IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY COFFEY PIERSON,

Plaintiff,

v.

RAYMOND GERARD MEJIA,
TERRY R. KRAUCUNAS and
KRAUCUNAS LAW OFFICE,

Defendants.

OPINION and ORDER

00-C-0350-C

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This civil case for money damages arising out of the alleged legal malpractice of defendants is before the court on the motion of defendant Raymond Mejia for an award of sanctions against plaintiff Mary Coffey Pierson under Fed. R. Civ. P. 11. Defendant alleges that plaintiff based her law suit against him and the other defendants upon legal contentions not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law and that the complaint contained allegations that lacked evidentiary support and were not likely to have such support after a reasonable opportunity for further investigation. Defendant seeks an award of $56,326.91 in attorney fees and expert witness fees, to be divided between him and his co-defendant, Terry G. Kraucunas,

with $12,186.67 to be paid to Kraucunas and the remainder to be paid to him. (Kraucunas Law Office is not a party to this motion; it no longer exists.)

Plaintiff brought this suit, alleging that defendants committed legal malpractice in representing her in her efforts to establish guardianship for her aunt, Mary Gloria Scofield, and her aunt's friend, Mary Clare Mahoney, both of whom had written wills at one time or another leaving plaintiff the greater shares of their estates. She alleged that she was injured financially by defendant Mejia's failure to provide her legally adequate counsel and advice and defendants Kraucunas's and Kraucuna Law Office's failure to supervise Mejia properly. In particular, defendant Mejia failed to persuade the state court to hear plaintiff's motion to set aside certain trusts and wills executed by Scofield and Mahoney in 1993 and failed to insure that the court's dismissal of that motion was without prejudice. Thus, she alleged, when the women died in 1995, the uncertainty of the effect of the earlier dismissal posed a potential obstacle to her efforts to prove that the operative wills were ones that were beneficial to her and caused her to engage in settlement discussions that resulted in her receiving less money than she would have received under wills executed by Schofield and Mahoney in 1994 or in 1987.

In an order entered on February 20, 2002, I found that plaintiff had failed to adduce sufficient evidence from which a reasonable jury could find that she suffered any financial damage as a result of the alleged malpractice of defendant Mejia and that because her only

claim against defendants Kraucunas and Kraucunas Law Office rested on their obligation to supervise defendant Mejia, all of the defendants were entitled to summary judgment. Although the nub of plaintiff's claim against defendant Mejia was that he allowed the Milwaukee circuit court to dismiss the petitions filed by plaintiff to set aside certain trusts created by Scofield and Mahoney in 1993 without insuring that the dismissals were specified to be without prejudice, plaintiff had no evidence that the manner of dismissal would have been any obstacle to her pursuing her inheritance after her aunt and her aunt's friend had died. After the two women died, plaintiff had filed a petition to probate a will her aunt had executed in 1994 or, alternatively, for a declaration of rights concerning the trust her aunt had created in 1993. In the petition, she alleged that the earlier petition to set aside the trusts had been dismissed without prejudice in April 1995, for her failure to file security for costs. The matter was never litigated so it is impossible to know how the Milwaukee County probate court would have viewed the effect of the earlier dismissal on plaintiff's ability to litigate the validity of the 1994 and 1993 wills in 1999. Neither of plaintiff's expert witnesses had an opinion on the significance for future litigation of a dismissal that did not specify whether it was with or without prejudice. Without evidence that the dismissal would bar plaintiff from ever litigating the validity of the wills and trust instruments her aunt had signed or that it would be so likely to bar her from future litigation as to cause a reasonable person in plaintiff's position to refrain from attempting further litigation, plaintiff could not

prove that defendant caused her any injury. Plaintiff had no other evidence to show that she would have been unable to litigate the same issues in 1999 she was barred from raising in 1995, while her aunt was still alive. She adduced no evidence that any crucial witnesses became unavailable in the four-year period between the guardianship proceedings and her aunt's death. She argued that defendant hurt her 1999 case by failing to gather evidence of Scofield's and Mahoney's mental conditions in early 1993 or late 1994, without explaining how his failure to arrange for retrospective mental examinations of the two women prejudiced her in 1999. In fact, the expert she hired for this case was able to form an opinion about the mental states of the two testators as of early 1993 and 1994.

