

THIRD CIRCUIT GRANTS RULE 38 MOTION AGAINST ATTORNEY WHO COPY-AND-PASTED APPELLATE BRIEF

Conboy v. United States Small Business Administration, 992 F.3d 153 (3d Cir. 2021)

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Lawyers are no strangers to long work days and the heavy pressure caused by tight deadlines in high-stakes cases. It is not unusual to be working on several important cases at the same time, and to have several significant court filings due within the same short time period. Judges have an interest in moving their cases along, and they are not always sympathetic to a lawyer requesting an extension because other work in other cases must also be completed.

When faced with competing obligations and limits on time, a lawyer could be tempted to cut some corners to ensure that other work gets done. However, lawyers should think twice before doing so, as it could not only violate their duty to their clients, but could also result in the lawyer being responsible for paying the other side's fee. A recent Third Circuit case, *Conboy v. United States Small Business Administration*, 992 F.3d 153 (3d Cir. 2021), illustrates this point.

In *Conboy*, two borrowers took out a loan from the United States Small Business Association ("SBA") to convert a commercial property into a restaurant. To secure the loan, the borrowers executed a note, a mortgage, and personal guarantees. The borrowers defaulted on the loan. They obtained the SBA's consent to sell the property, but the SBA did not agree to release the borrowers from their personal guarantees. The SBA attempted to recover the debt from the borrowers, and eventually assigned the debt to a collection agency.

The borrowers responded by suing the SBA and others, and, following discovery, the defendants moved for and were granted summary judgment. The defendants also sought sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure on the grounds that the borrowers had brought frivolous claims and disregarded their discovery obligations. The district court, however, denied the motion for sanctions.

The borrowers appealed to the Third Circuit. In reading the borrowers' brief, however, the Court noticed some apparent errors in syntax. For example, the borrowers' brief stated: "the district court **has** subject matter jurisdiction," and "summary judgment should be denied." Upon further review, the Court discovered that, with the exception of some minor edits, the borrowers' counsel had copy-and-pasted the opposition to the defendants' motion for summary judgment from their filing in the district court. The word "Defendant" had been replaced with "Appellee," but aside from a few other similar changes, the briefs were substantially the same. The Court noted that "the lack of appellate argument reflects the correctness of the District Court's summary judgment," and in just one paragraph, disposed of any of the arguments the borrowers could have made on appeal.

Picking up on the borrowers' copy-and-pasted briefing, one of the defendants moved for sanctions under Rule 38 of the Federal Rules of Appellate Procedure. Under this Rule, the court can "award just damages and single or double costs" if the court "determines an appeal is frivolous." In their response, the borrowers' counsel again (with insignificant edits) copy-and-pasted their previous response to the motion for sanctions in the district court.

The Court granted defendants' Rule 38 motion and awarded damages. It began its analysis by noting that Rule 38 allows parties to recover compensatory damages (rather than sanctions or punishment) for being forced to defend a judgment against a frivolous appeal. Rule 38 also acts as a deterrent against appeals that waste the court's time, thus allowing courts to focus on cases worthy of their limited attention.

The Court determined that the merits of this appeal did not warrant the Court's attention. Instead of engaging with the district court's analysis in its appellate brief, the borrowers' counsel simply copy-and-pasted the opposition to summary judgment filed in the district court. According to the Court, it was "hard to imagine a clearer case for Rule 38 damages."

As for who must pay Rule 38 damages, the Court can order they be paid by the losing party. However, "when a frivolous appeal stems from counsel's professional error," the Court can require counsel to pay the damages. In this case, the Court determined the damages should be paid by the borrowers' counsel, who recycled the work done in the district court and failed to engage with the district court's analysis of the merits of the case.

Conboy serves as a reminder that, no matter what pressures the lawyer is facing, the judges and their clerks will read your brief, sometimes more than once. Make sure their time reading and rereading your brief is worth it. The failure to do so may result in a bad outcome for your client, or, in extreme cases, leave you with a bill for the other side's fee.