[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15336

D.C. Docket No. 1:14-cv-23388-KMM

ORLANDO ESTRADA,
and all others similarly situated under 20 U.S.C. 216(b),

Plaintiff - Appellant,

versus

FTS USA, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 20, 2020)

Before JORDAN and NEWSOM, Circuit Judges, and HALL,[*] District Judge.

[*] Honorable J. Randal Hall, United States District Judge for the Southern District of Georgia, sitting by designation.

PER CURIAM:

Jamie Zidell, Esq., and J.H. Zidell, P.A., appeal from the district court's orders requiring them to pay $60,000 in Rule 11 sanctions to FTS USA, LLC. Following oral argument and review of the record, we affirm.[1]

The district court imposed sanctions under Rule 11(b)(3) because it found that Mr. Zidell and his firm filed a Fair Labor Standards Act ("FLSA") complaint making the objectively frivolous allegation that FTS had "never" paid their client, Orlando Estrada, "any" overtime wages as required by the Act. The district court found this allegation demonstrably false because (1) FTS's weekly time records—signed by Mr. Estrada—showed that FTS had paid him overtime wages during the months in question, and (2) Mr. Estrada acknowledged in his deposition that he had been paid the overtime wages documented in his earnings statements. The district court explained that Mr. Zidell and his firm did not conduct a reasonable investigation into Mr. Estrada's claims and neglected to withdraw or modify the allegation in question when given the opportunity.

According to Mr. Zidell and his firm, the district court committed several errors. Reviewing for abuse of discretion, *see Cooter & Gell v. Hartmarx Corp., et al.*, 496 U.S. 384, 407–08 (1990), we address each of the four alleged errors.

[1] We assume the parties' familiarity with the facts and procedural history and set out only what is necessary to explain our decision.

First, Mr. Zidell and his firm argue that the district court ignored, "as required by the [FLSA]," language in the complaint that modified the factual claim that FTS had "never" paid Mr. Estrada "any" overtime wages. We disagree. The magistrate judge, in the report and recommendation adopted by the district court, noted that language. *See* D.E. 78 at 1–2.

Continuing to lean on the language of the complaint, Mr. Zidell and his firm contend that satisfying the pleading requirements to state an FLSA claim under Federal Rule of Civil Procedure 8 render sanctions inappropriate here. This argument fails to advance Mr. Zidell and his firm's position. The factual allegations required under Rule 8 "are subject to Rule 11's command—under pain of sanctions—that 'the allegations and other factual contentions have, or are likely to have following discovery, evidentiary support.'" *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1216 (11th Cir. 2007) (quoting FED. R. CIV. P. 11(b)). Therefore, alleging facts sufficient under Rule 8 does not shield the pleading from Rule 11 scrutiny when the allegations are objectively frivolous. Said another way, the magistrate court sanctioned Mr. Zidell and his firm not because the wording of the complaint failed to state a claim, but instead because the allegation as worded objectively lacked evidentiary support.

Second, Mr. Zidell and his firm assert that their factual claim was not objectively frivolous because Mr. Estrada was also alleging that he was not paid

"all" of the overtime wages to which he was entitled. This argument, however, ignores the fact that the unsupported factual allegation—that FTS "never" paid Mr. Estrada "any" overtime wages—was never withdrawn, and FTS was forced to defend against it. The assertion by Mr. Zidell and his firm that their case for Mr. Estrada "just . . . did not pan out," *see* Appellant's Br. at 32, does not show an abuse of discretion.

Third, Mr. Zidell and his firm claim that FTS, by delaying the filing of its Rule 11 motion, engaged in gamesmanship that undermined the policies motivating Rule 11. This counterclaim is unpersuasive, and we agree with the reasoning of the magistrate judge and district court as to this matter, *see* D.E. 98 at 8–10, and slightly build upon that reasoning. As the magistrate judge noted, Mr. Zidell and his firm relied upon *Peer v. Lewis*. 606 F.3d 1306 (11th Cir. 2010). In *Peer*, we focused our reasoning on the advisory committee's note to the 1993 amendments to Rule 11 to find the sanctions motion at issue untimely "because the district court had already rejected the offensive pleading at the time [the movant] moved for sanctions." *Id.* at 1313. The relevant section of the advisory committee's note states:

> Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions . . . a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

Peer is distinguishable from the present case for an essential reason. Here, the complaint subject to sanctions survived until the district court granted summary judgment after FTS moved for sanctions. Conversely, in *Peer*, the district court struck the complaint prior to the defendant moving for sanctions. Although FTS arguably possessed knowledge of the complaint's frivolity when it provided relevant records to Mr. Estrada, FTS argued that it waited to ensure no information supporting Estrada's position came to light during discovery—as Rule 11's advisory committee notes contemplate.

As discussed in *Donaldson v. Clark*, when the sanctionable conduct involves a pleading, such as a complaint (implicating the initiation of the lawsuit in general), the summary judgment stage may be an appropriate time to decide the issue. 819 F.2d 1551, 1555 (11th Cir. 1987). Rule 11 supports our reasoning in *Donaldson* because the nonmoving party is entitled to file a lawsuit if the claims will likely obtain evidentiary support. The advisory committee's notes account for a party's ability to obtain evidentiary support during discovery noting that, at times, it is appropriate for the nonmoving party to have a reasonable opportunity for discovery. We do not go so far as to hold that waiting until the conclusion of discovery is always the appropriate time to move for sanctions as to a frivolous complaint, but here, no

abuse of discretion occurred in granting FTS's motion for sanctions filed during the pendency of FTS's motion for summary judgment following the close of discovery.[2]

Finally, Mr. Zidell and his firm challenge the $60,000 sanctions as excessive. They say that (1) any Rule 11 violation was limited in scope; (2) the district court improperly relied on sanctions awards that were overturned; (3) the large amount was unnecessary to act as a deterrent in future cases; and (4) there is no explanation as to how the district court settled on the $60,000 figure.

It is true, as Mr. Zidell and his firm assert on appeal, that we overturned one of the sanctions orders cited by the magistrate judge. *See Silva v. Pro Transp., Inc.*, 898 F.3d 1335, 1341–42 (11th Cir. 2018). And another sanction order is not yet final. *See Collar v. Abalux, Inc.*, No. 19-11217-EE, 2019 WL 4803282, at *1 (11th Cir. 2019). But that leaves two other FLSA cases in which Mr. Zidell or his firm has been sanctioned, and those cases supported a finding that some deterrence was necessary.

As for the sanction amount, we do not know whether we would have reached the same $60,000 figure. But that is not the question. Our review is for abuse of discretion, and we cannot reverse just because we may have done things differently.

[2] As *Donaldson* described, the timing is likely stricter when a frivolous motion, rather than a frivolous pleading, generates Rule 11 review. For example, a court need not wait an extended period of time to determine that a party filed a frivolous motion for summary judgment. All the information relevant to determining the frivolity of the motion is before the court after the parties file the relevant papers. The filing at issue here, however, is a complaint and not a motion.

See United States v. Frazier, 387 F.3d 1244, 1258–59 (11th Cir. 2004) (en banc). Contrary to the arguments made by Mr. Zidell and his firm, the magistrate judge and district court did offer a rationale under Rule 11(c)(4) for the $60,000 awarded—it represented "the attorneys' fees [FTS] reasonably incurred defending this action." D.E. 98 at 17.

AFFIRMED.[3]

[3] FTS motioned this Court to impose sanctions on Mr. Zidell and his firm pursuant to Federal Rule of Appellate Procedure 38. In light of the dissent, we exercise our discretion and **DENY** that motion because Mr. Zidell's arguments are not so lacking in legal or factual support to merit Rule 38 sanctions.

JORDAN, Circuit Judge, concurring in part, dissenting in part.

Given the standard of review, I agree with the majority that we cannot overturn the district court's ruling that Mr. Zidell and his firm, J.H. Zidell, P.A., violated Rule 11. But I cannot agree that the Rule 11 violation at issue warranted a sanctions award of $60,000, and respectfully dissent on that score.

We review the amount of an attorney's fee award for abuse of discretion. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340–41 (11th Cir. 1999). A district court abuses its discretion when "it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014) (quoting *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010)). In my view, the district court abused its discretion in awarding FTS USA $60,000 under Rule 11 for two reasons.

First, the $60,000 award is inconsistent with the Supreme Court's pronouncement hat "Rule 11 is more sensibly understood as permitting an award only of those expenses *directly* caused by the filing [or sanctionable conduct.]" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) (emphasis added). The Rule 11 violation here was the failure to correct or withdraw Mr. Estrada's false factual allegation that FTS USA *never* paid him *any* overtime. *See* D.E. 1 at ¶ 13.

But even without this false allegation, FTS USA would have had to defend the lawsuit because Mr. Estrada further claimed that FTS USA did not pay him *all* the overtime required by the Fair Labor Standards Act. In other words, even if Mr. Estrada was paid *some* overtime, that is not proof that he was *always* paid overtime, and FTS USA's counsel would have spent much of the same time in defending the latter as in proving the former.

Second, FTS USA did not justify the $60,000 award. We have held that "the party who applies for fees is responsible for submitting satisfactory evidence to establish both that the requested rate is in accord with the prevailing market rate and that the hours are reasonable." *Duckworth v. Whisenhunt*, 97 F.3d 1393, 1396 (11th Cir. 1996). As the magistrate judge recognized, the fee submission by FTS USA was deficient in numerous ways, such as block billing, use of ambiguous phrasing, billing attorney and paralegal rates for administrative tasks, billing for appellate work, and billing for irrelevant arguments under Florida law. These deficiencies, by themselves, could have justified denial of any fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (recognizing that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims"). Moreover, it is undisputed that FTS USA has made legally frivolous arguments in defending

Mr. Estrada's claim. For example, FTS USA relied on Florida law in moving for sanctions, *see* D.E. 70 at 5–7, even though the district court "found earlier that this argument was plainly without merit, as [it] solely operat[ed] here under federal question jurisdiction." D.E. 98 at 18.

Under the circumstances, the district court's $63,715lump-sum reduction of the $123,715 sought by FTS USA was insufficient. I would reverse and remand for a recalculation of the fees and expenses to be awarded to FTS USA that were caused by the Rule 11 violation.