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No. 72265-4-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

Templar Label Group, Inc., Plaintiff,

v.

Sub Pop, Ltd., Respondent.

REPLY BRIEF OF APPELLANT, Anthony E. McNamer

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Regulations and Rules

Rule 11. *passim*

I. INTRODUCTION

This appeal addresses the issue of whether, under an objective, reasonableness standard, the trial court abused its discretion in awarding Rule 11 (A-1) sanctions against attorney Anthony E. McNamer under the facts presented. Further, this appeal addresses the issue of whether this appeal of the award of sanctions is sanctionable conduct.

II. SUMMARY OF ARGUMENT

The trial court abused its discretion in entering its order granting CR 11 sanctions against attorney Anthony E. McNamer (“the attorney”). The trial court did not give due weight to uncontroverted evidence that attorney McNamer inquired about the defendant’s identity by researching the official corporate record information found with the Washington Secretary of State---even though he did not check the business registry. The attorney presented legally reasonable arguments about standing, even though those arguments did not prevail on the merits. Furthermore, the trial court abused its discretion in naming the attorney personally in the judgment when the original motion and order upon which the judgment was based

did not name him and the motion against him was made only after his client failed to pay.

This appeal is based on rational arguments on the law and facts and Rule 11 sanctions for this appeal are not justified.

III. ARGUMENT

The trial court abused its discretion in awarding sanctions against attorney McNamer because its conclusions are not supported by substantial evidence. *See City of Tacoma v. State*, 117 Wash.2d 348, 361, 816 P.2d 7 (1991). Furthermore, Sub Pop, Ltd. greatly overstates its case in arguing that the attorney McNamer's appeal is not "supported by any rational argument on the law or facts" (Respondent's Brief, p. 7).

A. The Trial Court Abused Its Discretion in Awarding Sanctions.

I. Attorney McNamer Made a Reasonable Inquiry as to the Proper Sub Pop Party.

Attorney McNamer inquired as to the identity of defendant and that inquiry was reasonable. The evidence is uncontroverted that, before filing suit, attorney McNamer searched the Washington Secretary of State corporate

database to determine the appropriate "Sub Pop" entity against which to file suit (CP 332 at ¶¶2). In his 19 years of experience as an attorney, whenever unaware of the proper party, attorney McNamer uses the official corporate information found with the relevant Secretary of State (CP 333 at ¶¶3). A copy of the search result is attached to attorney McNamer's declaration (CP 334-335). The search for any "Sub Pop" entity revealed three such entities, of which Sub Pop, Ltd. is the first registered entity (CP 334).

Sub Pop, Ltd.'s argument about whether it is registered to do business in Washington is a red herring, used in an attempt to divert the court's attention from the real issue---whether Mr. McNamer's search of the corporate website was reasonable.¹

In hindsight, attorney McNamer could have searched the Washington State Business License Service to learn of a general partnership called Sub Pop Records (the entity that Sub Pop, Ltd. asserts is the appropriate party) that is registered to

¹ The appellant's brief mistakenly stated that Sub Pop, Ltd. was not registered to do business in Washington, rather than that Sub Pop, Ltd. was not registered to do business as a corporation in Washington, but whether the entity is registered to do business is irrelevant to this appeal. The issue on appeal is whether McNamer's pre-filing search was so egregiously unreasonable that it warrants sanctions.

do business in Washington (CP 334-335), but that fact does not make the search that attorney McNamer conducted worthy of sanctions.

Indeed, even if McNamer had reviewed those records, it would not have revealed the identity of the "right" Sub Pop entity among the four entities revealed. As between the corporation established in 1989 (CP 334) and the general partnership established in 1995 (CP 367), it was patently reasonable to assume the corporation was the proper entity.

Attorney McNamer is not asking this court to resolve disputed facts differently, as Sub Pop, Ltd. implies (Respondents' Brief, p.12). Attorney McNamer is asking this court to acknowledge the fundamental importance of the undisputed fact that he made an inquiry as to the appropriate defendant by checking with the relevant Secretary of State. He is asking this court to hold that the trial court erred in finding---without even acknowledging the uncontroverted facts regarding attorney McNamer's pre-filing investigation or the reasons underlying them---that the "pre-filing investigation...was

inadequate” (CP 57, ¶1.8), and not only inadequate but so egregious that it was worthy of sanctions.

Defense counsel’s pre-suit correspondence to attorney McNamer did not say that Sub Pop, Ltd. was the wrong “Sub Pop” entity against which to file suit (CP 51, 68-71). Defense counsel’s pre-suit correspondence did not identify the “right” party against which to file suit. It was only when Sub Pop, Ltd. filed its answer that Sub Pop, Ltd. alleged for the first time that Plaintiff had sued the wrong entity (CP 17). Defendant presented what attorney McNamer considered a routine denial (CP 351) that “it is a proper party at interest or any wrongdoing” (CP 18). Defendant did not claim that Sub Pop Records was the proper Sub Pop party.

Even the answer of Sub Pop, Ltd., that alleges that Plaintiff had sued the wrong party, includes allegations that specifically tie it to the transaction at issue. Defendant alleges a counterclaim based on the exact same agreement that was key to Plaintiff’s complaint (CR 18-21). The fact that Sub Pop, Ltd. raised counterclaims based on the agreement, including breach of contract, infringement and liability under the Copyright Act

and restitutionary remedies/disgorgement (CP 18-21 at ¶ 3.0-3.17) shows that Sub Pop, Ltd. in fact was related to the case. In essence, Sub Pop, Ltd. claimed that it was not a proper *defendant* but also claimed that it was a proper *counter-claimant* based on the same contract.

Sub Pop, Ltd's repeated references to itself as an "innocent party" (Respondent's Brief, pp. 4, 5, 13, 16) should not inflame the passions of the court as Defendant apparently intends. Guilt or innocence obviously is not at issue in this civil case. Similarly, Sub Pop Ltd.'s attempted shaming of Mr. McNamer---for failing to show "contrition" (Respondent's Br., p. 5) and proceeding with this appeal---is also completely irrelevant.

"The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 219, 829 P.2d 1099, 1104 (1992)(emphasis added). The choice of defendant was not baseless or an abuse of the judicial system; Attorney McNamer did not file suit against some random entity with no relationship to the case. Sub Pop Ltd. had a relationship so close enough

to the transaction that it filed multiple counterclaims based on the same underlying contract. That Mr. McNamer may have been able to make other inquiries is not the standard. He had a legitimate “basis” for naming Sub Pop, Ltd. as the defendant in this matter.

Sub Pop, Ltd. is wrong in arguing that attorney McNamer’s motion practice provides substantial evidence to justify the imposition of sanctions. Attorney McNamer’s motion practice was *defensive* only; he filed no motions forwarding the complaint, just a motion defending the counterclaim. On behalf of plaintiff, he filed a motion to dismiss Sub Pop, Ltd.’s counterclaims on jurisdictional grounds. Furthermore, after Sub Pop, Ltd. filed its cross-motion for dismissal of Plaintiff’s claims on grounds including that Sub Pop, Ltd. was not the proper party for plaintiff to sue (CP 94-105), attorney McNamer attempted to correct the error by filing a motion to substitute the proper party, a motion which Sub Pop, Ltd. opposed (CP 3, 4).

The case Sub Pop, Ltd. cites on this issue is inopposite. It involved an offensive motion for summary judgment. In *Brigade v. Econ. Dev. Bd. For Tacoma-Pierce County*, 61

Wash. App. 615, 620, 811 P.2d 697, 699 (1991) a reasonable inquiry would have revealed both that the complaint and the motion for summary judgment were not supported by facts or law. Here, when the issue was raised, attorney McNamer did not move for summary judgment. He moved to substitute the appropriate defendant (CP 3, 4).²

2. Attorney McNamer Made a Reasonable Inquiry Regarding Standing.

Sub Pop, Ltd. incorrectly argues that attorney McNamer cited no authority in support Plaintiff's standing (Respondent's Br., p. 21). On the contrary, attorney McNamer presented two, alternate arguments in opposition to Sub Pop, Ltd's argument that Plaintiff has no standing because the contract was an unassignable personal service contract between Butler and D'Cide.

