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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.

OPENING 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

BRIEF OF APPELLANT

ASSIGNMENT OF ERROR

The trial court erred in the following respect:

By awarding sanctions against Counsel for the Plaintiff/Appellant for his failure to voluntarily agree to extend the time in which Counsel for the Defendant/Appellee was to file its Answer, as required by Rule 3:8 (a) of the Rules of the Supreme Court of Virginia.

Counsel for the Plaintiff/Appellant preserved the issue for appeal by his written objection on the Order awarding sanctions which was entered by the trial Court on February 3, 2014[1], and in the Final Order entered on February 18, 2015[2].

NATURE OF THE CASE

In this brief, the parties will be referred to by the same designations which they held in the trial court.

This proceeding is one for the enforcement of a mechanic's lien filed in the office of the Clerk of the Circuit Court of Stafford County, Virginia, on July 31, 2013. On October 21, 2013, and within the six (6) month period permitted under Virginia Code §43-17, a "Complaint to Enforce Mechanic's Lien"

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[1] Joint Appendix at page 59
[2] *Id.* at page 64

(the "Complaint")[3] was filed in the office of the Clerk of the Circuit Court of Stafford County Virginia.

The parties to the proceeding in the trial Court are the Plaintiff/Appellant, Environment Specialist, Incorporated, t/a Howell's Heating & Air Conditioning Co. ("Howell's"), a licensed Virginia contractor that purchased and installed the heating, ventilation, and air conditioning system in a commercial office building at 205 and 225 Solomon Drive, Stafford County, Virginia (hereinafter the "Property")[4].

Defendants Stafford Office One, LLC and Stafford Office Two, LLC, were the owners of the Property at the time Howell's performed its work on the Property and filed its mechanic's lien[5]. Between the time that the mechanic's lien was filed and the Complaint was filed. Stafford Management I, LLC, became the owners of the Property by quit-claim Deed dated March 21, 2013, and recorded April 3, 2013, as Instrument No. LR130008418[6]. The Stafford entities are jointly referred to herein as the "Owners".

Defendant, Lawyers Title Realty Services, Inc., Trustee

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[3] Joint Appendix at page 1
[4] Contract, Exhibit A to the Complaint, Joint Appendix at page 10
[5] Complaint, paragraph 4, Joint Appendix at page 2
[6] *Id.*

(the "Trustee") is the Trustee named in that certain Deed of Trust, Security Agreement, Assignment of Leases and Rents, and Fixture Filing Statement dated March 25, 2013, and recorded in the office of the Clerk of Circuit Court of Stafford County on April 3, 2013, as instrument number LR130008419[7].

Defendant/Appellee, Wells Fargo Bank Northwest, N.A. As Trustee of the GSA Fredericksburg FBI 2013 Pass Through Trust ("Wells Fargo") is the beneficiary named in the Deed of Trust[8].

MATERIAL PROCEEDINGS BELOW

The Complaint was served on the Registered Agent for Stafford Office One, LLC, on November 1, 2013, requiring that its Answer be filed no later than November 22, 2013. The Complaint was served on the Registered Agent for Stafford Office Two, LLC, on October 25, 2013, requiring that its Answer be filed not later than November 15, 2013. The Complaint was filed on the Registered Agent for Stafford Management I, LLC, on October 25, 2013, requiring that its Answer be filed no later than

[7] Complaint, paragraph 5, Joint Appendix at pages 2 and 3
[8] *Id.* paragraph 6, Joint Appendix at page 3

November 15, 2013. The Complaint was served on the Registered Agent for Lawyers Title Realty Services, Inc., Trustee, on October 29, 2013, requiring that its Answer be filed no later than November 19, 2013. The Complaint was served on Wells Fargo by service on the Secretary of the Commonwealth. The "Certificate of Compliance" was subsequently filed by the Secretary of the Commonwealth with the Clerk of the Circuit Court of Stafford County. The record in the Clerk's office reflects that Wells Fargo was served on October 30, 2013. Accordingly, Wells Fargo was required to file its Answer not later than November 21, 2013.

None of the Defendants filed responsive pleadings within the time permitted under Rule 3:8 of the Rules of Supreme Court of Virginia.

Prior to November 21, 2013, counsel for the Owners endorsed and delivered to counsel for Howell's a "Consent Order" acknowledging the contract balance due to Howell's, the validity of the mechanic's lien filed by Howell's, and consenting to the entry of the "Consent Order" of judgement by the Court if all amounts due to Howell's were not paid on

or before December 19, 2013[9]. No part of the balance due Howell's was paid on or before December 19, 2013; and on December 20, 2013, counsel for Howell's forwarded the "Consent Order" to the trial Court for entry. The "Consent Order" granting joint and several judgement against the Owners was entered by the Court on January 2, 2014[10].

Prior to November 21, 2013, the Trustee under the Deed of Trust had filed no responsive pleading and was in default.

On November 21, 2013, at 2:45 pm, counsel for Wells Fargo emailed counsel for Howell's and asked that Howell's agree to extend the time in which Wells Fargo might file its Answer. Wells Fargo's Answer was due that day. A copy of the email from counsel for Wells Fargo is attached to Wells Fargo's Motion for Leave to File Answer Out of Time[11]. After conferring with his client, counsel for Howell's advised counsel for Wells Fargo that he could not agree to extend the time in which Wells Fargo might file its Answer.

As a result, on Thursday, November 21, 2013, counsel for Wells Fargo forwarded to the Clerk of the Circuit Court of

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[9] Consent Order, Joint Appendix at page 50
[10] *Id.* Joint Appendix at page 51
[11] Motion for Leave to File Answer Out of Time, Joint Appendix at page 40

Stafford County its Motion for Leave to File Answer Out of Time[12]. On Monday, November 25, 2013, counsel for Wells Fargo filed its Answer with the Clerk[13]. On December 19, 2013, counsel for Wells Fargo filed its Notice of Hearing on its Motion for Leave to File its Answer Out of Time. In response, counsel for Howell's filed its Motion for Default Judgement against the Trustee, and Wells Fargo.

A hearing on the cross motions was held on February 3, 2014. At the hearing, the Court acknowledged its prior receipt of the "Consent Order" and advised the parties that, that Order had been entered on January 2, 2014[14]. The Court granted the Plaintiff's Motion for Default Judgement against the Trustee. That Order was entered on February 7, 2014.[15] The Court also entered its Order extending the time in which Wells Fargo might file its Answer, and granting sanctions in the amount of $1,200.00 in favor of Wells Fargo and against counsel for Howell's for his failure to voluntarily agree to extend the time in which Wells Fargo might file its Answer[16].

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[12] *Id.* at page 37
[13] Answer, Joint Appendix at page 43
[14] Consent Order, Joint Appendix at page 50
[15] Order, Joint Appendix at page 60
[16] Order granting Motion for Leave to File an Answer Out of Time, Joint Appendix at page 58

Prior to the date set for trial, March 3, 2015, the Owners paid the amount due to Howell's and on February 18, 2015, a Final Order was entered dismissing the Complaint with prejudice and preserving Howell's right of appeal on the issue of sanctions[17].

On March 18, 2015, Howell's filed its Notice of Appeal with the Clerk of the Circuit Court of Stafford County, and on April 10, 2015, Howell's filed with the Clerk of the trial Court a "Written Statement in Lieu of Transcript", and "Notice of Presentation of Written Statement" as required by Rule 5:11 (e) of the Rules of the Supreme Court of Virginia.

STATEMENT OF FACTS

The facts relevant to the error on appeal are set forth in the Final Order entered on February 18, 2015, and are presented here verbatim:

> "On February 3, 2014, Howell's, by counsel, and Wells Fargo, by counsel, appeared before the Court on Wells Fargo's Motion for Leave to File its Answer out of Time and Howell's Motion for Default Judgement against Wells Fargo for its failure to file responsive

[17] Final Order, Joint Appendix at page 62

pleadings within the time permitted under Rule 3:8 of the Rules of the Supreme Court of Virginia. 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. The Court's award of sanctions against counsel for Howell's is set forth in its Order dated February 3, 2014, which directed the payment of $1,200.00 to counsel for Wells Fargo to be made within thirty (30) days. Prior to the Court's entry of its Order, counsel for Howell's noted its written objection to the Court's ruling on the Order. By letter dated February 28, 2014, counsel for Howell's forwarded to counsel for Wells Fargo its check in the amount of $1,200.00 annotated "Paid Under Protest." Counsel for Howell's objection to the Court's Order of February 3, 2014 as it relates to the award of sanctions is noted and preserved for appeal."[18] [Emphasis Added].

[18] Final Order, Joint Appendix, pages 63 and 64

AUTHORITIES & ARGUMENT

In the decision of *McNally v. Rey,* 275 Va. 475, 659 S.E. 2nd 279 (2008), this Court established the limits of the authority of a circuit court to impose as a sanction, an award of Attorney's fees.

> Initially, we observe that we are unable to discern from the circuit court's order whether the court imposed sanctions authorized by Code § 8.01-271.1 or some other source of authority. We note, however, that this Court has previously held that a circuit court does not have inherent authority to impose as a sanction an award of attorney's fees and costs:
>
> "In the absence of authority granted by a statute, such as Code § 8.01-271.1, or a rule of court, such as Rule 4:12, … a trial court's inherent power to supervise the conduct of attorneys practicing before it and discipline an attorney who engages in misconduct does not include the power to impose as a sanction an award of attorney's fees and costs to the opposing parties." *Nusbaum v. Berlin,* 273 Va. 385, 400-01, 641 S.E.2d 494, 502 (2007) *McNally* at pages 480 and 481.

