Wolff v. Sugiyama, 5 ROP Intrm. 105 (1995)
MARTIN WOLFF,
Appellant,

v.

PETER SUGIYAMA,
Appellee.

CIVIL APPEAL NO. 22-94
Civil Action No. 109-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 16, 1995

Counsel for Appellant: Martin Wolff

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice.

BEATTIE, Justice:

This matter is before the Court on Martin Wolff's ("Wolff") appeal from the trial court's order granting Peter Sugiyama's ("Sugiyama") motion for summary judgment and the trial court's imposition of sanctions against Wolff. We affirm the trial court's grant of summary judgment, but vacate and remand its imposition of sanctions.

I. FACTS

This action was initiated by persons not parties to this appeal who filed a complaint with the trial court naming Wolff as a defendant. Wolff, who is an attorney licensed to practice law before this Court, appeared on his own behalf and filed an answer to the complaint. In addition to responding to the allegations in the complaint, Wolff's answer included assorted purported counterclaims and third-party complaints. One such self-designated third-party complaint is against Sugiyama. Wolff claims that Sugiyama intentionally interfered with an employment contract ⊥106 between Wolff and Jane Arugay ("Arugay") for the provision of domestic services.

After answering the complaint, Sugiyama filed his combined Motion to Dismiss for Failure to State a Claim or, Alternatively, for Summary Judgment and Motion to Dismiss for Failure to Exhaust Administrative Remedies (collectively "Motion"). Sugiyama included affidavits from various witnesses testifying to the effect that Sugiyama took no action to induce

Arugay to breach her contract with Wolff. In its August 23, 1993 Order and Judgment, and after oral argument, the trial court granted Sugiyama's Motion and dismissed Wolff's claim against Sugiyama. The trial court also sanctioned Wolff for filing a frivolous claim. Wolff now appeals the trial court's Order and Judgment.[1]

II. PROCEDURAL HISTORY

The Motion has a tortured history. It was served on Wolff and filed with the court on June 13, 1994. A scheduling order was issued the next day, requiring Wolff to respond by July 29, 1994 and setting oral argument for August 10, 1994. Wolff neither filed a timely response, nor did he appear at the oral argument. The trial court dismissed the action and awarded Sugiyama sanctions by way of attorney's fees. On August 11, 1994, Wolff filed a motion and affidavit requesting that the trial court vacate the order of dismissal and award of attorney fees on the ground that Wolff had not known of the hearing. That same day, the trial court discovered that Wolff had not been served with the scheduling Order and his name was absent from the trial court's biweekly motions calendar. Accordingly, the trial court granted Wolff's motion, rescinded its August 10, 1994 rulings, ordered Wolff to respond to the Motion by no later than August 18, 1994, ordered Sugiyama to reply by August 19, 1995 [sic], and set oral argument for August 22, 1994.

On August 15, 1994, Wolff filed a document captioned "Wolff's Response to Sugiyama's Motion for Summary Judgment" in which Wolff requested an extension of time to file a substantive response to the Motion and postpone oral argument. In the document, Wolff contended that he needed the time to take the depositions of Sugiyama, Sugiyama's wife, Akiko Sugiyama, and two ⊥107 others involved in the matter. Simultaneously, Wolff filed an affidavit attesting in a conclusory manner his need for more time to take the four depositions.

The trial court went forward with the August 22, 1994 oral argument. Wolff appeared and again argued that he needed time to adequately respond. The trial court rejected the argument, concluding that Wolff had an opportunity to respond and the allegations in the complaint were without merit.

III. DISCUSSION

Although the trial court did not specifically state that it was granting Sugiyama's motion for summary judgment as opposed to his motion to dismiss, the fact that it dismissed the complaint on the grounds that the allegations of the complaint lacked merit strongly suggests that the trial court considered matters outside of the pleadings and ruled on the summary judgment portion of the Motion. In any event, we review both types of motions de novo and we may enter summary judgment on appeal. *Becheserrak v. ROP* , 5 ROP Intrm. 63, 67 (1995). Accordingly, the issue before us is whether Sugiyama was entitled to summary judgment on Wolff's claim

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[1] In a previous Order, this Court held that the award of sanctions was immediately appealable. *Wolff v. Sugiyama*, 5 ROP Intrm. 10 (1994). This Court also employed the doctrine of pendent appellate jurisdiction to hear Wolff's appeal of the dismissal of his third-party complaint against Sugiyama. *Wolff*, 5 ROP Intrm. at 11-12.

against him .

A. *Conversion to a Motion for Summary Judgment*

Wolff first argues that the trial court was required to convert the Motion to one for summary judgment, provide notice of the conversion to the parties and delay ruling until a reasonable time to conduct discovery had past. See ROP R. Civ. Proc. 12(c) ("[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). Wolff contends that the trial court's failure to do so is reversible.

We disagree. The Motion was filed as one to dismiss for failure to state a claim, or in the alternative for summary judgment. There was no need for the trial court to "convert" the Motion, because it was already, on its face, one for summary judgment (albeit in the alternative). Wolff was on notice that the Motion was one for summary judgment immediately upon service and treated the Motion as such throughout the proceedings. The trial court had no obligation to convert the Motion.

⊥108 B. *Rule 56(f) and Supporting Affidavits*

Wolff contends that his August 15, 1994 response to the Motion was made pursuant to ROP Rule of Civil Procedure 56(f) and that the trial court erred by not granting him more time to conduct discovery before ruling on the Motion.

Rule 56(f) provides the party opposing a motion for summary judgment with a procedural mechanism to request that the court delay its ruling on the motion until the party can obtain the necessary discovery to respond to the motion. Rule 56(f) requires the party to submit an affidavit to the court stating the reasons why the party cannot present the facts essential to justify the party's opposition to the motion. We assume for purposes of this appeal that Wolff's August 15, 1994 response and accompanying affidavit were filed pursuant to Rule 56(f). By granting summary judgment, the trial court necessarily denied Wolff's Rule 56(f) request.

Although we review de novo the grant of summary judgment, we will not reverse a trial court's ruling on a Rule 56(f) motion unless the trial court abused its discretion. *First Nat'l Bank v. Cities Serv. Co.* , 88 S.Ct. 1575 (1968); *Mackey v. Pioneer Nat'l Bank* , 867 F.2d 520, 523-24 (9th Cir. 1989). Rule 56(f) should be applied liberally when the party invoking it has complied with the dictates of the Rule, and has acted with great diligence and good faith. *See VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475-76 (9th Cir. 1986). To comply with the dictates of the Rule, however, it is not enough for a party to aver that the information necessary to defeat the summary judgment motion is in the hands of others. *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414, 422 (2d Cir. 1989); 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.24 at 56-811 (1988). In addition, the moving

party should specify what facts he intends to discover and how such facts support his opposition to the summary judgment motion. *See, e .g., Lunderstadt v. Colafella* , 885 F.2d 66, 71 (3d Cir. 1989); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 229-30 (3d Cir. 1987).

The moving party's affidavit should also specify what actions to obtain the discovery have been taken and what has frustrated the efforts. *See, e.g., Koplove v. Ford Motor Co.* , 795 F.2d 15, 18 (3d Cir. 1986); *see also* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.24 at 56-811 (1988) (moving party must show to the best of his ability what facts are within the movant's exclusive knowledge or control, what steps have been taken to obtain the desired information pursuant to the discovery procedures under the Rules, and that he wishes to take advantage of these discovery procedures.").

⊥109 Wolff's affidavit falls far below this standard. Wolff merely stated that "[t]o properly respond to the Motion it is necessary to take the depositions of Herman Rhodas, Mrs. Sugiyama, Peter Sugiyama and Atoy Banting. This can not be accomplished within the briefing schedule. It is physically impossible for Martin Wolff to file a brief when he is off island." Although Wolff averred his inability to take the depositions in the week preceding the hearing, he failed to state what efforts he had taken to obtain the requested discovery and the obstacles (if any) he faced in those efforts in the four months since he filed his claim against Sugiyama or the two months since he had been served with the Motion. Wolff also failed to identify the information he hoped to obtain and how that information is material to the summary judgment motion.

Given the incomplete affidavit, read in the light of the fact that Wolff is a licensed attorney, the trial court did not abuse its discretion in rejecting Wolff's request under Rule 56(f) for more time to conduct discovery before responding to the Motion.

C. Summary Judgment

We now turn to the question of whether the trial court erred in granting summary judgment in favor of Sugiyama. We review the determination de novo. *Becheserrak*, 5 ROP Intrm. at 64-65.

