IN THE MATTER OF THE ESTATE OF ANDRELL CYRANO "BILLY" ADAMS, DECEASED

DOCKET NO. A-5764-08T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 2044

April 27, 2010, Argued
August 19, 2010, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-247-08.

COUNSEL: Andre Shramenko argued the cause for Pro se appellant Deener, Hirsch & Schramenko, P.C.

Glenn R. **Reiser** argued the cause for respondent Administratrix Debra Myers (LoFaro & **Reiser,** LLP, attorneys; Mr. **Reiser,** on the brief).

Respondent Dourpatee Barker has not filed a brief.

JUDGES: Before Judges Skillman, Gilroy and Simonelli.

OPINION

PER CURIAM

On leave granted, appellant, Deener, Hirsch & Shramenko, P.C. (the law firm), appeals from those parts of two June 12, 2009 orders that directed the law firm to pay *Rule 1:4-8* counsel fee sanctions. We reverse.

Decedent Andrell Cyrano "Billy" Adams died intestate on February 11, 2008. Decedent had been married to Barbara Saunders-Adams (Saunders-Adams), but on June 30, 2006, the Chancery Division entered a judgment of divorce (JOD) dissolving their marriage. The JOD directed Saunders-Adams to transfer to decedent $ 900,000 of stock she then owned in United Parcel Service, Inc. (UPS).

Two children were born of the marriage: Kendrell Adams and Avent Banka Adams. Decedent had two other children, Makunda Noel and Amanda Barker, born from relationships with two other [*2] women. Amanda Barker was a minor at the time of decedent's death.

On June 9, 2008, Dourpatee Barker, the mother of Amanda Barker, filed a complaint on behalf of her daughter seeking to have Debra Myers, a friend of the Barker family, appointed administratrix of decedent's estate. Although Saunders-Adams and the decedent's three oldest daughters were served with the complaint and order to show cause, they did not appear in opposition to the application. On July 25, 2008, the court entered an order appointing Myers as administratrix. On August 12, 2008, Myers served Saunders-Adams with a copy of the order of appointment. On December 11, 2008, the Surrogate issued letters of administration to Myers.

On March 31, 2009, after Kendrell Adams, Avent Banka Adams, and Makunda Noel signed renunciations in Saunders-Adams' favor, the law firm filed a motion on behalf of Saunders-Adams seeking to reopen or vacate the July 25, 2008 order appointing Myers as the administratrix, contending that Saunders-Adams had engaged counsel to represent her in opposing Dourpatee Barker's application for the appointment of an administratrix, but counsel negligently failed to file opposition to the application. Myers [*3] opposed the motion, asserting that the court could only remove her as administratrix under *N.J.S.A. 3B:14-21*; and because she had been properly fulfilling her duties as the administratrix, there was no cause for her removal under that statute. Dourpatee Barker also opposed the motion, contending that Saunders-Adams could not serve as the administratrix because a conflict of interest existed between Saunders-Adams and the estate, as she had not fully transferred $ 900,000 of UPS stock to the decedent prior to his death. [1]

> 1 Pursuant to the JOD, Saunders-Adams transferred some of her UPS stock to the decedent. If the stock had been transferred the day of divorce, it would have fulfilled Saunders-Adams' $ 900,000 obligation. However, because there was a delay in delivery of the stock to decedent, the stock lost $ 81,919.60 in value. Saunders-Adams contends that she fulfilled her obligation under the JOD. Myers asserts that Saunders-Adams owes the estate $ 81,919.60, together with interest.

At argument on the motion on April 24, 2009, the law firm advised the court that not only was Saunders-Adams the designee of Kendrell Adams, Avent Banka Adams, and Makunda Noel, but also that they would [*4] accept appointment as substitute administratrix if the court denied the appointment to Saunders-Adams. The law firm argued the motion under *Rule 4:50-1(f)*, contending that Saunders-Adams' prior attorney's negligence in failing to properly represent her in opposing Dourpatee Barker's application for appointment of Myers constituted exceptional circumstances to warrant vacation of the July 25, 2008 order of appointment. The law firm requested that the court first determine whether reasons existed to vacate the order appointing Myers, and if so, then consider whether to appoint Saunders-Adams or one of decedent's daughters, other than Amanda Barker, as administratrix.

