UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20567

MICHAEL K. TOPALIAN, ET AL.,

Plaintiffs,

VERSUS

JOHN N. EHRMAN, ETC., ET AL.,

Defendants,

JOHN N. EHRMAN, ETC., RIO BRAVO OIL CO., INC. and ROCKWOOD INSURANCE CO.,

Defendants-Appellee,

VERSUS

ARMANDO LOPEZ,

Movant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CA-H-87-3826)

April 12, 1996

Before KING, DeMOSS and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:[*]

This sanctions case returns to us after remand. Armando

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[*] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Lopez, attorney for the plaintiffs in this case, was originally sanctioned $300,000 by the district court for frivolous, bad faith litigation and discovery abuse. On appeal, we determined that we could not adequately review the sanctions without further findings from the district court, so we remanded for further elaboration as to the reasons for sanctioning Lopez. ***Topalian v. Ehrman***, 3 F.3d 931 (5th Cir. 1993). On remand, the district court made further findings and re-assessed the $300,000 sanctions.[1]

After reviewing the district court's order, the briefs and the record, we determine that the district court was correct in sanctioning Lopez. However, the district court's assessment of the amount of the sanction was in error, because the amount was not "the least severe sanction adequate to achieve the purpose of the rules under which it was imposed." ***Topalian***, 3 F.2d at 937. We find that $50,000 is the least severe sanction that will achieve its purpose. Accordingly, we vacate the judgment of the district court and render judgment, sanctioning Lopez $50,000.

BACKGROUND

Once again, we are called upon to decide an issue arising out of this litigation. The underlying suit was filed almost a decade ago, and this is the third time our court has seen this case.[2] We

[1] On Lopez' motion, defendant Rockwood Insurance Company has been dismissed. Therefore, we need only concern ourselves with the appeals as to the Ehrman defendants and the Rio Bravo defendants. The sanctions against Rockwood were $100,000; the total sanctions still being contested are $200,000.

[2] The case was originally brought in December 1987. The appeal of the summary judgment dismissing the plaintiff's claims was decided in ***Topalian v. Ehrman***, 954 F.2d 1125 (5th Cir.), *cert.*

hope that this will be the end of the ***Topalian v. Ehrman*** saga.

This case originally involved 15 plaintiffs and 23 defendants. Most parties have fallen away and we are left with only five parties: Armando Lopez, attorney for the plaintiffs; and four defendants, John N. Ehrman and the Ehrman Investment Group, Inc. (collectively, the "Ehrman Defendants"); and Bert Gamble and Rio Bravo Oil Co., Inc. (collectively, the "Rio Bravo Defendants").

The plaintiffs were investors in Onshore Exploration Ltd., a Texas limited partnership formed to engage in oil and gas drilling ventures. In December 1987, plaintiffs sued defendants, "alleging that they suffered damages as a result of the offer and sale to them of limited partnership interests in Onshore and that they [were] the victims of a conspiracy in which all defendants participated. . . ." ***Topalian***, 954 F.2d at 1128. The district court granted summary judgment against plaintiffs on all counts, which we affirmed. ***Id***. at 1129.

During the pendency of the summary judgment appeal, the district court entered a sanctions order against plaintiffs and their attorney, Armando Lopez. We affirmed the sanctions against the plaintiffs. ***Topalian***, 3 F.3d at 938. However, we found that the district court had not given sufficient reasons for the $300,000 sanctions which it imposed on Lopez. We said that "nothing in the findings from the proceedings below . . . illuminate as to the court's decision making process in arriving at

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denied, 506 U.S. 825 (1992). We remanded the sanctions issue in ***Topalian v. Ehrman***, 3 F.2d 931 (5th Cir. 1993).

these severe sanction amounts. Accordingly, we cannot adequately review that decision for an abuse of discretion." ***Topalian***, 3 F.3d at 938.

On remand, we asked the district court to consider four factors in deciding whether to impose sanctions:

> (1) *What conduct is being punished or is sought to be deterred by the sanction?* It is axiomatic that the court must announce the sanctionable conduct giving rise to its order.
>
> (2) *What expenses or costs were caused by the violation of the rule?* The district court must demonstrate some connection between the amount of monetary sanctions it imposes and the sanctionable conduct by the violating party.
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> (3) *Were the costs or expenses "reasonable," as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention?* A party seeking costs and fees for defending against frivolous claims has a duty to mitigate those expenses, by correlating his response, in hours and funds expended, to the merit of the claims, as well as by giving notice to the court and the offending party promptly upon discovering the sanctionable conduct. The Court's findings must reflect some consideration of the reasonableness of the nonviolating party's actions in connection with the sanctionable conduct.
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> (4) *Was the sanction the least severe sanction adequate to achieve the purpose of the rule under which it was imposed? . . . .* [D]istrict courts must demonstrate that sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of the sanctioning provision.

Topalian, 3 F.3d at 937 (internal quotations and citations omitted).

On remand, the district court analyzed the sanctions under this four-part test. The court made findings and found that Lopez committed 12 sanctionable acts of misconduct. They are as follows:

(1) submitting to the Court as a true and correct copy a document which had been materially altered in a deliberate attempt to mislead the Court regarding pending orders against his client in violation of Rule 11 and 28 U.S.C. § 1927;

(2) submitting a pleading entitled "All Plaintiffs and their Petition for Reconsideration and for a Stay of all prior Dispositive Rulings and Response to Defendants John N. Ehrman, Roderick Johnson, P.C.'s Motions for Sanctions" which misstated the facts surrounding the status of the case and attempted to insert extraneous matters into the record in violation of Rule 11 and § 1927;

(3) failing to comply with the Court's order to reimburse the Ehrman Defendants $1500 for prior discovery abuses in violation of § 1927 and in contempt of court;

(4) failing to comply with three Court orders to reimburse Defendant Eckis's attorney $1,015.98 for the expenses incurred in taking Defendant Eckis's deposition in Houston, in violation of § 1927 and in contempt of court;

(5) filing motions for sanctions for failure to produce documents the Court had previously ordered Defendants were not required to produce, in violation of § 1927, Rule 11, and Rules 34 and 37;

(6) repeatedly rescheduling or cancelling depositions at the last minute and failing to produce witnesses scheduled for deposition in violation of § 1927 and Rules 26 and 30;

(7) failing to cooperate in the deposition process by encouraging or permitting Plaintiffs to refuse to answer such questions as their address, educational background, driver's license number, as well as substantive questions, in violation of § 1927 and Rule 30;

(8) commingling documents of all fifteen Plaintiffs together with each other and with documents produced by Defendants and producing documents only at depositions and not before as requested, in violation of § 1927 and Rule 34;

(9) submitting late, incomplete, and evasive answers to interrogatories in violation of § 1927 and Rule 33;

(10) disregarding the Court's order governing discovery by issuing excessive requests for admission and scheduling depositions after the discovery deadline, in violation of § 1927 and Rule 16;

(11) filing unnecessary motions solely for the purpose of harassing Defendants, including without limitation motions for extension of time, motions for protection, and motions for reconsideration, in violation of § 1927 and Rule 11; and

(12) filing pleadings on behalf of Texas Energy Ltd. in violation of the Court's order denying Plaintiffs the right to file pleadings on behalf of TEL, in violation of § 1927 and in contempt of court.

DISCUSSION

Having reviewed the district court's further order and the record in the case, we are satisfied that the first three factors were satisfied.[3] However, the fourth factor, the least severe sanction adequate to achieve the rule's purpose, was not satisfied.

The district court found that as a result of Lopez' misconduct, the defendants reasonably incurred the following expenses:

RIO BRAVO DEFENDANTS

(1) $45,000 for violations of Rule 11
(2) $10,000 for violations of Rules 26 and 16
(3) $7,500 for violations of Rules 34 and 37
(4) $7,500 for violations of Rule 30

[3] At seven pages, the district court's sanctions order is not voluminous. The district court merely lists what expenses were caused by the violation of each rule. The court did not choose to detail the expenses caused by each act of misconduct. While sanctions need not be calculated with mathematical precision, ***Topalian***, 3 F.3d at 938 n.7, one might hope for a more detailed analysis of the sanctionable conduct and resulting expenses by the district court. Nonetheless, we believe that the district court has provided "some avenue for us to trace [its] reasoning and review [its] exercise of discretion." ***Topalian***, 3 F.3d at 938.

(5) $7,500 for violations of Rule 33
(6) $22,500 for violations of 28 U.S.C. § 1927

EHRMAN DEFENDANTS

(1) $35,000 for violations of Rule 11
(2) $10,000 for violations of Rules 26 and 16
(3) $7,500 for violations of Rules 34 and 37
(4) $10,00 for violations of Rule 30
(5) $7,500 for violations of Rule 33
(6) $30,000 for violations of 28 U.S.C. § 1927

The district court further found that the $100,000 sanctions to each defendant were the least severe sanctions adequate to achieve the purpose of the rules.

"[D]istrict courts wield their various sanction powers at their broad discretion." ***Topalian***, 3 F.3d at 934. "The discretion vested in the trial court is granted so its thoughtful exercise will carry out the educational and deterrent functions of the rule." ***Jennings v. Joshua I.S.D.***, 948 F.2d 194, 199 (5th Cir. 1991), *cert. denied*, 504 U.S. 956 (1992). We review district court awards of sanctions for abuse of discretion. ***Thomas v. Capital Security Services, Inc.***, 836 F.2d 866, 872 (5th Cir. 1988) (en banc). As we have repeatedly said, the question is not whether "this Court, in its own judgment and as an original matter, would have imposed any of these sanctions. Rather, we only ask whether the district court abused its discretion in doing so." ***Topalian***, 3 F.3d at 934. "In sum, in reviewing the imposition of sanctions, we do not substitute our judgment for that of the district court in enforcing acceptable standards of conduct." ***Travelers Ins. Co. v. St. Jude Hosp***., 38 F.3d 1414, 1417 (5th Cir. 1994).

