Spallone v Spallone
2014 NY Slip Op 32412(U)
September 11, 2014
Sup Ct, NY County
Docket Number: 160061/2013
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SILVIO SPALLONE,

Plaintiff,

- v -

FRANK SPALLONE

Defendant.

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Index No.
160061/2013

DECISION and ORDER

Mot. Seq. 003

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Silvio Spallone ("Plaintiff") brings this action for false arrest, abuse of process, and intentional infliction of severe emotional distress arising from, *inter alia*, Plaintiff's arrest on April 1, 2013, for the attempted murder of defendant Frank Spallone ("Defendant"). Plaintiff claims that Defendant made various false accusations against Plaintiff in order to cause said arrest, as well as to obtain an order of protection against Plaintiff and to disadvantage Plaintiff in connection other civil litigation pending between the parties.

Plaintiff commenced this action on October 31, 2013, by summons and complaint. On December 17, 2013, Plaintiff filed a motion for an Order, pursuant to CPLR § 3215, entering a default judgment against Defendant based on Defendant's failure to appear in this action. In support, Plaintiff submitted the attorney affirmation of Andrew J. Wigler; the affidavit of facts of Silvio Spallone; and, the affidavit of service of Plaintiff's summons and complaint upon Defendant, dated November 7, 2013, attesting to service upon Defendant pursuant to CPLR § 308(1) on November 4, 2013, at 100 Centre Street, New York, New York. (CPLR § 3215[f]). On April 10, 2014, this Court granted Plaintiff's motion for the entry of a default judgment, without opposition, on the issue of liability, and further directed a trial on the issue of damages. On April 15, 2014, Plaintiff filed a notice of entry of this Court's April 10, 2014 Order entering a default judgment against Defendant,

and filed a note of issue for an inquest on the issue of damages, per this Court's direction.

Shortly thereafter, on April 17, 2014, Defendant filed a motion, by way of Order to Show Cause, for an Order, pursuant to CPLR §§ 5015(a)(1) and/or 317, vacating the default judgment against Defendant and permitting Defendant to file a late answer. In support, Defendant submitted the affidavit of Frank Spallone, attesting to the non-service of Plaintiff's summons and complaint upon Defendant and asserting that Defendant was not at 100 Centre Street, the place of service, at 10:25 A.M., the time Plaintiff's process server avers to have served Plaintiff's summons and complaint upon Defendant. Defendant further submitted the affidavit of Janice Bar, Defendant's employee, to the same effect. This Court signed Defendant's April 17, 2014 Order to Show Cause, and granted a stay of all proceedings in this action pending the hearing in Defendant's application. On April 18, 2014, Defendant's Order to Show cause was amended to strike the stay, following a hearing on the record, during which Plaintiff sought to demonstrate that Defendant had perjured himself in the affidavit of non-service submitted to this Court in support of Defendant's motion to vacate the default judgment entered against him. On April 20, 2014, Defendant withdrew the Order to Show Cause in its entirety.

Daniel Kogan ("Movant"), as attorney for Defendant, now moves, by way of Order to Show Cause, to withdraw as counsel for Defendant. Plaintiff cross moves for an Order, pursuant to 22 NYCRR § 130-1.1, granting Plaintiff attorney's fees and imposing sanctions as against Defendant; and, denying Defendant's Order to Show Cause to withdraw as counsel for Defendant. This Court heard oral argument on Movant's application and Plaintiff's cross motion on August 26, 2014.

22 NYCRR § 130-1.1 authorizes the Court, in its discretion, to award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from "frivolous conduct" as defined in this Part. Furthermore, "[i]n addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part." (22 NYCRR § 130-1.1[a]). Conduct is "frivolous" within the meaning of § 130-1.1 if, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;" if "it is undertaken primarily to delay or

prolong the resolution of the litigation, or to harass or maliciously injure another;" or, if "it asserts material factual statements that are false." (22 NYCRR § 130-1.1[c][1]-[3]).

CPLR § 5015 permits the court which rendered a judgment or order to relieve a party from that judgment or order, upon such terms as may be just, if excusable default is shown. Failure to properly effect valid service of Plaintiff's summons and complaint constitutes reasonable excuse for a Defendant's default. CPLR § 317 also permits the Court which rendered a judgment or order to relieve a party from that judgment or order. Under CPLR § 317, a defendant must demonstrate that he did not personally receive notice of the pending lawsuit. (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]).

Plaintiff seeks an award of attorney's fees and costs and the imposition of sanctions based on Defendant's purportedly perjurious affidavit of non-service of Plaintiff's initiatory papers upon Defendant. Plaintiff argues that such conduct is frivolous within the meaning of § 130-1.1[c] because the affidavit asserts material factual statements that are false, i.e., that Defendant was not served with Plaintiff's summons and complaint and that Defendant was not present at 100 Centre Street at 10:25 A.M., when Plaintiff's process server avers to have served Plaintiff's summons and complaint upon Defendant. To this end, Plaintiff's counsel affirms that Defendant was present inside the Criminal Courthouse located at 100 Centre Street on the morning of November 4, 2013, where Defendant appeared in a criminal proceeding before the Honorable Joanne Quinones. Plaintiff's counsel affirms that the transcript of the calendar call on November 4, 2013 indicates that Defendant's criminal attorney received a text message from Defendant stating that Defendant is "on line downstairs", and that Judge Quinones wrote "Defendant came in at 10:30 A.M." on the jacket of Defendant's file in that matter.

In determining whether conduct is "frivolous" for purpose of 22 NYCRR § 130-1.1(c)(3), the court "shall consider, among other issues 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, or should have been apparent, or was brought to the attention of counsel or the party." Here, in light of Movant's withdrawal of Defendant's Order to Show Cause and the instant application to be relieved as counsel for Defendant, the imposition of sanctions upon Defendant's attorney is not warranted. However, the apparent lack of a factual basis for Defendant's affidavit of non-service—which, in turn, forms the basis of Defendant's claim for relief under CPLR §§ 5015 and 317—renders Defendant's conduct

frivolous within the meaning of 22 NYCRR § 130-1.1(c)(3), and Defendant should bear the cost of defending that motion, as well as the costs incurred in defending the instant application and moving for sanctions. (*Worldwide Asset Purch., LLC v. Akrofi*, 25 Misc. 3d 768, 771 [N.Y. City Ct. 2009]; *see also, Intercontinental Bank, Ltd. v. Micale & Rivera, LLP*, 300 A.D.2d 207 [1st Dep't 2002] [finding sanctions properly imposed for false assertions of material fact]; *Red Apple Child Dev. Ctr. V. Community School Dists. Two, Twenty, Twenty-Five & Twenty-Eight*, 299 AD2d 274, 750 N.Y.S.2d 844 [1st Dept 2002]).

Based upon the foregoing, it is hereby

ORDERED that the application of Daniel Kogan, to be relieved as attorney for Defendant, is granted; and it is further

ORDERED that no further proceedings may be taken in this matter without leave of this court for a period of 30 days from the date of this order within which time Defendant must appoint a substitute attorney or opt to proceed pro se; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, Movant serve a copy of this order with notice of entry upon the former client at its last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by regular mail; and it is further

ORDERED that, together with the copy of this order served upon the former client, moving counsel shall forward a notice directing the former client Frank Spallone to appoint a substitute attorney or opt to proceed pro se within 30 days from the date of this decision and the former client shall comply therewith; and it is further

ORDERED that any new attorney retained by Defendant file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part within 30 days from the date the notice to retain new counsel is mailed; and it is further

ORDERED that Plaintiff's cross motion for costs is granted and Defendant Frank Spallone shall reimburse Plaintiff for actual expenses reasonably incurred and

reasonable counsel fees in accordance with this Decision in the amount to be determined by reference to a Special Referee; and it is further

ORDERED that the amount of actual expenses reasonably incurred and reasonable counsel fees owed by Defendant Frank Spallone to Plaintiff is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including Defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 11, 2014

Eileen A. Rakower, J.S.C.