



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 7, 2018

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Counsel for Plaintiff Hamid Fathi

Kevin S. Jaros, Esq.
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Counsel for Defendant Hagomer Nasir

Re: Hamid Fathi v. Hagomer Nasir
CL-2017-11581

Dear Counsel:

This case came before the Court on October 12, 2018 for a hearing on the Defendants' Motion for Sanctions Pursuant to Virginia Code § 8.01-271.1 and Plaintiff's Opposition. Having taken the Motion for Sanctions under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion granting Defendant's Motion for Sanctions.

BACKGROUND

First Case

This matter arises out of Plaintiff's Complaint for damages and injuries incurred resulting from Defendant Nasir's alleged assault, battery, and intentional infliction of emotional distress. Plaintiff was employed by Defendant DNS Family Market, LLC from February 2014 to June 3, 2014. Plaintiff filed the initial Complaint on May 25, 2016 ("First Case").

In the First Case, Plaintiff was represented by Katherine Martell and Lesley A. Zimmerman of First Point Law Group, P.C. The Complaint alleged that Defendant Nasir grabbed Plaintiff from behind the waist and pressed his body into Plaintiff's buttocks. Plaintiff alleged that as a result of Defendant Nasir's alleged conduct, he suffered mental anguish and was admitted to the psychiatric department of INOVA Fairfax Hospital Emergency Department for eight days. Plaintiff further alleged he continued his psychiatric and mental health treatment in outpatient care at the Woodburn Facility from July 2014 through October 2015.

This matter was set to be tried before a jury on February 21, 2017. During the course of discovery, Plaintiff's counsel filed an Amended Expert Witness Designation. Plaintiff designated the following providers and their expected testimony:

Dr. Kirsten Erika Rindal of INOVA Fairfax Hospital – Emergency Department. Plaintiff stated that “Dr. Rindal will testify to Plaintiff having suicidal ideation, depressive disorder, and psychoses. Dr. Rindal will further testify that Plaintiff noted no prior history of psychiatric problems. Dr. Rindal will testify that Plaintiff claimed sexual abuse at the hands of Defendant caused the above mental concerns, and that such sexual abuse could trigger such mental issues in Plaintiff.”

Dr. Aditi Malik of INOVA Fairfax Hospital – Psychiatry Department. Plaintiff stated that “Dr. Malik will testify that Plaintiff had suicidal, depressive, and delusional thoughts upon admission to the hospital, and that Lexapro and Zyprexa were administered for treatment of his depression and delusional thoughts respectively. Dr. Malik will testify that Plaintiff claimed sexual abuse at the hands of Defendant caused the above mental concerns, and that such sexual abuse could trigger such mental issues in Plaintiff.

Dr. Robert Strange of Fairfax – Falls Church CSB (Woodburn Facility). Plaintiff stated that “Dr. Strange will testify to Plaintiff's risk assessment including suicidal ideation and that Plaintiff was diagnosed with depression and an anxiety disorder. Dr. Strange will testify that Plaintiff claimed sexual abuse at the hands of Defendant caused the above mental concerns, and that such sexual abuse could trigger such mental issues in Plaintiff.”

On February 6, 2017, Ms. Martell issued witness subpoenas to be served via private process server on Dr. Rindal, Dr. Malik, and Dr. Strange to testify in the February 21, 2017 trial. On the day of trial, when no expert witnesses appeared, Plaintiff took a voluntary non-suit. As a result, Defendants moved for sanctions on February 24, 2017. Defendants alleged in their motion for sanctions that the subpoenas could not be served on one of the testifying experts and therefore could not establish causation. Plaintiff's opposition stated that while Dr. Strange could not initially be served, Plaintiff was able to locate Dr. Strange, and that “First Point Law spoke to Dr. Robert Strange's spouse and she stated that Dr. Robert Strange was in a medical facility due to an illness and unavailable.” Defendants' motion for sanctions was subsequently denied.

Second Case

On August 21, 2017, Plaintiff recommenced this lawsuit only against Defendant Hagomer Nasir, which is the present case before the Court (“Second Case”).¹ Plaintiff again

¹ Ms. Leslie A. Zimmerman did not sign the Complaint nor make an appearance in the Second Case.

alleged injuries and damages as a result of Defendant Nasir's assault, battery, and intentional infliction of emotional distress against Plaintiff. A trial date was set for September 4, 2018. Although Plaintiff did not file a designation of expert witnesses for the Second Case, Plaintiff did identify each expert he expected to testify at trial as well as the substance of the facts and opinions and a summary of the grounds for each opinion. Plaintiff again identified Dr. Rindal, Dr. Malik, and Dr. Strange in response to Defendant's interrogatories. Plaintiff's response to Defendant's Interrogatory No. 1 stated the following:

Dr. Kirsten Erika Rindal of INOVA Fairfax Hospital - Emergency Department. Plaintiff answered that "Dr. Rindal will testify to Plaintiff's depressive disorder, suicidal ideation, and psychoses. Dr. Rindal will testify that Plaintiff had no prior history of psychiatric problems, and that sexual abuse at the hands of the Defendant could and did trigger the above mental health issues."

Dr. Aditi Malik of INOVA Fairfax Hospital – Psychiatry Department. Plaintiff answered that "Dr. Malik will testify that Plaintiff had suicidal, depressive, and delusional thoughts upon admission, and that Lexapro an [sic] Zyprexa were administered for treatment of his depression and delusional thoughts respectively."

Dr. Robert Strange of Fairfax – Falls Church CSB (Woodburn Facility). Plaintiff answered that "Dr. Strange will testify to Plaintiff's risk assessment including suicidal ideation and that Plaintiff was diagnosed with depression and an anxiety disorder."

On August 22, 2018, Plaintiff's counsel issued witness subpoenas to be served via private process server on Dr. Rindal, Dr. Malik, and Dr. Strange to testify in the September 4, 2018 trial. On the day of trial, again no expert witnesses appeared, as well as the Plaintiff himself. Ms. Martell moved for a second nonsuit, but was denied and the case was dismissed with prejudice due to Plaintiff not being present in Court and Plaintiff being unable to proceed with evidence. Defendant's counsel then filed this instant motion for sanctions.

Defendant's counsel stated in its motion for sanctions that in the First Case, Plaintiff's counsel never spoke with the three doctors and that none of the doctors had agreed to serve as expert witnesses to testify that Plaintiff suffered mental health issues as a result of the alleged assault. In the Second Case, Defendants' counsel stated that the expert witnesses again did not appear and that Ms. Martell had stated that she "released" the three doctors from their witness subpoenas. During the sanctions hearing, and as similarly alleged in Defendants' motion for sanctions, Ms. Martell represented that both Dr. Rindal and Dr. Malik stated that they would not appear as they do not remember the details of their treatment of the Plaintiff since it was so long ago. Ms. Martell further admitted that other associates (such as Ms. Zimmerman) had only communicated with the doctors and that she never personally spoke with any of the doctors nor was she aware of what was said to other associates. Ms. Martell did not provide any contemporaneous notes or emails from associates or herself. She stated that her reliance that the three doctors would testify at trial was based on the fact that they were Plaintiff's treating physicians and on Plaintiff's medical records.

ANALYSIS

Virginia Code § 8.01-271.1 requires that, “every pleading, written motion, and other paper” filed on behalf of a represented party must be signed by at least one attorney of record in his individual name. Va. Code Ann. § 8.01-271.1 (2013). Section 8.01-271.1 states in pertinent part:

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it 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 (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

Under Section 8.01-271.1, if any of the three certifications are violated, the court “shall impose” an appropriate sanction upon the attorney, a represented party, “or both,” and such sanctions may include reasonable attorney’s fees. *Id.*; *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 105 (2012).

An objective standard of reasonableness is applicable when determining whether the “warranted by existing law” portion of Section 8.01-271.1 has been violated. *See Tullidge v. Board of Supervisors*, 239 Va. 611, 614 (1990); *see Martins*, 283 Va. at 107 (“Trial court did not abuse its discretion in imposing sanctions against the plaintiffs because the court correctly applied an objective standard of reasonableness in concluding that the facts of the case could not support a reasonable belief that the plaintiffs’ claims alleging: (1) interference with contract expectancy; (2) conspiracy to harm in business; and (3) defamation; along with the damages sought, were well grounded in fact or law, as required by § 8.01-271.1”). “It must be shown that a competent attorney, after reasonable inquiry, could not have formed a reasonable belief that [the defending party’s] contention was warranted by existing law.” *Tullidge*, 239 Va. at 614. If there any doubts, it should be resolved in favor of the party defending against the motion for sanctions. *Id.* However, the defending party should be appropriately punished if it’s clear that his or her claim had no chance of success under existing law. *Id.*

APPLICATION

The issue is whether Plaintiff’s counsel had a reasonable objective basis for designating the three doctors as expert witnesses in the Second Case after performing a reasonable inquiry that was well grounded in fact and warranted by existing law.

Ms. Martell asserts that she went through hundreds of pages of Plaintiff’s medical documents. She further asserts that the three doctors actually diagnosed and treated the Plaintiff, the medical records supported a reasonable basis for her to believe that they would testify that Plaintiff had no prior history of psychiatric problems, and that sexual abuse at the hands of the Defendant Nasir could and did trigger the alleged mental health issues. During the sanctions hearing, Ms. Martell submitted into evidence Plaintiff’s medical records (as Plaintiff’s Exhibit 1) from Dr. Strange, Dr. Malik, and Dr. Rindal. Ms. Martell admitted that although Plaintiff’s medical records do not explicitly state the words “in my opinion,” she argued that the cumulative effect of the doctors’ notes comprises their opinions.