1. Summary Judgment Standards

ROP Rule of Civil Procedure 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ROP R. Civ. Proc. 56(c). Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a factual question as to the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986).

Where, as here, the moving party will not bear the burden of proof at trial of the essential element placed at issue in the motion, the moving party has the "initial responsibility of informing the [trial court] of the basis for its motion, and identifying the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 106 S.Ct. at 2553 (quoting Fed. R. Civ. Proc. 56(c)).

⊥110 For a party to defeat a properly supported motion for summary judgment made against it based on the absence of an essential element on which the nonmoving party will bear the burden of proof at trial, the nonmoving party must offer evidence to dispute the facts advanced by the movant and show that there is a genuine issue of material fact to be resolved by the fact-finder. *R-G Denver, Ltd. v. First City Holdings* , 789 F.2d 1469, 1471 (l0th Cir. 1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.* , 106 S.Ct. 2505, 2510 (1986) (emphasis in original).

To be "genuine," the evidence offered by the nonmovant must be sufficient to support a trier of fact's finding in the nonmovant's favor on the disputed fact. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S.Ct. at 2511 (citations omitted). The nonmoving party who will bear the burden of proof at trial on the challenged element cannot rely on conclusory allegations in an affidavit to establish a genuine issue of fact. *Lujan v. National Wildlife Fed'n* , 110 S.Ct. 3177, 3188 (1990). A factual dispute is "material," as that term is used in Rule 56(c), if it must be resolved by the fact-finder before the fact-finder can determine if the essential element challenged by the movant exists.

2. Intentional Interference with Contract

Having set forth the standards for summary judgment, we next analyze the substantive claim challenged in the Motion. Pursuant to Title 1, section 303 of the PNC, this Court follows the American Law Institute's restatements of the law. *See, e.g., Salii v. Sugiyama* , 4 ROP Intrm. 89, 91-92 (1993) (trusts); *Kamiishi v. Han Pa Constr. Co.* , 4 ROP Intrm. 37, 40 (1993) (contracts); *A.J.J. Enter. v. Renguul*, 3 ROP Intrm. 29, 31 (1991) (contracts).

Section 766 of the Restatement of the Law (Second) of Torts describes the claim for intentional interference with contract:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts § 766.
⊥111 Courts that have adopted the Restatement's version of the tort have collectively identified seven elements of a *prima facie* case for the claim of intentional interference with contract. *First*, there must be a valid, enforceable contract between the claimant and a third-party. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1252 (7th Cir. 1994); *Dolton v. Capital Fed. Sav. and Loan*

Ass'n, 642 P.2d 21, 22-23 (Colo. App. 1981). *Second*, defendant must have knowledge of the existence of the contract, or knowledge of facts which should lead the defendant to inquire about the existence of the contract. *Comtrol, Inc. v. Mountain States Tel. & Tel. Co.* , 513 P.2d 1082, 1084 (Colo. App. 1973). *Third*, the third-party must actually breach the contract with the claimant. *McNeill v. Security Benefit Life Ins. Co.* , 28 F.3d 891, 893 (8th Cir. 1994). *Fourth*, defendant's action must have been the proximate cause of the third-party's breach of the contract. *Duct-O-Wire Co. v. US Crane, Inc.* , 31 F.3d 506, 509 (7th Cir. 1994); *McNeill*, 28 F.3d at 894. *Fifth*, at the time of defendant's action, defendant must have intended his or her action to induce the third-party to breach the contract. *McNeill*, 28 F.3d at 894; *Nathanson v. Medical College* , 926 F.2d 1368, 1388-89 (3d Cir. 1991) *Sixth*, defendant's actions must have been improper. *Alvord-Polk, Inc. v. F. Schumacher & Co.* , 37 F.3d 996, 1015 (3d Cir. 1994). [2] *Seventh*, claimant must have suffered a pecuniary loss as a result of the breach by the third-party. *Worldwide Primates, Inc. v. McGreal* , 26 F.3d 1089, 1091 (11th Cir. 1994). At trial, the claimant bears the burden to establish each of these elements by a preponderance of the evidence.