The trial court denied the motion, determining that a conflict of interest existed between Saunders-Adams and the estate because of the indebtedness owed by Saunders-Adams under the JOD. The court concluded that because of the conflict, even if Saunders-Adams' prior attorney had opposed the original application to appoint Myers and had sought to have Saunders-Adams appointed in lieu of Myers, Saunders-Adams' application for appointment would have been denied. The court also found that Myers had been properly fulfilling her [*5] duties as administratrix.

The court denied Dourpatee Barker's application for a counsel fee sanction under *Rule 1:4-8*, determining that the motion to vacate the order appointing Myers as administratrix had not been filed in bad faith, and was not "so meritless" as to invoke sanctions. However, the court qualified the denial of the application for counsel fees, stating that if Saunders-Adams continued in her failure to cooperate with the estate, an application for counsel fees "would be viewed in a different light or could be viewed in a different light."

On May 13, 2009, the law firm filed a motion for "reconsideration" in the name of Kendrell Adams, not in the name of Saunders-Adams. Kendrell Adams contended that the trial court had erroneously denied the original motion when it failed to "determine[] whether the appoint[ment] of Debra Myers as the [a]dministratrix should be set aside, before proceeding to consider the separate question of who should be [s]ubstituted [a]dministratrix." Kendrell Adams asserted that the court should not have denied the original application to vacate the July 25, 2008 order because of the conflict of interest between her mother and the estate, as the court [*6] could have appointed herself the substitute administratrix. The motion was supported by renunciations from Advent Banka Adams and Makunda Noel, favoring Kendrell Adams' appointment.

Dourpatee Barker filed a cross-motion seeking an award of counsel fees and costs from Kendrell Adams', Advent Banka Adams', and Makunda Noel Adams' shares of the estate, and an order directing partial distribution of the estate. On May 15, 2009, Myers' attorney sent the law firm a "safe harbor" letter demanding that it withdraw the motion, contending there was no basis for the motion, and that it was frivolous having been filed in the name of someone other than the original movant. On June 3, 2009, Myers filed a cross-motion seeking to compel

Saunders-Adams to pay the balance of $ 81,919.60 due the Estate, and to impose *Rule 1:4-8* sanctions against Kendrell Adams and/or the law firm.

The law firm argued that it was not asserting a new claim on behalf of Kendrell Adams, but had only requested the court to address the *Rule 4:50-1(f)* issue, that is, whether there were exceptional reasons to vacate the order appointing Myers as the administratrix, as the law firm believed the court had not addressed the issue [*7] on the original motion. The law firm's attorney stated:

> So the first part, for benefit of the record, is that we asked for a determination whether the Letters of Administration could be reopened under the law. Under the *[Rule] 4:50-1(f)*, and under the case law that sprang from that rule. That analysis is separate and apart from whether [Saunders-Adams] had the capacity to serve. So the second part of the relief effectively should not have been addressed until the letters were reopened.
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> My recollection, and I believe the transcript shows as well, is that [the attorney for Dourpatee Barker] argued the letters cannot be reopened because [Saunders-Adams] had a potential conflict. Which [the attorney for Myers] argued that there is no cause to remove Miss Myers. Your Honor held that [Sanders-Adams] had a conflict and that the letters cannot be reopened.
>
> With all due respect, I don't believe that there was an analysis independent of [Saunders-Adams'] capacity to serve. The analysis of whether the facts that took place in this matter conformed and meet the requirements under the rule, [*Rule] 4:50-1(f)*, [*8] and that rule allows for relief from a Final Judgment Order when there are exceptional circumstances.
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> . . . .
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> So the basis for the Motion for Reconsideration, we are seeking for your Honor to address, independent of who may or may not serve, why the letters cannot be reopened under the law.

