STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WILLIAM PADILLA,

Plaintiff,

-v-

File No. 95-13981-NZ
HON. PHILIP E. RODGERS, JR.

NORTHERN A-1 SANITATION SERVICE, INC.; its successor corporation, UNITED WASTE, INC., and EDWARD ASCIONE, JR.,

Defendants.
_____/

James I. Sullivan (P25330)
Attorney for Plaintiff

Paul T. Sorensen (P29582)
Attorney for Defendants
_____/

DECISION AND ORDER RELATING TO PLAINTIFF'S ALLEGATIONS OF FRAUD AND MISREPRESENTATION AS SET FORTH IN THE MOTION TO SET ASIDE ORDER OF DISMISSAL WITH PREJUDICE

Plaintiff was fired from his employment at Defendant Northern A-1 Sanitation Service, Inc. on October 5, 1991. In this wrongful discharge action, Plaintiff alleged that he suffered discrimination and disparate treatment because of his national origin. At the conclusion of the hearing on Defendants' Motion for Summary Disposition on September 9, 1996, this Court dismissed Counts I, III, IV and V. This Court provisionally dismissed Count II, subject to possible further proceedings relating to documents to be produced by Defendants.[1] If Plaintiff chose to pursue the Court's ruling further, Plaintiff had the obligation to file a motion for

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[1]At the September 9, 1996 hearing, Defendants had an outstanding obligation to produce certain employee records which Plaintiff timely requested, late in the extended discovery period to which the parties had informally agreed. At the conclusion of the hearing, this Court advised the parties that the provisional dismissal of Plaintiff's discrimination suit, as set forth in Count II, would become final unless Plaintiff brought forth admissible evidence from the documents which were due to be produced by Defendants.

rehearing with a supporting brief and affidavit, by September 27, 1996. See, Order Granting Defendants' Motion for Summary Disposition dated September 20, 1996.

Plaintiff failed to file a motion for rehearing as provided for the September 20, 1996 Order and this Court entered its Final Order Dismissing Case with Prejudice on October 2, 1996. Subsequently, Plaintiff filed a Motion to Set Aside the Order of Dismissal, and a hearing was held on November 4, 1996.[2] In the motion, Plaintiff brought charges of fraud and misrepresentation against Defendants, as shown in the following paragraphs:

> 1. That the Order of Dismissal with Prejudice was obtained by and through fraud upon this Court by the Defendant Edward Ascione, Jr.
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> 2. That the specifics of this fraud are quite simply and plainly that Mr. Ascione, by affidavit, (a copy of which is attached hereto as Exhibit 1) and defense counsel, in argument to this Court in support of Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10), represented to this Court that there were seventeen other employees who were terminated for the same or

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[2]Attached to the motion to set aside the dismissal were a brief and affidavits of Attorneys George Beeby and James Sullivan, counsel for the Plaintiff. In their affidavits, the attorneys stated their understandings of instructions ostensibly given by the Court at the conclusion of the Final Pre-Trial Settlement Conference held on September 13, 1996. This Court has reviewed its notes of the settlement conference and finds nothing to support Plaintiff's recollection that this Court informally modified its bench order of September 9, 1996. The record shows that contrary to these allegations of oral modifications at the Settlement Conference, Plaintiff's counsel assisted in drafting the Order which was ultimately signed on September 20, 1996, one week after the Settlement Conference, and this Order was consistent with the September 9, 1996, bench ruling.

Defendants attached to their brief in opposition to the motion, as Exhibits F and G, copies of two drafts of the order prepared by Defendants' counsel and sent by facsimile to Plaintiff's counsel. The Fax cover sheets, dated respectively September 17 and September 18, 1996, included a Remarks section with messages from Defendants' attorney, Martha Atwater, to Plaintiffs' counsel, George Beeby. The remarks show that the parties' counsel worked together to create wording which accurately set forth the Court's specific instructions. The September 20, 1996, Order was approved as to form by Attorneys Atwater and Beeby, with Ms. Atwater signing for Mr. Beeby, with his permission. Plaintiff does not dispute the authenticity of copies of the above-described cover sheets and draft orders, nor does he dispute having received the faxed messages.