I entered summary judgment for defendant Mejia after finding that a lay juror would be unable to evaluate the effect of the 1995 order of dismissal on plaintiff's ability to litigate her claim to her aunt's estate unless it had the benefit of expert testimony. Although I noted the possibility that plaintiff might not have been injured by the settlement because she might have received more money under the agreement than she would have received under the 1994 wills she arranged for Scofield and Mahoney to sign, I did not put any weight on that possibility or base my decision on it. Had the case gone to trial, however, it would have been plaintiff's burden to establish that she had suffered damages by showing that the amount she received in settlement with the other primary beneficiary, Gesu Church, was less than the amount she could reasonably have expected to receive through litigation to establish the

validity of wills that benefited her (after deducting administrative and litigation costs from that amount). See, e.g., Mattson v. Schultz, 145 F.3d 937, 938 (7th Cir. 1998) (to prove damages resulting from legal malpractice, plaintiff must show that he would have prevailed in underlying suit had it been tried properly); Nicolet Instrument Corp. v. Lindquist & Vennum, 34 F.3d 453, 455 (7th Cir. 1996); Glamann v. St. Paul Fire & Marine Ins. Co., 144 Wis. 2d 864, 424 N.W.2d 924, 926 (1988). It would have been her burden also to show that her decision to settle was based on the dismissal order and not on the many obstacles in proving that the wills that should be probated were ones that favored her, rather than the church. (Plaintiff argues that I relied on defendant Mejia's unsupported allegations and speculation in suggesting that plaintiff would have difficulty proving either the invalidity of the 1993 documents, the validity of the 1994 wills or the validity of wills written in 1987. There was no reason to do so. It is obvious from the undisputed facts that a probate court would be hard-pressed to find that the 1994 wills were valid in light of all that is known about Scofield's and Mahoney's mental competency in late 1994, or, alternatively, that the 1993 documents were invalid in light of the circumstances in which they were prepared and executed *and* that the operative will should be the one written in 1987 that cannot be found and that has handwritten changes on one of the copies that has been located.)

After the motion for summary judgment had been decided and judgment entered in favor of defendants, defendant Mejia filed this motion for Rule 11 sanctions on his own and

Kraucunas's behalf. In an affidavit accompanying the motion, defendant Mejia defends his representation of plaintiff in the guardianship proceedings she initiated in the Circuit Court for Milwaukee County and attests to the severe financial impact this case has had upon him and his family-operated small business. He does not say that he ever served plaintiff with a Rule 11 notice during the pendency of the suit or provided plaintiff the "safe harbor" required by the rule, that is, 21 days in which to withdraw or amend the allegedly improper filing. Fed. R. Civ. P. 11(c)(1)(A). He does not identify any particular statements or conduct alleged to have violated the rule. Id.

Clearly, defendant is angry that he was sued for a representation that he believes complied with all of his professional obligations. As defendant should know better than a lay person, however, most defendants are angry about being sued and believe that the allegations made against them are without foundation. This does not mean, however, that all prevailing defendants are entitled to sanctions. The question is whether defendant Mejia has shown that he is entitled to an award of sanctions under the particular requirements of Rule11. I conclude that he has not, for several reasons. First, he did not comply with the requirements of the safe harbor provision and he has cited no case law authorizing district courts to dispense with this requirement. He cites Divane v. Krull Electric Co., 200 F.3d 1020 (7th Cir. 1999), for the proposition that a Rule 11 motion may be filed after the termination of legal proceedings. In Divane, the court of appeals declined to hold that a

Rule 11 motion could never be filed after trial or after the entry of summary judgment, holding instead that district courts have discretion to decide when such a late-filed motion would prejudice the movant's opponent. However, the court held also that the 21-day safe harbor provision was not a mere formality. Because the movant had complied with the provision, albeit much earlier in the case, the district court had authority to act on the motion. Id. at 1027.