The law firm's attorney further stated that it filed the reconsideration motion in Kendrell Adams' name because it had advised the court at argument on the original motion that Kendrell Adams was willing to serve as substitute administratrix if the court denied her mother the appointment.

The court denied the reconsideration motion. Although the trial court initially expressed its concern with the motion having been filed in the name of a party other than that of the original movant, the court ultimately stated that whether the motion had been filed as a motion for reconsideration in Saunders-Adams' name or as a separate motion in Kendrell Adams' name, was not dispositive, as that would have been placing form over substance. [2] The court concluded that the reconsideration motion was "frivolous" and not made in "good faith," finding that it had addressed the *Rule 4:50-1(f)* issue on the original [*9] motion. "I found that there was no reason to remove [Myers] as delineated in the [s]tatute and that [Saunders-Adams], the ex-wife had missed all of the time line[s] in terms of presenting herself as [a]dministratrix, as did the children." As to Kendrell Adams' request to serve as substitute administratrix, the court determined that Kendrell Adams "would not be able to function any better than her mother in this position" because the court believed that she would not pursue the estate's claim for the difference in value of the UPS stock. In sum, the court determined that "[t]he [m]otion for [r]econsideration was inappropriate because it sought another bite at the apple without any legitimate reason."

> 2 Nonetheless, in its supplemental opinion of August 26, 2009, the trial court found the law firm's filing of the reconsideration motion in the name of Kendrell Adams improper, determining that Kendrell Adams lacked standing to file the motion.

On finding the motion frivolous and filed in bad faith, the court awarded Myers and Dourpatee Barker counsel fee sanctions under *Rule 1:4-8*, directing the law firm to pay each of the parties $ 1,800 for services rendered by their respective attorneys [*10] in opposing the motion. In so doing, the court reasoned that the law firm had filed the motion "to delay the outcome of the

distribution from the estate and saddle a modest estate with a needless increase in the cost of litigation." Following the court's oral decision, the court entered the two orders from which the law firm now appeals. On August 26, 2009, the trial court filed a supplemental opinion in support of the two orders pursuant to *Rule 2:5-1(b)*.

On appeal, the law firm only challenges the trial court's imposition of the *Rule 1:4-8* counsel fee sanctions. The law firm argues that the reconsideration motion was not frivolous and that the opposing parties' applications for sanctions under the rule were defective.

On appeal we consider the imposition of *Rule 1:4-8* counsel fee sanctions under the abuse of discretion standard. *Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407, 975 A.2d 473 (App. Div.), certif. denied, 200 N.J. 502, 983 A.2d 1110 (2009)*; *Masone v. Levine, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App. Div. 2005)*.

Rule 1:4-8 counsel fee sanctions "are specifically designed to deter the filing or pursuit of frivolous litigation." *LoBiondo v. Schwartz, 199 N.J. 62, 98, 970 A.2d 1007 (2009)*. A second purpose of the rule is [*11] to compensate the opposing party in defending against frivolous litigation. *Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 71, 918 A.2d 595 (2007)*. The rule provides for imposition of sanctions where the attorney files a pleading or a motion with an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," *R. 1:4-8(a)(1)*, or by asserting a claim or defense that lack the legal or evidential support required by *Rule 1:4-8(a)(2), (3)*, and *(4). State v. Franklin Sav. Account No. 2067, 389 N.J. Super. 272, 281, 913 A.2d 73 (App. Div. 2006)*.

The nature of litigation conduct warranting sanctions under this rule has been strictly construed. Pressler, *Current N.J. Court Rules*, comment 2. on *R. 1:4-8* (2010) (citing *K.D. v. Bozarth, 313 N.J. Super. 561, 574-75, 713 A.2d 546 (App. Div.) certif. denied, 156 N.J. 425, 719 A.2d 1023 (1998))*. Accordingly, *Rule 1:4-8* sanctions will not be imposed against an attorney who mistakenly files a claim in good faith. *Horowitz v. Weishoff, 346 N.J. Super. 165, 166-67, 787 A.2d 236 (App. Div. 2001)*; *see also First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 430, 918 A.2d 666 (App. Div. 2007)* (holding that an objectively reasonable belief in the merits of a claim precludes [*12] an attorney fee award); *Wyche v. Unsatisfied Claim & Judgment Fund, 383 N.J. Super. 554, 560-61, 892 A.2d 761 (App. Div. 2006)* (holding that a legitimate effort to extend the law on a previously undecided issue precludes the award of sanctions); and *K.D., supra, 313 N.J. Super. at 574-75* (declining to award counsel fees where there is no showing that the attorney acted in bad faith).

We have considered the law firm's argument in light of the record and applicable law and are satisfied that the trial court mistakenly imposed the frivolous litigation sanctions against the law firm. The original motion to vacate the July 25, 2008 order appointing Myers as administratrix of the estate was filed in the name of the decedent's former spouse, Saunders-Adams. The motion was filed under *Rule 4:50-1(f)*. The law firm sought to first have the court determine whether there were grounds to vacate the order appointing Myers, and if so, to next consider whether to appoint Saunders-Adams or one of the decedent's three oldest daughters as substitute administratrix. At oral argument, the law firm informed the court that, if the court chose not to appoint Saunders-Adams as the substitute administratrix, Kendrell Adams, [*13] Avent Banka Adams, or Makunda Noel were willing to serve in that capacity. Although the court denied the motion, it found that the motion had not been filed in bad faith and was not so meritless as to invoke a frivolous litigation sanction.

The law firm filed a motion for reconsideration in the name of Kendrell Adams, believing that the trial court had failed to address the *Rule 4:50-1(f)* issue when the court decided the original motion. The law firm represented to the court that it believed the court had denied the original motion because of the conflict of interest between Saunders-Adams and the estate, and because no grounds existed warranting Myers' removal under *N.J.S.A. 3B:14-21*. Kendrell Adams sought to have the court address the *Rule 4:50-1(f)* issue, asserting that if the court found exceptional circumstances existed to justify vacating the order appointing Myers, the court should consider appointing herself as the substitute administratrix.

We do not agree that the filing of the motion for reconsideration on that basis supports the finding that the law firm filed the motion for an improper purpose. Indeed, the trial court's initial comments lent credence to the law firm's belief [*14] that the court had not addressed the *Rule 4:50-1* aspect on the original motion when the court stated it had denied the original motion

"[b]ecause there is a conflict of interest in my view between [Saunders-Adams] and the Estate, she was not permitted to become the [a]dministratrix. I also found that the current [a]dministratrix was doing a perfectly capable job and there was no allegation to the contrary, and that finding is on page 24 of the [April 24, 2009] transcript." Although the court actually addressed the *Rule 4:50-1* aspect of the original motion on April 24, 2009, a mistaken belief to the contrary does not warrant a frivolous litigation sanction.

What is more, we determine that counsel fee sanctions were not in accord with the procedural requirements of *Rule 1:4-8*. *Subsection (b)(1)* of the rule requires that a party seeking a counsel fee sanction against an attorney or pro se party "file a separate motion [for the sanction] describing a specific conduct alleged to be a violation of the *Rule*." *Toll Bros., supra, 190 N.J. at 69*. Additionally, prior to filing such a motion, the litigant seeking the sanction "is required to serve a written notice and demand upon the attorney or [*15] pro se party, which must include a request that the allegedly frivolous paper [or pleading] be withdrawn." *Ibid*. This notice is generally referred to as a "safe harbor" notice. *Ibid*. Failure to conform to the rule's procedural requirements will result in a denial of the request for a counsel fee sanction. *Franklin Sav. Account No. 2067, supra, 389 N.J. Super. at 281*. Here, the applications for frivolous litigation sanctions were included in cross-motions, not in a motion filed independent of other applications. Additionally, the record is devoid of evidence that Dourpatee Barker ever served a safe harbor notice upon the law firm as to the reconsideration motion.

Reversed.