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Law firms held liable for frivolous appeals

By: David E. Frank May 8, 2014

Civil litigators say two recent Rule 1:28 decisions show that the Appeals Court will hold law firms jointly and severally liable with their clients when frivolous appeals are filed.

In one of the cases, *Callahan v. Bedard* (Lawyers Weekly No. 81-543-14), a three-judge panel on April 24 ordered Maine law firm Bedard & Bobrow to pay a Hingham attorney legal fees and costs, finding that the firm "should have known equally well or better than the client of the meritless quality of the appeal."

Ten days earlier, a different panel decided *AvalonBay Communities, Inc. v. Hamilton* (Lawyers Weekly No. 81-503-14), and imposed the same punishment on D'Angelo & Hashem for appealing a lower court judge's determination that the North Andover firm had pressed forward with a meritless counterclaim and appeal.

According to James A. Vevone II of Worcester, attorneys traditionally have been reluctant to seek fees against fellow bar members "unless the situation is something that really rises to the level of bad faith and harassment. These kinds of decisions should send a strong message that this is the kind of punishment that's now going to be available if a lawyer doesn't have a legitimate basis for seeking a reversal and is just using an appeal as a method to gain leverage in a post-judgment settlement or to delay the effect of a judgment."

Vevone, who practices at Seder & Chandler, was not involved in Callahan or AvalonBay Communities but did handle *City of Worcester v. AME Realty Corp.*, et al., a 2010 Appeals Court decision in which Judge Mitchell J. Sikora Jr. held that the court had the authority to sanction a law firm if it should have known the claim had no basis in law.

"At the time of that decision, the appellate courts hadn't been so bold as to say sanctions should be awarded against counsel," Vevone said. "We hadn't really pushed that issue, but the court didn't take too kindly to what was going on and took it upon itself to come out and say that, in a case where it is egregious, an award of appellate fees against the attorney is warranted."

'Frivolous' action

Jason V. Owens, who represented the plaintiff in *Callahan*, said the Appeals Court in City of Worcester suggested it would be receptive to a request for appellate fees and costs under Massachusetts Rule of Appellate Procedure 25.

The conduct in *Callahan* warranted such a result, he said.

The defendant in *Callahan* had entered an agreement to transfer ownership of property in a trust to the plaintiff mother of his child and his daughter. He later tried to back out of the agreement, arguing in part that the Probate & Family Court lacked subject-matter jurisdiction to order such a transfer.

The Appeals Court called the argument "frivolous" and said the defendant's lawyers should have known their claims conflicted with the plain meaning of the statute and precedent.

Even though the facts were egregious, Owens said, he could not locate a single decision since City of Worcester in

which the Appeals Court had held a law firm responsible.

"I know it hasn't happened at the full court level of published opinions," he said. "Rule 1:28 decisions are sometimes a little harder to find. I did a thorough search, but couldn't locate any case in which they applied joint and several liability or made a law firm liable."

Owens, who practices at Hingham's Stevenson & Lynch, said a 1st U.S. Circuit Court of Appeals decision issued in 1996 permitted such a sanction. But Federal Rule of Appellate Procedure 38 requires the moving party to expressly ask for opposing counsel to share in the liability, he said.

"One of the reasons I think we haven't seen this very often after the court suggested in Worcester that they were open to it is that most attorneys aren't really aware it's even an option," he said. "The court made it clear that if you wanted joint and several liability, you had to actually ask for it, which we did, and you actually had to cite some of that federal authority in support of your request."

Owens declined to discuss Bedard & Bobrow's alleged misconduct but noted that a request for joint and several liability in general must include at least an inference that opposing counsel acted in bad faith.

"There probably must be an element that goes a little bit beyond just that the other side's legal argument was stretching it," Owens said. "If opposing counsel tightly briefs and carefully writes something that's a bit of a stretch, the court may award appellate fees. But they aren't going to punish the firm unless the court concludes there's more there."

In *Callahan*, the court noted that the firm, which is co-managed by the brother of the defendant, had wasted the resources of both the mother and the court.

Owens said law firms can create problems for themselves when they opt to appeal an adverse ruling without the use of outside counsel.

"It increases the chances that the Appeals Court may view this as a situation where a firm is just not accepting the authority of the trial court judge," he said. "They may look at it as more of a stubborn maneuver, which can create problems."

Chilling effect

Patrick Bedard, whose firm represented his brother in the case against Owens' client, said he "respectfully disagrees" with the court's conclusion that his appeal was frivolous.

"I stand by what we did and would have no problem holding up our brief and the issue to anybody. But they're the judges, and they get to make that decision."

Bedard said he believes the court did not like the fact that his firm represented his brother. He said he was involved in writing the brief, while his partner, David J. Bobrow, handled the oral argument.

"The fact that they sanctioned the firm and not David was, I believe, based on the fact that it was my brother," he said. "I'm not licensed in Massachusetts, and I don't plan to get licensed there, but David is. Normally you sanction an attorney for a fruitless appeal and not the law firm. But they bypassed the attorney and said, 'We looked at your brother's firm and concluded that we feel the brother was given bad advice.'"

Bedard said the court has set a dangerous precedent by telling a law firm it can be held jointly and severally liable if an appeal is deemed frivolous.

"It has had a chilling effect in this case, which means it will on others," he said. "I think it's dangerous for us to appeal further, even though we believe in our claim."

Steven D. Weil of Franklin, however, said he anticipates no chilling effect on the bar.

While rare at the Appeals Court, he said, Rule 11 sanctions have long been in place against lawyers at the lower court level. Rule 11 places an obligation on lawyers not to file suits in bad faith.

"The circumstances in which an attorney is going to be held responsible or partially responsible for the frivolous quality of the litigation or appeal is tied in closely to your obligation under Rule 11," Weil said. "Attorneys should read decisions like these and think twice about bringing cases or appealing them when there's no reasonable expectation of reversal or when there's not a good-faith basis for asserting the claims that are being asserted."

Weil, who practices at Doherty, Ciechanowski, Dugan & Cannon, represented the plaintiff in *AvalonBay Communities*. He said defense counsel from D'Angelo & Hashem should have known its counterclaim had no merit when a Superior Court judge held a two-day Daubert hearing and precluded its expert from offering testimony about the plaintiff's severe respiratory illness.

Even though the court found the counterclaim was meritless after the Daubert issue was resolved, the firm filed a motion for summary judgment that was granted on the eve of trial, Weil said.

"The last trial judge who touched the case was so angry at what he saw on the record that he invited me to apply for my attorneys' fees," Weil said. "No judge has ever invited me to bring an application like that."

Even after the Superior Court sanctioned D'Angelo & Hashem for its conduct in litigation that had then been pending for six years, the firm appealed.

"The bottom line is that cases like [*Callahan* and *AvalonBay Communities*] should emphasize that lawyers and litigants in civil cases ought to think twice before appealing cases they've lost where they really have no grounds for appeal," Weil said. "It's as simple as that."

Stephen L. D'Angelo, one of the law firm's attorneys involved in the case, did not return calls for comment.

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