There is obvious facial tension between a requirement that a Rule 11 motion may be filed after summary judgment and the requirement that the movant comply with the safe harbor provision. It can be resolved by reading the court's holding as applying only to Rule 11 motions that have been proceeded by service of a formal safe harbor warning. The safe harbor provision was added to the Federal Rules of Civil Procedure after extensive review of the effect of the rule and consensus that a safe harbor provision would improve the rule's effectiveness and fairness. See Advisory Committee Notes, 1993 Amendments. It would undermine the purpose of the provision to ignore it in any circumstance, even in one such as this in which a movant has waited until the case is over to file his motion and there is no practical means by which he can satisfy the safe harbor requirement. Cf. Ridder v. City of Springfield, 109 F.3d 288, 295 (6th Cir. 1997) (disagreeing with district court's characterization of safe harbor rule as empty formality when motion for sanctions was filed after court had granted motion for summary judgment; service and filing of Rule 11 motion

must occur before final judgment or before court has acted on objectionable filing).

Second, even if it were proper to entertain defendant's Rule 11motion despite his failure to observe the safe harbor requirement, I would deny it for his failure to specify the alleged violations of the rule. Merely stating that the pleadings contained legal contentions not warranted by existing law is insufficient. The opposing party is entitled to particularization, so that she may evaluate the pleadings in light of the objection and make an informed decision whether to proceed on them or, in this instance, to determine how to respond to the challenge.

Third, the lack of specificity in the objections demonstrates their true nature: a denial of the allegations in the complaint. This is the stuff of law suits, not of Rule 11 motions. For example, defendant Mejia asserts that plaintiff would be unable to prove that he did anything improper in representing her. When I decided defendants' motion for summary judgment, I based my decision on the conclusion that plaintiff had failed to adduce sufficient evidence from which a reasonable jury could find in her favor on the issue of causation. I did not decide whether she would have been able to prove that defendants had committed acts of negligence; defendants had conceded that point for the purpose of the summary judgment motion. I did not decide whether plaintiff would be able to prove damages; that issue had not been briefed. In other words, I have not addressed many of the issues that defendant contends are baseless. I cannot do so now because the "facts" that defendant

Mejia relies upon to support his contentions are not a matter of record and are not undisputed.

The drafters of Rule 11 emphasized that it was not their intention that sanctions motions would generate extensive satellite litigation. It could not have been their intention that such a motion was to be used as a vehicle for a court to review all of the unresolved allegations of a lawsuit to determine their validity. Defendant Mejia's motion for Rule 11 sanctions will be denied, as will his effort to assert a Rule 11 motion on behalf of his co-defendant. Not only is defendant Mejia representing only himself in these post-judgment proceedings, but defendant Kraucunas has disavowed any interest in recovering Rule 11 sanctions. See "Reply Brief to Plaintiff's Rule 60(b) Motion," dkt. #112 (defendant "does not represent [by filing her reply] that she is joining in defendant Mejia's motion for sanctions under Rule 11").

I note that in plaintiff's brief in opposition to defendant Mejia's motion for Rule 11 sanctions, plaintiff asked for relief under Fed. R. Civ. P. 60(b). I am not considering that request because it was not made in a separate document and because plaintiff did not identify the grounds for the motion with any particularity. Furthermore, I am not going to award plaintiff any fees or costs for defending against the motion for an award of Rule 11 sanctions, although the rule allows such an award. Despite defendant's inability to establish his entitlement to Rule 11 sanctions, plaintiff's lawsuit seems dubious. I am not persuaded

that plaintiff should be awarded any fees for having to oppose defendant's motion.

One other matter remains. Plaintiff filed a "Motion for Emergency Relief and Related Motion to Strike Pro Se Papers Filed by Terry Kraucunas on June 5, 2002." Dkt. #124. One day earlier I had denied defendant Kraucunas's motion for relief under the court's inherent powers and Fed. R. Civ. P. 26 and 37, making plaintiff's motion unnecessary.

ORDER

IT IS ORDERED that the motion of defendant Raymond Gerard Mejia for an award of sanctions pursuant to Fed. R. Civ. P. 11 is DENIED; the request of plaintiff Mary Coffey Pierson for recovery of the fees and costs she incurred in defending against defendant Mejia's Rule 11 motion is DENIED; plaintiff's motion for relief under Fed. R. Civ. P. 60(b) is DENIED as not properly raised; and plaintiff's motion to strike Terry Kraucunas's papers and to obtain emergency relief is DENIED as unnecessary.

Entered this 9th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge