IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BARRY AVIATION, INC.,

Plaintiff,

OPINION AND ORDER

v.

02-C-0635-C

LAND O'LAKES MUNICIPAL AIRPORT COMMISSION, TOWN OF LAND O'LAKES, WISCONSIN, RICHARD PETERSON, individually and as a Land O'Lakes Town Supervisor, HENRY MITCHELL, individually and as a Land O'Lakes Town Supervisor, MICHAEL STOPCZYNSKI SR., individually and as a Land O'Lakes Town Supervisor, RONALD RAMESH, individually and as a Land O'Lakes Town Supervisor, KARL KERSCHER, individually and as an Airport Commission Official, and JAMES A. BATES,

Defendants.

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This civil action for monetary relief arising out of defendants' alleged fraudulent inducement is before the court on defendants' motion for an award of sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Defendants allege that plaintiff based its law suit 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. Defendants seek an award of attorney fees and expenses.

In its complaint, plaintiff Barry Aviation, Inc. contended that defendants fraudulently induced it to enter into a contract to become a fixed-base operator at the Land O'Lakes Municipal Airport and in doing so, (1) violated the Wisconsin Organized Crime Control Act, Wis. Stat. § 946.83; (2) violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961; (3) committed common law fraud; (4) destroyed public records in violation of Wis. Stat. § 946.72; (5) committed a civil conspiracy to defraud; (6) violated plaintiff's rights to due process and equal protection; and (7) breached the parties' contract by failing to observe the covenants of good faith and fair dealing. In addition, plaintiff alleged that defendants violated the express terms of their contract by allowing non-qualified personnel to perform airplane maintenance and by failing to maintain and replace the aviation fuel system and underground tanks.

In an order entered on May 16, 2003, I found that plaintiff had failed to plead its allegations of fraud with the particularity required under Fed. R. Civ. P. 9(b), that plaintiff's RICO and § 1983 claims were barred by the applicable statutes of limitation and that the

dismissal of plaintiff's federal claims deprived the court of supplemental jurisdiction to hear plaintiff's state law claims. An amendment to the complaint would have been futile because the statutes of limitation had run on plaintiff's RICO and § 1983 actions. Accordingly, I denied plaintiff leave to amend its complaint. On June 12, 2003, plaintiff filed a notice of appeal. Although notice of an appeal deprives a district court of jurisdiction over most aspects of a case, it does not preclude the lower court from deciding matters that are ancillary to the appeal. Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995). Because resolution of this motion does not involve the merits of the appeal, jurisdiction is present. See, e.g., State of Wisconsin v. Missionaries to the Preborn, 796 F. Supp. 389, 392 (E.D. Wis.1992) (issuance of Rule 11 sanctions for improper removal despite absence of subject matter jurisdiction) (citing Willy v. Coastal Corp., 503 U.S. 131 (1992)).

In defendants' motion, filed four days after plaintiff filed its notice of appeal, defendants argue that plaintiff's attorney failed to make a reasonable inquiry into the legal and factual foundation for plaintiff's complaint "and other papers filed." I find the motion procedurally flawed, making it unnecessary to address its substance.

Fed. R. Civ. P. 11(c)(1)(A) contains a 21 day "safe harbor" period. The rule provides that a Rule 11 motion for sanctions "shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or

appropriately corrected." The safe harbor provision was added to Rule 11 in part to make the rule more fair by giving a potential violator notice and an opportunity to correct. Fed. R. Civ. P. 11, advisory committee notes, 1993 amendment (provision intended "to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."); see also Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1058 (7th Cir. 1998).

Defendants concede that they did not serve plaintiff with their motion 21 days before filing it. After plaintiff moved to strike the motion for failure to comply with the safe harbor provision, defendants withdrew their motion, served it on plaintiff again and re-filed it 21 days later.

Defendants' post-judgment service does not satisfy Rule 11's safe harbor provision. Therefore, the motion will be denied. Although a party may file a Rule 11 motion after a court enters judgment, the party must have served the alleged violator at least 21 days before the entry of judgment. Divane v. Krull Electric Co., 200 F.3d 1020, 1026 (7th Cir. 1999) (holding that because plaintiff filed its Rule 11 motion more than 21 days before final judgment entered, plaintiff had met requirements of Rule 11). Post-judgment service does not satisfy the safe harbor provision for a good reason: the party facing sanctions is no

longer able to withdraw or correct its allegedly flawed submission. Id. Although defendants' motion to dismiss put plaintiff on notice of the defects in its complaint and provided it with an opportunity to withdraw or amend, they did not comply with the safe harbor provision. This provision is not a mere formality that a court may ignore when it believes that formal notice would be unnecessary or ineffective. Id. (citing Ridder v. City of Springfield, 109 F.3d 288, 297 (6th Cir. 1997), and Barber v. Miller, 146 F.3d 707-710-11 (9th Cir. 1998)).

Defendants argue that their post-judgment service satisfies the safe harbor provision because plaintiff may correct its flawed submission by withdrawing its appeal. The safe harbor is provided to allow a party to correct the "*challenged* paper, claim defense, contention, allegation, or denial." Fed. R. Civ. P. 11(c)(1)(A) (emphasis added). Defendants have not challenged plaintiff's appeal, but its complaint, which can no longer be amended or withdrawn. Even if I were to read into defendants' motion an allegation that plaintiff's appeal violated Rule 11 because an appeal would suffer from the same alleged flaws as the complaint, it is not proper for this court to evaluate the merits of an appeal. Kusay, 62 F.3d at 194 (timely notice of appeal transfers jurisdiction to the court of appeals over all "those aspects of the case involved in the appeal") (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).

Alternatively, defendants seek recovery of attorney fees under 28 U.S.C. § 1927, which provides that an attorney "who so multiplies the proceedings in any case unreasonably

and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Plaintiff has not responded to this argument or even acknowledged that defendants' motion was premised on § 1927. Despite the wholly one-sided litigation of this issue, I am unable to find that § 1927 applies in this situation. First, 28 U.S.C. § 1927 was intended to apply only to those attorneys who "needlessly delay *ongoing* litigation." Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789, 794 (7th Cir. 1989). Defendants do not claim that plaintiff's complaint was a dilatory tactic. Moreover, § 1927 sanctions are appropriate only in instances of "serious and studied disregard for the orderly process of justice." Ross v. City of Waukegan, 5 F.3d 1084, 1089 n.6 (7th Cir. 1993) (quoting Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968)). Plaintiff's conduct does not meet that extreme standard.

ORDER

IT IS ORDERED that defendants' motion for sanctions under Fed. R. Civ. P. 11 and

28 U.S.C. § 1927 is DENIED.

Entered this 12th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge