

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

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MICHAEL M. GESSNER, ESQUIRE	:	CIVIL TRIAL DIVISION
	:	
Appellant/Plaintiff,	:	DECEMBER TERM, 2004
	:	No. 3275
	:	
v.	:	Superior Court Docket No.
	:	2980 EDA 2007
BROADVIEW NETWORKS, INC.	:	
	:	
Appellees/Defendants	:	
_____	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals from the Order dated November 16, 2007, wherein this Court denied Plaintiff's Motion for Sanctions and ordered Plaintiff to pay Defendant \$500.00 in attorney fees for having defense counsel have to respond to the Motion after full terms of a settlement had been reached pursuant to the Pennsylvania Rules of Civil Procedure.

FACTUAL BACKGROUND

Michael Gessner (Plaintiff), instituted this action on December 30, 2004, alleging that in October 2004, Broadview Networks, Inc. (Broadview) was the sole provider of two (2) business telephone lines, which he operated as his business telephone lines. (Complaint, ¶3). Plaintiff states that on or about November 1, 2004, Broadview terminated and sold Plaintiff's main business number without any prior notice. (Complaint, ¶3-5).

Plaintiff specifically alleges that Defendant placed a pre-recorded message on Plaintiff's main telephone line stating the number was disconnected and no longer in service. Immediately after discovering this, Plaintiff contends that he and his staff repeatedly attempted to have the phone line reconnected but to no avail despite promises from Broadview to do so.

Plaintiff's Complaint asserts causes of action sounding in breach of contract and negligence for claims of harm to his business reputation, embarrassment, loss of income and expectation income, resulting from this occurrence. (Complaint, pgs. 3-14).

On August 2, 2007 both parties appeared before this Court for a settlement conference. On August 7, 2007 the parties had formally reached a settlement agreement and the case was marked settled accordingly. (See Docket).

Even though the settlement funds had been disbursed to plaintiff on September 10, 2007, he subsequently filed his Motion for Sanctions on September 19, 2007, alleging that Broadview acted in bad faith by holding the funds for nearly three (3) weeks prior to this disbursement date. (Plaintiff's Motion for Sanctions for Bad Faith, pg.2)¹. Broadview responded to this Motion, even though settlement funds were disbursed and full satisfaction of the terms of the settlement had been met. By Order dated October 16, 2007, this Court denied Plaintiff's Motion for Sanctions for Bad Faith and ordered Plaintiff to pay \$500.00 in attorney fees within ten (10) days of the date of this Order for the need to respond to this unnecessary Motion.

On November 15, 2007, Plaintiff filed his Notice of Appeal to the Superior Court and issued his Statement of Matters.

The sole issue to be addressed on appeal is whether this Court committed an error of law or abused its discretion in denying Plaintiff's Motion for Sanctions for Bad Faith and fining Plaintiff \$500.00 for pursuing a baseless motion meant merely to harass the Defendant and defense counsel after settlement funds were released in accordance with the Pennsylvania Rules of Civil Procedure.

LEGAL ANALYSIS

Pursuant to Pa.R.C.P. 229.1(c): "If a plaintiff and a defendant have entered into an agreement of settlement, the defendant shall deliver the settlement funds to the attorney for the plaintiff, or to the plaintiff unrepresented, within twenty calendar days from receipt of an executed release."

On August 2, 2007, Plaintiff and Broadview reached a settlement agreement. On August 8, 2007, counsel for Broadview sent the proposed General Release and Settlement Agreement to Plaintiff for his signature as is required under Pa.R.C.P. 229.1(c). (Broadview Response to Motion for Sanctions for Bad Faith, ¶6). Thereafter, on August 10, 2007, Plaintiff wrote to defense counsel asserting his belief that the proceeds were due and payable August 23, 2007. (Id.). On August 17, 2007, counsel for the Defendant responded to Plaintiff's letter of August 10, 2007 advising that settlement proceeds would be disbursed in accordance with Pa.R.C.P. 229.1. (Id.). After receiving the August 17, 2007, letter Plaintiff raised no objection to signing the Release and showed up at the defense counsel's office on August 21, 2007 and signed the Release. (Id. at ¶7). According to the Pa.R.C.P. 229.1, this would require Broadview to have the settlement check available to Plaintiff by September 10, 2007. By letter dated September 6, 2007,

¹ It has been stated by Broadview that a different version of the Motion for Sanctions for Bad Faith was sent to them on August 27, 2007 and was alleged to be filed by plaintiff, but the docket does not reveal that

defense counsel advised Plaintiff that the settlement funds were available for pick up at the office of defense counsel or, if Plaintiff desired, it could be mailed. (Id.). When Broadview did not hear a response from Plaintiff, they mailed the check via certified mail, returned receipt requested on September 10, 2007. (Plaintiff's Motion for Sanctions for Bad Faith, Exhibit B). In his Motion for Sanctions for Bad Faith that was filed on September 19, 2007, Plaintiff admits that he received the settlement check, but does not state when it was received. What is a certainty is that the check was received prior to his filing the Motion because he attaches the envelope and check as an exhibit. (See Id. Exhibit "B"). When Plaintiff contacted Broadview's counsel on September 11, 2007 he was advised that the check had been mailed to him on the previous day. (Response to Motion for Sanctions for Bad Faith, pg.3). Despite this, Plaintiff chose to file this Motion and seek sanctions against Broadview.

Defense counsel also admits that she was unaware that the check had been issued by Broadview prior to September 6, 2007, which is when she sent the correspondence to Plaintiff advising him that the funds were available. (Response to Motion for Sanctions for Bad Faith, Exhibit "E").

Plaintiff's conduct in filing this frivolous motion is evidenced by the fact that Pa.R.C.P. 229.1(e) states: "A plaintiff seeking to impose sanctions on the *defendant shall file an affidavit with the court attesting to non-payment....*" Plaintiff fails to attach an affidavit to his Motion because he had already received the settlement funds prior to filing this Motion.

As such, not only has Plaintiff failed to properly adhere to the rule 229.1 for petitioning this Court for sanctions in this case, it is also evident that Plaintiff's filing of

this motion was filed at that time. (Response to Motion for Sanctions for Bad Faith, ¶ 9).

this Motion was done with the sole purpose of harassing Broadview and its counsel by forcing them to respond to this unnecessary Motion when full satisfaction and settlement had been reached by the parties. Therefore, the Plaintiff should be required to pay the \$500.00 cost of attorney fees for having counsel for Broadview prepare and file a response to this Motion.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Motion for Sanctions for Bad Faith was properly denied and the Order for Plaintiff to pay \$500.00 in attorney fees to Broadview was appropriately decided, and respectfully requests that it be affirmed by the Court above.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.

cc:

Michael M. Gessner, Esq.
Catherine Nancy Walto, Esq.