

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

558
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
00 CvS 2603

MICHAEL SANDS,
Plaintiff,

v.

ORDER

R.J. REYNOLDS TOBACCO CO.,
Defendants,

This matter came on for hearing before the undersigned judge presiding at the March 26, 2001, term of court on a Show Cause Order entered by the Hon. Judson D. DeRamus, Senior Resident Superior Court Judge, on March 9, 2001. When the matter was called for hearing close to the end of the morning session on March 26, the Court held a brief hearing concerning scheduling issues and then held the matter open until March 29, at which time a full hearing was held. Present were B. Eryin Brown, counsel for the plaintiff and Jennifer Labosky, the court-appointed mediator. W.R. Loftis, counsel for the defendant, was present as a witness. The Court called Ms. Labosky to testify and then gave Mr. Brown an opportunity to present evidence and to be heard. Based on the evidence of record in the court file and the evidence presented, the Court finds and concludes as follows:

1. This case and its relevant participants were properly ordered into mediation pursuant to NCGS 7A- 38.1 and the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions ("MSC Rules") by Order dated July 14, 2000, which order was properly served on counsel for all parties.

2. Rule 2 of the MSC Rules provides that if the parties agree on a mediator, "[t]he plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order." Mr. Loftis and Mr. Brown selected Jon Harkavy to serve as mediator and Mr. Brown agreed to file the Notice of Selection of Mediator by agreement with the Court. Mr. Brown did not file this form with the Court.

3. NCGS 7A-38.1(h) specifically provides that "Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge." No form having been filed within 21 days, the time allowed by the Rules, the Court thereafter on August 15, 2000 appointed Dudley Humphrey as the mediator to conduct the mediated settlement conference. The Court timely caused copies of the appointment to be served upon all counsel herein. Mr. Humphrey informed the court of a possible conflict and asked that another mediator be appointed. The Court appointed Jennifer Labosky as mediator in lieu of Mr. Humphrey on August 22, 2000. The Court's Order directed that the

conference be completed by November 10, 2000. The Court timely caused copies of the appointment to be served upon all counsel herein.

4. Thereafter Mr. Brown and Mr. Loftis discussed Ms. Labosky's appointment. Mr. Brown agreed to seek court approval of the substitution of Mr., Harkavy for Ms. Labosky but Mr. Brown did not do so. No such papers were filed and court approval for the substitution was never obtained. Mr. Brown did not then notify Ms. Labosky that the parties had agreed on a different mediator.

5. Upon motion of the defendant, the deadline for completion of the conference was extended until November 20, 2000.

6. At some point Ms. Labosky communicated with counsel after her appointment and scheduled a mediated settlement conference for November 10, 2000. At no time did Mr. Brown indicate that the parties would be using another mediator. Upon request of Mr. Loftis, Ms. Labosky rescheduled the mediated settlement conference for January 29, 2001. At no time until January 20, 2001, did Mr. Brown tell Ms. Labosky that the parties wanted to use another mediator.

7. On January 20, 2001, Mr. Brown wrote to Ms. Labosky and stated as follows:

Due to an apparent overlap in the mails, counsel for both parties to this litigation had already designated John [sic] Harkavy of the Greensboro bar to mediate this case prior to your being designated by the court. We apologize for the mixup and look forward to working with you the next time around.

Please be so kind as to send a letter to the Forsyth County trial administrator indicating this change. If you have any questions please feel free to give me a call.

Mr. Brown did not offer to pay or pay the administrative fee required by Rule 7.

8. Upon receipt of this letter, Ms. Labosky checked with court staff and learned that there was no order in the file relieving her of her duties as mediator. She did not cancel or reschedule the mediated settlement conference and so informed counsel.

9. At this point Mr. Brown asked that the mediation be continued until a later date. Ms. Labosky denied this request. Mr. Brown or someone in his office later informed Ms. Labosky that Mr. Brown had to be in Superior Court in Rowan County on January 29 and that he expected to be first for trial that week. Ms. Labosky spoke with Mr. Brown's associate, Mr. Gibbs, who told Ms. Labosky that he would attend the mediated settlement conference on January 29, 2001.

