

Sanger v Bower, Sanger & Lawrence, P.C.

2009 NY Slip Op 30420(U)

February 24, 2009

Supreme Court, New York County

Docket Number: 600862/08

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Howe ~~HON. ROBERT S. LEVY~~
Justice

PART Ston

Warren S. Sanger

INDEX NO. 600862108

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Bower, Sanger et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/24/09

~~HON. ROBERT S. LEVY~~
[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X

WARREN J. SANGER,

Plaintiff,

-against-

Index No. 600862/08

BOWER, SANGER & LAWRENCE, P.C.,

Defendant.

-----X

RICHARD B. LOWE III, J:

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this action for the dissolution of the defendant law firm, Bower, Sanger & Lawrence P.C. (now known as Bower & Lawrence P.C.) ("BL"), plaintiff, Warren J. Sanger ("Sanger"), former partner, moves pursuant to CPLR 5104 and Judiciary Law Section 753 for an order holding BL, its employees Peter Bower ("Bower") and Guy Lawrence ("Lawrence") and Signature Bank (the "bank") in contempt of this court's May 22, 2008 preliminary injunction order. By separate cross motions, the bank and BL and its employees move pursuant to 22 NYCRR 130.1-1 for sanctions against plaintiff's attorney for frivolous motion practice.

On May 9, 2008, the parties entered into a consensual temporary restraining order ("TRO") to preserve BL's assets. The TRO provides, in pertinent part, that:

BL, its employees, servants, agents, attorneys, and any other person acting in concert with it or on its behalf, be and hereby are, temporarily restrained and enjoined from taking any action, directly or indirectly, to assign, transfer, or otherwise encumber or dispose of any assets, including but not limited to accounts receivable, cash on hand, work in process or insurance contracts and proceeds other than payments made in the ordinary course of business of BL.

(Brown Aff, Ex. A)

By order dated May 22, 2008, the court continued the TRO as a preliminary injunction.
(Brown Aff, Ex. A, last page)

BACKGROUND

In 2001, Signature Bank issued a letter of credit securing BL's office lease. (Rosenblith Aff., Ex. E) Thereafter, on February 13, 2007, the bank granted defendant a one year \$325,000 revolving line of credit ("BRLOC"). (Rosenblith Aff., Ex. G) Sanger, Bower and Lawrence pledged the proceeds of BL's insurance policies on their lives to collateralize the line of credit at Signature Bank. (Rosenblith Aff., Ex. I; Lawrence Aff., Ex. A)

In addition to using defendant's insurance policy on his life to collateralize the letter of credit and the BRLOC, Sanger gave the bank a continuing personal guaranty of the firm's obligations. The guaranty states, in pertinent part:

This Continuing Guaranty is continuing, unlimited, absolute and unconditional. This Continuing Guaranty may be terminated by Guarantor only by express written notice to Bank of termination No notice of termination shall affect or impair the obligations of Guarantor with respect to Indebtedness existing on the date Bank receives such notice

(Brown Aff., Ex. B)

On February 19, 2008 Sanger was terminated as a partner in Bower, Sanger & Lawrence, P.C.

In March, 2008, BL surrendered the firm's insurance policy on Sanger's life and deposited the proceeds of the policy (\$268,798.61) with the bank as collateral for the letter of credit securing the office lease. That letter of credit will expire December 1, 2009.

By letter dated May 1, 2008, the bank returned plaintiff's original guaranty. (Brown

Aff., Ex. B) However, according to that guaranty, Sanger remained responsible for all debts to the bank, including but not limited to the letter of credit securing the office lease and the BRLOC, that BL had incurred on or before the date the bank received notice from Sanger that he was no longer associated with BL.

It is undisputed that, on or before November, 1, 2008, Bower and Lawrence surrendered the firm's life insurance policies in their names to Signature Bank and the bank used the proceeds of those policies to pay down the BRLOC which matured November 1, 2008. Signature is currently holding \$38,000 that remained after the BRLOC was satisfied.

In support of the motion for contempt, Sanger argues that defendant and its employees, Bower and Lawrence and Signature Bank violated the May 22, 2008 preliminary injunction by surrendering the law firm's insurance policy on his life and depositing the proceeds of that policy into an account at the bank as collateral for the 2001 standby letter of credit securing BL's lease. Sanger maintains that the continued use of his money to collateralize the letter of credit is unwarranted because he is no longer liable for the firm's obligations. Moreover, he contends that the surrender of Bower and Lawrence's insurance policies to pay the BRLOC also constituted a violation of the preliminary injunction because that injunction prohibited the defendants, inter alia, from disposing of the proceeds of insurance policies except in the ordinary course of business. Plaintiff contends that use of the insurance proceeds for this purpose was extraordinary because, in the past, BL used operating cash to pay down the firm's credit line.

In opposition to the contempt motion and in support of its cross motion for sanctions, the bank argues that the preliminary injunction was obtained without notice to it and thus it has been deprived of an opportunity to be heard and to protect its rights; that the order does not prohibit

the bank, as a creditor of the firm, from acting to insure repayment of the firm's indebtedness to it and that it has never been served with a copy of the TRO/preliminary injunction order.

Moreover, the bank and BL and Bower and Lawrence argue that they assigned the policies to the bank as collateral in January, 2002; that the proceeds of the Bower and Lawrence policies were used in the ordinary course of business to pay off pre-existing debt as it became due and plaintiff has failed to demonstrate that they disobeyed a clear and unequivocal court order because the preliminary injunction does not explicitly prohibit Signature from applying the collateral to satisfy the firm's pre-existing obligations. In addition, they argue that the surrender of Sanger's insurance policy occurred before the court issued a restraining order and that the proceeds of Sanger's insurance policy have not been disposed by the bank, but rather, those proceeds are being held in a separate account to collateralize the previously acquired letter of credit.

The alleged contemnors contend that the court should sanction plaintiff's counsel for the frivolous contempt motion because counsel persisted with the motion despite the fact that there was no factual or legal basis for the allegations of contempt.

DISCUSSION

A. Contempt

CPLR 5104 provides, in pertinent part, that an order of the court may be enforced by serving a certified copy of the order upon the person required by law to obey it and, "if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court."

Judiciary Law, 753 permits a court to punish an individual or entity for contempt for disobedience of a lawful mandate of the court. Pursuant to the Judiciary Law:

In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate was in effect. It must appear with reasonable certainty that the order has been disobeyed. Moreover, the party held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served on the party. Finally, prejudice to the right of a party to the litigation must be demonstrated.

(*McCormick v. Axelrod*, 59 N.Y.2d 574, 583, *amended* 60 N.Y.2d 652 [1983][internal citations omitted])

The party bringing the application for civil contempt has the burden of establishing the contempt by clear and convincing evidence. (*Denaro v. Rosalia*, 50 A.D.3d 727 [2nd Dept 2008]; *Beverina v. West*, 257 A.D.2d 957 [3rd Dept 1999])

1. Signature Bank

Plaintiff has failed to demonstrate that the bank was served with a certified copy of the TRO and/or preliminary injunction pursuant to CPLR 5104. Moreover, plaintiff has not shown that the bank had actual knowledge of the contents of the TRO and/or injunction before it applied the proceeds of Bower and Lawrence the insurance policies to the BRLOC debt. (Judiciary Law § 753).

The documentary evidence establishes that the bank surrendered Sanger's insurance policy in April, 2008, at least one month before the court issued the TRO or preliminary injunction (Lawrence Aff., Ex. B). Accordingly, at the time of the surrender of Sanger's policy there was no "lawful order of the court clearly expressing an unequivocal mandate." Moreover, the proceeds of the Sanger policy have not been disposed. Rather, those proceeds are currently being held in a certificate of deposit at Signature Bank pending the outcome of this litigation.

As to the firm's life insurance policies on Bower and Lawrence, plaintiff's attorney contends that at the end of October she learned that the bank would use the proceeds of the Bower and Lawrence policies on November 3, 2008 to satisfy the BRLOC. However, plaintiff's counsel also states that she did not provide Mr. Rosenblith, the bank's attorney in this matter, with a copy of the injunction until November 4. (Brown Aff., para.4)

Indeed, the bank asserts, without contradiction, that the TRO/injunction was obtained without notice to it and plaintiff has failed to provide any evidence that that the TRO/injunction was ever served on the Bank. Indeed, at oral argument, Mr. Rosenblith, the bank's attorney, stated that he was not the bank's general agent for acceptance of service of process and that he is retained by the bank on a case by case basis. (12/18/08 Hearing Transcript, p. 13, ll. 20-23) Accordingly, plaintiff has failed to establish that Rosenblith was authorized to accept service of process on behalf of Signature Bank.

Here, plaintiff has failed to demonstrate that Signature bank had knowledge of the contents of the TRO/preliminary injunction when it applied the proceeds of the Bower and Lawrence policies to satisfy the indebtedness on the BRLOC. Moreover, for the reasons stated below, plaintiff has also failed to establish that the payment was outside of the ordinary course of business or that the payment prejudiced plaintiff's rights.

