

STATE OF VERMONT
WINDSOR COUNTY, SS.

BILL BERNSON,
Plaintiff

v.

WILLIAM R. JOHNSON,
NANCY PRESTON JOHNSON, and
CATHERINE ANN JOHNSON,
Defendants

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WINDSOR SUPERIOR COURT

CIVIL ACTION

DOCKET # S170-4-97 Wrcv

**DECISION AND ORDER:
MOTION FOR RULE 11 SANCTIONS,
FILED ON BEHALF OF**

DEFENDANTS WILLIAM R. JOHNSON AND NANCY PRESTON JOHNSON

I. INTRODUCTION

Plaintiff commenced this action with a lengthy pleading in which he sought an immediate *ex parte* order of replevin of personal property as well as other forms of relief. A hearing was scheduled for May 12, 1997, which he then sought to cancel. Defendants William R. Johnson and Nancy Preston Johnson appeared at the hearing with their attorney, Martha M. Davis, Esq., who filed a Motion for Rule 11 Sanctions on their behalf. Plaintiff did not appear at the hearing. Instead, he faxed a letter to the court in which he advised that he would not be proceeding with further court action, and requested that the filings be withdrawn "effective immediately". The Motion for Rule 11 sanctions was scheduled for hearing, and came before the court on June 24, 1997. Plaintiff did not appear. Attorney Davis and her clients were present, and offered documentary evidence and argument in support of the Motion. Defendant Catherine Ann Johnson was also present with her attorney Anne Duncan Cooley, Esq., who indicated she would be filing a similar motion on behalf of her client, although this has not yet occurred. In this Motion, Defendants William R. Johnson and Nancy Preston

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Johnson seek a ruling that the action was commenced and conducted in violation of V.R.C.P. Rule 11, and as sanctions they seek dismissal of the complaint with prejudice, and attorney's fees and expenses. For the reasons set forth below, the Motion is GRANTED.

II. FACTS

On April 15, 1997, Plaintiff commenced this action by filing on his own behalf a document entitled "Pleading of Bill Bernson", together with an Affidavit and a document entitled "Application" which requested an order requiring the return of personal property as set forth in the Pleading. The format was unusual, but the "Pleading" purported to set forth claims for relief that would normally appear in a complaint, including a claim for the return of personal property and claims for monetary damages, and the "Application" contained a request for the equivalent of an *ex parte* order of replevin of the personal property described in the complaint. The gist of the case was that Plaintiff had had personal and business relationships with Catherine Ann Johnson over a period of weeks, that he had lived with her in a home owned by her parents, Defendants William R. Johnson and Nancy Preston Johnson and had sought to acquire an interest in the travel business owned and operated by Catherine Ann Johnson and her mother Nancy Preston Johnson, that a falling-out had taken place and he had been required to leave the home, and that he had filed the action to seek return of personal belongings from the home and to assert monetary claims based on the failed business negotiations. The court denied the motion for *ex parte* relief, but provided that a hearing date would be set and the Notice of Hearing should be served with the summons and complaint. The court also referred Plaintiff to V.R.C.P. Rules 10 and 7 with respect to pleadings in civil actions.

A Notice of Hearing was issued setting a hearing for May 12, 1997 at 1:00 p.m. All Defendants were served on April 24, 1997. On April 25, 1997, the court received a letter from Attorney Martha Davis on behalf of Defendants William R. Johnson and Nancy Preston Johnson requesting that the hearing be scheduled for more than the one-half hour allotted. Mr. Bernson objected by letter and requested that the hearing proceed as planned on May 12, 1997. Attorney John

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Storrs Stebbins entered an appearance on behalf of Defendant Catherine Ann Johnson. On April 30, 1997 Deputy Court Clerk Jane Ammel wrote to Plaintiff and both attorneys to confirm that the hearing would go forward on May 12, 1997 as planned due to the lack of available time on other dates.

On May 7, 1997, Mr. Bernson caused Defendant Catherine Ann Johnson to be served with a subpoena requiring her to attend the hearing on May 12th to give testimony, and to bring a number of specified business documents. A similar subpoena was served upon William R. Johnson and Nancy Preston Johnson on May 8, 1997.

