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IN THE

Supreme Court of Virginia

RECORD NO. 150693

ENVIRONMENT SPECIALIST, INCORPORATED, t/a
HOWELL'S HEATING AND
AIR CONDITIONING CO.,

Appellant,

v.

WELLS FARGO BANK NORTHWEST, N.A., as
TRUSTEE of the GSA FREDERICKSBURG FBI
2013 PASS-THROUGH TRUST,

Appellee.

REPLY BRIEF OF APPELLANT

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 150693

ENVIRONMENT SPECIALIST, INCORPORATED,
t/a HOWELL'S HEATING AND AIR CONDITIONING CO.,

Plaintiff/Appellant,

v.

WELLS FARGO BANK NORTHWEST, N.A., As TRUSTEE of
the GSA FREDERICKSBURG FBI 2013
PASS-THROUGH TRUST,

Defendant/Appellee.

On Appeal from the
Circuit Court of Stafford County

REPLY BRIEF OF APPELLANT

INTRODUCTION

The Brief of the Appellee asserts that the Appeal awarded herein to Environment Specialist, Incorporated, t/a Howell's Heating and Air Conditioning Co. ("Howells") against Wells Fargo Bank Northwest, N.A., as Trustee of the GSA Fredericksburg FBI 2013 Pass-Through Trust ("Wells Fargo") must be denied on the grounds that:

(1) The record provided by Howells to this Court is insufficient for the Court to evaluate Howell's Assignment of Error; and

(2) The trial court did not err in awarding sanctions because Howell's Motion for Default Judgement was filed for an improper purpose.

Each of these grounds will be addressed seriatim.

ARGUMENT AND AUTHORITIES

A. The Record on Appeal is Sufficient for this Court to Evaluate the Error Assigned.

Howell's has asserted that the trial court erred by awarding sanctions against its counsel for his failure to voluntarily agree to extend the time in which counsel for the Wells Fargo was to file its Answer, as required by Rule 3:8 (a) of the Rules of the Supreme Court of Virginia. Counsel for Wells Fargo asserts that this appeal must be dismissed because Howells has failed "…to provide the basis for the trial court's ruling to this Court…"[1] That assertion is both factually and legally without merit. The record before this Court as reflected in the Joint Appendix establishes that pursuant to Rule 3:8 of the Rules of the Supreme Court of Virginia, that Wells Fargo was to file its Answer in the trial court not later than November 21, 2013, and that it failed to do so. Recognizing its deficiency,

[1] Brief of the Appellee at page 4

Wells Fargo filed its Motion for Leave to File Answer Out of Time[2]; and in response, Howells filed its Motion for Default Judgement against Wells Fargo[3]. On February 3, 2014 the trial court entered its order,[4] granting Wells Fargo's Motion to File its Answer Out of Time and sanctioned counsel for Howells for its failure to voluntarily agree to extend the time in which Wells Fargo was to answer. The basis for the award of sanctions is clearly set forth in the Court's Final Order of February 18, 2015:

> Upon a review of the papers in the file and hearing argument by counsel the Court granted Wells Fargo's Motion to file its Answer beyond the time permitted by Rule 3:8, and awarded attorney's fees and costs against counsel for Howell's for its failure to voluntarily extend the time in which Wells Fargo might file its Answer.[5]

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[2] Joint Appendix at page 37
[3] Joint Appendix at page 53
[4] Joint Appendix at 58
[5] Final Order, Joint Appendix pages 63-64

The trial court has informed us that the basis for its award of sanctions is that Howells failed to voluntarily extend the time in which Wells Fargo might file its Answer. Counsel for Wells Fargo asserts that more is required; specifically, that the rationale for the trial court's award of sanctions must be contained within the record. The flaw in that argument is addressed in the decision of *McNally v. Ray*, 275 Va. 475 (2008). In *McNally*, this Court had before it the order prepared by the trial court awarding sanctions against Mr. McNally. Upon its review of the trial court's order, this Court stated:

> The circuit court's order that imposed the sanctions against McNally was based upon the circuit court's conclusion that McNally filed a witness and exhibit list when he did not intend to try the case. There is simply nothing in the record before this Court that supports this finding. There is no evidence in the record that McNally's act of filing the witness and exhibit list was not well grounded in fact. There is nothing in the record before this Court that supports a

> finding that the witness and exhibit list was interposed for an improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation.... [citation removed] Simply stated, the record before this Court is devoid of any evidence that supports the circuit court's award of sanctions. McNally's act of filing the witness and exhibit list, as required by the circuit court's own pretrial order, did not violate Code § 8.01-271.1. [Emphasis Added] *McNally,* at page 482.

This Court placed the burden of supporting the award of sanctions on the Judge in the trial court. The trial court's failure to include in its order granting sanctions the evidence supporting its conclusion that the pleading was filed for an improper purpose made it impossible for this Court to determine whether sanctions were warranted. As a result, the order of sanctions was reversed. It is not Howell's burden to produce a record that sets forth the trial court's rationale in its award of sanctions; that burden falls to the trial court.

The trial court was provided ample opportunity to expand upon the language of the Final Order. Within the time permitted under Rule 5:11 under the Rules of the Supreme Court of Virginia, counsel for Howells filed its Written Statement of Lieu of Transcript.[6] In response thereto, counsel for Wells Fargo filed its Objection to Written Statement.[7] Both of these pleadings are made part of the Record forwarded by the trial court to this Court, but neither pleading is signed by the trial court. Rule 5:11 (g) provides that upon the filing of these pleadings with the trial court, that the trial court shall have ten (10) days in which to take one or more of the following actions:

> (1) overrule the objections; or
> (2) make any corrections that the trial judge deems necessary;
> (3) include any accurate additions to make the record complete; or
> (4) certify the manner in which the record is incomplete; and

[6] Record from the trial court, at page 118
[7] Record from the trial court, at page 125

> (5) sign the transcript or written statement.
>
> At any time while the record remains in the office of the clerk of the trial court the trial judge may, after notice to counsel and hearing, correct the transcript or written statement.[8]

The trial court failed to take any of the actions required by the Rule. Accordingly we are left with the description of the trial court's actions as set forth in the court's order of February 3, 2014[9] and the Final Order of February 18, 2015[10], which counsel for Wells Fargo endorsed "Seen and Not Objected To". If the basis for the trial court's decision to award sanctions is not substantiated by the orders which it has entered; then the trial court's award of sanctions must be reversed.

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[8] Rule 5:11 (g) Rules of the Supreme Court of Virginia
[9] Joint Appendix at page 58
[10] Joint Appendix at page 62

B. A Motion for Default Judgement Filed Against a Defendant That is Admittedly in Default is Not a Pleading Filed For an Improper Purpose.

In support of its assertion that the trial court's award of sanctions against Howells should be affirmed, counsel for Wells Fargo states:

> In this case, counsel for Wells Fargo requested an extension of a few days to file its answer to the complaint…. Nevertheless, Howells refused to consent, opposed Wells Fargo's Motion for Leave, and filed a Motion for Default Judgement against Wells Fargo. Howells' filing of a motion that it knew, or should have known, would be denied caused unnecessary delay and needlessly increased the cost of litigation by forcing Wells Fargo to appear at a contested hearing to argue the motion. [11] [Emphasis Added]

Counsel's assertion fails to comport with the standard for determining when conduct is sanctionable.

> In making that review, we apply an objective standard of reasonableness in order to determine whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was warranted by existing law

[11] Brief of Appellee at page 8

> or a good faith argument for the extension, modification, or reversal of existing law. *Nedrich v. Jones,* 245 Va. 465, 471-72 (1993).

The filing of a Motion for Default Judgement against a defendant that is admittedly in default is clearly a pleading well-grounded in fact and warranted by existing law; specifically, Rule 3:8 of the Rules of the Supreme Court of Virginia. Wells Fargo asserts that a pleading well-grounded in fact and warranted by existing law may nevertheless be a pleading filed for an improper purpose if it fails to rise the level of professional courtesy which counsel for Wells Fargo believes it is entitled to. That assertion has no legal basis, and is at the very heart of this appeal. As lawyers we rely upon the belief that when we conduct ourselves within the express provisions of the Rules of this Court, that our actions may not be deemed to be for an improper purpose. There are no exceptions to the provisions of Rules 3:8 and 3:19 for professional

courtesy. If such an exemption is to be adopted, it must be adopted by this Court and spread upon the record book in order that all lawyers may be made aware of it and conform their conduct accordingly. Otherwise the bar is subject to each trial court's perception of the extent to which professional courtesy should take precedence over the Rules of this Court. At that point the Rules become meaningless.

A recurring theme in Wells Fargo's argument that the trial court's award of sanctions should be upheld is its assertion that counsel for Howells knew, or should have known, that its Motion for Default Judgement "would be denied"[12], or alternatively, that the Motion "was certainly not going to be granted".[13] The trial court's actions in this case do not support such an assertion. The trial court granted Howell's Motion for Default Judgement[14] against Lawyers Title Realty

[12] Brief of the Appellee at page 8
[13] Brief of the Appellee at page 12
[14] Joint Appendix at page 60

Services, Inc., Trustee, the Trustee named in the Deed of Trust under which Wells Fargo claims to be the beneficiary. If the application of Rule 3:8 is proper as to defendant Lawyers Title Realty Services, Inc., Trustee, how may it be said to be filed for an improper purpose when sought to be applied against Wells Fargo. This type of double standard is precisely what the Rules seek to prevent.

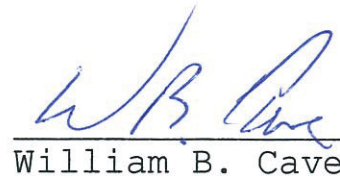
CONCLUSION

By its award of sanctions against counsel for Howell's refusal to voluntarily agree to extend the time in which counsel for Wells Fargo might file its Answer, the trial Court has abused its discretion and the Order entered on February 3, 2014, awarding sanctions, must be reversed.

Respectfully Submitted,

ENVIRONMENT SPECIALIST, INCORPORATED,
t/a HOWELL'S HEATING AND AIR CONDITIONING CO.,

By Counsel



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CERTIFICATE

This Certificate acknowledges compliance with Rule 5:26 of the Rules of the Supreme Court of Virginia:

1. The name of the Appellant herein is Environment Specialists, Incorporated, t/a Howell's Heating & Air Conditioning Co. Counsel for the Appellant is:

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2. The name of the Appellee is Wells Fargo Bank Northwest, N.A., As Trustee of the GSA Fredericksburg FBI 2013 Pass-Through Trust. Counsel for the Appellee is:

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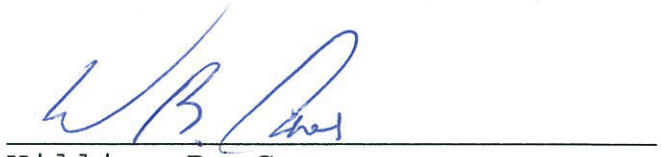
3. Rule 5:26 has been complied with and the correct number of copies of the Reply Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia and a true copy of the Reply Brief has been emailed and one (1) copy of the Reply Brief of Appellant has been forwarded by United States Mail to counsel for Wells Fargo Bank Northwest, N.A., As Trustee, at the address listed herein on this 3rd day of December, 2015.



William B. Cave