10. On January 29, 2001, Mr. Brown called Mr. Loftis and told him the mediation was cancelled. At the date, time, and place scheduled, January 29, 2001 at 2 p.m. at Mr. Loftis' office, counsel for the defendant appeared. With the mediator's permission, the

defendant was available on ten-minute standby. Neither plaintiff nor plaintiff's counsel appeared.

11. Mr. Brown was in Rowan County Superior Court on January 29, 2001, in connection with a jury trial. At some point before 2 p.m., Mr. Brown asked the presiding judge, the Hon. W. Erwin Spainhour, to call Mr. Loftis' office. Judge Spainhour did so. Ms. Labosky had not arrived and Judge Spainhour told Mr. Loftis that Mr. Brown was in Rowan County Superior Court.¹

12. Ms. Labosky thereafter filed a Report of Mediator and also wrote the Senior Resident Superior Court Judge about the status of the mediated settlement conference.

13. On March 9, 2001, Jon Harkavy filed a report of Mediator with the Court indicating that he had conducted a mediated settlement conference with the parties of this case on that date pursuant to Court Order.

14. The MSC program has been in effect in this judicial district for several years and counsel for the plaintiff regularly appears in Forsyth County Superior Court. Mr. Brown is deemed to be aware of the requirements of NCGS 7A-38.1, the MSC Rules, and the local rules of this judicial district further implementing this statute and rules. The MSC Rules clearly and specifically require plaintiff's counsel to advise the court when the parties select and agree upon a particular mediator. Rule 2.A. provides:

Selection of certified mediator by agreement of parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice.

15. The MSC Rules clearly and specifically require parties who fail to timely advise the Court that a mediator has been selected who thereafter wish to use a selected mediator rather than the appointed mediator to seek and obtain court approval of the substitution of the selected mediator for the appointed mediator and then to pay the appointed mediator the administrative fee. Rule 7.C. provides:

Change of appointed mediator. Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the \$125 one time, per case administrative fee provided for in Rule 7.B.

¹ After the hearing, Mr. Brown filed an affidavit in this matter concerning Judge Spainhour's involvement. By accepting the evidence that Judge Spainhour called Mr. Loftis, the Court does not accept Mr. Brown's statement in his affidavit concerning the testimony of Mr. Loftis and Ms. Labosky on this point. The Court recalls their testimony differently and does not believe its findings are inconsistent with the testimony of Mr. Loftis and Ms. Labosky.

16. Failure to comply with these duties makes work for the Court and court staff and makes work for the appointed mediator. It has the potential to cause delays in court proceedings. It shows disrespect for court orders. It interferes with appropriate court supervision of the mediated settlement conference process, which is court-ordered.

17. Mediation in this case was court-ordered. As allowed by statute, this means that the Court required the parties to participate. Because the court requires parties to participate, the Court and the public have a substantial interest in insuring that the mediator involved in the mediation is competent and well trained. The Rules therefore set forth a detailed process whereby the Dispute Resolution Commission certifies mediators. The Rules further require that only after certification may a person be appointed to serve as a mediator. Court approval remains required when the parties select a mediator, to be sure that the person conducting the court-ordered MSC which the parties are required to attend is competent and well-trained and to be sure that the mediator will follow the requirements of the statute and Rules.

18. Mediation is not to delay trial. When attorneys fail to comply with the MSC Rules, delays are often the result. Then the mediation process becomes a hindrance to final resolution, whether by settlement or by trial, instead of a process that facilitates resolution of a case. In this case the court ordered that the mediation occur before November 20, 2000, but it did not occur before that date.

19. The Order signed by the Senior Resident Superior Court Judge appointing Ms. Labosky imposed a number of duties on Ms. Labosky as mediator. See Rule 6. For example, the mediator must schedule the mediated settlement conference and must conduct it before the deadline imposed by the Court order. The mediator must also report the results to the court. The court-appointed mediator remains under these duties unless and until she is relieved of those duties by the Senior Resident Superior Court Judge. A lawyer may not unilaterally cancel a mediated settlement conference scheduled by a mediator. See Rule 7.E. When a lawyer fails to comply with the Rules, he is being inconsiderate and rude to the court-appointed mediator and making work for the mediator for no good purpose. In this case, for example, as a result of Mr. Brown's failure to comply with the Rules, Ms. Labosky spent time scheduling mediated settlement conferences, reading correspondence from Mr. Brown, investigating the status of this matter, conferring with the Court staff, and writing a letter to the Senior Resident Judge for guidance.

20. Mediation pursuant to the statute offers some substantial protections to the parties and the mediator. Negotiations are not admissible, and the mediator has judicial immunity. It is inappropriate to imply to a selected mediator that he has been approved to conduct a court-required mediation if he has not; to do so would imply to the mediator that he had judicial immunity for his acts, when in fact he did not.

21. Parties to a lawsuit may voluntarily participate in any alternative to litigation at any time if they all consent. That appears to be what happened here on March 9. The

mediated settlement conference that occurred on that day did not occur pursuant to statute and rules and was not a court-ordered mediated settlement conference. In this particular case there is no specific evidence concerning whether the mediator was aware that the mediation he was conducting was not pursuant to statute and rule but rather was pursuant to agreement. The fact that Mr. Harkavy filed a Report of Mediator would indicate that Mr. Harkavy thought he was conducting the mediation pursuant to court order. Because of the lack of specific evidence on this point, the Court will not make any findings of any violations in this regard.

22. B. Ervin Brown, counsel for the plaintiff, failed to notify the Court that the parties had selected a mediator within 21 days of the date this case was ordered to mediation. Such failure violated the requirements of Rule 2 of the MSC Rules.

23. B. Ervin Brown, counsel for the plaintiff, failed to seek substitution of a selected mediator for an appointed mediator from the Court as allowed by the Rules when he had agreed with other counsel that he would do so. He failed to notify the Court that the parties had agreed upon another mediator in a timely fashion and disregarded the Court's Order appointing Ms. Labosky as mediator. He did not pay or offer to pay the administrative fee to Ms. Labosky required by Rule 7.C. Such failures violated the requirements of the Rules.

24. By his letter of January 20, 2001, Mr. Brown attempted to shift his responsibility for seeking court approval of the substitution of mediator to Ms. Labosky. This was inappropriate, rude, inconsiderate, unprofessional and shows an attempt by Mr. Brown to avoid a duty that clearly lay on his own shoulders. By his actions during the two-week period leading up to January 29, Mr. Brown showed to the mediator an unwarranted casualness about compliance with Court Orders and Supreme Court Rules and reasonably appeared to the mediator to be dissembling in order to avoid the mediated settlement conference. He further purported to cancel a mediated settlement conference when he had no authority to do so.

25. Mr. Brown asserts that he asked his office staff to take care of what he deemed to be the clerical tasks of filling out the needed forms and filing them with the Court. However, he admits that this was his ultimate responsibility and acknowledges that he made mistakes in meeting his responsibilities in this case.

26. Mr. Brown was in Superior Court on January 29. While ordinarily a court appearance in Superior Court would certainly take precedence over a mediated settlement conference, an attorney who is aware that a mediator is attempting to schedule a mediation should make every effort to inform that mediator of his court schedule in advance so that such a conflict can be avoided. If a mediation is scheduled on a date and time an attorney has to be in court, the attorney should immediately inform the mediator of the conflict, preferably in writing. Here, Mr. Brown informed the mediator of this conflict only a few days before the scheduled conference, under circumstances that reasonably caused the mediator to question this conflict. Moreover, Mr. Gibbs told Mr. Labosky he would attend the conference. Mr. Gibbs' name is on the pleadings in this

case and Mr. Brown has offered no reason why his associate could not attend the conference as required by Rule 4.A.1.c. A lawyer should show courtesy and respect for others involved in court proceedings and Mr. Brown's dilatory conduct herein evidences the opposite. Even during the court proceedings in connection with this matter Mr. Brown by his attitude, tone of voice, and questions to Ms. Labosky showed nothing but disdain for Ms. Labosky such that the Court had to intervene and instruct Mr. Brown to be polite. Ms. Labosky has done nothing inappropriate.