There is no reference to a statute, rule, or other source of authority in the circuit court's Order entered on February 3, 2014,[19] or in the Final Order.[20] The Final Order states:

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[19] Joint Appendix at page 58
[20] *Id.* at page 62

> The Court's award of sanctions against counsel for Howell's is set forth in its Order dated February 3, 2014, which directed the payment of $1,200.00 to counsel for Wells Fargo to be made within thirty (30) days.[21]

The circuit court's use of the word "sanctions" infers a reliance upon Va. Code § 8.01-271.1 which 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. [22]

This Court has established an abuse of discretion standard in its review of the award of sanctions under Virginia Code Section 8.01-271.1.

> "We apply an abuse-of-discretion standard in reviewing a trial court's award or denial of a sanction." *Id.* [citing *Oxenham v. Johnson,* 241 Va. 281, 402 S.E.2d 1, (1991)] at 287, 402 S.E.2d at 4. 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 or a good faith argument for the extension,

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[21] *Id.* at pages 63 and 64

[22] Virginia Code §8.01-271.1

> modification, or reversal of existing law. *Nedrich v. Jones,* 245 Va. 465, 471-72, 429 S.E.2d 201, 204 (1993). *Gilmore v. Finn,* 259 Va. 448, 466, 527 S.E.2d 426, 435-36 (2000).

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. Insisting that a defendant file its Answer within the time required by Rule 3:8 of the Rules of the Supreme Court of Virginia, may not be said to be an improper purpose. The trial Court's award of sanctions appears to be founded on its belief that counsel's failure to act in a collegial manner caused a "…needless increase in the cost of litigation".[23] That rationale was rejected by this Court in *McNally.* This Court reviewed the following language contained in the circuit court's Order that imposed sanctions against Mr. McNally:

> "the conduct of Mr. McNally in filing pleadings[24] indicating an intent to try the case while in fact knowing that bankruptcy was to be filed was not in good faith and was for an improper purpose including to needlessly increase the cost of litigation to the Plaintiffs. As a result, Plaintiffs incurred unnecessary legal and expert fees and costs in

[23] Virginia Code §8.01-271.1

[24] The pleadings filed by Mr. McNally were the witness & exhibit lists required by the pretrial order

preparing the case for trial." *McNally* at 479.

This Court held that the filing by Mr. McNally of witness and exhibit list, pleadings required by the pretrial order, was not in bad faith or for an improper purpose; and therefore, not sanctionable. The filing of a Motion for Default Judgement against a defendant that is admittedly in default may not therefore be characterized as done in bad faith, or for an improper purpose. In the award of sanctions, the standard of conduct is Va. Code § 8.01-271.1, not a subjective notion of professional civility. This is especially true in this case where counsel is being sanctioned for acting in a manner permitted by the Rules of this Court.

> (a) Failure Timely to Respond. – A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default. A defendant in default is not entitled to notice of any further proceedings in this case, including notice to take depositions, except that written notice of any further proceedings shall be given to counsel of record, if any. The defendant in default is deemed to have waived any right to trial of issues by jury[25].

As attorneys admitted to the Bar of this Court we rely on the Rules of this Court as the "Rule of Law".

[25] Rule 3:19 of the Rules of the Supreme Court of Virginia.

> The Rules are the guide posts within which we are to conform our professional conduct. If circuit courts are permitted to sanction conduct which is permitted by the Rules of this Court the foundational stability which the Rules are designed to provide to the members of the Bar is undermined.
>
> In addition to creating an air of uncertainty on an attorney's reliance upon the Rules of this Court, the circuit court's ruling also impinges on our ethical obligations to our clients.

Counsel has an ethical obligation to advocate to the fullest benefit of his client's cause. The ethical requirements of Virginia Code §8.01-271.1 are incorporated in Rule 3.1 of the Virginia Rules of Professional Conduct:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[26]

The official comment to the Rule guides the attorney in determining the bounds of advocacy.

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[26] Part 6, § II, Rule 3.1, Rules of the Supreme Court of Virginia, Page 718

> [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.[27] [Emphasis Added]

A refusal to voluntarily agree to extend the time in which Wells Fargo might file its Answer, is clearly within the limits that an advocate may proceed, and counsel has an ethical obligation to advocate the imposition of Rule 3:8 for the fullest benefit of his client.

To advocate the enforcement of the time limits of Rule 3:8 was ethically required in this case where all of the Defendants were in default, and the Owners had entered into a Consent Order of Judgement. If the trial Court had denied Wells Fargo's Motion to extend its time, the litigation for all practical purposes would have been over.

CONCLUSION

By its award of sanctions against counsel for the Plaintiff/Appellant for his refusal to voluntarily agree to extend the time in which counsel for the Defendant/Appellee,

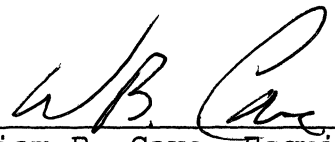
[27] *Id.* Page 718

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. A copy of the Brief of Appellant and the Joint Appendix has been emailed as stated above and one (1) copy of the Brief of Appellant and the Joint Appendix have been forwarded by Federal Express to counsel for Wells Fargo Bank

Northwest, N.A., As Trustee, at the address listed herein on this 28th day of October, 2015.

William B. Cave