In reviewing Plaintiff's medical records, the Court notes that while the medical records do reference the Plaintiff's allegations of Defendant Nasir's sexual assault, it is clear that the doctors do not causally connect Defendant Nasir's alleged assault to Plaintiff's injuries. Instead, the three doctors referenced the allegations of sexual assault to describe why the Plaintiff was admitted to the hospital or is a transcription of Plaintiff's statements.

Even though the medical records address the alleged sexual assault, not one of the three doctors rendered an opinion as to whether Plaintiff's injuries were caused by Defendant Nasir's alleged conduct.² During the sanctions hearing, Ms. Martell admitted that she did not speak with any of the three doctors. Ms. Martell stated that other associates such as Leslie A. Zimmerman, who did not make an appearance in the second case, communicated with the doctors although Ms. Martell could not recall what Ms. Zimmerman said.

While Ms. Martell may initially have had a reasonable objective basis to believe that the three doctors would testify at trial during the First Case, Ms. Martell was put on notice at the conclusion of the First Case that none of the doctors were willing to testify as an expert witness. Without evidence of any further development, Ms. Martell recommenced the lawsuit. Even after the doctors' non-appearance in the First Case, Ms. Martell again still identified and served subpoenas on the same three doctors as expert witnesses without ever speaking with them. Although Ms. Martell stated that counsel extensively interviewed Plaintiff and reviewed two hundred pages of his medical records, no reasonable inquiry was made as to whether any of the doctors would testify to their treatment of Plaintiff or offer their expert opinion to Plaintiff's diagnosis to include causation testimony. It is apparent that Ms. Martell solely relied on Plaintiff's medical records and that as Plaintiff's treating physicians, they could testify at trial.

Without further inquiry, the medical records alone are unclear as to whether Plaintiff's injuries and damages were causally connected to Defendant Nasir's actions. Without the testimony of experts, it is unlikely that Ms. Martell would have been able to prove Plaintiff's injuries and damages. In light of the events that transpired in the First Case, the onus was on Plaintiff's counsel to conduct a reasonable inquiry as to whether the experts that she designated through discovery responses and the issuance of subpoenas would testify at trial, or in the very least, to communicate with them. It thus becomes evident that Ms. Martell lacked a reasonable objective basis to identify the doctors as expert witnesses who would testify to Plaintiff's treatment and proffer their opinion as to his diagnosis during trial in the Second Case. Ms. Martell's lack of a reasonable objective basis becomes even more obvious when considering that Dr. Strange was again identified and served with a witness subpoena although she was undeniably aware that he was unavailable to testify at trial due to an illness.³ Therefore, Ms. Martell's conduct in the Second Case was not a reasonable inquiry that was well grounded in fact and warranted by existing law, nor was made in good faith.

² The Court is not opining as to Plaintiff's allegations of the sexual assault, but as to whether it is clear from the medical records that the doctors are rendering an opinion as to the cause of Plaintiff's condition.

³ It is indisputable that Ms. Martell and First Point Law were aware that Dr. Strange was in a medical facility due to an illness prior to the commencement of the second lawsuit and the second issuance of the witness subpoenas. It is unclear to this Court why Dr. Strange was again designated as an expert witness and again served with a subpoena for the Second Case.

The Court reviewed the Defendant's attorney fees affidavit and will award the Defendant only the time allotted to preparing for the Plaintiff's experts for the Second Case and any fees required to prepare and present the Motion for Sanctions.

CONCLUSION

The Court does not take this issue lightly and fully understands the long term implications of this ruling. Trials are fluid and events happen that can alter a case and trial strategy may demand unconventional tactics. However, an attorney, an officer of the Court, must do more than what was presented in this case. The case represents a blatant disregard of the responsibility of our profession to do the proper inquiry to ensure what is represented in pleadings and responses is based on at least a modicum of fact; to do otherwise would make motions practice worthless.

Defendant's Motion for Sanctions Pursuant to Virginia Code § 8.01-271.1 is granted and Plaintiff's counsel be ordered to pay \$9,912.50 in attorneys' fees. To the extent necessary, the Court's September 19, 2018 Order is vacated. The Court requests Defendant's Counsel to prepare an order reflecting the Court's ruling. Plaintiff's counsel is ordered to pay the \$9,912.50 in attorneys' fees within 90 days from the date of the entered Order.



Penney S. Azcarate
Fairfax County Circuit Court

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