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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

FRED TOPOUS, JR.

Plaintiff

Case No. 12-28977-CB

V
GOMERY & ASSOCIATES, ET AL

Defendants

EXCERPT OF JUDGE'S RULING

Before the Honorable THOMAS G. POWER.

Traverse City, Michigan - Monday, August 26th, 2013.

APPEARANCES:

For the Plaintiff: CHRISTOPHER COOKE (P35034)
12935 S.W. BAYSHORE DR.
CENTERPOINTE BLDG.
TRAVERSE CITY, MI 49684
(231) 342-3170

For the Defendant: LAURA GARNEAU (P70568)
JOHN GROGAN (P56577)
423 E. EIGHTH STREET
TRAVERSE CITY, MI 49696
(231) 333-0023

Reported By:
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
(231) 922-4576

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WITNESSES: PLAINTIFF
(None)

PAGE

WITNESSES: DEFENDANT
(None)

EXHIBITS:
(None)

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Traverse City, Michigan

Monday, August 26, 2013 - 3:56 PM.

(Excerpt of Judge's Ruling)

THE COURT: Okay. Back to Topous versus Gomery. All right. This is -- these are two motions filed by the Defendant -- pardon me, by the Plaintiff for sanctions, costs and fees. One is for spoliation of evidence sanctions, relating to the refusal and failure to produce a computer that was used in the drafting and preparation of the LLC operating agreement that was the heart of this case.

And the second is a motion for damages claiming that -- that the defenses raised were frivolous. And that -- that the costs; and therefore, costs and fees incurred after the answer was filed, would be recoverable by the -- by the Plaintiff.

The basic facts are that the -- Mr. Gomery, the Defendant, encountered a parcel of property on Three Mile Road, quite large acreage parcel, which he discovered was in -- owned by people who were in financial distress and were being foreclosed on, possibly had late taxes to pay. And he arranged with the owner a purchase price, \$500,000.

Mr. Gomery, who had a previous

1 attorney-client relationship with Mr. Topous,
2 contacted Mr. Topous to come up with the money to buy
3 the property. Mr. Gomery clearly had a prior
4 attorney-client relationship. It was argued by
5 Mr. Gomery that he did not have a current
6 attorney-client relationship with Mr. Topous, it was
7 certainly evidence to the contrary, but in any event,
8 the jury decide that they did. And triggered various
9 responsibilities under the Rules of Professional
10 Responsibility.

11 In any event, Mr. Topous put up \$510,000,
12 which was used to buy this property. Mr. Gomery
13 prepared an LLC agreement. And that was in fact
14 signed by Mr. Topous. And the parties were --
15 continued to be friends for an extended period,
16 before their relationship fell out for various
17 reasons, which aren't really relevant, and this
18 action ensued in which Mr. Topous claimed the
19 property was totally his.

20 Mr. Gomery claimed that the LLC agreement
21 provided that he and Mr. Gomery (sic) would get half
22 the property, even though he put up none of the
23 money. And there was some other talk at one point
24 about how he was supposed to -- Mr. Gomery was going
25 to contribute some adjoining acreage, but that never

1 came to pass and was not the centerpiece of the case,
2 really.

3 A second issue having to do with \$25,000
4 that Mr. Topous provided to Mr. Gomery, he originally
5 provided in the form of a check. This was -- and
6 then at the request of the Defendant, it was -- he
7 then replaced the check with 25,000 in cash in
8 several instalments. But effectively replaced the
9 check with cash in the same amount.

10 This was supposedly to settle a lawsuit
11 that was being filed by an employee who was claiming,
12 I think sexual harassment or whistle blower or
13 something, against Mr. Topous' brother, who was
14 managing a business he had an interest in called the
15 Southside Hideout, a bar and concert venue in the
16 Buckley area.