On May 9, 1997, Plaintiff filed a document entitled "Motion to Amend Pleadings" in which he sought to supplement his original filing with a "Complaint for Wrongful Detention of Property - Replevin". The same day (Friday, May 9, 1997), he telephoned the court and asked that the hearing on May 12th be cancelled and rescheduled. The court staff initially agreed to cancel the hearing, which was for the purpose of hearing his request for immediate relief. He faxed a notice to the court and parties and attorneys that the hearing was cancelled and that the court would contact the parties about rescheduling. Defendant William R. Johnson, who had been subpoenaed for the hearing, objected to the continuance and requested that the hearing be held, and the court staff called Mr. Bernson's telephone number at 3:30 p.m. and left a message that the hearing would go forward as scheduled on May 12, 1997. At about 4:30 p.m., Mr. Bernson appeared at the courthouse, and the court staff confirmed to him that the court intended to proceed with the hearing. At that time, Mr. Bernson filed a handwritten "Notice to Vacate Hearing", in which he stated: ". . . I give notice of my intention to vacate this action and to immediately file a fresh action (Complaint of Replevin) forthwith." On Monday, May 12, 1997, the court issued an Entry Order confirming that the hearing would go forward at 1:00 p.m. and clarifying that the hearing would be limited to the request for possession of personal property, and to pretrial procedural planning. The court staff communicated the court's decision to Mr. Bernson by faxing it to him and by leaving a telephone message. That morning Mr. Bernson called the court in response to the telephone messages, and the court staff

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informed him that the court intended to go forward with the hearing at 1:00 p.m.

Meanwhile, defendant was also filing documents to initiate two other actions. On Friday, May 9, 1997, he had filed a "Complaint for Wrongful Eviction" and a document entitled "Writ of Summons" captioned Bill Bernson v. Norwich Police Department & Town of Norwich, Docket No. 221-5-97. Also on May 9, he had filed a "Complaint for Wrongful Detention of Property - Replevin" and three separate documents entitled "Writ of Summons" captioned Bill Bernson v. William R. Johnson, Nancy Preston Johnson & Catherine Ann Johnson, Docket No. 223-5-97 Wrcv.

The court held a hearing in the instant case on May 12, 1997, at 1:00 p.m. All defendants were present with their attorneys. Plaintiff did not appear. Dan Billin, a reporter from the Valley News newspaper, observed the proceeding. The Defendants agreed to the terms of an Order providing for the Plaintiff to retrieve items of personal property according to a specified procedure, and the Order was issued. The hearing continued throughout most of the afternoon, as Defendants filed Motions to seal the complaint and sought time to research and support the Motions. Reporter Dan Billin asked for an opportunity to be heard on the Motions to Seal, but they were eventually withdrawn and no records were sealed. Defendants William R. Johnson and Nancy Preston Johnson filed Answers and Counterclaims and the Motion for Rule 11 Sanctions considered herein, as well as a Motion to Quash the Subpoena. While this hearing was proceeding without the presence of the Plaintiff, a complaint similar to the one in this action was being filed on Mr. Bernson's behalf at 2:34 p.m. in federal court in New Hampshire. At 4:26 p.m., the Court Clerk of this court received a fax from Mr. Bernson stating that he had not received a fax from the court about the hearing that day, and further stating the following:

Please be advised that I will not be proceeding further with either of the above actions. Please withdraw these filings effective immediately.

The relevant papers have been filed this day in Federal Court; a more competent jurisdiction and they will proceed through that system.

The original of this letter will follow in due course.

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On May 12, 1997 at 4:27 p.m., the court faxed to Mr. Bernson a copy of the May 12, 1997 Order concerning return of personal property to him, and at 5:12 p.m. he faxed back to the court a copy of a letter addressed by him to Attorney Stebbins in which he responded to the details of the Order and addressed implementation issues.

On May 14, 16, 19, and 22, 1997, Mr. Bernson faxed letters to the court and copies of correspondence addressed by him to attorneys in the case. He blamed the court for not notifying him in time that the hearing on May 12, 1997 would take place after he had requested that it be cancelled, and claimed that that was the reason he had not attended. He further stated that he would be present at any hearing at which his presence was required. On May 15, the court sent Mr. Bernson a "Notice to Plaintiff," explaining that his documents in the related docket no. 223-5-97 Wrcv entitled "Writ of Summons" did not comply with Rule 4 of the Vermont Rules of Civil Procedure. The court provided Mr. Bernson with a form summons that appears as Form 1 in the V.R.C.P. (1988) at page 405. Also on May 15, the court received a letter from Mr. Bernson dated May 12, 1997. In that letter Mr. Bernson advised the court that he would not be proceeding further with either of the two new actions, and he asked that the filings be withdrawn immediately. The letter also indicated that "the relevant papers have been filed this day in Federal Court."

No originals of any of the faxed documents in this case were ever filed with the court, and there has been no further action of any kind in the case on behalf of Mr. Bernson. The only original documents ever filed by Mr. Bernson in this case were the original pleadings commencing the action, filed on April 15, 1997, and the "Notice to Vacate Hearing" and Motion to Amend Pleadings and related Complaint for Replevin filed on May 9, 1997. All other communications to the court have been by fax with no hard copies ever filed.

On May 19, 1997, Attorney Davis filed an Answer and Counterclaim to the second Complaint filed by Mr. Bernson on May 9, 1997.

On May 30, 1997, the Valley News printed a story by Staff Writer Dan Billin in which he claimed that Mr. Bernson is a con man wanted by law enforcement agencies in England and the

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Netherlands, that Mr. Bernson had denied in a telephone interview on May 22nd that he was the con man from England, and that he telephoned the newspaper on May 26th and claimed that he had left the country and was 8,000 miles away. Mr. Billin also wrote that Mr. Bernson had tried for weeks to get the Valley News to publicize the allegations contained in his pleadings filed with the court, but had refused to meet with the reporter, and that upon investigation, Mr. Billin had discovered that Mr. Bernson's address and phone number were actually a mail-box rental service and a telephone answering service. The story included some details about the personal relationship between Mr. Bernson and Catherine Ann Johnson, the fact that William Johnson is a Justice of the New Hampshire Supreme Court, and information about various legal actions filed by Mr. Bernson in which he had demanded money.

On June 9, 1997, the court issued orders granting Mr. Bernson's Motion to Amend Pleadings, and scheduling the Motion for Rule 11 Sanctions for hearing on June 24, 1997 at 9:30 a.m.

Mr. Bernson did not appear at the hearing on June 24, 1997 at 9:30 a.m. Defendants William R. Johnson and Nancy Preston Johnson were present with their attorney Martha Davis. Catherine Ann Johnson was present with her attorney Ann Duncan Cooley. The court admitted evidence and heard arguments from both attorneys. Defendants William R. Johnson and Nancy Preston Johnson have incurred attorneys' fees in responding to this lawsuit in the amount of \$1,844.08, plus an anticipated \$200 representation on May 12, 1997. This amount represents a reasonable amount of work at a reasonable rate in relation to the requirements of this case. Defendant Catherine Ann Johnson has incurred attorneys' fees in the amount of \$3,823.45 and expenses of \$149.70 in connection with Mr. Bernson's claims.

III. DISCUSSION

At the hearing on June 24, 1997, the court informed Attorney Cooley that since she had filed no written motion for Rule 11 sanctions on behalf of her client, the court would not hear her oral motion made in court that day because Plaintiff had no notice of the motion or hearing. V.R.C.P.

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11(c). She was notified that if she subsequently filed such a motion, it would be scheduled for hearing. No such motion has been filed, and therefore the court has not scheduled a hearing and is not ruling on any motion of Defendant Catherine Ann Johnson.

With respect to the Motion for Rule 11 Sanctions heard on June 24, 1997 on behalf of Defendants William R. Johnson and Nancy Preston Johnson, Attorney Davis argued that neither the original complaint or the complaint as amended set forth a clear basis for a cause of action against her clients. She claimed that their only involvement was as owners of the house in which Mr. Bernson had resided with their daughter. She argued that the purpose of the suit against them was only to harass and humiliate them, and to obtain a financial settlement from them. In support of this argument, she pointed out that Mr. Bernson had sought to publicize his claims against her clients, one of whom is a distinguished public figure; that he had issued subpoenas in advance of the hearing and yet failed to appear at it; that he had attempted to dismiss this case and file a new one rather than appear at the hearing when his strategy did not work; and that his decision to abandon this case and file a similar lawsuit in federal court at the exact same time of the hearing in this court shows his intent to misuse legal process in a pattern of threats and harassment rather than as a forum for resolving legitimate disputes. She requested that the court find that Mr. Bernson had violated his obligations under V.R.C.P. Rule 11, and that as sanctions her clients be awarded their attorneys' fees and dismissal of the claims against them with prejudice. Her clients seek to maintain their counterclaim, because they are not confident that service against Mr. Bernson can be obtained in the future.

The facts set forth by Mr. Bernson in his complaint show involvement of Mr. Johnson and Nancy Preston Johnson beyond simply owning the house in which their daughter lives. The facts describe the involvement of both of them in business transactions in relation to the business in which Mr. Bernson was seeking to acquire an interest. Nonetheless, as Attorney Davis points out, the complaint is long and rambling and does not specify the legal theory on which a claim for relief against her clients is based. This by itself would not justify a finding of violation of Rule 11

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obligations or sanctions, as some leeway is permitted to unrepresented parties in connection with their statements of their claims, particularly since notice pleading is the theory of pleading underlying the Vermont Rules of Civil Procedure. "A pleading is sufficient if it gives fair notice of the claim and the grounds upon which it rests." Reasonable inferences that can be drawn from the factual allegations may also be considered. Bressler v. Keller, 139 Vt. 401, 403 (1981).

Mr. Bernson's misuse of legal process is more troubling. Even after the court had referred him specifically to the Vermont Rules of Civil Procedure, his filings to the court consisted of faxed letters rather than pleadings, and were not followed up with hard copies of the letters he filed. He invoked the court process to obtain a hearing and used subpoenas to indicate to the Defendants that he intended to appear at the hearing, yet he then attempted to cancel the hearing, and failed to appear when notified that it would proceed. He attempted to dismiss the action and file another as a means of avoiding the hearing he had obtained in this case. He attempted to override the court's authority in decisionmaking about whether the scheduled hearing would or would not be cancelled or continued. He attempted to dismiss the action altogether once counterclaims were filed, and he has not maintained communication with the court or appeared at any scheduled hearing. The court concludes that he did not, as of May 9, 1997, and does not presently, intend to conform his pleadings or his conduct of the case to the Vermont Rules of Civil Procedure. Based on this conclusion and the impulsive tone of his pleadings and communications, the lack of specificity in the articulation of his claims, and the pattern of his conduct of the case since it was filed, the court concludes that Mr. Bernson commenced and pursued the case against William R. Johnson and Nancy Preston Johnson for an improper purpose, specifically to harass and embarrass those Defendants, and to cause them to incur needless expenses to respond to the litigation, and/or to bring about a speedy financial settlement. Bill Bernson is the party responsible for this violation, as he was personally responsible for all aspects of his conduct in the case. See Cameron v. Burke, 153 Vt. 565, 576 (1990) (violation of Rule 11 where party abuses court process to harass or cause unnecessary delay). Although Mr. Bernson is not an attorney, he is nonetheless responsible for observing all requirements of Rule 11.

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V.R.C.P. 11(a) and (b).

The court is authorized to impose sanctions after notice and a reasonable opportunity to respond, which occurred in this case. V.R.C.P. 11(c). Sanctions shall be limited to what is sufficient to deter repetition of such conduct, or comparable conduct by others similarly situated. V.R.C.P. 11(c)(2). Payment of reasonable attorneys' fees is specifically authorized if warranted for effective deterrence, and such a penalty is warranted in this case. Mr. Bernson's actions resulted in Defendants William R. Johnson and Nancy Preston Johnson obtaining legal counsel to respond to both an original and an amended complaint, to move to quash a subpoena, to prepare for two hearings which the plaintiff did not attend, and to determine how to conduct a lawsuit in which plaintiff indicated his clear intent not to abide by court rules. This plaintiff and other plaintiffs must be deterred from engaging in such conduct.

Sanctions are also authorized in the form of "directives of a nonmonetary nature" if warranted for effective deterrence. V.R.C.P. 11(c)(2). In this case, it appears that Mr. Bernson, once having invoked the processes of the court to pursue Defendants William R. Johnson and Nancy Preston Johnson, suddenly and unilaterally abandoned that effort when his objectives were not achieved. Although it is impossible to know what his real objectives were, his failures to appear in court and his attempt to withdraw his claims when called upon to be accountable on his claims strongly suggest that his objective was not to prove entitlement to a recovery based on a recognized legal cause of action. He had an opportunity to appear at the June 24, 1997 hearing to support his claims and the basis for his actions, but he did not do so. He did not even file a written response to the Motion for Rule 11 Sanctions. This irresponsible use of court resources and lack of respect for the judicial process calls for strong and effective deterrence of such conduct on his part and on the part of any others contemplating invoking court processes in such a manner. While dismissal with prejudice is a harsh sanction which should not be used to deny a litigant with a colorable claim access to judicial process, Mr. Bernson has wasted the opportunity that was available to him, and done so in a manner that wasted the time and resources of the Defendants, their attorney, and the court. Rule 11 gives

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the court discretion to tailor sanctions to fit the violation. 5A Wright and Miller, Federal Practice and Procedure (1990), § 1336 at 113. Dismissal of claims is available as a sanction. Id. at 117. The court has provided an opportunity for evidence and argument, and Mr. Bernson has not availed himself of that opportunity. The court has herein set forth the findings and conclusions that form the basis for its decision. See Goshy v. Morey, 149 Vt. 93, 99 (1987). For the foregoing reasons, the court concludes that dismissal of the claim against Defendants William R. Johnson and Nancy Preston Johnson, with prejudice to reassert such claim again, is fully warranted by the facts and circumstances of this case.

IV. SUMMARY

For the foregoing reasons, it is hereby **ORDERED**:

1. Plaintiff's complaint against Defendants William R. Johnson and Nancy Preston Johnson is hereby dismissed with prejudice;
2. Defendants William R. Johnson and Nancy Preston Johnson are awarded attorneys' fees in the amount of \$2,044.08; and
3. Defendants William R. Johnson and Nancy Preston Johnson are entitled to proceed against Plaintiff Bill Bernson on their counterclaim.
4. The oral Motion for Rule 11 Sanctions made on the record on June 24, 1997 by Attorney Cooley on behalf of Defendant Catherine Ann Johnson is denied, but without prejudice to file such a motion in written form.

Dated at Woodstock this 17th day of July, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout
Presiding Superior Court Judge

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