STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. 326-5-07 Wncv

IN RE: ALAN BJERKE, ESQ. and
BAUER, GRAVEL, FARNHAM,
NUOVO, PARKER & LANG, Appellants,
ex rel. Green Mountain Bureau, LLC

v.

Jonathan Larkin

DECISION AND ENTRY ORDER
GRANTING APPEAL OF COLLATERAL FINAL ORDER

Pending before the court is an "appeal" purportedly taken pursuant to VRSCP 10, by Alan Bjerke, Esq. and his law firm, Bauer, Gravel, Farnham, Nuovo, Parker & Lang, from a Decision and order of the "Small Claims Court" (under Docket # 43-1-05 Wnsc) entered March 29, 2007. That Small Claims decision and order, authored by Superior Judge Mary Miles Teachout after a "show cause" hearing initiated on the court's own motion, found Appellants to be in violation of VRCP 11, and imposed certain sanctions not relevant here.[1]

Appellants take issue, on numerous substantive grounds, with the findings and conclusions of the court as to whether (or not) Rule 11 was violated by Attorney Bjerke's conduct. However, whatever issues are presented in the context of that dispute, it is clear that none of them involve the merits of any claim by Plaintiff Green Mountain Bureau, LLC (apparently, a credit card servicing and collection entity), and the underlying judgment it had already obtained (on 2/23/05) against Defendant Jonathan Larkin.[2] Thus VRSCP 10 does not appear, by its very terms, to apply to this situation, or to permit the "appeal" now ostensibly taken from the 3/29/07 Decision and order. VRSCP 10(a) allows an appeal to be taken only "from a small claims judgment."

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[1] Although it does not appear that any motion for stay was filed, or granted, *cf.* VRSCP 10(b), it does not appear from the record whether there has been any actual compliance with the sanction(s) imposed by the court (which, as stated in the 3/29/07 order, did not include any specific deadline for compliance).

[2] The 3/29/07 Small Claims order did deny a then-pending application for a financial disclosure hearing under VRSCP 7. Indeed, it was that application which apparently triggered the court's invocation of Rule 11 proceedings. But the appeal now at issue was filed only by Attorney Bjerke and his law firm to challenge the Rule 11 sanctions, and not by (or on behalf of) Plaintiff itself to challenge the denial of financial disclosure relief. And, that denial was interlocutory only (and thus not appealable) in any event, since it merely required Plaintiff to refile the request using standardized, unaltered court forms.

Defendant Larkin has not himself appeared in connection with, and has no direct interest in the Rule 11 proceedings involving Attorney Bjerke and his firm. However, Vermont Legal Aid has appeared and been heard on the Rule 11 issues, apparently as an "*amicus curiae*."

Turning to VRSCP 13, that provision allows the court to refer to any other Rule of Civil Procedure, even if not specifically referenced and incorporated by the Small Claims rules, that would by analogy provide a "consistent ... simple, informal, and inexpensive determination of the claim." Putting aside the obvious – that nothing is going to be "simple, informal, and inexpensive" in connection with ultimate resolution of the Rule 11 issues now presented, and that VRSCP does not expressly reference the Rules of Appellate Procedure as an alternative source of guidance – it does seem that the instant proceedings are wholly collateral, and unrelated to any merits issue in the underlying Small Claims case. And, the "Small Claims Court" is not actually a separate court, but rather just an adjunct, or division of the Superior Court which then has its own simplified procedural rules. *See* 12 V.S.A. § 5531(a); VRSCP 1.

Appellants have already had a trial-level determination of the Rule 11 issues by the then-Presiding Judge of the Washington Superior Court. If there was any ability at all to convene Rule 11 proceedings arising out of a Small Claims case, it was arguably pursuant to the Presiding Judge's inherent oversight authority as to all matters, and cases in the Washington Superior Court during the judge's assigned term(s), of which the Small Claims cases are a subset. Thus, not only does it appear that the instant "appeal" is not within the proceedings expressly allowed by VRSCP 10, but also such an appeal, even if technically compliant, would essentially involve a "horizontal," or "lateral" appeal to a different Superior Court judge, wherein the second Superior Judge is asked to deliver what is really nothing more than an advisory "second opinion" about the collateral legal issues decided by the then-Presiding Judge.[3] The court declines that invitation.

The most analogous procedure, and the one that best appears to fit the present circumstances, is the authority under VRAppP 5.1 to allow appeals directly to the Supreme Court from collateral final orders. The 3/29/07 Decision and order, insofar as it relates solely to Rule 11 issues and sanctions, does conclusively determine those issues, which were, and are obviously disputed; those issues are "important" and are "completely separate from the merits of the [underlying Small Claims] action;" and it is "effectively unreviewable on appeal from a final [Small Claims] judgment." VRAppP 5.1(a). The Second Circuit Court of Appeals has held that an order for Rule 11 sanctions against an attorney (as opposed to a party) is appealable under the collateral order doctrine, *see Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 22 fn. 1 (2nd Cir. 1995), and this appears to be the "majority" view under the federal rules.

VRAppP 5.1 does state that its provisions are triggered by a motion filed by the aggrieved party seeking an appeal. Within the context of VRSCP 13, which essentially directs this court to cobble together some reasonable

[3] Of course, when an appeal on the merits has been duly perfected, and if the Small Claims case was heard and decided by another duly-appointed Superior or District judge, a "lateral" review of the legal (but not factual) issues is statutorily required. 12 V.S.A. § 5538; VRSCP 10(d). But that is not the instant situation.

procedure to address circumstances which were not specifically anticipated or addressed with respect to Small Claims cases, Appellants' ineffective Rule 10 appeal is deemed to be such a request. Clearly, Appellants desire to have meaningful, plenary review of the Rule 11 sanctions against them, and direct appeal of those collateral legal issues to the Supreme Court seems to be the most efficient means of granting them the review ultimately sought.

Order

1. Appellants Alan Bjerke, Esq. and his law firm, Bauer, Gravel, Farnham, Nuovo, Parker & Lang, are hereby granted permission to appeal to the Vermont Supreme Court, from the 3/29/07 Decision and order entered by the Small Claims division of this court, under Docket No. 43-1-05 Wnsc.

2. The underlying action, *Green Mountain Bureau, LLC v. Larkin*, # 43-1-05 Wnsc, is not stayed, so that financial disclosure, or other available post-judgment relief in that Small Claims action, may still be pursued while any appeal of the Rule 11 issues remains pending.

3. This action, or intermediate appeal, is concluded.

IT IS SO ORDERED, at Montpelier, Vermont, this 30th day of November, 2007.

Dennis R. Pearson, Presiding Judge