all accounts, Defendant completed the above payment plan. Nevertheless, Plaintiff filed a new complaint in 2014, case no. CV-14-821976, alleging that the same exact tax certificates remained due and owing and seeking foreclosure. The new complaint does reference the prior foreclosure, but fails to indicate that any amount had been collected in satisfaction of the liens. It never once mentions that Defendant paid approx. \$8,671.00 toward the resolution of this issue.

Attorney Gary Williams represented Defendant in the prior case. Being familiar with the prior settlement he attempted to contact Plaintiff with the overriding assumption that some error had been made that could easily be resolved. Unfortunately, after several attempts to clarify the problem via phone calls and email messages, Attorney Williams was unable to garner a dismissal. He ultimately filed a motion to dismiss. That motion went unopposed and was granted by the Court on August 29, 2014. The Motion for Sanctions followed.

CONCLUSIONS OF LAW

Civil Rule 11 addresses the signing of pleadings, motions and other documents. It states in pertinent part that the signature of an attorney constitutes a certificate by the attorney that they have read the document, to the best of their knowledge, information and belief, there are good grounds to support it, and it has not been interposed for delay. A willful violation of this rule may result in appropriate action as well as an award of attorney fees.

Ohio Revised Code Section 2323.51 allows for the imposition of attorney fees as a sanction against a party for frivolous conduct in a civil action. It defines conduct as the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion or other paper in civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action. The statute goes on to deem frivolous conduct under section 2323.51 (A)(2)(a)(i)-(iv) as follows:

- (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.
- (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.
- (iii) The conduct consists of allegation 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 evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

The mere filing of a duplicate complaint is problematic. The filing of a duplicate complaint without an indication of defendant's substantial compliance is even more troubling. To say that someone did not exercise due care, did not exercise due diligence, did not do their job, is being kind. However, the ineptitude displayed was not just the result of the filing and signing of the complaint, but the course of events that followed. As such, this Court does not find that the action was willful under civil rule 11, but does find that the action was frivolous under ORC § 2323.51.

Again, the facts are undisputed and speak for themselves. However, this is an imperfect society. Mistakes happen in every facet of our work environment. It is the failure to recognize and acknowledge our mistakes that generally compound an issue. This case is a textbook example.

Defense counsel reached out to Plaintiff on more than one occasion seeking to resolve this issue. Telephone calls and emails detailing the prior case, the prior settlement and seeking dismissal went unattended too. The 12(B) Motion to Dismiss would seemingly be the next indication that something was wrong. NO, that went ignored as well. Plaintiff allowed the motion to stand unopposed. Apparently no effort was made to investigate the claim, no effort was made to determine if the allegations were supported, no effort was made to contact defense counsel to determine the results of the prior case, no effort was made to voluntarily dismiss the case, and no effort was made whatsoever. A simple review would have resulted in at least the minimization of the problem.

The Motion for Sanctions should have been the second indication that something was wrong. Again, Plaintiff could have exercised some degree of care, investigated the issue, and worked to resolve this issue with Defense counsel without the intervention of the Court. Instead, Plaintiff allowed this case to proceed with what turned out to be an embarrassing attempt to justify their behavior.

The testimony at hearing revealed something even more troubling. The testimony of witness Joseph Lord, while interesting, was found to be totally unreliable. He testified that the new case was based on Defendant's outstanding balance of \$321.37. He testified that he personally spoke to Attorney Williams and they haggled over the balance, and due to their failure to resolve, a new complaint was filed. This testimony was found to be unreliable for several reasons, the least of which is the fact that Mr. Lord is a disbarred attorney.

First, the schedule attached to the original settlement agreement was created by Plaintiff. It clearly breaks down all fees and the reduction in the balance based on 24 payments. The payment history submitted at hearing to support the \$321.37 balance is different in its appearance as well as the fees charged. The first red flag is an increase in legal fees from \$2,630.00 to \$3,155.00. There is also a small increase in the monthly payment from \$277.11 to \$278.00.

The presentation of a new document, different in kind than the original, to support the demand for additional costs is insufficient evidentiary support and lacks good faith.

Second, Mr. Lord testified that even though the schedule created by his office may indicate a zero balance, it doesn't necessarily mean a zero balance. There may be additional fees hanging out there that need to be paid. This Court is amazed. What fees? Where do they come from? Why do they exist? Why aren't they on the schedule you created? Plaintiff has already turned \$3,397.54 of outstanding taxes into \$8,671.00. However, according to Mr. Lord's testimony there still may be a few unaccounted for, unlisted, unexplained fees and costs that need to be paid. In other words, even though one has completed their end of the agreement, the Plaintiff may just arbitrarily call and demand more money from you.

Third and finally, Attorney Williams testified that he at no time spoke to Mr. Lord about an outstanding balance of \$321.37. He testified that this amount of money was insignificant and easier to unjustifiably pay than to thrust his client into new litigation.

The Defendant in this matter is an elderly gentleman on a fixed income. His ability to pay \$8,671.00 to the Plaintiff is commendable. To have him return to this Court to re-litigate the same exact issue is shameful to our profession. Defendants has clearly shown that the conduct in question is sufficient under ORC § 2323.51 to establish frivolous conduct.

This Court has reviewed the affidavit of Attorney Gary Williams as well as his testimony related to additional hours expended relative to the sanctions hearing and attorney fee hearing. The Court has considered the experience and ability of counsel, the time and labor required, and the fees customarily charged. This Court finds the fees charged were necessary and reasonable in terms of the work performed and hours expended.

Pursuant to ORC § 2323.51, Judgment is hereby awarded to Attorney Gary Williams in the sum of \$16,850.00 for attorney fees as sanctions against Aeon Financial, LLC and the Law Office of Schwartz & Associates. IT IS SO ORDERED.


MAGISTRATE TRACEY S. GONZALEZ

CERTIFICATE OF SERVICE

Copies of the foregoing have been sent via Ordinary U.S. Mail, by the Clerk of Courts to the following parties and their counsel of record.

David Patterson
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Counsel for Plaintiff

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Counsel for Archie S. Lewis

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Counsel for Cuyahoga County Treasurer

Unknown Spouse if any of Archie S. Lewis
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Copies mailed by the Clerk of Courts on

MAR 26 2015

Williams