DA 18-0444

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 89N

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4,

Plaintiff and Appellant,

v.

MONICA J. HANSON,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 14-398
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Clifton G. Rodenburg, Stephanie R. Hayden; Rodenburg Law Firm, Fargo, North Dakota

For Appellee:

Monica J. Hanson, self-represented, Billings, Montana

Submitted on Briefs: February 6, 2019

Decided: April 16, 2019

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff National Collegiate Student Loan Trust 2007-4 (NCSLT) appeals from a judgment of the Montana Thirteenth Judicial District Court, Yellowstone County, imposing sanctions on adjudicated violations of M. R. Civ. P. 11. We affirm in part and reverse in part.

¶3 On March 13, 2014, NCSLT, by and through counsel Stephanie Hayden of the Rodenburg Law Firm, filed a complaint against Monica J. Hanson to recover the total outstanding principal and interest due ($32,695.35) on a prior student loan. On May 5, 2014, counsel Hayden and Hanson, *pro se*, executed a written "Stipulation and Consent" agreement that set forth:

> (1) Hanson's acknowledgment that she "ha[d] no defenses to the [complaint] allegations";
>
> (2) the parties' agreement that NCSLT's "complaint is dismissed with prejudice subject only to [NCSLT's] right," upon Hanson's "default" by failure to timely pay on a specified monthly schedule, "to file an affidavit to reopen and for entry of judgment against [her] for" the total amount of $32,850.35;
>
> (3) the parties' agreement that the stipulated amount due ($32,850.35) would be subject to a "0%" annual interest rate on the "unpaid balance"; and

(4) Hanson's express waiver of notice, hearing, and court findings of fact and conclusions of law in "connection" with the above-specified procedure.

NCSLT signed the agreement through counsel Hayden without reference to her specific authority to bind NCSLT to such an agreement.

¶4 Hayden subsequently filed the settlement agreement with a stipulated "Order for Dismissal" for consideration by the court. In pertinent part, the proposed order stated that the parties' referenced settlement agreement "is hereby approved by the court" and thus "ordered" that:

> [NCSLT's] cause of action is DISMISSED WITH PREJUDICE subject only to [its] right to file an affidavit to reopen and for entry of judgment in the amount noted in said stipulation should [Hanson] default in the payment plan noted therein.

The presiding district judge subsequently signed and issued the stipulated order on June 3, 2014.

¶5 Almost four years later, on February 1, 2018, NCSLT, through counsel Hayden, filed an *ex parte* motion, supporting affidavit, and proposed judgment against Hanson for $52,931.84—a sum considerably higher than the $32,850.35 sum specified in the parties' 2014 settlement agreement as the maximum amount of a stipulated judgment without notice in the event of a future default. The supporting affidavit asserted that Hanson had defaulted on the stipulated 2014 payment schedule and further calculated the claimed sum due as including $45,290.25 in principal, $7,441.59 in interest, and $200 in costs.

¶6 On February 16, 2018, the District Court issued a responsive order denying the *ex parte* motion and further finding that NCSLT's "request for a $52,931.84 judgment against Ms. Hanson appears to be without any reasonable basis in fact or law" on the grounds that:

> (1) the parties' settlement agreement at most authorized a $32,850.35 judgment against Hanson upon default;
>
> (2) the *ex parte* motion and affidavit did not account "for any payments Ms. Hanson may have made" and included "no explanation" for the increased principal and interest on the purported no-interest debt;
>
> (3) it was "not at all clear what 'right' [NCSLT] would have to reopen" the case following a dismissal with prejudice—"[t]o preserve its 'right' to pursue a judgment against Ms. Hanson in this case, [NCSLT] should not have dismissed the case with prejudice" because such a dismissal "extinguishes any right [it] had to recover a judgment against Ms. Hanson"; and
>
> (4) NCSLT "failed to preserve any rights" under the settlement agreement because lawyers "do not have implied authority to bind" clients to third-party settlement agreements, NCSLT "did not sign" the agreement, and the agreement included "no indication [counsel] had the authority" to settle this matter on the client's behalf.

The court thus ordered counsel Hayden to appear and show cause how or on what basis "her affidavit" and "proposed judgment . . . does not violate [M. R. Civ. P.] 11(b)(1), (2), and/or (3)." In addition to authorizing the presentation of evidence and argument at hearing, the order also authorized her to file a brief further addressing the issues raised by the court.

¶7 On March 13, 2018, Hayden filed an explanatory affidavit and brief in response to the show cause order. Counsel admitted in her affidavit that the subject motion, affidavit, and proposed judgment erroneously claimed judgment against Hanson in an amount substantially exceeding the amount stipulated in the parties' settlement agreement for a

judgment without notice in the event of a default. Counsel explained that the error was the result of her inadvertent, mistaken conflation of two separate student loan files involving Hanson and the corresponding settlement agreements respectively filed in this and another collection action. Counsel "sincerely apologize[d] to [Hanson] and the [c]ourt for the confusion caused by [her] error." The affidavit further asserted and acknowledged that Hanson "is now current on her obligations for both files/lawsuits."

¶8 At hearing on March 26, 2018, counsel Hayden personally appeared and again acknowledged and apologized for her inadvertent error. As to the settlement agreement enforcement process, Hayden explained that her firm had been using similar settlement agreement forms and procedure since at least 2010 and that she was previously unaware of any problems or concerns similar to those raised by the court. From the bench at the close of hearing, the District Court orally found and concluded that NCSLT's *ex parte* motion, affidavit, and proposed judgment for $52,931.84 violated M. R. Civ. P. 11 due to lack of evidentiary support upon reasonable diligence and inquiry. Noting the significant risk of serious latently lurking harm to debtors, and particularly *pro se* debtors, the court condemned the settlement enforcement procedure utilized by NCSLT as not authorized by the Montana Rules of Civil Procedure and violative of due process. The court took the matter under further advisement pending issuance of a written ruling and determination of an appropriate sanction.

¶9 On May 3, 2018, though not captioned as such, the District Court issued a written judgment setting forth various findings of fact, conclusions of law, and judgment addressing the various Rule 11 issues raised in its prior show cause order. The court again

found and concluded that NCSLT's *ex parte* motion, affidavit, and proposed judgment for $52,931.84 violated M. R. Civ. P. 11 due to lack of evidentiary support upon reasonable diligence and inquiry. The court further found and concluded that the settlement enforcement procedure utilized by NCSLT (i.e., dismissal with prejudice, no-notice "reopening," and *ex parte* judgment on affidavit) was a separate Rule 11 violation because the Rules of Civil Procedure do not authorize such a procedure and it thus further "violates due process." The court last found and concluded that the issue of whether the lack of a client signature on the settlement agreement violated Rule 11 was "moot" based on counsel's showing at hearing that NCSLT had in fact authorized her to enter into such agreements on its behalf. As sanctions on the two adjudicated Rule 11 violations, the District Court: (1) ordered that NCSLT may not "reopen[]" its original 2014 complaint; (2) "forever" enjoined NCSLT from "collecting . . . any amounts of money from [Hanson] *in this case*" based on its 2014 complaint or the underlying 2014 settlement agreement (emphasis added); and (3) enjoined NCSLT counsel and her law firm from further use of "the procedure of dismissing complaints with prejudice" and later reopening those cases to obtain judgment against the adverse party without notice. NCSLT timely appealed the adjudicated Rule 11 violations and sanctions.

¶10 In pertinent part, M. R. Civ. P. 11(a) requires that "[e]very pleading . . . motion, and other paper" of a party represented by an attorney "must be signed by" an attorney of record. By signing or later advocating on a pleading, motion, or other filing, an attorney certifies, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that:

(1) the filing was not made for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions asserted therein are warranted by existing law or by a non-frivolous argument for extension, modification, or alteration thereof; and

(3) the factual contentions asserted therein "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ."

M. R. Civ. P. 11(b).

¶11 We review lower court adjudications of violations of M. R. Civ. P. 11 de novo for conformance to applicable provisions of the Rule. *Byrum v. Andren*, 2007 MT 107, ¶ 19, 337 Mont. 167, 159 P.3d 1062. A lower court determination that a pleading, motion, other filing, or advocacy thereof violated M. R. Civ. P. 11(b) is ultimately a question of law reviewed de novo. *See Byrum*, ¶ 19. However, we review any underlying findings of fact only for clear error. *Byrum*, ¶ 19. A finding of fact is clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or we are firmly convinced upon our review of the record that the district court was otherwise mistaken. *Brown v. MacDonald*, 2007 MT 197, ¶ 8, 338 Mont. 390, 165 P.3d 1125.

¶12 Here, the District Court's finding that NCSLT's *ex parte* motion, affidavit, and proposed judgment for $52,931.84 lacked evidentiary support upon reasonable diligence and inquiry is supported by substantial record evidence. The record further manifests that the court did not misapprehend the effect of the evidence and we are not firmly convinced that the court was otherwise mistaken. As a matter of law, mere inadvertence or good faith mistake are not defenses to M. R. Civ. P. 11(b)(3) (lack of evidentiary support upon

reasonable inquiry). We hold that the District Court correctly concluded that NCSLT's *ex parte* motion, affidavit, and proposed judgment for $52,931.84 violated M. R. Civ. P. 11, i.e., Rule 11(b)(3).

¶13 The court's additional conclusion that the settlement enforcement procedure utilized by NCSLT (dismissal with prejudice, no-notice "reopening," and *ex parte* judgment on affidavit) violated M. R. Civ. P. 11 was more specifically a conclusion that the procedure violated Rule 11(b)(2) (requiring assertion of claim "warranted by existing law" or non-frivolous argument for extension, modification, or alteration thereof). The court reached this conclusion based on its characterization of the dismissal of the original 2014 complaint as an unqualified dismissal with prejudice. The essence of the court's related conclusion that the procedure further "violates due process" was that the procedure unlawfully deprived Hanson of the notice and opportunity to be heard otherwise afforded by the Rules of Civil Procedure.

¶14 However, focused on the 2014 dismissal as a dismissal "with prejudice," the District Court did not duly consider the expressly conditional nature of the order of dismissal and the referenced court-approved settlement agreement from which it arose. While the court correctly observed that the Montana Rules of Civil Procedure do not expressly authorize conditional dismissals "with prejudice," nor do they expressly prohibit them. Moreover, except as otherwise provided by statute or procedural rule of court, a party may knowingly, voluntarily, and intelligently waive statutory, procedural, and fundamental constitutional rights. *State v. Chaussee*, 2011 MT 203, ¶ 4, 361 Mont. 433, 259 P.3d 783; *Woodruff v. Bretz, Inc.*, 2009 MT 329, ¶ 15, 353 Mont. 6, 218 P.3d 486. Finally, for purposes of

M. R. Civ. P. 11(b)(2), it is significant to note that NCSLT was utilizing a court-approved procedure.

¶15 We certainly share the District Court's concern that the procedure used by NCSLT poses a significant risk of potentially "dire consequences" for adverse parties, is susceptible to "abuse and careless practice," and is not necessary in light of a more prudent practice available under the Rules. However, for the limited purpose of M. R. Civ. P. 11(b)(2), we cannot conclude as a matter of law on the record in this case that the procedure was *per se* unwarranted by existing law or a non-frivolous argument for extension, modification, or alteration thereof. We hold that the District Court erroneously concluded that the settlement enforcement procedure utilized by NCSLT violated M. R. Civ. P. 11(b)(2).

¶16 Upon adjudication of a violation of M. R. Civ. P. 11(b), a "court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." M. R. Civ. P. 11(c)(1).[1] As pertinent here, "[t]he sanction may include . . . an order to pay a penalty into court" or "nonmonetary directives." M. R. Civ. P. 11(c)(4). The court must in any event limit the sanction "to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." M. R. Civ. P. 11(c)(4). An order imposing a sanction "must describe the sanctioned conduct and explain the basis for the sanction." M. R. Civ. P. 11(c)(6).

¶17 We review a lower court's choice of Rule 11 sanction for an abuse of discretion. *Byrum*, ¶ 19. A lower court abuses its discretion when it exercises its discretion based on

[1] "Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." M. R. Civ. P. 11(c)(1).

a mistake of law, clearly erroneous finding of fact, or otherwise acts arbitrarily without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241.

¶18 Here, though enumerated in three parts, the District Court essentially imposed two Rule 11 sanctions. The court's first sanction prohibited NCSLT from enforcing the parties' 2014 settlement agreement except by filing and prosecuting a new action against Hanson in accordance with the ordinary course of procedure specified by the Rules of Civil Procedure. In substance, and procedurally as applied to Hanson, this sanction was directly related and proportional to the adjudicated violation of M. R. Civ. P. 11(b)(3). We hold that the District Court did not abuse its discretion in prohibiting NCSLT from enforcing the parties' 2014 settlement agreement except by filing and prosecuting a new action against Hanson in accordance with the ordinary course of procedure specified by the Rules of Civil Procedure.

¶19 The court's second sanction enjoined counsel Hayden and her law firm from further use of "the procedure of dismissing complaints with prejudice and [later] reopening the case to obtain" judgment against the adverse party without notice. This sanction was directly related to the erroneously adjudicated violation of M. R. Civ. P. 11(b)(2). We hold that the District Court abused its discretion in enjoining NCSLT counsel and her law firm from further use of the settlement enforcement procedure utilized in this case.

¶20 Though we hold that the settlement enforcement procedure utilized by NCSLT does not *per se* violate the rather low and liberal standard prescribed by M. R. Civ. P. 11, it likely would have resulted in a due process violation under the circumstances of this case

but for the *sua sponte* vigilance and intervention of the District Court. For the reasons stated by the District Court, we too disapprove of and strongly caution against further use of this unnecessarily risky settlement enforcement practice. We concur that commencement of a separate enforcement action on the settlement agreement, upon due notice in the ordinary course of the Rules of Civil Procedure, would be more advisable and better comport with due process.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶22 Affirmed in part and reversed in part.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON