

Circuit Court for Baltimore County
Case No. 03-C-08-009058

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2905

September Term, 2018

RUSSELL MIRABLE

v.

NANCY LEITER

Berger,
Nazarian,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from an Order of the Circuit Court for Baltimore County requiring Russell Mirabile, Appellant, to pay attorney’s fees and expenses in the amount of \$151,631.50 to Nancy Leiter, Appellee. Mirabile and Leiter were partners in Liberty Mobile Home Park Partnership and sought to dissolve their partnership in 2008. In 2010, both parties signed a Settlement Agreement, which was incorporated into a Consent Order by the circuit court. Mirabile refused to abide by the Settlement Agreement and challenged the Agreement by filing numerous nonmeritorious motions from 2010 through 2019. In 2019, pursuant to Maryland Rule 1-341, the circuit court awarded Leiter attorney’s fees and expenses in the amount of \$151,637.50.

Mirabile presents a single issue for our review, which we have separated into two issues:

1. Whether the trial court was clearly erroneous when it found that Mirabile’s legal claims and motions were made in bad faith and/or without substantial justification.
2. Whether the court abused its discretion when it awarded attorney’s fees and costs incurred by Leiter.

For the reasons stated herein, we affirm the judgment of the Circuit Court for Baltimore County.

FACTS AND PROCEDURAL HISTORY

In 1993, Mirabile and Leiter’s mother passed away, leaving them joint title to Liberty Home Mobile Park (“Liberty”). Leiter and Mirabile became partners in Liberty Home Mobile Park Partnership, which owned Liberty as well as another property in Baltimore County and additional properties in Baltimore City (the “Ancillary Properties”).

Due to disagreements between the two siblings, Leiter and Mirabile wished to dissolve their partnership. The parties were unable to agree on terms for dissolution on their own, prompting Leiter to file a Complaint and move for a temporary restraining order and preliminary injunction against Mirabile in 2008. Leiter additionally requested for an accounting of the partnership. A four-day trial was held in November of 2010. The circuit court found Leiter to be a “very credible witness” and further found that Mirabile was not “believable in hardly any respect.” Moreover, the trial court found that Mirabile “was not credible, he was evasive in answering questions.”

On November 19, 2010 the trial court determined that Leiter was entitled to \$147,000.00 for Mirabile’s failure to account to the partnership for certain rents associated with partnership property. The court further awarded Leiter \$168,004.12 in income associated with one partnership property, and \$4,800.00 associated with another property. The court appointed a trustee for the purpose of winding up the affairs of the partnership and ordered Mirabile to attend anger management classes.

On November 22, 2010, both Mirabile and Leiter signed a Settlement Agreement, which provided for Leiter to buy Mirabile’s interest in the partnership and a dissolution of their partnership. The Agreement provided that Leiter would purchase Mirabile’s interest in the partnership for \$1,500,00.00, which included the properties associated with Liberty, certain Ancillary Properties, as well as one parcel owned solely by Mirabile. Leiter was to

pay Mirabile \$60,000.00 within ten business days of the signing of the Agreement and \$1,440,000.00 at the time of closing.¹

Pursuant to the Agreement, closing was to occur on or before March 24, 2011. Closing would be extended for acts of force majeure or acts by Mirabile to delay closing or financing. In the event that Leiter failed to close within the time period set forth in the Agreement, the decision of the circuit court was to take effect. On November 23, 2010 Mirabile executed an Irrevocable Power of Attorney to Kevin Keene, Esquire, as his agent for the real property transactions associated with the Settlement Agreement and to convey certain personal and business interests defined in the Settlement Agreement.

The Settlement Agreement was entered as a Consent Order by the circuit court on December 1, 2010. Leiter, despite applying to 49 financial institutions, was unable to obtain financing by the closing date specified in the Settlement Agreement. On April 14, 2011, several weeks after the closing date, Harford Bank approved her request for a loan in the amount of \$1,100,000.00 and a line of credit for \$400,000.00.² Mirabile, however, refused to extend the closing date.

From 2011 through 2018, Mirabile refused to abide by the terms of the Settlement Agreement and challenged the Agreement through various motions and appeals. On

¹ The Agreement did not contain a contingency for financing.

² Leiter applied for and obtained financing six times between 2011 and 2017. Each time she was required to pay extensive fees associated with the application and approval of the financing.

April 29, 2011 Mirabile filed a “Motion for Appropriate Relief,”³ seeking appointment of a trustee for the sale of the real property associated with the partnership. On May 17, 2011, Leiter filed an opposition to Mirabile’s motion and a “Motion to Enforce Settlement Agreement.” Mirabile’s motion was denied and Leiter’s motion was granted. Mirabile filed a “Motion to Reopen this Case to Revise Judgment” on June 6, 2011, which was denied. On August 15, 2011 Mirabile filed a “Motion to Alter/Amend Judgment,” which was again denied. On August 17, 2011 Mirabile filed a “Notice disputing Attorneys Lien and Request for Adjudication of Rights,” which was denied in August of 2012.

On September 14, 2011, Mirabile filed a “Notice of In Banc Review.” On September 29, 2011 Mirabile filed a “Motion for a Protective Order”, which was denied on February 8, 2012. In March of 2012, Mirabile moved to transfer the case to Harford County, which was denied. On August 14, 2012 the In Banc panel affirmed the circuit court’s decision granting Leiter’s motion to enforce the settlement. The In Banc panel found that Leiter exercised due diligence in attempting to close on March 24, 2011 and did not substantially breach any obligations under the Settlement Agreement.

On September 13, 2012, Mirabile filed a “Notice of Appeal with this Court” for the denial of his “Notice disputing Attorneys Lien and Request for Adjudication of Rights.” His appeal was dismissed by this Court on November 30, 2012 for his failure to file a Civil Appeal Information Report pursuant to Maryland Rule 8-205. On October 9, 2012,

³ Throughout the litigation, Mirabile filed numerous motions and pleadings in the circuit court. We refer to those motions and pleadings by the terminology used by Mirabile in his filings with the trial court.

Mirabile filed a “Motion for Appointment of a Special Auditor.” In his Motion, Mirabile alleged that Leiter was guilty of misappropriation, embezzlement, and financial crimes against vulnerable adults related to actions she took in 2005 regarding unrelated Deeds of Trust. That motion was denied on January 24, 2013. Mirabile further revoked the Irrevocable Power of Attorney that he executed in connection with the Settlement Agreement.

On December 21, 2012, Leiter filed a “Petition for Contempt and Other Relief” against Mirabile. Following two days of testimony, the Circuit Court for Baltimore County found that Mirabile did not abide by the Settlement Agreement. Mirabile was ordered to sign deeds to several properties as required by the Settlement Agreement in order to purge himself. Despite the finding of contempt, on February 13, 2013 Mirabile filed a “Motion to Rescind the Agreement,” which was denied a week later. On February 15, 2013, Mirabile filed an appeal of the contempt finding with this Court. Mirabile filed another appeal with this Court of the denial of his motion to rescind on March 28, 2013. This Court consolidated both appeals and ultimately dismissed them both when Mirabile failed to file his brief, despite being granted multiple extensions.⁴

⁴ Mirabile additionally filed a defamation action against Leiter, which was addressed by this Court in an unreported opinion. *See Mirabile v. Leiter*, No. 0513, Sept. Term 2015, (Filed March 15, 2016). Mirabile claimed that Leiter had defamed him by informing third parties that he was no longer a partner of Liberty Mobile Home Park Partnership. *Id.* We affirmed the circuit court’s grant of summary judgment in favor of Leiter on all counts. *Id.*

Mirabile's attempts to evade the Settlement Agreement continued out of court as well. In 2014, Mirabile solicited Jay Miller, Esquire ("Miller") to negotiate with Leiter on his behalf. Miller informed Leiter's attorney, Christine Nielson, Esquire, that Mirabile would settle everything for \$2,500,000.00, representing \$1,000,000.00 more than the agreed-upon terms of the Settlement Agreement. When Leiter declined Mirabile's offer, Mirabile requested \$1,500,000.00 in addition to ownership of all Ancillary Properties, contrary to the terms of the Settlement Agreement. Leiter declined his offer in a letter dated September 19, 2014. On September 26, Miller stated that attempts to settle were "now off the table."

Leiter hired Mary Hammel, Esquire ("Hammel") as her closing agent and title attorney in 2014. Miller and Hammel began communication in 2015, but Mirabile thwarted any attempts to facilitate closing. Harford Bank once again approved Leiter for a loan and intended to settle at the end of January 2015. Hammel attempted to communicate with Miller in order to obtain documents from Mirabile which were necessary for closing. Hammel's efforts to obtain the necessary information and documents from Mirabile were unsuccessful. Miller made another attempt to "settle" the matter in 2015, which Leiter declined.

In the meantime, unbeknownst to Leiter, Mirabile had an environmental study performed on the Liberty Trailer Park in October of 2015. In the study, which Mirabile sent to Harford Bank, an engineer opined that the site had been filled with construction debris and that there was hazardous material contamination. The engineer additionally

opined that the cost of remediation could exceed the value of the property. The loan officer informed Leiter “[y]our brother just cost you a lot of money [i]f we move forward, having received this notice, we have no choice but to reengage an environmental professional to do at the very least, a completely new Phase 1 evaluation and possibly more.” During this time, Mirabile continued to collect rent on the Ancillary Properties.

On January 9, 2015, Mirabile filed a “Motion for Contempt” and on February 12, 2015 filed a “Motion to Unseal.” Both motions were subsequently withdrawn. In December of 2016 Mirabile filed a “Motion to Consolidate” the case with another related case pending in the circuit court. That motion was denied on February 6, 2017. Mirabile filed another “Renewed Motion to Rescind” on February 13, 2017, which was amended on April 10, 2018. Leiter filed an opposition to Mirabile’s motion on March 10, 2017 and a “Petition for Contempt and Other Relief” on July 17, 2017.

The circuit court denied Mirabile’s “Amended Renewed Motion to Rescind” and further denied Leiter’s “Counter-Motion for Breach.” The circuit court granted Leiter’s “Petition for Contempt” on October 31, 2018. The court denied both Leiter and Mirabile’s requests for attorney’s fees. On November 30, 2018 Leiter filed a “Motion Pursuant to Rule 1-341,” requesting attorney’s fees, which was granted in part and denied in part. Following a “Motion to Alter or Amend” by Leiter, the circuit court awarded additional fees to Leiter.

Additional facts shall be added where they are necessary to the issues in this appeal.

DISCUSSION

I. Standard of Review

The trial court awarded fees to Leiter pursuant to Maryland Rule 1–341(a), which provides the following:

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

This Rule is intended as a limited exception to the general American rule that litigants pay their own attorney's fees. *See Christian v. Maternal-Fetal Med. Assocs. of Maryland, LLC*, 459 Md. 1, 18 (2018). Moreover, the Rule is “intended to function primarily as a deterrent against abusive litigation.” *Id.* (quotations and citations omitted).

“Rule 1–341 requires a court to make two separate findings, each with different, but related, standards of review.” *Id.* at 20 (citing *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267–68 (1991)). First, the court must find “that the conduct of a party during a proceeding, in defending or maintaining the action, was without substantial justification or was done in bad faith.” *Id.* at 20–21. This finding is reviewed “for clear error or an erroneous application of the law.” *Id.* at 21. “‘In bad faith’ means vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons.” *Inlet Assocs.*, *supra*, 324 Md. at 268. The test for determining substantial justification is whether or not the litigant has a “reasonable basis for believing that the claims would generate an issue of fact for the fact finder.” *Id.* Further, “the parties position should be ‘fairly debatable’ and

‘within the realm of legitimate advocacy.’” *Id.* (quoting *Newman v. Reilly*, 314 Md. 364, 550 (1988)).

Second, “the judge should then exercise discretion in deciding, in light of those findings, whether costs and/or attorney's fees should be awarded.” *Inlet Assocs.*, *supra*, 324 Md. at 266. “An appellate court reviews this finding under an abuse of discretion standard.” *Christian v. Maternal-Fetal Med. Assocs. of Maryland, LLC*, 459 Md. 1, 21 (2018).

II. The trial court did not abuse its discretion when it determined that Mirabile acted in bad faith and without substantial justification.

We must first review whether the trial court was clearly erroneous in finding that Mirabile acted in bad faith and without substantial justification in protesting the Settlement Agreement. The trial court concluded that there was overwhelming evidence that Mirabile acted without substantial justification and in bad faith, as set forth in its Memorandum Opinion on October 31, 2018:⁵

The inability of the parties to close after the signing of the agreement was not due to the imperfections of the English language or unforeseen contractual complexities. Rather, Mirabile’s uncooperative, deceitful behavior blocked the Agreement from going forward and forced years long litigation.

Subsequent to Judge Souder’s ruling there was a contractual resolution between the parties: Leiter agreed to tender 1.5 million dollars for Mirabile’s 50% interest in the partnership

⁵ The Court incorporated its entire Memorandum Opinion from October 31, 2018, which provided substantial evidence that Mirabile acted with bad faith and without substantial justification. In the Memorandum Opinion, the court found Mirabile to be in constructive civil contempt for his failure to comply with the Consent Order.

by March 24, 2011, paying Mirabile the good faith deposit immediately. Although she was unable to secure financing by that date, she had a commitment within 30 days after.

Despite numerous attempts to arrange closing, Mirabile refused to cooperate, instead engaging in a two-prong attack calculated to frustrate the Agreement. He filed an array of frivolous legal filings, wasting the limited time and resources of the judicial system. While doing so, he failed to act with good faith with Leiter and others who tried to move the settlement forward. Ms. Hammel, Mr. Swanson, and the loan officer from Harford bank all testified to Mirabile's obstructionist actions and Miller's testimony did nothing to suggest otherwise.

Mirabile revoked the Irrevocable Power of Attorney, refused to provide necessary information regarding the property including liens placed on the property; made ridiculous demands to settle the case for amounts greatly exceeding the initial agreed upon price and impeded Leiter's financing with Harford bank. The seriousness of any one of these actions would have been more than sufficient to deny his claim for rescission and to find him in contempt. On the other hand, the court record is void of any blame on the part of Leiter except her initial difficulty in obtaining financing.

.... The Court will not forgive eight years of inequitable conduct and retroactively give Mirabile the benefit of his poor behavior. Mirabile is found to be in contempt of the Court Order and will be required to comply with the terms of that Agreement.

The court went on to conclude the following:

Therefore, this Court finds that the proceedings beyond the date of the In Banc appeal decision were unnecessary and unduly protracted due to the actions of Defendant/Counter-Plaintiff Mirabile, without substantial justification and in bad faith.

This Court further finds that the acts committed in this case warrant the assessment of attorney's fees to be paid by

Defendant to Plaintiff. The facts of this case more than amply establish that Plaintiff was forced to incur unnecessary attorney's fees to compel the Defendant to do what he was legally obligated to do and to defend frivolous motions filed by Defendant. Therefore, an award of attorney's fees is appropriate.

We conclude that the trial court did not err in determining that the acts committed in this case warrant the assessment of fees to be paid by Mirabile to Leiter. As the trial court properly held, there was ample evidence that Mirabile defended the claim in bad faith and without substantial justification, including his refusal to comply with the terms of the Settlement Agreement, which was incorporated into the Consent Order. Further support for the findings of the trial judge include Mirabile's filing of frivolous motions for many years after the Settlement Agreement was executed. We, therefore, hold that the trial court's finding that Mirabile acted in bad faith and without substantial justification was not clearly erroneous.

At oral argument, Mirabile's counsel argued that the circuit court erred in analyzing the justification for his legal filings from a retrospective point of view, rather than from a prospective one. In that context, Mirabile argued that because the court held an eight-day trial on Mirabile's "Amended Renewed Motion to Rescind," the court necessarily determined that the motion was meritorious. We disagree. First, the trial was held not only on Mirabile's motion, but also on Leiter's "Petition for Contempt and Other Relief" and "Counter-Motion for Breach." Additionally, while we recognize that a court may not determine substantial justification from the "vantage point of judicial hindsight," "[a] court need not decide at the outset of a trial whether a claim has substantial justification in order

to avoid falling into the pitfall of utilizing hindsight and committing legal error.” *Christian, supra*, 459 Md. at 22, 29.

III. The court did not abuse its discretion in awarding attorney’s fees and expenses to Leiter.

We must next determine whether the trial court abused its discretion in awarding fees and expenses to Leiter. “A court must make findings of fact regarding its award of attorney’s fees, and those findings must be made on the record.” *Christian, supra*, 459 Md. at 30-31. These “findings of the amount of fees awarded must be clearly delineated lest the court abuse its discretion.” *Id.* at 31. The court must find “that the fees requested by the aggrieved party were incurred by the party requesting the fees” and must make a finding that the requested fees are reasonable. *Id.*

In its Memorandum Opinion and Order, issued on May 6, 2019, the Court made the following findings regarding the amount and reasonableness of Leiter’s requested fees:

Plaintiff has failed to supply any documents of the costs and expenses, nor has she provided any reason why the documentation could not be provided. Therefore, no award for costs and expenses shall be made.