17 The -- Mr. Gomery was -- apparently told
18 Mr. Topous that he was getting rid of this claim,
19 which could be embarrassing to the business and call
20 unnecessary scrutiny to certain ownership
21 arrangements, which I would gather they didn't want
22 to have further examined.

23 In any event, the suit was to be settled by
24 Dan O'Neil, the lawyer who was handling the lawsuit,
25 killing it at Mr. Gomery's request in exchange for

1 Mr. Gomery giving Mr. O'Neil a personal injury case,
2 a juicy one, so Mr. O'Neil would take that and kill
3 the case against Southside Hideout, which of course
4 is accusing Mr. O'Neil of betraying his client who
5 had a claim against Southside Hideout.

6 That turned out to be and Mr. Gomery
7 admitted that was not true, was a lie. And there was
8 no truth to that at all. He then claimed the 25,000
9 was for legal work that he had done for friends of
10 Mr. Topous, friends and family members. And that the
11 various unpaid amounts amounted to -- that's really
12 what the 25,000 was for.

13 Although the invoices that -- that
14 supported this, which had almost no detail, including
15 such things as how much was spent on each day on each
16 task, which is stuff you would have in any normal
17 lawyers bill, wasn't there. But these invoices were
18 manufactured way after the fact, in contemplation of
19 this reason being given for the 25,000.

20 In any event, the jury rendered a verdict
21 that the -- among other things -- first, that they
22 had an attorney-client relationship. And that
23 Mr. Gomery had violated the Rules of Professional
24 Responsibility in his dealings with his client,
25 Mr. Topous.

1 The jury also found that Mr. Gomery had
2 committed fraud in inducing Mr. Topous both as to the
3 25,000 that he gave Mr. -- pardon me, that he gave
4 Mr. Gomery. And also as to the operating agreement.
5 And that a verdict was rendered at that time.

6 The -- so, with respect to the claim over
7 the 25,000, it was admittedly a lie that was told
8 about this arrangement with Dan O'Neil and that the
9 25,000 was to compensate Mr. Gomery for giving up
10 this juicy personal injury claim so Mr. O'Neil would
11 betray his client and -- and kill the case. There
12 was no truth to that whatsoever and the Defendant so
13 admitted.

14 Then, later on, he then claims, no, it was
15 actually for legal work. And the Defendant -- these
16 manufactured invoices, which computer records showed
17 were quite recent in the case, were not
18 contemporaneous in any way, shape or form and
19 Mr. Gomery admitted that under oath in his testimony.

20 Then this -- these invoices appear to have
21 been an excuse for manufacturing -- for claiming this
22 money. So it seems to me that the Defendant knew
23 there was no justification for the 25,000, that he
24 had committed a fraud. This is not a matter where
25 there's a fraud claimed and he had a defense. He

1 basically knew he defrauded Topous on that point.

2 So I'm going to award sanctions for the
3 25,000, any amount, time or cost or fees spent after
4 the answer in connection with pursuing the fraud
5 claim for the 25,000, fees and costs for that will be
6 awarded. Then -- next has to do with the spoliation
7 sanctions. This has to do pretty much exclusively
8 with the operating agreement.

9 There was an operating agreement with the
10 LLC. It was signed by Mr. Topous contemporaneous
11 with the setting up of this partnership and the
12 purchase of this property. There was a suggestion
13 and the Plaintiff thought that the LLC agreement that
14 was produced, when the dispute finally erupted some
15 time later, that that was not an accurate statement
16 of the -- of the LLC agreement.

17 The LLC agreement produced by the Defendant
18 was in fact -- showed that the Gomery and Topous
19 would each be a 50 percent owner of the LLC, which of
20 course owned the property. That Topous would pay
21 various carrying costs. And that he put up the money
22 and that Gomery would get a credit for half the value
23 of the property without putting anything up.

24 There was talk about a 40 acre parcel he
25 was going to contribute. That never came to pass.

1 And apparently he never owned the parcel and the ins
2 and outs of that weren't clear. But the operating
3 agreement, as produced, said he didn't have to put up
4 anything. Gomery.

5 When Mr. Cooke got involved in the case, he
6 demanded that in November -- at least by November 1st
7 and probably earlier, 2011, that the computer
8 hardware used to prepare this operating agreement be
9 preserved in the event it was necessary to go through
10 it to find out what had really happened.

11 Mr. Grogan, who was then representing
12 Mr. Gomery, provided -- was provided by his client
13 with a screen shot, "screen shot," which showed a
14 list of documents that were on Gomery computer,
15 including the golf course operating agreement, which
16 was apparently the operating agreement for this LLC.

17 And Mr. Grogan provided that screen shot
18 and said we have that agreement. And here is the
19 computer screen shot to show that we've got it.
20 Mr. Cooke responded again requesting that the
21 computer and other information about this be
22 preserved in the event it had to be explored.

23 Subsequently there were attempts to explore
24 what the computer history of this document had been.
25 However, the computer was not only not produced,

1 misrepresentations were made to the Plaintiffs'
2 computer expert about which computers were the ones
3 that might have produced this agreement.

4 That they specifically assured him one of
5 these two. One of which apparently didn't even exist
6 at the time. Hadn't been made. And the other of
7 which had -- while it had evidence of -- of thousands
8 of other -- other documents on it, it did not have
9 any evidence that this had ever -- this operating
10 agreement had ever been on it.

11 Then, excuses were made about how, well,
12 the -- the computer actually was gotten rid of a long
13 time ago. But the screen shot indicates that it was
14 in the possession of the Defendant at the time of the
15 screen shot. And it was so represented to the
16 Plaintiff.

17 And so, either they knew they didn't have
18 it at that time and misrepresented it. Or more
19 likely they had it and it never got produced or it
20 was deep-sixed some point after that. But it was
21 intentionally withheld. It was intentionally covered
22 up. And so it seems to me -- we have an addition to
23 that, the forensic document examiner testimony.

24 The Plaintiffs' document examiner gave
25 powerful testimony of evidence of why he was

1 confident there had been key middle pages in the
2 agreement, several pages in the guts of the agreement
3 substituted, including the pages that provided for
4 the interest of the parties, 50/50. And there were
5 various reasons why he felt that.

6 And the defense document examiner didn't
7 state that conclusion, but his detailed examination
8 confirmed pretty much what the Plaintiffs' expert
9 document examiner said. So there's strong evidence
10 of page substitution.

11 So that, coupled with the -- the
12 intentional withholding of the computer, appears,
13 therefore, to establish the spoliation or withholding
14 of evidence. And any time, effort, money and fees
15 spent by the Plaintiff to attempt to rundown the
16 computer problem or the document problems with
17 respect to the operating agreement, should be --
18 should be recovered from the Defendant as sanctions.

19 I would like to point out that the
20 Plaintiff had repeatedly requested copies of the
21 operating agreement from the Defendant. There was
22 some other evidence of that, but on the tape where
23 the Plaintiff and Defendant had a conversation, which
24 included some -- this lie about Dan O'Neil
25 deep-sixing his client in order to get a personal

1 injury case from Gomery. And Gomery getting 25,000
2 from -- from Topous to compensate, all that's on that
3 tape.

4 But in addition, there are references to
5 repeated requests from Plaintiff about the operating
6 agreement and what's our deal? And so, from that,
7 and other requests, it is apparent that it would be
8 apparent to the Defendant that the Plaintiff did not
9 have a copy of the agreement.

10 Now, ideally all people keep copies of all
11 important agreements. But, you know, I was trying to
12 do something with my estate planning just a few weeks
13 ago and I have a trust, I can't find a copy of it.
14 Well, I know I have one. Of course I call the
15 trustee and I get another copy. But that's the way
16 things are. People don't always keep copies of stuff
17 and can't find them.

18 And he -- Defendant knew Plaintiff did not
19 have a copy. And so that made it possible to make
20 these changes. And whatever they were, because there
21 was an agreement signed, but we don't know what the
22 original agreement said, because it was fraudulently
23 changed, to be honest with you.

24 So, I think, again, sanctions for the
25 spoliation and withholding of those evidence will

1 be -- piece of evidence will be awarded. We dealt
2 with the 25,000 already.

3 Now, Mr. -- with respect to the claim
4 that -- that the whole defense was frivolous, I'm
5 going to reject out of hand the idea that any finding
6 of fraud by a jury means there must be sanctions
7 for -- for the defense that was raised.

8 One could have a -- one could have a claim
9 of fraud made, defend it, because it's not true and
10 lose. And of course, that's the position the
11 Defendant takes. It takes more than that to assess
12 sanctions. We have to show that the Defendant knew
13 that he was -- had engaged in a fraud and was -- was
14 attempting to avoid being held responsible for it.

15 So just because he lost a fraud case,
16 doesn't mean there's automatically sanctions, at
17 least that's the way it seems to me. However, in
18 this case we have some other evidence that indicates
19 Mr. Gomery knew he had defrauded Mr. Topous. And the
20 fraud is -- I mean, part of the case is that Gomery
21 and Topous were in an attorney-client relationship.
22 That I do not take to be the -- the frivolous
23 defense.

24 But the fact that -- that Gomery claimed
25 that they had a 50/50 agreement. And here's this

1 operating agreement, which we now have strong
2 evidence to show was actually fabricated after the
3 dispute occurred. And so that's -- that's an added
4 fact over and above normal fraud claim.

5 In addition, we have Mr. Gomery's
6 testimony, which I made notes of. Which reflected
7 very poorly, I thought. He was evasive. He played
8 dumb, claiming that he didn't know anything about
9 anything. He didn't have much to do with the
10 drafting of the agreement.

11 He told Eileen (ph) his wife, who's also a
12 paralegal and has great real estate experience, used
13 to run a title company, I think, or at least run an
14 office of one. That he told her what to put in it.
15 And that she got a form from a new associate who
16 plugged it in and that's all it was.

17 He constantly referred questions of
18 whatever happened to -- to his wife, the paralegal.
19 Claimed that he barely read his document examiners'
20 report. Had no idea what Dr. Gogolin's report had in
21 it. Well, Dr. Gogolin was his computer expert. A
22 very key person. I mean, I did not find his
23 testimony credible. He was not being truthful.
24 And -- all right.

25 Stated he took no steps to preserve the

1 evidence. That was other attorneys -- his attorneys
2 were going to handle that. So, anyway. So all in
3 all, I find there's -- let's see, where was I here?

4 Hold it just a minute. So I find that
5 there was no reasonable basis in Mr. Gomery's mind to
6 believe that his position that there was no fraud was
7 true. He knew it wasn't true. He knew he had
8 misrepresented when he said the operating agreement
9 gave half to him for putting up no money at all.

10 And -- and he knew that the agreement had
11 been fraudulently manufactured to support that
12 version. So I think that means there's no reasonable
13 basis to believe the defense that was raised and so,
14 costs and -- and fees pursuing after the time the
15 answer is filed should be assessed against the
16 Defendant.

17 Now, with respect to these costs and fees,
18 there is an intricate and difficult system for
19 validating attorney fee cost claims. I forgot the
20 Plaintiff's name. The Defendant's name was Khoury,
21 K-H-O-U-R-Y, a recent Michigan Supreme Court case,
22 that tells you what has to happen.

23 It includes a Bar Association survey of
24 rates. And putting up an affidavit from your
25 colleagues to show how highly they think of you. And

1 so forth. And it's -- I won't comment on the value
2 of that evidence. It's what's required by the law.
3 And the appellate courts will require it. We're
4 going to have a hearing and you're going to have to
5 comply. And if you don't, I'm going to deny the fees
6 because they won't be supported.

