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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
OCT 28 2020

CITY OF MADEIRA,	:	Case No. A1802415
Plaintiff,	:	(Judge Shanahan)
vs.	:	<u>DECISION ON DEFENDANT'S</u>
PHILIP DOUGLAS OPPENHEIMER,	:	<u>MOTION FOR SUMMARY</u>
Defendant.	:	<u>JUDGMENT</u>

This case is before the Court on Defendant, Philip Oppenheimer's, Motion for Summary Judgment. No oral argument was heard on the motion because counsel for Plaintiff, Brian Fox, inexplicably failed to enter the hearing date on his calendar, notwithstanding the fact that the date was set during a conference call with the Court and counsel. Additionally, Mr. Fox failed to file a memorandum in opposition to Defendant's Motion for Summary judgment timely. Reluctant to assail Plaintiff for counsel Fox's lapse, the Court gave Plaintiff a brief continuance to file its memorandum in opposition to the Motion for Summary Judgment. As the time for the pretrial was drawing near, the Court denied the request for oral argument.

Correspondingly, the Court denies Plaintiff's motion for continuance filed September 30, 2020. The Court denies Defendant's motion to strike untimely filings filed October 22, 2020. Further, at the hearing on September 30, 2020, Plaintiff's counsel requested that the Court hold in abeyance Plaintiff's Motion to Compel filed September 29, 2020. For the reasons stated in this Decision, the Motion to Compel is moot.

FACTS

This case was filed by Plaintiff, the City of Madeira, pursuant to the vexatious litigator statute, R.C. § 2323.52. The City of Madeira alleges that “[o]ver the past several years, Mr. Oppenheimer has filed, or caused to be filed, numerous meritless causes of actions in the Hamilton County Court of Common Pleas against Madeira.” *Amended Complaint*, ¶ 5. And, “[e]ach of [these] most recent lawsuits has been – without exception – dismissed at the pleading stage by the various trial courts [and] [e]ach subsequent appeal has likewise been denied by the First District Court of Appeals.” *Id.* at ¶ 6.

“Declaring a plaintiff to be a vexatious litigator is ‘an extreme measure’ that should be granted only ‘when there is no nexus’ between ‘the filings made by the plaintiff and [his or her] intended claims.’” *Helfrick v. Madison*, 2012-Ohio-551, ¶ 60 (5th Dist.), quoting *McClure v. Fischer Attached Homes*, 145 Ohio Misc.2d 38, 882 N.E.2d 61, 2007-Ohio-7259 at ¶ 33. The penalty for vexatious litigators is a prohibition against instituting legal proceedings in various courts or continuing legal proceedings that had been instituted previously and/or making application in any pending legal proceeding without first obtaining leave of court to proceed. R.C. § 2323.52.

The parties recite the history of two lawsuits and one administrative appeal filed by Defendant against Plaintiff between 2014 and 2017. The first lawsuit was a statutory taxpayer lawsuit brought on behalf of the City of Madeira in which Mr. Oppenheimer served as the relator and was represented by counsel. It concerned a dispute over the interpretation of a provision of the Madeira City Charter that required certain historical property owned by the City of Madeira to be preserved and protected. The City of Madeira filed a counterclaim in that action wherein it also sought a declaratory judgment concerning its authority under the subject charter provision,

stating "a real and justiciable dispute exists between the parties regarding the rights, status and other legal relationship arising from the foregoing facts." *Counterclaim*, ¶ 13. The case ultimately was dismissed without prejudice. The nonexistence of a justiciable controversy was not the basis for the dismissal of the case.

The second legal proceeding was also a statutory taxpayer lawsuit brought on behalf of the City of Madeira in which Mr. Oppenheimer served as the relator and was represented by counsel. In that action, Mr. Oppenheimer sought judicial review of a decision of the Hamilton County Board of Elections over the placement of proposed charter amendments on the ballot at the then forthcoming election, as well as the validity of the underlying ordinance to place such proposed amendments on the ballot, and the City's compliance, or lack thereof, of mailing notice to each resident. Previously, Mr. Oppenheimer had been involved in a case with a similar issue wherein the court found that the City of Madeira had violated the law.

The third lawsuit was an administrative appeal of a decision of the Madeira Planning Commission filed by legal counsel on behalf of not only Mr. Oppenheimer, but also the Robert McCabe Company, Inc., and Woellner Enterprises, LLC. Ultimately, the administrative appeal, which notably is not a civil action but is an administrative appeal of a decision of the Madeira Planning Commission, was dismissed because it was filed prematurely.

STANDARD

Rule 56(C) of the Ohio Rules of Civil Procedure provides that:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment

is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

The purpose of Rule 56 is to analyze the evidence so as to ascertain whether an actual need for a trial exists. *Ormet Primary Aluminum Corp. v. Employers Ins. Co. of Wausau*, 725 N.E.2d 646, 653 (Ohio 2000).

LAW

"Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions. . . . R.C. § 2323.52(A)(3).

"Vexatious conduct" is conduct of a party in a civil action that satisfies any of the following:

- (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.
- (b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
- (c) The conduct is imposed solely for delay.

R.C. § 2323.52(A)(2).

"Conduct" means:

the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes; or the taking of any other action in connection with a civil action.

R.C. § 2323.51(A)(1)(a).

The Ohio Supreme Court has observed that the purpose of R.C. § 2323.52 is to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct in the trial courts of this state. . . . It is the nature of the conduct, not the number of actions, that determines whether a person is a vexatious litigator.

Borger v. McErlane, 2001-Ohio-4030 (1st Dist. *3), citing *Mayer v. Bristow* (2000), 91 Ohio St.3d 3, 13, 740 N.E.2d 656, 665, quoting *Cent. Ohio Transit Auth. v. Timson* (1998), 132 Ohio App.3d 41, 50, 724 N.E.2d 458, 463.

Defendant points out that none of the actions were filed by Defendant *pro se*. They were filed by legal counsel whom Defendant trusted for knowledge and expertise. Defendant argues there is no evidence of vexatious conduct, the conduct is not habitual or persistent, and none of the actions were filed without reasonable grounds.

Plaintiff counters that the question before this Court is whether Plaintiff can put forth evidence on each element of its claim under R.C. § 2323.52 and that the only element in dispute is whether Defendant has engaged in habitual and persistent vexatious conduct against the City of Madeira within the meaning of R.C. § 2323.52(A)(2). Further, Plaintiff states, in addition to the two lawsuits (and the attendant appeals), and the one administrative appeal, the private conduct of Defendant confirms his pattern of using litigation to harass the City of Madeira and its officials, including scurrilous allegations about the City of Madeira and its officials on social media and on Mr. Oppenheimer's personal website.

Defendant argues that, because the claim is brought by a government and/or because at least one of the legal proceedings purporting to support Plaintiff's claim that Defendant is a vexatious litigator involved a challenge to the official conduct of a government or public official, Plaintiff must demonstrate, by clear and convincing evidence, "actual malice" on the part of Defendant in the context of R.C. § 2323.52. Defendant posits that Plaintiff must demonstrate that Defendant actually knew or was reckless with respect to whether he was "habitually, persistently, and without reasonable grounds engaging in vexatious conduct" when various legal counsel filed the three legal proceedings upon which Plaintiff bases its claim.

According to Plaintiff, the burden of proof is a preponderance of the evidence, not clear and convincing evidence, and no showing of actual malice is required. Plaintiff argues that the actual malice standard applies to the degree of fault a court may require for common law defamation claims and other causes of action that seek to impose pecuniary liability for speech-related conduct. Plaintiff concludes that a determination that one is a vexatious litigator would not equate to the imposition of a pecuniary liability.

The Second District of Ohio held that “in short, the vexatious litigator designation is an extraordinary remedy that should be applied in very limited circumstances, on clear and convincing evidence that a pro se litigant persistently and habitually uses the legal process solely to harass another party or delay an ultimate resolution in the legal proceeding.” *Lasson v. Coleman*, 2008-Ohio-4140 (2d Dist. 2008) at ¶ 33.

In this case, the Court finds that, even under a preponderance of the evidence standard, there is no genuine issue of fact for the trier of fact to decide. The conduct with which the City of Madeira takes umbrage does not rise to the level of vexatious conduct. It does not “obviously serve merely to harass or maliciously injure” the City of Madeira. The Court cannot say that the two lawsuits were not warranted under existing law and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. Indeed, in the lawsuit concerning the historical district, the City of Madeira beseeched the court to enter a declaratory judgment in its favor on the issue brought before the court by Defendant. And, regarding the second lawsuit, Defendant had been in a similar lawsuit and garnered a favorable result. Finally, there is no evidence that Defendant’s conduct was imposed solely for delay.

The Court further finds that Plaintiff cannot establish that Defendant has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or

actions. Although Plaintiff may not fancy being involved in these lawsuits, the Court, at this time, finds that there is not genuine issue of material fact and that Defendant's Motion for Summary Judgment should be granted.

CONCLUSION

The Court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to Plaintiff, construing the evidence most strongly in Plaintiff's favor. Defendant's Motion for Summary Judgment is granted.

The parties are directed to submit an Entry pursuant to Local Rule 17.


Judge Megan E. Shanahan 10/28/20

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ENTERED

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