Plaintiff asserted, on p 6 of his brief, that "[it was the impression of Mr. Beeby [at the settlement conference] ... that the Court had dispensed with any requirement for a brief, or an specific affidavit." Again, the record shows that Mr. Beeby reviewed and approved the form of the Order after he attended the Settlement Conference.

similar reasons underlying the termination of Mr. Padilla, and that Defendants had records and files bearing evidence of these seventeen terminations and the reasons therefore.

* * *

6. That the "evidence" produced by Defendants shows that there were not seventeen but rather only three terminations, and the circumstances of these three terminations were not similar to the termination of Plaintiff.

7. That the affidavit of Edward Ascione is fraudulent and filed in bad faith, such that Plaintiff is entitled to relief under MCR 2.116(F).

8. That had the Court known the true state of the evidentiary record no "provisional" order would have been entered in the first place.

9. That the above-described conduct of Defendant also justifies setting aside the Order, pursuant to MCR 2.612(C)(1)(f), in that this Court was misled by Defendants into "palpable error" in entering the initial, provisional order.

10. That Plaintiff's counsel did not file a "brief" or "specific affidavit" due in part, to the fact that the "evidence" produced by Defendants is so blatantly at variance with what was represented to this Court, that there is nothing to brief, and nothing upon which to construct a non-redundant affidavit; that, further, as is more specifically set forth in Plaintiff's Brief in Support, undersigned counsel and co-counsel George Beeby were justifiably operating under the impression that the Court, at the settlement conference of September 13, 1996 had instructed that there be no further argument of legal issues, and that -- in light of the adjournment by the Court of the October 8th trial date -- all that Plaintiff's counsel needed to do, upon receipt and review of the documentary evidence from Defendants, was to file a notice of continued hearing to be confined to examination of whatever documentation Defendants produced.

Plaintiff indicated that the documents produced by Defendants on September 10, 1996, did not include the Loss Time/Absence Reports of some of the individuals named in Defendant Ascione's affidavit. The parties agreed that the documents were outside the scope of the discovery requests.[3] This Court queried Defendants as to whether they were willing to produce

[3]Mr. Ascione, in his affidavit, provided facts related to terminations of employees who worked before and after Plaintiff's employment with the Defendant firm. Plaintiff's discovery requests limited inquiry to the Loss Time/Absence Reports who worked during Plaintiff's tenure with the company. Documents relating to the eight employees who fit within Plaintiff's parameters were timely disclosed prior to the parties' informally agreed to discovery deadline.

the additional employee records forthwith so Plaintiff could review the records relating to all of the 17 terminated employees. Defendants voluntarily agreed to produce the related records.

At the conclusion of the November 4, 1996, hearing this Court adjourned further argument to allow time for the production of the transcript of the September 9, 1996 hearing. This Court advised the parties that, pending its review of further written arguments and oral arguments with regard to the fraud charges, it would make a ruling at a later hearing with regard to sanctions. Specifically, this Court announced that, if it found a basis for the claims of fraud and misrepresentation, it would reinstate the case and award sanctions to Plaintiff. Alternatively, in the event that this Court found no basis for Plaintiff's assertions of fraud, there would be no reinstatement of the case and it would award sanctions to Defendants. Subsequently, the proceedings were completed at a hearing held on March 17, 1997.

It is the view of this Court that the motion to set aside the dismissal is, for the most part, a mischaracterized motion for reconsideration of the Court's decisions on the motion for summary disposition.[4] Indeed, Plaintiff brought his motion pursuant to MCR 2.612(C) and MCR 2.119(F).

MCR 2.612(C), addresses Grounds for Relief From Judgment and provides, in pertinent part, as follows:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> * * *
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> * * *
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> (f) Any other reason justifying relief from the operation of the judgment.

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[4]Plaintiff's motion, in paragraphs 2 and 5, sets forth arguments related to Defendants' (C)(10) motion. After the November 4, 1996 hearing, Plaintiff filed a document entitled Plaintiff's Supplemental Brief in Support of Motion to Set Aside Order of Dismissal, and Supplemental Brief in Opposition to Defendant's Motion for Summary Disposition. Clearly, Plaintiff is reluctant to acknowledge the totality of the proceedings which led to this Court's Final Order. The sole bases properly asserted by Plaintiff which could justify setting aside the dismissal on Count II are the claims of fraud and misrepresentation.

