AFFIRM; and Opinion Filed March 28, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00433-CV

SHEREEF KAMEL, W.D. MASTERSON, AND KILGORE & KILGORE, PLLC, Appellants
V.
ADVOCARE INTERNATIONAL, L.P., Appellee

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-03276-2015

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Lang-Miers

This is an appeal from an order granting a motion for sanctions filed by appellee AdvoCare International, Inc. against appellants Shereef Kamel, a former independent distributor of AdvoCare products; Kamel's attorney, W.D. Masterson; and Masterson's law firm, Kilgore & Kilgore, PLLC. The trial court found that appellants brought baseless claims against AdvoCare and ordered Masterson to pay AdvoCare $3500 in attorney's fees as a sanction. On appeal appellants argue that the sanctions order is defective and the evidence is insufficient to support the award. We resolve appellants' issues against them and affirm the sanctions order.

BACKGROUND

AdvoCare sells nutrition and other health-related products exclusively through independent distributors. Kamel became a distributor with AdvoCare in March 2013. In late

2013, AdvoCare blocked Kamel's purchase of 800 boxes of gingerbread bars due to what it contended was suspicious activity. Kamel said he was going to give the bars to school teachers. Unhappy with Kamel's explanation, AdvoCare suspended Kamel's account. In December 2013, Kamel accused a distributor in his upline, Aly Gwin, of sending him a text message that made disparaging remarks about his race and national origin.[1]

Gwin informed AdvoCare about Kamel's accusations and denied sending the text message. AdvoCare immediately hired an attorney to investigate the matter. In a December 2013 letter, the attorney asked both Gwin and Kamel to obtain and pay for a forensic examination of their phones. Gwin did; Kamel did not. The investigation revealed that Gwin's phone did not contain the text message. Kamel kept assuring AdvoCare that he was having his phone examined independently, but he never produced any reports from the examination, never provided his phone for an examination, and never produced any proof that Gwin sent the message. When AdvoCare's counsel advised Kamel by e-mail about the results of the examination of Gwin's phone, Kamel responded that the "results were fabricated" and he had "100% proof that those texts were sent from her number." He said "[t]he next correspondence between us needs to be a settlement offer." AdvoCare offered to settle with Kamel if Kamel paid AdvoCare $2500. He declined. Ultimately, Kamel said his phone was broken while on vacation. AdvoCare concluded that Kamel "spoofed" the text message (sent it to himself) and lied about it and terminated his distributorship agreement in January 2014.

Over a year later, in June 2015, AdvoCare suspended the distributorship agreements of 55 distributors, including a man named Michael Moussa, due to concerns that the distributors had violated AdvoCare's policies and procedures by, for example, stockpiling its products and

[1] The text message stated verbatim: "You foreigners don't know the first thing about running a business!!! Unless it's a gas station!!! Leave the big business to the ones that founded this country!!! Noone [sic] will believe an arab over an all American girl!!! Good Luck!!!"

selling them on eBay. About a month after that, AdvoCare filed a petition for presuit discovery pursuant to Texas Rules of Civil Procedure 202, in which it sought to depose Moussa and to require him to produce certain documents in advance of his deposition "in anticipation of a lawsuit regarding, *inter alia*, Moussa's likely breach of his contract with AdvoCare."

Shortly after AdvoCare filed the Rule 202 petition, Kamel and Moussa filed a document titled "Counter-Plaintiffs' Original Class Action Petition" in the same cause number as the petition for presuit discovery. In this class-action petition, Kamel and Moussa purported to represent "[a]ll persons or entities who are Texas citizens and from January 31, 2014 to the present had their distributorships suspended or terminated by AdvoCare for alleged excessive purchases." They asserted claims for breach of contract, quantum meruit and unjust enrichment, common law fraud, and conspiracy to commit unlawful acts. The class-action petition alleged that AdvoCare breached its contract in connection with Kamel's purchase of the gingerbread bars, "promoted racism" against "distributors with an Egyptian heritage" and "supported by inaction" the racist text message allegedly sent to Kamel by Gwin. The petition implied that AdvoCare had no basis to terminate these distributorships and did so based on racial discrimination.[2]

AdvoCare moved for sanctions against appellants contending the allegations were verifiably groundless. According to AdvoCare, the racist text message was fabricated and appellants knew or should have known it was fabricated at the time they filed their lawsuit. As support, AdvoCare submitted evidence showing that:

[2] The petition alleged, in relevant part,

> 4.06 In truth this suit and the suspensions/terminations of an entire downline are only the latest chapter in a long history of theft by AdvoCare of the distributorships of successful distributors without any proper basis. . . .
> 4.07 AdvoCare began softening up its present victims by a racist attack on distributors with an Egyptian heritage with the following racial epithets which AdvoCare supported by inaction, even accusing Kamel of sending it to himself: [racist text message omitted].
> 4.08 Not only has AdvoCare promoted racism . . . .

(1) nine months before the petition was filed, Gwin notified AdvoCare that Kamel accused her of sending the racist text message;

(2) Gwin denied sending it, and AdvoCare immediately initiated an investigation;

(3) AdvoCare asked both parties to submit their cell phones to a forensic examiner;

(4) Gwin agreed to have her phone examined; Kamel did not;

(5) the examination of Gwin's cell phone and cell phone records showed that the racist text message was not sent from her cell phone.

Appellants' response to the motion for sanctions was largely a laundry list of allegations against AdvoCare that did not address the arguments raised in the motion and instead related to the merits of the claims asserted in their petition. As support, appellants attached the declarations of Kamel and Masterson. Kamel's declaration traced the history of his dispute with AdvoCare concerning his distributorship agreement and the events surrounding his receipt of the "vicious racist text." Masterson's declaration stated that he interviewed Kamel and Moussa and reviewed their documents. He said he believed their claims were meritorious based on their statements, their documents, and his "prior experience with AdvoCare and familiarity with their business practices."

The trial court held an evidentiary hearing. Four witnesses testified. Gwin testified that she did not send the racist text message from any device. Lance Stokes, the expert who performed the forensic examination of Gwin's phone, testified that he did not find the racist text message among "both deleted and active messaging" on Gwin's phone. AdvoCare also introduced several exhibits to support its motion.

Kamel also testified. He said he was of Egyptian heritage and that he received the racist text message but did not spoof the message. During cross-examination, AdvoCare's counsel asked Kamel about the whereabouts of the phone that he was using when he received the racist text message, and Kamel responded that "[t]he phone was broke [sic] on vacation" and he had to

get a new phone. AdvoCare's counsel also asked Kamel about the "100 percent [sic] proof" Kamel stated he had showing Gwin sent the racist text message; Kamel said he did not have "100 percent [sic] proof" at the time he made that statement.

Counsel for AdvoCare testified that AdvoCare incurred about $5000 in attorney's fees in connection with the motions for sanctions. Masterson did not testify about anything he specifically reviewed before filing the counter-petition. However, he made the following argument:

> [T]here is no evidence whatsoever in this case that Mr. Kamel libeled himself. Even the expert was never even asked about this alleged spoofing where Mr. Kamel is supposed to have libeled himself.
>
> The AdvoCare method is to first they suspend these people. They take all their income. And then they want – they want them to participate in these quasi[-] judicial proceedings to bring in their phones or whatever it is that they want when they have no income. They can't afford a lawyer. . . .
>
> I have undertaken to go through all their papers and respond. They have absolutely no evidence that Mr. Kamel wrote that e-mail [sic]. And we have shown to the Court the history of Mrs. Gwin's defamatory comments on the Internet.
>
> First she went after Logan Stout, then she went after Mr. Kamel, and continues to go after Mr. Kamel. And this last racial text is – is just part of a string of e-mails and texts. So I think the inference is very, very strong that she sent this. Whether she sent it from that phone or not, I don't – we don't know. But she didn't have to send it from the phone. She could have gotten somebody else to send it, she could have sent it from another phone, or she could have sent it from a computer.
>
> And we – we investigated this case. . . . We have undertaken to defend [the class action plaintiffs] and we've relied on what the witnesses have told us and they can't show to the contrary. So I think this sanctions motion is frivolous."

Following the hearing, the trial court granted AdvoCare's motion for sanctions and ordered Masterson to pay AdvoCare $3500 in attorney's fees. The trial court signed an order finding a violation of Rule 13. In an amended order, the court found violations of both Rule 13 and Chapter 10 of the Texas Civil Practice & Remedies Code. The court found that appellants'

conduct "wasted the resources of this Court and AdvoCare." Masterson paid the sanction before the deadline stated in the order.

Appellants appealed the sanctions order and we dismissed for want of jurisdiction. On remand, the trial court granted the parties' respective nonsuits, rendering the sanctions order final. This appeal followed.

THRESHOLD ISSUE

Before addressing appellants' issues, we address a threshold issue raised by AdvoCare. AdvoCare argues that this appeal is moot because Masterson paid the sanction "without reservation of rights." In response, appellants argue that the appeal is not moot because they filed a motion for new trial and a notice of appeal before Masterson paid the sanction. We agree with appellants.

As the Supreme Court of Texas has explained, an appeal must be dismissed as moot "when a judgment debtor voluntarily pays and satisfies a judgment rendered against him." *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 236 (Tex. 1982). In other words, a party cannot freely decide to pay a judgment and later change its mind and seek an appellate court's help in recovering the payment. *Id.* This rule is designed to prevent appellants from misleading their opponents into believing a controversy is over when it is not. *Id.* At the same time, however, "[t]he Texas rule is not, and never has been, simply that any payment toward satisfying a judgment, including a voluntary one, moots the controversy and waives the right to appeal that judgment." *Miga v. Jensen*, 96 S.W.3d 207, 211 (Tex. 2002). Instead, "payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile." *Id.* at 212.

In this case we cannot conclude that AdvoCare was misled into believing the controversy concerning the sanctions order was over at the time the payment was made. The amended

sanctions order was signed on October 8, 2015, and required Masterson to pay the sanction on or before November 2, 2015. Before Masterson paid the sanction on October 30, 2015, however, appellants had already filed a motion for new trial objecting to the sanctions order and a notice of appeal. In short, by the time AdvoCare received payment, it was on notice that appellants intended to exercise their right of appeal. For these reasons, we decline AdvoCare's request that we dismiss the appeal.

ISSUES ON APPEAL

Appellants raise three issues on appeal. First, they argue that the sanctions order is defective because it does not state with sufficient particularity the reason for the sanction. Second, appellants argue that there is no or insufficient evidence to support a finding of sanctionable conduct. Finally, appellants argue that there is no evidence to support the amount of the sanction.

We review an award of sanctions for an abuse of discretion. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). In matters committed to a trial court's discretion, the test is whether the ruling was unreasonable or arbitrary or whether the court acted without reference to any guiding rules or principles. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014). If some evidence supports the trial court's decision, no abuse of discretion is shown. *Id*. A trial court looks at the evidentiary support for the pleading at the time the pleading was filed in determining whether to assess sanctions. *Nath*, 446 S.W.3d at 369.

DISCUSSION

First Issue: Lack of Specificity

Appellants first argue that the sanctions order is defective because it does not sufficiently state the basis for the sanction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (West 2002) (court must describe conduct that violated statute and explain basis for sanction); TEX. R. CIV. P.

13 (order must contain "the particulars" of good cause for issuing sanction). Appellants, however, did not present this complaint to the trial court to afford the trial court the opportunity to correct any error. *See* TEX. R. APP. P. 33.1(a). Although appellants filed a motion for new trial in which they argued that the sanctions order was not supported by sufficient evidence, they did not argue that the sanctions order failed to comply with specificity rules. As a result, we conclude that this issue was not preserved for appellate review. *Birnbaum v. Law Offices of G. David Westfall, P.C.*, 120 S.W.3d 470, 476 (Tex. App.—Dallas 2003, pet. denied) (appellant waived error concerning lack of specificity in sanctions order because appellant did not bring complaint to attention of trial judge); *see also Mobley v. Mobley*, 506 S.W.3d 87, 93–94 (Tex. App.—Texarkana 2016, no pet.) (same). We resolve issue one against appellants.

Second Issue: No or Insufficient Evidence of Sanctionable Conduct

In their second issue, appellants argue that there is no or insufficient evidence to support the sanctions order.

The trial court did not make findings of fact and conclusions of law. The court stated in the amended order, among other things, that Masterson and his firm "brought allegations or other factual contentions . . . that lack evidentiary support and are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Signing such a pleading is a violation of Chapter 10 of the Texas Civil Practice and Remedies Code."

Under Chapter 10, the signing of a pleading constitutes the certificate by the signatory that he has conducted a "reasonable inquiry" and that to his "best knowledge, information and belief,"

> each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3); *Nath*, 446 S.W.3d at 362.

On appeal appellants argue that "[a]ssuming that AdvoCare's assertion is that these [allegations] charge AdvoCare with sending the Racist Text, it is obvious from the express language that they do not[.]" Appellants also argue that "[t]he basis of AdvoCare's claim for sanctions appears to be that it is being wrongfully accused of selective enforcement of policies and procedures against a minority, immigrant Christian religious group. This is not what the Petition states . . . . However, such a claim would not be groundless[.]"

Additionally, appellants argue that there was a reasonable investigation before filing the petition, and they cite as support: "Kamel has at all times denied defaming himself"; because Gwin had previously defamed other distributors it "was reasonable to assume" she sent the racist text message; "AdvoCare's involvement was established by the suspension of Kamel"; AdvoCare's investigation did not consider "other means [Gwin] had available for sending the Racist Text"; and "[t]he investigation prior to filing the petition established numerous facts to support the petition drafted, even though material questions of fact might have developed with discovery."

The trial court had before it evidence of AdvoCare's investigation showing Gwin did not send the text message from her phone, Kamel's refusal to cooperate with the investigation and repeated assurances that he was having his phone examined when he was not, Kamel's admission that he did not have 100% proof Gwin sent the text message at the time he made that statement, and Masterson's declaration. Masterson did not contradict any of AdvoCare's evidence, but primarily impugned AdvoCare's integrity and method of conducting business. Masterson did not present any evidence or argument about how the allegations of racism were relevant to the class-action plaintiffs' allegations of breach of contract and other claims.

A trial court does not abuse its discretion if its decision is supported by some evidence. *See Nath*, 446 S.W.3d at 365; *see also Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). Based on the evidence attached to the motion, response, and adduced at the hearing, the court could have concluded that the allegations of racism against AdvoCare did not have evidentiary support and were not likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3). Consequently, the trial court did not abuse its discretion by concluding that Masterson failed to make a reasonable inquiry into the allegations before signing the petition. *See Nath*, 446 S.W.3d at 365; *see also Elliott v. Dauterman*, No. 05-15-00516-CV, 2016 WL 6835710, at *3–4 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.). We resolve issue two against appellants.

Third Issue: Insufficient Evidence to Support Amount of Sanctions

In their third issue, appellants argue that "the testimony was too indefinite and insufficient to support the award" of sanctions. Appellants rely solely on the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), for determining the reasonableness and necessity of attorney's fees. But "proof of the necessity or reasonableness of attorney's fees is not required when such fees are assessed as sanctions." *Gorman v. Gorman*, 966 S.W.2d 858, 868–69 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Instead, the court should consider several factors in assessing the amount of sanctions. *Nath*, 446 S.W.3d at 371–72 & n.29 (citing list of nonexclusive factors set forth in *Low*, 221 S.W.3d at 620 n.5). Although a trial court is not required to address all these factors, generally an acknowledgment of the costs and fees incurred as a result of the sanctionable conduct is a good starting point. *See Low*, 221 S.W.3d at 620–21.

Here, appellees' attorneys presented evidence of $5000 in attorney's fees incurred as a result of appellants' sanctionable conduct. The trial court assessed $3500 in sanctions.

Appellants do not analyze the award in light of the *Low* factors or explain why, based on the *Low* factors, the evidence is insufficient to support the award. We resolve issue three against appellants.

CONCLUSION

Having affirmed the sanctions order under Chapter 10, we do not need to consider appellants' arguments under Rule 13. We affirm the trial court's October 8, 2015 order.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SHREEF KAMEL, W.D. MASTERSON, AND KILGORE & KILGORE, PLLC, Appellants

No. 05-16-00433-CV V.

ADVOCARE INTERNATIONAL, L.P., Appellee

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Trial Court Cause No. 429-03276-2015.
Opinion delivered by Justice Lang-Miers.
Justices Bridges and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Advocare International, L.P. recover its costs of this appeal from appellant Shreef Kamel, W.D. Masterson, and Kilgore & Kilgore, PLLC.

Judgment entered this 28th day of March, 2017.