Plaintiff’s Motion, supplemented by testimony presented at oral argument, partially satisfies the technical requirements of Maryland Rule 1-341 for an award of attorney’s fees. The invoices that were provided contain a reasonable explanation of the work performed and the rate charged. Counsel’s affidavit sets forth the hourly fee she charged, and added that at some time during these proceedings her normal hourly rate was increased, but she continued to charge Plaintiff the original hourly rate. Counsel claimed her hourly rate to be ‘fair and reasonable.’ Testimony from Troy Swanson, Esquire, a practicing attorney in the area for over 30 years and admitted as an expert witness in the filed of fees and expenses, that

counsel's fees incurred were fair and reasonable, as was the amount of time counsel expended prosecuting and defending the action involved herein. Mr. Swanson also testified that the fees charged were in accordance with those charged in the community for similar legal services, and were customary for similar legal services in Baltimore County.

No invoices were provided beyond April 2, 2018. Therefore, any claim for fees incurred beyond that date must be denied, as there is no documentation of the work performed. However, this Court will allow attorney's fees at the rate of \$325.00 per hour, 10 hours per day, for six days of trial.

The trial court awarded Leiter a sum of \$99,114.32, which was evidenced by invoices from September 7, 2012 through April 2, 2018 for a total amount of \$86,358.34, plus fees for trial time for a total amount of \$19,500 less undocumented expenses in the amount of \$6,744.02. It is clear that the trial court carefully examined the invoices before awarding fees to Leiter, as it did not include costs and expenses or fees for services rendered beyond April 30, 2018.

Following a Motion for Reconsideration filed by Leiter, the trial court issued an Amended Memorandum Opinion. In Leiter's motion, she asserted that the invoices for costs and expenses were provided in her original motion, as were the invoices for services rendered beyond April 2, 2018. The circuit court concluded that a review of the court file established that those invoices were provided but erroneously not considered by the Court when rendering its ruling. The court, therefore, awarded Leiter fees totaling \$151,631.50. This amount included attorney's fees from September 7, 2012 through April 2, 2018

totaling \$79,614.00, and for April 30, 2018 through October 31, 2018 in the amount of \$62,972.38. The award also included documented expenses in the amount of \$9,044.80.⁶

In its Memorandum Opinions, the trial court made the necessary findings for an award of fees and expenses pursuant to Maryland Rule 1-341. The court specifically referenced the testimony of Troy Swanson and Leiter’s attorney, who both testified that the fees and expenses sought by Leiter were reasonable. Moreover, the court specifically addressed invoice numbers, dates of representation, and the amounts that it awarded to Leiter. Further, Leiter’s attorney testified that the fees and expenses were actually incurred.

Leiter relies on *Shanks v. Williams*, 53 Md. App 670 (1983) in support of imposing sanctions against tenacious litigants. *Shanks* involved the appellant’s “refusal to accept an unfavorable declaration of her rights regarding a right of way over her property.” *Shanks*, *supra*, 53 Md. App. at 451-52. Appellant sought to challenge the declaration over a

⁶ Mirabile cites to *Newman v. Reilly*, 314 Md. 364 (1988) to support his assertion that the circuit court did not have authority to impose fees for any activities occurring in this Court. *Newman*, however, is distinguishable from the present case. In *Newman*, the Court of Appeals held that the circuit court lacks the power to sanction conduct which occurred before the Health Claims Arbitration Office (“HCAO”). *Newman*, *supra*, 314 Md. at 377. The Court based its holding on the concern that the HCAO is an executive agency, and not a proceeding in court. *Id.* at 376-77. It held that to interpret the proceedings before the HCAO and subsequent proceedings in the circuit court as a continuous action, all of which comprise a “civil action” under Rule 1-341 would “raise[] substantial questions concerning the constitutional power of this Court to regulate conduct before an executive agency.” *Id.* Here, however, there are no such constitutional concerns presented. There is no question that the proceedings involved occurred in relation to a “civil action.” Mirabile additionally argues that “settlement negotiations which are not tied to ongoing litigation are not subject to sanctions pursuant to Maryland Rule 1-341.” This argument is unavailing, as all negotiations between the respective parties were directly tied to the ongoing litigation related to the Settlement Agreement.

number of years by amending the proceedings to include new defendants, attacking the judgment collaterally, and seeking to revise the judgment. *Id.* at 452. Mirabile’s efforts to continuously relitigate the validity of the Settlement Agreement are similar to those in *Shanks*. Mirabile’s argument that *Shanks* is distinguishable because it was Leiter who first failed to abide by the Settlement Agreement, by failing to close on the specified date, is unavailing. The circuit court consistently denied his efforts to relitigate the terms of the Settlement Agreement. Mirabile, however, continuously refused to accept the rulings which were unfavorable to him.

We, therefore, hold that the circuit court did not abuse its discretion in awarding fees to Leiter under the circumstances of the protracted litigation in this case.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**