MCR 2.119(F) addresses for Motions for Rehearing or Reconsideration and reads, in pertinent part, as follows:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Plaintiff has the burden of proving the allegations of fraud and misrepresentation. As recently stated by the higher court, in *IBEW , Local 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995),

> To show fraud or misrepresentation, a plaintiff must establish the following elements: (1) the defendant made a material misrepresentation; (2) it was false; (3) when it was made, the defendant either knew it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

Plaintiff stated, in his brief, that "[t]his is a case of blatant fraud practiced upon this Court and Plaintiff by Defendants." Plaintiff asserted that Defendant Ascione, in his affidavit dated August 7, 1996, and Defendants' attorney, Mr. Sorensen, made fraudulent statements to this Court and misrepresented the existence of documentary evidence to support their defense against Plaintiff's allegations. Plaintiff's brief, p 1. Plaintiff, in paragraph 6 of his motion to set aside the dismissal, stated that only 3 terminations are shown on the requested reports and the circumstances are not similar to the reasons that Plaintiff was terminated. In his supplemental brief, Plaintiff analyzed the attendance problems, and other matters, recorded on the Loss Time/Absence Reports of the 17 workers who Defendants indicate have been fired.

> In paragraph 12 of his August 7, 1996 affidavit, Mr. Ascione testified that,
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> During and after plaintiff's employment with Northern A-1, other employees from the Kalkaska facility have been discharged for conduct similar in one or more ways to plaintiff's. Including plaintiff's termination, there were 18 such discharges, including: no shows/unexcused absence/failure to report to work (13 employees - two roll off drivers, eight laborers, one sweeper operator, one transfer station employee, and one office worker); failure/refusal to answer beeper (one laborer); poor job performance (one equipment operator and one laborer); excessive absences (two laborers). Of these 18 terminated employees, 15 are

white males, one is a black male, one is an Hispanic male (plaintiff), and one is female.

Defendant Ascione averred that he handled work-related employee problems on "a case-by-case basis." Plaintiff characterized Defendant Ascione's affidavit as "patently untrue." Plaintiff's brief, pp 4 and 5. Plaintiff failed to provide a nexus between his conclusions, Mr. Ascione's affidavit and the documents which Plaintiff argues support the claim that Defendants and their counsel have perpetuated fraud and misrepresentation in these proceedings.

Plaintiff described the records he wanted Defendants to produce and acknowledged receipt of the documents which he sought through the discovery process. Plaintiff did not assert that Defendants failed to produce any requested documents. Nor has Plaintiff disputed Defendants' assertion, in their brief, that Defendants produced documents, in addition to the requested documents, to Plaintiff, after the September 13, 1996 Settlement Conference. Plaintiff argued that the requested documents do not include information showing the reasons that Defendant fired the above described 17 employees.

It is not the Defendants' responsibility to describe the company's records which document the reasons that the 18 individuals were terminated. Defendants stated that it is the company's practice to record employees' attendance problems not terminations or discharges on the Loss Time/Absence Reports. Defendants' Brief in Opposition, p 2. This Court finds nothing on the record, including the transcript of the September 9, 1996 hearing, to support Plaintiff's assertion that Defendants indicated that the Loss Time/Absence Reports would show the reasons that employees were terminated.

Plaintiff submitted "several proposed Affidavits, representing what certain other employees have told Plaintiff's investigator, Mr. Paul Socha." The proposed affidavits, Exhibits 7-13, are unsigned and have no value as evidence to support Plaintiff's arguments. MCR 2.119(B). At the hearing held on March 17, 1997, Plaintiff submitted Mr. Paul M. Socha's affidavit, dated March 13, 1997. *Inter alia*, Mr. Socha testified that he was retained on behalf of Plaintiff to investigate facts and circumstances relating to terminations at the Defendant firm. Mr. Socha averred that he had reviewed Plaintiff's briefs and exhibits and with one exception, all the information with regard to his contacts with Defendant's former employees was "true and

accurate." Mr. Socha's statements are inadmissible hearsay, MRE 802, and no substitute for the witnesses' signatures. MCR 2.116(H)(2).

Plaintiff failed to produce admissible evidence which supports his allegations that he was treated differently than others of a different race.[5] Further, in his brief, supplemental brief and in oral argument, Plaintiff failed to present an analysis of facts related to the relevant court rules and case law to support the very serious charges of fraud and misrepresentation. It is the opinion of this Court that the motion was not well grounded in fact and was not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. MCR 2.114(D)(2).

Based on the foregoing analysis, Plaintiff's motion is denied. The case will not be reinstated. In light of Plaintiff's failure to prevail on the issue of fraud and misrepresentation, this Court will now address sanctions in the context of the applicable court rules and statutes. MCR 2.114, includes the following provisions:

> (D) **Effect of Signature**. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
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> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document 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
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> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> (E) **Sanctions for Violation**. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

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[5]To the extent that Plaintiff's motion was brought pursuant to MCR 2.119(F), the motion is moot. "Palpable error," in this case, was the claimed misleading of the Court by fraud or misrepresentation. MCR 2.119(F)(3).

(F) **Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR 2.625(A)(2) regarding, **Frivolous Claims and Defenses,** provides as follows:

> In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591.

The text of MCL 600.2591 is as follows:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
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> (b) "Prevailing party" means a party who wins on the entire record.

The following excerpt from the Court of Appeals' opinion in Davids v Davis, 179 Mich App 72; 445 NW2d 460 (1989), is helpful and instructive:

> This court rule[6] imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 748, 792-795; 415 NW2d 310 (1987); *Hicks v Ottewell*, 174 Mich App 750; 436 NW2d 453 (1989). The reasonableness of the inquiry is determined by analysis under an objective standard. *Briarwood,*

[6]Referring to MCR 2.114.

> *supra*. MCR 2.625(A)(2), which is referenced in MCR 2.114(F), provides that, if a court finds, on motion of a party, that an action or defense was frivolous, "costs shall be awarded as provided by MCL 600.2591; MSA 27A.2591." We believe that, similarly, in examining whether, under § 2591(3)(a)(ii), a party had no reasonable basis to believe that the facts underlying his or her legal position were in fact true, an objective standard of reasonableness is appropriate.

Davids, supra at p 89.

Further, the imposition of sanctions pursuant to MCR 2.114 is not discretionary. See, *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69; 512 NW2d 49 (1994). In this case, the Court of Appeals wrote as follows:

> In reviewing the record, we also note that the trial court indicated that it had discretion to decide whether sanctions should be imposed. This was clear error. The imposition of sanctions under MCR 2.114 is mandatory upon a finding that a pleading was signed in violation of the court rule. *Contell Systems Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990). There is no discretion for the trial court to exercise in determining if a sanction should be awarded. Thus, the trial court upon remand must also determine whether the petitioner violated MCR 2.114, including whether it filed the forfeiture complaint for an improper purpose. If the court rule was violated, the court must impose sanctions.

In re Forfeiture, supra, at p 73.

See, also, *In re Pitre*, 202 Mich App 241; 508 NW2d 140 (1993); *Contell Systems Corp v Gores, supra*, pp 710-711.

Sanctions are awarded to Defendants. Accordingly, counsel for the Defendants may submit an affidavit together with their time records setting forth the costs and attorneys' fees which they have incurred in the defense of this action for the period of time following the entry of the Final Order Dismissing Case with Prejudice on October 2, 1996 through the hearing held on March 17, 1997. Production of the requested discovery documents and other documents which Defendant voluntarily produced for Plaintiff after the Settlement Conference shall be excluded from Defendants' accounting of costs and attorneys' fees. The affidavit and records submitted to the Court should clearly describe the nature of the services rendered, the date they were rendered, the name of the attorney providing them, the amount of time allocated to the

service and the hourly rate of the individual performing them. Expenses and costs should also be itemized.

This affidavit and supporting documentation will be due within 14 days of the date signed below or the request for sanctions will be deemed waived. Within 28 days of the date signed below, the Plaintiff may file his specific written objections to the sanctions sought by Defendants. The Court will rule upon those objections based upon the parties' written submissions. If the Court cannot so rule, then it will conduct an evidentiary hearing to resolve the remaining issues.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/07/97