After reviewing the district court's reasoning regarding the sanctions, we find that the district court abused its discretion in the amount of sanctions it imposed. The district court was correct in imposing sanctions -- Lopez' conduct clearly warranted punishment. However, the amount of the sanctions was not the least severe adequate to achieve its purpose. We believe that the district court was overzealous in the degree to which it desired to punish Lopez' improper behavior. It is understandable that the district court, after years of dealing with Lopez and his bad faith litigation tactics, would err on the side of deterrence. However, we require that the sanction be "the least severe sanction adequate to achieve the purpose of the rule under which it was imposed." ***Topalian***, 3 F.3d at 931; ***Thomas***, 836 F.2d at 878.

The primary purpose of sanctions is to deter frivolous litigation and abusive tactics. Sanctions seek to deter both the culpable attorney and members of the bar in general. ***Pavelic & Le Flore v. Marvel Entertainment Group***, 493 U.S. 120 (1989) (the primary purpose of Rule 11 is deterrence, not compensation); ***Fred A. Smith Lumber Co. v. Edidin***, 845 F.2d 750, 752 (7th Cir. 1988) ("the most important purpose of 1983 Rule 11 sanctions is to deter frivolous litigation and the abusive practices of attorneys"); GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 47(A) (2d ed.)(the purpose of Rule 37 is four-fold: "(1) penalizing the culpable party or attorney; (2) deterring others from engaging in similar conduct; (3) compensating the court and other parties for the expense caused by the abusive conduct; and (4) compelling

discovery"); ***Id***. at § 20 (the purpose of 28 U.S.C. § 1927 is to deter unnecessary delays in litigation).

The shear enormity of the sanctions levied against Lopez do not necessarily lead us to conclude that the amount is not the least necessary to achieve its purpose. ***NASCO, Inc. v. Calcasieu Television and Radio, Inc.***, 111 S. Ct. 2123 (1991)(upholding $996,644.65 sanction under court's inherent power). However, we are obligated to closely scrutinize the award to ensure that it is not vindictive or overly harsh. ***Topalian***, 3 F.3d at 937. Such an analysis cannot take place in a vacuum; instead, we must determine whether the amount is appropriate for *this defendant* and *this conduct.* After reviewing Lopez' financial situation and the conduct which he engaged in, we find that the $200,000 sanction is overly harsh and a lesser award will properly deter such conduct in the future. We find that a sanction of $50,000 -- $25,000 to the Ehrman Defendants and $25,000 to the Rio Bravo Defendants -- will adequately punish Lopez for his misdeeds and will prevent his, and others', repetition of them.[4]

While the evidence in the record of Lopez' financial condition is not great, we are able to determine that Lopez is not a wealthy man.[5] An uncontroverted affidavit by Lopez indicates that his only

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[4] Rather than remanding for a determination of sanctions, we choose to determine the amount ourselves, in order "to bring the proceedings to a close." ***Jennings***, 948 F.2d at 199.

[5] Assessing sanctions is an imperfect science at best. The court must carefully tailor the sanction to the individual wrongdoer in order to assure that the proper deterrence is achieved while avoiding undue harshness. To properly assess sanctions, a district court must accurately know the financial condition of the

significant assets are two pieces of real estate, a 1984 Volvo and a watch. As of June 1994, the date of the affidavit, Lopez had a negative balance in his personal checking account. The total amount of his interest in the real estate is approximately $100,000.

Lopez' conduct certainly was sanctionable. The violations the district court detailed evince bad faith and are inappropriate for a member of the federal bar. The district court is right, and fully within its power, in seeking to deter such reprehensible conduct. The question, however, is what is the least severe sanction necessary to ensure (1) that Lopez never again engages in these acts and (2) that other attorneys understand the consequences of such behavior and are deterred from following Lopez' bad example.

A $50,000 sanction is approximately one-half of Lopez' assets. This is a punishment which he will not soon forget. Most lawyers would be sufficiently deterred by the threat of such a penalty. Additionally, by this sanction, attorneys are put on notice that conduct such as Lopez' will not be tolerated in federal court and will result in severe penalties. Attorneys will be sobered upon learning that a lawyer was sanctioned an amount nearing one-half of his assets.

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individual. Litigants are encouraged to properly construct a record of the wrongdoer's financial condition. Evidence of the individual's assets and income will greatly assist the district court in imposing the proper penalty.

Yet, we believe that a sanction below $50,000 would not adequately deter Lopez or others like him. His abusive, bad faith conduct was willful and repetitive. The district court often warned him that sanctions would be imposed if he persisted in his actions. Nonetheless, he was not deterred. A lesser sanction would allow Lopez to believe that his conduct went unpunished. Therefore, we find that $50,000 is the least severe sanction necessary to deter such improper conduct by Lopez and other members of the bar.

CONCLUSION

The judgment of the district court is VACATED and judgment is RENDERED, assessing sanctions against Armando Lopez in the amount of $50,000, $25,000 to the Ehrman Defendants and $25,000 to the Rio Bravo Defendants.[6]

[6] Lopez also argued that the district judge had become a partisan in the case and should have recused himself. We find no merit to this argument.