

Del-Star Jewelry Corp. v Davidov

2015 NY Slip Op 31106(U)

June 25, 2015

Supreme Court, New York County

Docket Number: 160690/2013

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; IAS PART 63

DEL-STAR JEWELRY CORP. and EDUARD
DELGADO, General Manager,

Index No. 160690/2013

Plaintiffs,

-against-

RAFAEL DAVIDOV, LEYLA BAYBULATOVA,
and RD PRECIOUS METALS, INC.,

Defendants.

RAFAEL DAVIDOV, LEYLA BAYBULATOVA,
and RD PRECIOUS METALS, INC.,

Third-Party Plaintiffs,

-against-

EDUARDO DELGADO,

Third-Party Defendant.

DEL-STAR JEWELRY CORP. and EDUARD
DELGADO, General Manager, and
EDUARDO DELGADO,

Second Third-Party Plaintiffs,

-against-

SCHILLER LAW GROUP, P.C. and
ALLAN SCHILLER,

Second Third-Party Defendants.

ELLEN M. COIN, J.:

In motion sequence 002 second third-party defendants
Schiller Law Group, P.C. and Allan Schiller (collectively, the
Schillers) move for an order pursuant to CPLR § 3211(a)(2), (3),

and (7) dismissing the second third-party complaint, together with sanctions against the second third-party plaintiffs Del-Star Jewelry Corp., Eduard Delgado and Eduardo Delgado (collectively, the Delgados) and their counsel for the Schillers' legal fees.

In motion sequence 004 the Delgados move for an order disqualifying the Schillers from representing Defendants/First Third-Party Plaintiffs in this action. This decision and order disposes of both motion sequences.

The Motion to Dismiss

The Second Third-Party Complaint (Complaint) pleads one cause of action: for violation of Judiciary Law § 487. Its allegations of wrongdoing as against the Schillers are:

(1) that defendants Rafael Davidov, Leyla Baybulatova and RD Precious Metals, Inc. (collectively, Defendants) "**by their attorneys**, falsely claim that by December 2012, Second Third-Party Defendant Eduardo Delgado owed Defendant RD Precious Metals more than \$193,000.00", and that the Schillers have submitted false documentation in this case and colluded with their clients to deceive the court (Second Third-Party Complaint, ¶¶ 9, 32; emphasis added);

(2) that the Schillers represented defendant Rafael Davidov (Davidov) in an Involuntary Chapter 7 proceeding against Debtor Diamond Depot, Inc. in the United States Bankruptcy Court for the Southern District of New York; that in the course of that

proceeding the Schillers represented that Davidov had limited resources and that any judgment against him would be uncollectible; that in reliance on that representation, the trustee in bankruptcy agreed to accept a reduced offer to settle claims of two creditors; that at the time the Schillers made that representation, Davidov owned and operated at least three other lucrative entities, including defendant RD Precious Metals, Inc.; and that the Schillers intended to deceive the bankruptcy court in order to obtain approval of the reduced settlement amount (Second Third-Party Complaint, ¶¶ 11, 19-21).

The Schillers argue that the Delgados lack standing to bring this action pursuant to Judiciary Law § 487, contending that this statute applies only to a pending judicial proceeding in which the plaintiff was a party (*Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 386 [1st Dept 1992]). However, where, as is alleged here, the deception is directed against a court, a pending judicial proceeding is not required; it is sufficient if the deception relates to a prior judicial proceeding (*Singer v Whitman & Ransom*, 83 AD2d 862 [2d Dept 1981]). Accordingly, the Schillers' contention falls of its own weight.

The Schillers' motion is also predicated on their argument that the Delgados have failed to allege that they suffered any injury as a result of the proceedings in the bankruptcy court.

Thus, they claim that this aspect of the Second Third-Party Complaint fails to state a cause of action. In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Nerey v Greenpoint Mtge. Funding, Inc.*, 116 AD3d 1015 [2d Dept 2014]; *Goldberg v Rosenberg*, 116 AD3d 919 [2d Dept 2014]).

The Second Third-Party Complaint contains no allegation that the Schillers' deception of the bankruptcy court and trustee caused any injury to the Delgados. Thus, this aspect of the Second Third-Party Complaint fails to state a cause of action for violation of Judiciary Law § 487 (See *Bohn v 176 W.87th St. Owners Corp.*, 106 AD3d 598, 600 [1st Dept 2013]; *Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012]).

The allegation in paragraph 9 of the Second Third-Party Complaint that the Schillers, on behalf of the Defendants, "falsely claim" that Eduardo Delgado owed money to RD Precious Metals, and the allegation in paragraph 32 that the Schillers submitted false documentation fail to plead that the Schillers acted with the requisite intent to deceive. Specifically, there

are no factual allegations from which to infer that the attorneys knew that their clients' claims and documentation were false. Accordingly, the portion of the Judiciary Law claim predicated on the allegations in paragraphs 9 and 32 also fails to state a cause of action (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506 [1st Dept 2015]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]).

As no part of the Delgados' claims for violation of Judiciary Law § 487 remains, the motion to dismiss the Second Third-Party Complaint is granted.

The Motion to Disqualify

The Delgados' motion to disqualify the Schillers from representing the Defendants is predicated exclusively on the assertions contained in the now-dismissed Second Third-Party Complaint. Accordingly, this motion has been rendered moot (*Spectacolor Inc. v Banque Nationale de Paris*, 207 AD2d 726 [1st Dept 1994]; *Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202[A] [Sup Ct, New York County 2006], *aff'd* 49 AD3d 408 [1st Dept 2008]).

The Motion for Sanctions

The Schillers seek sanctions in motion sequence 002 against the Delgados and their attorneys pursuant to Part 130 of the Uniform Rule of Trial Courts because the claim the Delgados asserted in the Second Third-Party Complaint was frivolous. Additionally, although they do not cross-move in motion sequence

004, they nevertheless ask the court to impose sanctions upon the Delgados for moving to disqualify them.

An action is frivolous, within the meaning of Part 130 if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

The decision to impose or not to impose sanctions lies within the court's sole discretion (*Liddle & Robinson v Shoemaker*, 276 AD2d 335 [1st Dept 2000]). "In determining whether conduct is frivolous, the court shall consider the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (*Borstein v Henneberry*, ___ AD3d ___, 2015 NY Slip Op 05390, 2015 WL 3851807 [1st Dept 2015][internal citation and quotation marks omitted]).

The motion for sanctions against the Delgados and/or their counsel is denied. "Litigation can be rough and tumble, often filled with acrimony and harsh accusations which may be ill advised, but not sanctionable" (*Hubshman v 1010 Tenants Corp.*,

2011 WL 5130830 [Sup Ct, New York County 2011][Gishe, J.].

While assertion of the Second Third-Party Complaint may have been an error of professional judgment, it is not sanctionable. Moreover, had the pleading not been dismissed, the Delgados and their counsel would have been completely appropriate in seeking disqualification of the Schillers. Here the Schillers were not merely witnesses, but were named as parties defendant for actions they took in the bankruptcy proceeding and in the instant case. Thus, Allan Schiller or someone from the Schiller Law Group, P.C., would likely have been a witness on significant issues of fact in the Second Third-Party Action. (Rules of Professional Conduct [22 NYCRR 1200.0], rule 3.7(a); *Ehrlich v Wolf*, 127 AD3d 613, 614 [1st Dept 2015]).

That said, the Delgados and their attorneys will be on slippery ground should they engage in similar tactics in the future in the absence of solid factual support for allegations of impropriety vis-a-vis opposing counsel. The fact that this court, in its discretion, has not seen fit to impose sanctions at this time does not preclude their imposition, should plaintiffs and their attorneys engage in unsupported procedural assaults.

In light of the foregoing, it is

ORDERED that so much of motion sequence 002 as seeks dismissal of the Second Third-Party Complaint is granted, and the Second Third-Party Complaint is dismissed in its entirety, and

the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the motion to disqualify Allan Schiller, Esq. and the Schiller Law Group, P.C. from representing defendants/third-party plaintiffs Rafael Davidov, Leyla Baybulatova and RD Precious Metals, Inc. (motion sequence 004) is denied; and it is further

ORDERED that counsel for defendants herein shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein.

Dated: June 25, 2015

ENTER:



Ellen M. Coin, A.J.S.C.