⊥112 3. Sugiyama's Motion for Summary Judgment

Sugiyama contends that summary judgment is appropriate because there is no genuine issue of material fact concerning the fourth element of the tort of intentional interference with contract, that some act of Sugiyama was the proximate cause of Arugay's alleged breach of contract. The affidavits submitted by Sugiyama satisfied his responsibility to inform the trial court of the basis for his Motion and the portions of the record which he believes demonstrate the absence of a genuine issue of material fact.

Specifically, Saturnino "Atoy" Banting testified through his affidavit that he introduced Arugay to Sugiyama's wife, Akiko Sugiyama, and asked Ms. Sugiyama if she needed someone to assist in household chores. Mr. Banting also testified through his affidavit that he never had any contact with Sugiyama about the matter. Similarly, Sugiyama and his wife both testified through their affidavits that Sugiyama had no involvement in the hiring of Arugay and the Sugiyama had

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[2] As to this element, section 767 of the Restatement provides that:

> In determining whether an actor's conduct in intentionally interfering with a contract or prospective contractual relation of another is improper or not, consideration is given to the following factors:
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> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

Restatement (Second) of Torts § 767.

no contact with Arugay concerning the matter. Moreover, in his claim against Sugiyama, Wolff alleged that Arugay left his employ on October 21, 1993. Banting testified in his affidavit that he did not contact Ms. Sugiyama until sometime in November, 1993, when Arugay had already left Wolff's employ.

These affidavits, together with Wolff's pleading, establish that there is no genuine issue of material fact concerning the fourth essential element of Wolff's claim. The breach of Arugay's employment contract allegedly occurred when Arugay left Wolff's employ without his consent on October 21, 1993. Wolff failed to demonstrate that a trial was necessary to find whether any act of Sugiyama's was the proximate cause of Arugay's leaving Wolff's employ.

Wolff asserted in his August 11, 1994 affidavit that Sugiyama had told Wolff that Arugay was working for Sugiyama. Although this purported admission contradicted Sugiyama's affidavit
to the extent it stated that Arugay was not employed by him, it did not create a genuine issue of fact on the question of whether any act of Sugiyama induced Arugay to breach her contract with Wolff. Sugiyama's affidavit was uncontradicted on that issue. Wolff's affidavit thus did not show the existence of an issue of material fact. [3] Wolff failed to come forward with any evidence in the form ⊥113 of affidavits, depositions, answers to interrogatories or admissions that demonstrate the existence of a genuine issue of material fact for trial concerning this essential element of his claim on which he would have the burden of proof at trial. Accordingly, summary judgment was properly entered in favor of Sugiyama.[4]

IV. SANCTIONS

The trial court, *sua sponte*, imposed monetary sanctions against Wolff in an amount equal to the attorney's fees Sugiyama expended. Wolff appeals from this portion of the Order and Judgment as well.

We review all aspects of the trial court's imposition of sanctions under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.* , 110 S.Ct. 2447, 2460-61 (1990). It is an abuse of discretion for the trial court to impose sanctions "with no explanation, or with an explanation that is so conclusory that the appellate court cannot review the substance of its decision." *Caisse Nationale de Credit Agricole-CNCA v. Valcorp, Inc.* , 28 F.3d 259, 264 (2d Cir. 1994) ("[t]he findings of a sanctioning court must of course be sufficient to permit appellate review."); *LaSalle Nat'l Bank v. County of DuPage*, 10 F.3d 1333, 1338 (7th Cir. 1993).

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[3] For example, assume X and Y are two separate and essential elements of recovery, and that the burden of proof at trial rests with Plaintiff. If Defendant files a properly supported motion for summary judgment against Plaintiff and shows that the undisputed facts preclude a finding of element X, Plaintiff cannot defeat the motion by establishing a genuine issue of fact concerning element Y. Such an issue of fact would not be material.

[4] Because of our reasoning in affirming the grant of summary judgment, we have no opportunity to address Sugiyama's additional argument that Wolff failed to exhaust his administrative remedies.

Nonetheless, "even a perfunctory order may at times suffice if the award of sanctions was clearly appropriate from the face of the record." *Katz v. Household Int'l, Inc.* , 36 F.3d 670, 673 (7th Cir. 1994). Likewise, a conclusory order may be enough where the parties on appeal have identified the critical issues in dispute and meaningful review may be had. *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994).

Except for the conclusory holding that "Mr. Wolff's third party complaint is without merit and is therefore frivolous," the trial court neither identified the source of its authority to impose sanctions nor the sanctionable conduct. Furthermore, the ⊥114 record below, and the briefs and argument on appeal do not provide this information.

The silence of the record on these points makes review impossible. There are several possible sources of authority on which the trial court may have relied in imposing the sanction. For example, the trial court may have relied on ROP Rule of Civil Procedure 11, 14 P.N.C. § 702, contempt of court powers or its inherent powers. *See Dalton v. Heirs of Bernardo Borja* , 5 ROP Intrm. 95 (1995); *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 218 (1994); *Cooter & Gell*, 110 S.Ct. at 2460-61. Each of these sources of authority may differ from the others in the type of conduct prohibited, the types of sanctions that may be imposed and other important respects. Without a basis to discern on what authority the trial court relied, we have no ability to review the sanction. *See, e.g., Harris v. Heinrich* , 919 F.2d 1515, 1516-17 (11th Cir. 1990) ("[t]he absence of specific basis for the imposition of sanctions makes meaningful appellate review of the order impossible."); *Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) (same).

Similarly, it is not apparent from the record, the Order and Judgment, or the arguments and briefs on appeal what conduct was sanctioned. This too makes review impossible. *See Coltrade Int'l, Inc. v. United States* , 973 F.2d 128, 132 (2d Cir. 1992) ("[a]s a general matter . . . once the individual who signed the offending paper has been identified, the [trial court] need 'only . . . specify the sanctionable conduct and the authority for the sanctions.'") (quoting *United States v. International Brotherhood of Teamsters* , 948 F.2d 1338, 1346 (2d Cir. 1991)). We cannot tell from the record whether the trial court found the third party complaint to be frivolous due to the lack of a reasonable investigation by Wolff before filing the complaint, a finding that no reasonable attorney could conclude that the complaint was warranted by existing law or a good faith argument for extension, reversal or modification of existing law, or the lack of a factual basis of which Wolff should have been aware, or some other reason. A complaint is not frivolous simply because it lacks sufficient merit to withstand a summary judgment motion.

A trial court need not make findings of fact and conclusions of law in all cases when exercising its discretion in imposing sanctions. *See Brown v. Federation of State Med. Bds.* , 830 F.2d 1429, 1438 (7th Cir. 1987); *Ross v. City of Waukegan*, 5 F.3d 1084, 1088-89 (7th Cir. 1993). The trial court must, however, ensure that the record is sufficient to allow for meaningful appellate review of the sanction.

To assist on remand in this case, and for the guidance of trial courts in future cases, we now address the three basic ⊥115 procedural requirements for the trial court's *sua sponte* imposition of sanctions. First, before imposing sanctions on its own motion, the trial court

should provide the party who faces potential sanctions with notice. Second, the trial court should provide the party with an opportunity to respond. Third, the trial court should ensure that the record is sufficient to allow for a meaningful review of the imposition of sanctions.

The notice need not be formal or take any particular form. *See Donaldson v. Clark* , 819 F.2d 1551, 1556 (11th Cir. 1985). Notice is sufficient if it informs the party of (1) the fact that the trial court is considering the imposition of sanctions, (2) the basic reason(s) why the trial court is considering imposing sanctions and (3) the form of sanctions under consideration. *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Braley v. Campbell*, 832 F.2d 1504, 1514-15 (l0th Cir. 1987); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 662 (7th Cir. 1987).

Once notice has been provided, the trial court should allow the party an opportunity to respond. Like notice, the opportunity to respond need not fit any ritualistic formula. *Donaldson*, 819 F.2d at 1556. For example, there is no absolute requirement that a hearing be held before a trial court can impose sanctions. *See McLaughlin v. Bradlee* , 803 F.2d 1197, 1205-06 (D.C. Cir. 1986). All that is required is that the party have a forum to contest the imposition of sanctions. The particular format to be followed should depend on the conduct in question and the severity of the sanction under consideration. *See Rodgers v. Lincoln Towing Serv.* , 771 F.2d 194, 205-06 (7th Cir. 1985).

For the above stated reasons, we AFFIRM the trial court's grant of summary judgment in favor of Sugiyama and against Wolff. We VACATE the trial court's award of sanctions against Wolff, and REMAND for further proceedings consistent with this Opinion to determine whether sanctions against Wolff are appropriate, giving Wolff an opportunity to show why sanctions are unwarranted.