2. BL and Bower and Lawrence

Plaintiff has not established all of the elements necessary for a finding of contempt.

Plaintiff has demonstrated that on May 22, 2008, this court issued a preliminary injunction order that, *inter alia*, prohibited BL and Bower and Lawrence from taking any action to directly or indirectly dispose of BL's assets, including the insurance contracts that the firm

held on their lives and the proceeds thereof, except in the ordinary course of business. Plaintiff has also shown that on or before November 3, 2008, Bower and Lawrence surrendered the insurance policies that the firm held on their lives to satisfy the BRLOC indebtedness at Signature Bank. Moreover, it is undisputed that, at the time of the surrender, BL and Bower and Lawrence had knowledge of the contents of the preliminary injunction.

However, plaintiff has failed to establish, by clear and convincing evidence, that the use of the insurance policies by BL, Bower and Lawrence to satisfy the BRLOC indebtedness was outside of the ordinary course of business. It is undisputed that in February, 2007, BL, Sanger, Bower and Lawrence secured the Signature Bank BRLOC in the ordinary course of business and that, prior to the May 22, 2008 court order, the parties had pledged the insurance policies on their lives as collateral for indebtedness at Signature Bank. The BRLOC became due on November 1, 2008, and payment of the outstanding indebtedness was required, in the ordinary course of business. Moreover, plaintiff has failed to demonstrate that, on November 1, 2008, BL had operating cash or other resources, other than the proceeds of the Bower and Lawrence insurance policies, that were sufficient to satisfy the \$176,400 indebtedness that remained on the Signature Bank BRLOC.

In addition, plaintiff has failed to establish that the use of the proceeds of the Bower and Lawrence insurance policies actually prejudiced his rights in this action. Indeed, it appears that in the event that the dissolution is granted, Sanger would not be entitled to any portion of the proceeds of the Lawrence and Bower insurance policies.¹ As plaintiff's counsel testified at the

¹ As stated above, the Sanger policy was surrendered before the court order and the proceeds of that policy are being held in an account at Signature Bank pending the outcome of this litigation.

hearing, “(t)he insurance policies were in place so that if a partner departed or died it could be surrendered and the proceeds used to partially pay out those partners.” (12/18/08 Transcript, p.4, l. 26; p. 5, ll. 2-4; *See, e.g., Alizio v. Perpignano*, 2005 WL 1802974 at *4 [Sup. Ct. Nassau County][defendants actions did not prejudice or defeat plaintiff’s right to receive his full pro rata share]) In fact, it appears that Sanger benefitted from Signature’s use of the Bower and Lawrence insurance proceeds to pay off the BRLOC because, according to Sanger’s continuing guaranty to Signature Bank, he remained liable for the BRLOC indebtedness, which the law firm incurred before Sanger notified the bank that he was no longer associated with that law firm.

3. Ryan, Brennan & Donnelly, LLP

Plaintiff has failed to come forward with a scintilla of evidence demonstrating that Ryan, Brennan & Donnelly, LLP, the law firm representing BL and Bower and Lawrence, took any action, or acted in concert with its clients, to assist in the assignment, transfer, encumbrance or disposal of any of the Bower, Sanger & Lawrence P.C.’s assets.

B. Sanctions

Pursuant to 22 NYCRR 130-1.1(a) the court may impose sanctions against a party who engages in frivolous conduct, including, but not limited to conduct that: is “completely without merit in law” (22 NYCRR 130-1.1[c][1]); is undertaken primarily to harass (22 NYCRR 130-1.1[c][2]) or asserts material factual statements that are false (22 NYCRR 130-1.1[c][3]). In determining whether the conduct undertaken was frivolous the court should consider, inter alia, whether the conduct was continued when its lack of legal or factual basis was brought to the attention of a party or counsel. (22 NYCRR 130-1.1[c][3])

Here, defendants have failed to establish that plaintiff’s motion for contempt was

completely without merit or that it was taken primarily to harass the parties. An acrimonious feeling between the parties does not, by itself, support a finding of frivolous conduct. (24 N.Y. Jur. 2d Cost in Civil Actions, Section 69; *Schulz v. Washington County*, 157 A.D.2d 948, 950 [3rd Dept 1990])

Accordingly, it is ORDERED that plaintiff's motion for contempt is denied in its entirety; and it further

ORDERED that Signature Bank's cross motion for sanctions is denied; and it is further

ORDERED that defendant's cross motion for sanctions is denied.

This decision constitutes the order of the court.

DATE: February 24, 2009

ENTER:



HON. RICHARD A. LOVE, JR.
J.S.C.

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK