**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 20-1726

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DESMOND CONBOY; BRENDAN GILSENAN,

Appellants

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION;
CBE GROUP; FIRST NATIONAL BANK, d/b/a Metro Bank; SEDA COG

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-18-cv-00224)
District Judge: Honorable Malachy E. Mannion

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Submitted on January 21, 2021

Before: HARDIMAN, ROTH, *Circuit Judges*, and
PRATTER, *District Judge*.[*]

(Filed: March 19, 2021)

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[*] The Honorable Gene E.K. Pratter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

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HARDIMAN, *Circuit Judge*.

Almost two decades ago, this Court declared that "[a]n appeal is not just the procedural next step in every lawsuit," and the decision to challenge "an order of the District Court is not a matter to be taken lightly." *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004). Today we reemphasize these truths. In this appeal, counsel for Appellants Desmond Conboy and Brendan

Gilsenan filed a brief that was essentially a copy of the one he filed in the District Court. Because the substance of this appeal is as frivolous as its form, we will affirm the District Court's summary judgment and grant Appellee CBE Group's motion for damages under Rule 38 of the Federal Rules of Appellate Procedure.

I

The case arises out of an unpaid debt. Appellants Conboy and Gilsenan, with help from a $594,000 loan from the United States Small Business Administration, bought and renovated a commercial property in Harrisburg, Pennsylvania that became Ceoltas Irish Pub. Conboy and Gilsenan executed a note, mortgage, and unconditional guarantees that they would repay the loan. The guarantees provided that federal law would control the enforcement of the note and guarantees and that Conboy and Gilsenan may not invoke any state or local law to deny their obligation to the SBA.

Conboy and Gilsenan defaulted on the loan and sold the property. The SBA allowed the sale to proceed but declined to release Appellants from their loan obligations.

After repeated attempts to collect the debt failed, the SBA assigned the debt to CBE Group for collection. Rather than pay the debt, Conboy and Gilsenan sued the SBA, the United States Treasury Department, First National Bank, Seda Cog (an agency that facilitated the original loan transaction), and CBE in the Court of Common Pleas of Monroe County, Pennsylvania. The SBA removed the case to the United States District Court for the Middle District of Pennsylvania. The Treasury Department and First National Bank were dismissed from the litigation with Conboy and Gilsenan's consent.

In an amended complaint, Conboy and Gilsenan alleged federal claims for violating the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692, *et seq.*, and the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681, *et seq.* They also alleged state law claims for violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 PA. CONS. STAT. §§ 201-1, *et seq.*, breach of contract, unjust enrichment, and defamation.

After discovery, Defendants moved for summary judgment, and CBE sought sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure. CBE argued that Conboy and Gilsenan brought frivolous claims and disobeyed discovery orders. Conboy and Gilsenan filed an untimely brief opposing both sanctions and summary judgment, which did not include the separate responsive statement of material facts required by Local Rule 56.1. Under the Local Rule, that failure to provide a responsive statement conceded the material facts set forth in the moving parties' statements.

The District Court granted summary judgment and denied the sanctions motions. It held, among other things: (1) that the FDCPA and UTPCPL claims failed because neither statute applies to commercial debts; (2) Conboy and Gilsenan identified no material facts in the record supporting their claims against Seda Cog, their unjust enrichment claim against CBE, or their FCRA claim against the SBA; (3) the contract claim against the SBA failed because Conboy and Gilsenan "admitted"—by not filing a counterstatement of material facts—that the unconditional loan guarantees foreclosed bringing a state law claim to deny their loan obligations; (4) they admitted they had no contract with CBE; and (5) sovereign immunity barred the unjust enrichment and defamation claims against the SBA. The District Court also

held that "no extraordinary circumstances" justified Rule 11 sanctions, and that Rule 37 sanctions were unnecessary because Conboy and Gilsenan's conduct during discovery did not "significantly prejudice[] CBE." *Conboy v. U.S. Small Bus. Admin.*, 2020 WL 1244352, at *7 (M.D. Pa. Mar. 16, 2020). Conboy and Gilsenan appealed the summary judgment.

## II[1]

Conboy and Gilsenan's opening brief begins with a proper introductory sentence arguing that the District Court should not have granted summary judgment. Opening Br. at 1. But it quickly goes awry in the next paragraph: "The district court has subject-matter jurisdiction over this case . . . ." *Id*. One could readily assume that the sentence included a typographical error, using "has" instead of "had." But just two sentences later, the brief declares: "Venue is appropriately laid in the District Court of New Jersey . . . ." *Id*. This second use of the present tense, denoting the wrong trial court, presages what comes after, which belies the notion of an honest mistake.

In the first sentence of his legal argument, counsel describes the summary judgment standard. *Id*. at 6. Two pages later, he argues that "summary judgment should be denied . . . ." *Id*. at 8. In the next section of his argument, counsel again writes as if the case remains in the District Court, claiming "there is no reason to grant summary judgment based on jurisdictional reasons for either party." *Id*. at 13. Apart from

[1] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1367, and 15 U.S.C. § 1692k(d). We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's summary judgment de novo. *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015).

these unusual (and inappropriate) references to the case pending in the District Court, counsel's fifteen pages of "argument" do not mention how the District Court erred. This left us with the suspicion that something was amiss with counsel's brief.

Unfortunately, our suspicions were confirmed. Counsel for Conboy and Gilsenan simply took the summary judgment section of his District Court brief and copied and pasted it into his appellate brief, with minor changes such as swapping "Defendant" for "Appellee." *Compare* Appendix A hereto, *with* Appendix B. This is not proper appellate advocacy.

Unsurprisingly, the lack of appellate argument reflects the correctness of the District Court's summary judgment. The Court properly granted judgment on the UTPCPL and FDCPA claims because those statutes apply to consumer debts, not commercial ones like the debt at issue. *In re Smith*, 866 F.2d 576, 583 (3d Cir. 1989) (73 PA. CONS. STAT. § 201-9.2, the UTPCPL section on private actions, applies "only [to] those persons who purchase or lease goods or services primarily for consumer use rather than for commercial use"); *Staub v. Harris*, 626 F.2d 275, 278 (3d Cir. 1980) (the FDCPA "was intended to apply only to debts contracted by consumers for personal, family or household purposes" (citation and internal quotation marks omitted)). Conboy and Gilsenan did not identify evidence supporting their claims against Seda Cog, their unjust enrichment claim against CBE, or their FCRA claim against the SBA. Nor did they point to evidence of any contract with CBE. In addition, the unconditional loan guarantees preempted the contract claim against the SBA, and the defamation claim against the SBA failed because of sovereign immunity. *See Brumfield v. Sanders*, 232 F.3d 376, 382 (3d Cir. 2000) ("[D]efamation suits against the United

States are prohibited."). Finally, although we have not explicitly addressed whether the United States has waived sovereign immunity as to unjust enrichment claims, we need not resolve that issue here because Conboy and Gilsenan cited no record evidence creating a factual dispute material to their unjust enrichment claim against the SBA. *See Kabakjian v. United States*, 267 F.3d 208, 213 (3d Cir. 2001) ("We may affirm a judgment on any ground apparent from the record.").

Regrettably, counsel's response to CBE's motion for damages under Rule 38 of the Federal Rules of Appellate Procedure is yet another copy-and-paste job. Counsel copied Conboy and Gilsenan's previous opposition to sanctions in the District Court under *Civil* Rules 11 and 37—with only insignificant alterations and additions. *Compare* Appendix C hereto, *with* Appendix A at 10–12. Contrary to counsel's assertion, the Rule 38 motion did not duplicate the sanctions motions, and we will grant it even though the District Court's denial of sanctions was well within its discretion.

Rule 38 authorizes compensatory damages—not sanctions or punishment—to reimburse appellees who must defend judgments against frivolous appeals, "and to preserve the appellate court calendar for cases worthy of consideration." *Kerchner v. Obama*, 612 F.3d 204, 209 (3d Cir. 2010) (quoting *Huck v. Dawson*, 106 F.3d 45, 52 (3d Cir. 1997)); *Beam*, 383 F.3d at 108. We "employ[] an objective standard to determine whether or not an appeal is frivolous" on the merits, without considering appellants' "good or bad faith." *Kerchner*, 612 F.3d at 209 (quoting *Hilmon Co. (V.I.) v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir. 1990)). "Here, despite many cues from . . . the District Court that [their] cause was wholly meritless," *see Beam*, 383 F.3d at 109, Conboy and Gilsenan's counsel filed a copy-and-paste appeal without bothering to explain what the

District Court did wrong. It is hard to imagine a clearer case for Rule 38 damages.

We may impose these damages on clients, but here we will place responsibility for payment on the lawyer. *See id.* "[A]ttorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous." *Hilmon*, 899 F.2d at 254. "[B]ecause it would be unfair to charge a damage award against [parties who have] relied upon [their] counsel's expertise in deciding whether to appeal, we have routinely imposed Rule 38 damages upon counsel when a frivolous appeal stems from counsel's professional error." *Beam*, 383 F.3d at 109. In this case, Conboy and Gilsenan's attorney is to blame for recycling meritless arguments without engaging the District Court's analysis.

* * *

It's not easy to become a lawyer. The practice of law is challenging, and even the best lawyers make mistakes from time to time. So we err on the side of leniency toward the bar in close cases. But the copy-and-paste jobs before us reflect a dereliction of duty, not an honest mistake. We will therefore affirm the District Court's summary judgment and grant CBE's motion for Rule 38 sanctions after counsel for CBE files an appropriate fee petition and counsel for Appellants has a chance to respond.