First, when Templar purchased all of Bright Gray's stock (and Bright Gray merged into Templar) there was no

² The trial court findings imply, and Sub Pop, Ltd. argues, that attorney McNamer unnecessarily burdened Defendant with motion practice before conducting discovery. Plaintiff filed a motion to dismiss Defendant's counterclaims on legal grounds---that the Virginia courts had exclusive jurisdiction---so discovery was not required.

assignment because “[S]tock purchase transactions ...do not result in assignment by operation of law.” *Meso Scale Diagnostics v. Roche Diagnostics GmbH*, 62 A.3d 62, 87 (Del. Ch. 2013). Second, Templar was not seeking to enforce a personal services contract against Butler at all. Instead, Templar was suing Defendant for its interference with business relations and interference with contract (CP 11-14). Therefore, Defendant’s argument regarding assignability was moot.

In assessing whether the filing of a particular pleading was frivolous under Rule 11, this court should not consider the failure on the merits, but rather whether the position taken was “warranted by existing law” (CR 11)—in essence, that the argument was not “legally unreasonable.” See *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994); *Zaldivar v. City of L.A.*, 780 F.2d 823, 832 (9th Cir. 1986). Attorney McNamer’s argument was legally reasonable and he cited legal authority for Plaintiff’s position that it had standing. See *Meso Scale*, supra.

The trial court failed to explain why the *Meso Scale* Court’s holding did not control, and cited no authority

whatsoever on the relevant point: whether a transfer pursuant to a stock purchase results in an assignment.

The trial court abused its discretion in awarding sanctions against Mr. McNamer on the standing issue where there was clear legal authority to support attorney McNamer's argument.

3. The Trial Court Abused its Discretion by Adding Attorney McNamer to the Judgment, When the Original Motion and Order Did Not Name Him.

Sub Pop, Ltd. did not bring a motion for sanctions against attorney McNamer when it sought fees and costs against Plaintiff Templar. The trial court did not order sanctions against Mr. McNamer when it ordered fees and costs against Templar. The trial court order ordered fees and costs against Templar and Templar alone. Defendant waited until Templar failed to pay, then sought sanctions against its attorney. Defendant cited no case, and none exists, that gives the court the power to rewrite history and to add an additional un-named party to a judgment, after motion and after an order is entered thereon.

4. Sanctions Do Not Serve the Purposes of Rule 11.

Sanctions are an appropriate as a remedy for egregious conduct. *See, Hicks*, 73 Wn. App. at 163; *Zaldivar*, 780 F.2d at 832. There was no egregious conduct here.

B. This Appeal is Not Frivolous and This Court Should Not Award Rule 11 Sanctions For It.

Sub Pop, Ltd. is incorrect when it argues that this appeal is unsupported “by any rational argument on the law and facts.” (Respondent’s Brief, p. 22, *citing Clarke v. Equinox Holdings, Ltd.*, 56 Wash. App. 125, 132, 783 P.2d 82, *rev. den.* 113 Wash.2d 001, 777 P.2d 1050 (1989)). On the contrary, this is a valid appeal of an abuse of discretion---under an objective reasonableness standard---by a trial court that: (1) gave no weight to the fact that attorney McNamer inquired about the defendant’s identity by researching the official corporate record information found with the Washington Secretary of State website; (2) failed to acknowledge or distinguish the authorities attorney McNamer cited in support of his client’s standing to sue when it awarded sanctions; and (3) awarded sanctions against an unnamed non-party after motion and an order was entered.

The filing of the complaint, the motion to dismiss the counterclaim, and this appeal are not frivolous; they were and are meritorious.

VI. CONCLUSION

The judgment entered against attorney McNamer should be reversed and vacated and no Rule 11 sanctions should be awarded based on the filing of this appeal.

Dated this 11th day of February, 2015.

Respectfully submitted,



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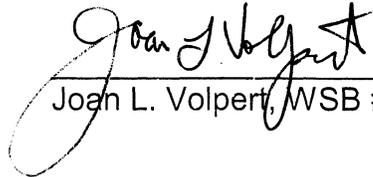
I certify that on this date I have mailed two copies of the REPLY BRIEF OF APPELLANT ANTHONY E. MCNAMER by first-class mail, postage pre-paid to the following attorney at the address below:

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I also certify that, pursuant to a stipulation, I have e-mailed a copy of said brief to Attorney Gordon Randolph at randy@randygordonlaw.com.

I further certify under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of February, 2015.


Joan L. Volpert, WSB #17003