27. Mr. Brown by his actions and inactions set forth herein violated RRPC 1.3, RRPC 3.2, and RRPC 4.4 and further violated his professional duties to his client and to the Court. His procrastination and dilatory conduct exposed his client to the possibility of sanctions for violating the Rules. As a result of his mistakes and failures, he has inconvenienced Ms. Labosky and caused extra work for Judge Spainhour and Mr. Loftis.

28. Mr. Brown has on at least one other occasion failed to comply with his obligations under the MSC Rules. See Ancho v. AFLAC, 00 CvS 6676, Forsyth County Superior Court.

29. While Mr. Harkavy had no obligation to file a report with the Court about the results of the mediation he conducted in March, as the mediation was not court-ordered, Mr. Harkavy did file such a report. It is now of record and is a certification by Mr. Harkavy that he conducted the mediated settlement conference pursuant to the Rules and statutes governing court-ordered mediation. Because of this and in the light of all the facts and circumstances about this case, the Court will not require a second mediated settlement conference to be conducted pursuant to court order.

30. Ms. Labosky was present in court for three and a half hours on March 26 and again for an hour on March 29 to participate in these proceedings. She was a necessary witness and her attendance and testimony was helpful to the Court in understanding the events at issue. She spent time scheduling the mediated settlement conference in this case and is entitled to an administrative fee. She had to appear for the conference on January 29 and should be paid for her time on that date.

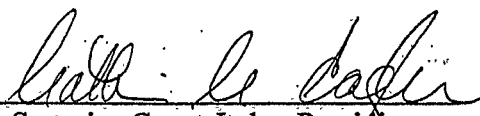
31. The plaintiff does not appear to be responsible for Mr. Brown's failures in this case other than vicariously. In the Court's discretion the Court will not impose any sanctions on the plaintiff and will dismiss the Show Cause Order as to the plaintiff.

In the Court's discretion based on the evidence and the law, after consideration of lesser and more serious sanctions, and in its inherent power and duty to supervise attorneys and enforce its own Rules, it is therefore ORDERED that:

1. The Show Cause Order against the plaintiff is DISMISSED.
2. B. Ervin Brown is REPRIMANDED for his violation of the Rules governing Mediated Settlement Conferences and the Revised Rules of Professional Conduct in connection with his actions in this case.

3. B. Ervin Brown SHALL within ten days of the date of this Order pay to Jennifer Labosky the sum of \$125 as the administrative fee required by Rule 7. He SHALL further within ten days of the date of this Order pay to Jennifer Labosky the sum of \$500 to compensate her for her time in attending the hearings during the week of March 26 and as a sanction. He SHALL further within ten days of the date of this Order pay to Jennifer Labosky the sum of \$125 to compensate her for her time on January 29.
4. B. Ervin Brown SHALL within ten days of the date of this Order read and study the statute and Rules governing Mediated Settlement Conferences in Superior Court. He SHALL obtain a copy of the current Rules from the Dispute Resolution Commission. He SHALL within ten days of the date of this Order write letters of apology to the Senior Resident Superior Court Judge and to Jennifer Labosky. He SHALL mail a copy of this Order to Jon Harkavy.
5. B. Ervin Brown SHALL within ten days of the date of this Order prepare and implement a written procedure for use within his office to insure that the Rules concerning selection and substitution of mediators are complied with and that he is taking personal responsibility for this compliance.
6. B. Ervin Brown SHALL file an affidavit showing compliance with this Order within fifteen days of the date of this Order. He SHALL attach copies of the letters of apology required by this Order, a copy of the Rules he has reviewed and studied, and a copy of the written procedure required by Paragraph 6.
7. B. Ervin Brown is warned that further violations of the Rules governing Mediated Settlement Conferences and the Revised Rules of Professional Conduct can result in suspension of his privilege to practice law in the Superior Court.
8. Jennifer Labosky is relieved of the appointment to serve as mediator in this case.
9. The parties are relieved of their obligation to participate in a mediated settlement conference.
10. The Clerk shall mail a copy of this Order to all counsel of record and to Jennifer Labosky.

This 5th day of April, 2001.


Superior Court Judge Presiding