7 Lastly, the other attorneys. Mr. Grogan,
8 he signed no pleadings whatsoever. I can't
9 understand what the basis is for sanctions against
10 him. All he did was forward this screen shot.
11 There's no showing that he knew this was fabricated,
12 if it was. Indeed I suspect it wasn't.

13 And he -- he did nothing wrong. I can't
14 understand why he's being requested for sanctions.
15 And I'm going to award sanctions to Mr. Grogan
16 against Mr. Cooke, not the Plaintiff, but against
17 Mr. Cooke for the time and fees Mr. Grogan has
18 incurred in responding to that motion only. Not
19 other times.

20 MR. GROGAN: Yes, sir.

21 THE COURT: With respect to Ms. Garneau.
22 She was more involved, but I found the motion has no
23 evidence that she was involved in the destruction of
24 the computer or hiding it. She was representing her
25 client, saying what they told her happened.

1 But I don't see any evidence that she was
2 involved in the destruction of the evidence or
3 fraudulently hiding the evidence. She represented a
4 position. And I didn't see any evidence of that. So
5 I'm going to award her sanctions against Mr. Cooke
6 for the cost of preparing her last response,
7 specifically to this motion and only that.

8 And both of you might want to read this
9 case, again the last name is Khoury. I can't
10 remember the first name. The Plaintiff's name. But
11 there is -- there's appellate law on how you do that
12 and you have to follow it. So file your claims as to
13 amounts and we'll -- and the documentation in support
14 and we'll set a hearing.

15 Let's see here, you want to prepare an
16 order on you and Ms. Grogan?

17 MR. GROGAN: Ms. Garneau, yes, sir.

18 THE COURT: Ms. Garneau. Mr. Cooke, you'll
19 prepare an order with respect to the spoliation
20 sanctions and with respect to the frivolousness
21 sanctions.

22 MR. COOKE: I will, your Honor.

23 THE COURT: And that's frivolousness on
24 both the operating agreement and the \$25,000.

25 MR. COOKE: I will do that.

1 MR. GROGAN: Your Honor, just a point of
2 clarification. The order prepared by Mr. Cooke only
3 applies to Mr. Gomery or the Defendants in the case,
4 not the attorneys?

5 THE COURT: That's right. Not to you, and
6 not Ms. Garneau and not new counsel.

7 MR. GROGAN: Smith Haughey or anybody else.

8 THE COURT: Okay. Thank you.

9 MR. COOKE: Can I ask for one brief
10 clarification, your Honor?

11 THE COURT: Sure.

12 MR. COOKE: The -- the statute that allows
13 us to request sanctions for frivolous claims of
14 defenses, creates that conjunctive language against
15 the Defendant and counsel. Which was the reason I
16 told the Court that they were added into this
17 request.

18 THE COURT: Well, maybe -- this is going up
19 on appeal. And you certainly have preserved that
20 argument.

21 MR. COOKE: All right. Thank you.

22 MR. GROGAN: Or the Court could find under
23 214 then there aren't any attorneys involved. It's
24 up to the Court.

25 THE COURT: Okay. That's -- that's a good

1 point. Well, yeah, I -- but of course, if it was
2 required by statute, then by definition 2114 would
3 apply. I mean, I am awarding it under 2114 as to you
4 and Garneau.

5 MR. GROGAN: Yes, sir.

6 THE COURT: But -- but if the statute
7 requires it, and the Court of Appeals buys that, then
8 you know, poor Mr. Cooke is -- is, you know, ensnared
9 by a statute. I'm not buying it. But they might.

10 (Excerpt concluded)

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1 State of Michigan)

2 County of Grand Traverse)

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February 9th, 2014

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/s/ Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597
Official Court Reporter
328 Washington Street
Traverse City, MI 49684
(231) 922-4576