

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

ADRIANN MCGEE (Guardian),

Plaintiff,

vs.

DAVID POND,

Defendant.


Case No. 22 CV H 11 0619

JAMES P. SCHUCK, JUDGE

NUNC PRO TUNC
JUDGMENT ENTRY
RULING ON PENDING MOTIONS
AND
DECLARING DEFENDANT TO BE A VEXATIOUS LITIGATOR

This matter is before the Court on the following:

- Pro se Defendant David Pond's motion to compel discovery, filed August 15, 2023;
- Plaintiff Adriann McGee's motion for summary judgment, filed August 30, 2023;
- Defendant's motion to dismiss, filed September 12, 2023;
- Plaintiff's motion to strike Defendant's motion to dismiss, filed September 20, 2023; and
- Plaintiff's motion to strike Defendant's response to Plaintiff's motion for summary judgment, filed September 20, 2023.

Common Pleas Court
Delaware, Co., Ohio
I hereby certify the within be a true
copy of the original on file in this office
Natalie Fravel, Clerk of Courts
By  Deputy



I. FACTUAL BACKGROUND

In March 2021, the Probate Division of the Delaware County Common Pleas Court appointed Plaintiff as guardian of the estate of Defendant's mother, Mary Ann Pond.

Plaintiff's November 29, 2022 complaint in the present case asserts that Defendant is a vexatious litigator as defined in R.C. 2323.52 because he has "purposefully, willfully, and habitually harassed Plaintiff with relentless, exuberant filings and communications, with the purpose to maliciously injure her and the Guardianship." [Complaint ¶ 5.]

In support, Plaintiff points to Defendant's history of allegedly vexatious conduct in other civil litigation. [Compl. ¶ 8.] The complaint seeks relief in the form of costs and attorney fees. Plaintiff also seeks a declaration that Defendant is a vexatious litigator, and an injunction against Defendant instituting or continuing in any legal proceeding without leave of court.

In the months since the complaint was filed, the Court has addressed two motions to dismiss by Defendant and several motions to strike by both parties. The Court's previous entries establish:

- This Court has jurisdiction, the matter is properly venued here, and Plaintiff obtained service of process (*Judgment Entry Denying Defendant's*

January 3, 2023 Motion To Dismiss, filed March 9, 2023, and Judgment Entry Denying Defendant's March 10, 2023 Motion To Dismiss, filed April 21, 2023);

- Plaintiff was not required to seek the permission of the Delaware County Probate Court prior to filing this action (*Judgment Entry Denying Defendant's March 10, 2023 Motion To Dismiss, filed April 21, 2023*)¹;

- Defendant must serve motions and accurately certify service of motions pursuant to Civ.R. 5, and may face sanctions if he does not do so.

(Judgment Entry Granting Plaintiff's Motion To Strike And Denying Motion For Status Conference And Motion To Strike Motion For Status Conference, filed June 5, 2023);

- As a pro se litigant, Defendant is presumed to have knowledge of the law and correct legal procedures, and is held to the same rules and procedures as litigants represented by counsel. (*Judgment Entry Granting Plaintiff's Motion To Strike And Denying Motion For Status Conference And Motion To Strike Motion For Status Conference, filed June 5, 2023*).

¹ The Fifth District Court of Appeals considered a judgment entry approving Plaintiff's February 23, 2023 application to the Probate Court to pursue this vexatious litigator complaint on behalf of her ward, concluding the entry was not a final appealable order. In so concluding, the court described the application process as "merely a means to keep the probate court informed of litigation filed on behalf of ward and to verify the filing is in ward's best interest. It is not jurisdictional to the filing of a complaint in the General Division. The granting of the application has no bearing on [Pond's] rights. He can defend himself in the vexatious litigator case." *In re: Guardianship of Pond*, 5th Dist. Delaware No. 23 CAF 04 0025, 2023-Ohio-2190, ¶ 22.

II. LEGAL ANALYSIS

A. Defendant's Motion to Compel

On August 15, 2023, Defendant filed a one-page motion to compel discovery in which he argues that Plaintiff "has not answered one question or interrogatory, nor provided one single document that was requested in discovery."

The motion contains a service certification stating:

I certify that the Above was sent not only by the courts [sic] electronic notification service but by ordinary U.S. mail to Adrian [sic] Mcgee in her office 200 civil [sic] Center Drive Suite 800, 43015 on August 15th, 2023[.]

Despite this certification, the docket does not reflect that this document was served using the Court's electronic notification service. In addition, the certification misspells Plaintiff's counsel's name and incorrectly identifies her address as "200 civil Center Drive" [sic] when, as indicated in all of Plaintiff's filings, counsel's name is Adriann S. McGee, and her address is Reminger Co., LPA, 200 Civic Center Drive, Suite 800, Columbus, Ohio 43015.

Plaintiff did not respond to the motion to compel.

In its June 5, 2023 Judgment Entry, the Court informed Defendant of his duty under Civ.R. 5 to serve copies of all filings and to certify service with each filing. In that entry, the Court addressed Defendant's failure to notify Plaintiff via the electronic filing service despite having certified that he did so. The Court also pointed out that Defendant was, in fact, registered with the Delaware County Clerk of Courts as an e-

filer despite his claim that this service is not available to him as a pro se litigant. The Court stated that “Any further failure to timely provide service copies to Plaintiff may subject Defendant to sanctions.”

Nevertheless, Defendant has used this same certification language in all of his filings since June 5, 2023 despite not using the e-filing service and despite Plaintiff’s representation that she has not received ordinary mail service. Defendant attempted to prove he sent ordinary mail by attaching copies of addressed envelopes to each of his filings on September 26, 2023. However, the address is not correct and the envelope is not postmarked. Thus, these copies do not establish that he, in fact, served the documents, and so it is not apparent that he served Plaintiff the motion to compel.

Moreover, Defendant cannot establish he is entitled to an order compelling Plaintiff to produce discovery.

The decision to impose Civ.R. 37 sanctions for failure to provide discovery lies within the sound discretion of the trial court. *Goedel v. Beneficial Mortg. Co. of Ohio*, 5th Dist. Tuscarawas Nos. 2003AP050038, 2003AP070056, 2003AP070058, 2004-Ohio-1689, ¶ 39, citing *Toney v. Berkemer*, 6 Ohio St.3d 455, 453 N.E.2d 700 (1983).

Civ.R. 37(A)(1) requires a motion to compel to include “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.” In addition,

Delaware County Common Pleas Loc.R. 28.02 requires motions to compel discovery to be “accompanied by a statement reciting efforts made to resolve the matter.”

Defendant’s motion to compel is not accompanied by a certification that he attempted to resolve the matter with Plaintiff before filing the motion. *See, e.g., 513 E. Rich Street Co. v. McGreevy*, 10th Dist. Franklin No. 02AP-1207, 2003-Ohio-2487, ¶ 11; *Briggs v. Glenbeigh Health Servs.*, 8th Dist. Cuyahoga Nos. 77395, 77665, 2000 WL 1754008 (before moving to compel, party shall make a reasonable effort to resolve the matter; in general, discovery should require court intervention only as a last resort).

Nor has Defendant identified what discovery was sought and when his request for discovery was served. Responding to Defendant’s claims that Plaintiff provided no answers whatsoever, Plaintiff asserts in her September 20, 2023 motion to strike Defendant’s third motion to dismiss that she timely answered the discovery on May 24, 2023.

Because Defendant has not established that he properly served his motion to compel, that he attempted to resolve the discovery dispute before moving to compel discovery, or that Plaintiff, in fact, failed to respond to his discovery requests, the Court denies Defendant’s motion to compel.

B. Plaintiff's Motion for Summary Judgment

On August 30, 2023, Plaintiff moved for summary judgment, arguing there is no genuine issue of material fact for trial that Defendant is a vexatious litigator as that term is defined in R.C. 2323.52(A)(3).² Identifying multiple civil actions and appeals instituted by Defendant, Plaintiff alleges that Defendant's conduct has been vexatious because: 1) the conduct serves merely to harass or maliciously injure another party to the civil action; 2) the conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; and 3) the conduct is imposed solely for delay. R.C. 2323.52(A)(2).

The purpose of the vexatious litigator statute is to prevent abuse of the system by persons who persistently and habitually file lawsuits without reasonable grounds, thus flooding the court dockets with filings that increase governmental costs and waste judicial resources. *Mayer v. Bristow*, 91 Ohio St.3d 3, 13, 740 N.E.2d 656 (2000). At its core, the vexatious litigator statute establishes a screening mechanism that serves to protect courts and other potential victims against frivolous, repetitive lawsuits filed by persons who have historically engaged in prolific and vexatious conduct in civil proceedings. *Id.*

² R.C. 2323.52(A)(3) provides, in part: "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions.

A person may be declared a vexatious litigator based on multiple cases or based on actions in a single case. *Caghan v. Caghan*, 5th Dist. Stark No. 2014 CA 00094, 2015-Ohio-1787, ¶ 82, citations omitted. The statutory scheme establishes a screening mechanism by which a vexatious litigator can petition the court for a determination of whether the proposed claim is legitimate. *Mayer, supra*, at 14.

Declaring a litigant to be vexatious is an extreme measure that should only occur where there is no nexus between the litigant's filings and his intended claims. *Caghan, supra*, ¶ 89; *Howdyshell v. Battle*, 5th Dist. Morgan No. 19AP0001, 2019-Ohio-5232, ¶ 15, citing *McClure v. Fischer Attached Homes*, 145 Ohio Misc.2d 38, 2007-Ohio-7259, 882 N.E.2d 61, ¶ 33. Where the litigant's filings constitute persistent and habitual conduct done without reasonable grounds, or where the litigant raises and re-raises arguments that have been rejected, sometimes repeatedly, a court does not err in finding the litigant to be a vexatious litigator. *Howdyshell, supra*, ¶¶ 17-18, citations omitted.

To illustrate her allegation, Plaintiff attaches to her motion exhibits consisting of over a thousand pages of court filings in cases involving Defendant. These include Delaware County probate cases and appeals relating to Defendant's mother's guardianship, as well as cases involving Defendant's medical practice business, a tenant at premises belonging to the Robert Pond Trust, a professional tort case against an attorney, Defendant's divorce action, and other matters.

These filings resemble Defendant's filings in the present matter: in them he re-raises arguments that have been considered and rejected; issues personal, unfounded attacks; misstates facts; and attempts to re-litigate matters that are in the jurisdiction of – and have been addressed by – the probate court.

1. Summary Judgment Standard

A motion for summary judgment may not be granted unless the court determines that: (1) no genuine issue as to any material fact remains for litigation; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56; *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 663 N.E.2d 639 (1996).

If the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts showing there is a genuine issue for trial. If the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

2. Plaintiff Has Met Her Summary Judgment Burden

Having reviewed Plaintiff's motion and supporting exhibits, the Court finds that Plaintiff has met her burden to demonstrate that there is no genuine issue of material

fact for trial, and that Plaintiff is entitled to judgment as a matter of law that Defendant meets the definition of a vexatious litigator and should be declared as such.

It remains whether Defendant has satisfied his reciprocal burden to set forth specific facts showing there is a genuine issue for trial.

Responding to the motion on September 12, 2023, Defendant again raises the claim that this Court lacks jurisdiction because he does not reside in Delaware County. This claim was rejected in this Court's March 9, 2023 entry denying Defendant's motion to dismiss.

Defendant also argues that Plaintiff has committed crimes in connection with her actions as guardian, specifically that she stole money out of family trusts. He states he cannot be a vexatious litigator because his actions have been initiated in an attempt to protect his property rights.

He claims that two of the cases Plaintiff cites as examples of his vexatious conduct are still pending and so cannot be used as a basis for claiming his claims are frivolous.

Finally, he asserts that his property rights have been infringed by actions of the guardian and the probate court, and that he is the victim of graft and corruption.

As provided in Civ.R. 56(C),

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Defendant's response to the motion for summary judgment satisfies none of the requirements in Civ.R. 56(C) for countering a motion for summary judgment. He does not present an affidavit, but rather raises unsworn and unsupported allegations that he is the victim of a crime. Rather than demonstrating how his filings were not habitual, persistent, or without reasonable grounds, he argues his conduct was justified by what he alleges are the unethical or criminal acts of others. He provides no basis for his allegation that corruption or crime has occurred here.

Because his response does not consist of evidence that is acceptable under Civ.R. 56(C), and because his arguments are not, in any way, responsive to Plaintiff's motion for summary judgment, Defendant has failed to meet his reciprocal burden to demonstrate that Plaintiff is not entitled to judgment in her favor as a matter of law.

3. *Defendant's Response and Plaintiff's Motion to Strike Defendant's Response*

On September 20, 2023, Plaintiff moved to strike Defendant's response to the motion for summary judgment. In addition to arguing that Defendant failed to serve his response in compliance with Civ.R. 5, Plaintiff also emphasizes that Defendant

failed to present Civ.R. 56(C) evidence to counter the motion. As already discussed, Defendant has not complied with the service requirements of Civ.R. 5, and his summary judgment response does not satisfy his reciprocal evidentiary burden under Civ.R. 56(C).

Plaintiff also objects to Defendant's unsupported claims of criminal acts by Plaintiff. Civ.R. 11 provides that a document that contains scandalous or indecent matter may be stricken as sham and false. The Court grants Plaintiff's motion to strike, and strikes all such statements from Defendant's response. As the remaining portions of Defendant's response do not establish a genuine issue for trial, the Court grants summary judgment in Plaintiff's favor.

C. Defendant's Third Motion to Dismiss and Plaintiff's Motion to Strike It

On two previous occasions, the Court denied motions to dismiss by Defendant. In this third motion, filed on September 12, 2023, Defendant argues Plaintiff's case should be dismissed because she has not answered discovery.

Responding on September 20, 2023, Plaintiff asks for the motion to dismiss to be stricken on the basis that the motion to dismiss was not served on her, and, further, because she did respond to discovery on May 24, 2023.

The issues raised by this motion to dismiss have been addressed above in the context of Defendant's motion to compel. Specifically, Defendant did not serve the motion to dismiss (or the motion to compel) in compliance with Civ.R. 5. Moreover, he

does not support his motion with evidence of what discovery was propounded and what answers were given. Plaintiff's position is that she did answer, but in the form of objections. In any event, this Court is not able to review or consider either the discovery propounded or the responses given because neither side has provided copies of these documents.

Therefore, the Court denies Defendant's motion to dismiss.

E. Plaintiff's February 7, 2023 Motion for Sanctions

On February 7, 2023, Plaintiff filed a motion for sanctions pursuant to the frivolous conduct statute, R.C. 2323.51, and Civ.R. 11.

Plaintiff's motion focuses on Defendant's "Motion to Strike All Pleadings from Attorney McGee," filed January 30, 2023. In that motion, Defendant claimed that Plaintiff does not have authority to bring suit on behalf of her ward, that another attorney was appointed to be Mrs. Pond's counsel due to Plaintiff's conduct, and that Plaintiff cannot complain in the present case about Defendant's conduct in the probate case.

In denying Defendant's motion to strike on April 21, 2023, the Court deferred decision on Plaintiff's frivolous conduct motion.

R.C. 2323.51 controls the award of attorney's fees as a sanction for frivolous conduct. R.C. 2323.51(A)(2) defines frivolous conduct as:

(a) Conduct of an inmate or other party to a civil action * * * that satisfies any of the following:

- (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 allegations 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 the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

Whether conduct is frivolous under R.C. 2323.51(A)(2)(a) is judged under an objective rather than subjective standard, and it must involve egregious conduct. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 15.

“Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect.” *Id.* A claim is not frivolous merely because it is not well-grounded in fact. *Id.* Instead, R.C. 2323.51 was enacted to chill overzealous, unjustifiable and frivolous actions, not punish mere misjudgment or tactical error.

Turowski v. Johnson, 68 Ohio App.3d 704, 706, 589 N.E.2d 462 (9th Dist. 1990).

Plaintiff also argues that Defendant’s conduct violates Civ.R. 11, which provides, in part:

The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

In determining whether sanctions are warranted under Civ.R. 11, the relevant question is whether the pro se litigant's actual intent or belief was willful or merely negligent. *See Almasoodi v. J. Harris Constr., Inc.*, 5th Dist. Delaware No. 22 CAE 06 0053, 2023-Ohio-895, 211 N.E.3d 209, ¶ 71, citations omitted. A court must consider whether the proponent has read the filing, harbors good grounds to support it to the best of his knowledge, information, and belief, and did not file it for purposes of delay. *Johnson v. Stachel*, 5th Dist. Stark No. 2019CA00123, 2020-Ohio-3015, 154 N.E.3d 577, ¶ 102, citing *Ceol v. Zion Indus. Inc.*, 81 Ohio App.3d 286, 290, 610 N.E.2d 1076 (9th Dist.1992). Before imposing sanctions, the Court is required to hold an evidentiary hearing on the motion. *Bringman v. McGann*, 5th Dist. Knox No. 17 CA 000006, 2017-Ohio-8153, ¶ 34; *State ex rel. Ebbing v. Ricketts*, 133 Ohio St.3d 339, 343-44, 2012-Ohio-4699, 978 N.E.2d 188, ¶ 24.

Upon review, the Court finds there is an arguable basis for an award of sanctions under R.C. 2323.51 and Civ.R. 11.

The Court will conduct an evidentiary hearing regarding Plaintiff's motion for sanctions on THURSDAY, OCTOBER 26, 2023 at 2:00 p.m., at the Delaware County Courthouse, 117 N. Union St., Fifth Level, Hearing Room 6, Delaware, Ohio 43015.

At the hearing, Plaintiff shall be prepared to substantiate any attorney fees incurred in responding to Defendant's January 30, 2023 motion to strike.

III. CONCLUSION

The Court denies Defendant's August 15, 2023 Motion to Compel.

The Court grants Plaintiff's August 30, 2023 Motion for Summary Judgment and Grants Plaintiff's Motion to Strike Defendant's Response to that Motion.

The Court denies Defendant's September 12, 2023 Motion to Dismiss and Grants Plaintiff's September 20, 2023 Motion to Strike the Motion to Dismiss.

Defendant is declared to be a vexatious litigator. Pursuant to R.C. 2323.52(D)(1), he is expressly and indefinitely prohibited from doing any of the following without first obtaining leave of that court to proceed:

- a) Instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court;
- b) Continuing any legal proceedings that he had instituted in any of the courts specified above prior to this order; and/or
- c) Making any application, other than an application for leave to proceed allowed under R.C. 2323.52(F)(1) in any legal proceeding instituted by himself or another person in any of the courts specified above.

Any proceedings instituted or continued, or any application made by Defendant without leave of that court to proceed shall be dismissed.

The Clerk of Courts is hereby ordered to send a certified copy of this Order to the Supreme Court of Ohio for publication pursuant to R.C. 2323.52(H).

Court costs assessed to Defendant.

IT IS SO ORDERED.

The Clerk of this Court is hereby ordered to serve a copy of this Judgment Entry upon all parties or their counsel through the Clerk's e-filing system, by regular mail, or by facsimile.


JAMES P. SCHUCK, JUDGE