Weiss v Rubenstein
2007 NY Slip Op 30399(U)
March 15, 2007
Supreme Court, Suffolk County
Docket Number: 0027575
Judge: Joseph Farneti
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SHORT FORM ORDER INDEX NO. 27575/2001

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

MELVIN WEISS, as personal representative of the Estate of MINNIE RUBENSTEIN,

Plaintiff,

-against-

ARLENE RUBENSTEIN, as Executor under the Last Will and Testament of EDWARD RUBENSTEIN, deceased, LESLIE RUBENSTEIN and NICOLE REUBEN,

Defendants.

ORIG. RETURN DATE: NOVEMBER 17, 2006
FINAL SUBMISSION DATE: JANUARY 11, 2007
MTN. SEQ. #: 007
MOTION: MD

ORIG. RETURN DATE: NOVEMBER 17, 2006
FINAL SUBMISSION DATE: JANUARY 11, 2007
MTN. SEQ. #: 008
CROSS-MOTION: MD

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Upon the following papers numbered 1 to 9 read on this motion and cross-motion FOR SANCTIONS; Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Replying Affidavits and supporting papers 7, 8; Other Stipulation dated November 28, 2006 - 9.

Plaintiff and defendant, NICOLE REUBEN, seek an Order of this Court granting the following relief:

(a) pursuant to 22 NYCRR 130-1.1, imposing sanctions upon defense counsel, RICHARD GABOR, ESQ., and defendants, ARLENE RUBENSTEIN, as Executor under the Last Will and Testament of EDWARD RUBENSTEIN, and LESLIE

RUBENSTEIN ("defendants"), in the amount of $10,000 and directing them to reimburse the Estate its counsel fees in the amount of $39,121.61 and $2,500.00 as additional sanctions for their alleged frivolous conduct and dilatory tactics;

(b) pursuant to the Stipulation dictated on the record on June 16, 2005, and the Stipulation submitted to the Appellate Division dated August 11, 2005 (i) authorizing IRA LEVINE, ESQ., to deposit the escrow monies with the Treasurer of Suffolk County pending further Order of the Court; (ii) directing defendants to release NICOLE REUBEN from all claims in accordance with the Stipulation of June 16, 2005; and (iii) awarding counsel fees; and

(c) substituting MELVIN WEISS, in his capacity as personal representative of the Estate, as the plaintiff in this case in place of JOHN THOMSON, and amending the caption accordingly.

Defendants have filed a cross-motion seeking an Order denying the motion-in-chief in its entirety, as well as granting defendants attorneys' fees, pursuant to 22 NYCRR 130-1.1, in the amount of $3,045.00, incurred in connection with the instant applications. Plaintiff and defendant, NICOLE REUBEN, have filed a reply thereto.

Subsequent to the filing of plaintiff's motion, the parties entered into a Stipulation dated November 28, 2006, which was So-Ordered by this Court. The Stipulation indicates that as defendants had delivered general releases in favor of NICOLE REUBEN; as IRA LEVINE, ESQ., pursuant to the Stipulation submitted to the Appellate Division on or about August 11, 2005, is the escrowee of the monies in the aggregate sum of $942,000; and as the parties agreed to a disposition of the escrow monies pending the determination of the instant applications, counsel, on behalf of the parties, agreed to the following:

(1) IRA LEVINE, ESQ., was authorized to retain from the escrow monies the sum of $45,000 pending the determination of the instant application. Upon approval of the Stipulation by the Court, the balance of the escrow monies was to be turned over

to defendants, each receiving fifty (50%) percent of the balance;

(2) in the event that plaintiff prevails on the instant application, then plaintiff shall automatically be entitled to receive from the escrow monies all monies awarded against defendants, after all appeals have been exhausted;

(3) the branch of plaintiff's instant motion seeking an Order authorizing IRA LEVINE, ESQ., to deposit the escrow monies with the Treasurer of Suffolk County pending further Order of the Court, and directing defendants to release NICOLE REUBEN, was withdrawn; and

(4) MELVIN WEISS, in his capacity as personal representative of the Estate of MINNIE RUBENSTEIN, was substituted as the plaintiff in the case.

Given the Stipulation of November 28, 2006, the Court is left to determine that branch of plaintiff's application seeking the imposition of sanctions, pursuant to 22 NYCRR 130-1.1, upon defense counsel, RICHARD GABOR, ESQ., as well as defendants, in the amount of $10,000, and directing them to reimburse the Estate its counsel fees in the amount of $39,121.61 and $2,500.00 as additional sanctions.

Plaintiff, MINNIE RUBENSTEIN, initiated the instant action for, among other things, recovery upon a promissory note executed on or about November 12, 1998 by all of the defendants, her three children, in exchange for stock in three family businesses. By Order dated April 1, 2005 (Werner, J.), the Court granted plaintiff's motion for summary judgment on the complaint against defendants, ARLENE RUBENSTEIN, as Executor of the Last Will and Testament of EDWARD RUBENSTEIN, and LESLIE RUBENSTEIN, and judgment was entered on July 5, 2005 against defendants in the amount of $3,569,661.72. The Court found that plaintiff had made out a *prima facie* case for summary judgment on the Note by submitting evidence that defendants executed the Note, accepted transfer of the plaintiff's stock in exchange therefor and, after making interest payments on the Note, defaulted and failed to make payment in accordance with its terms. The aforementioned Order and judgment were appealed to the Appellate Division, Second Department, and a decision and Order was issued,

dated July 5, 2006 (*Thomson v Rubenstein*, 31 AD3d 434 [2006]), dismissing the appeal of the Order because the right of direct appeal therefrom terminated with the entry of judgment; affirming the judgment insofar as appealed from; and awarding plaintiff one bill of costs.

In the instant application, plaintiff alleges that as the Appellate Division has affirmed the Order awarding plaintiff summary judgment and the subsequent money judgment entered, it is appropriate for this Court to now consider whether the conduct of defendants and their attorney during the litigation was in good faith or was "frivolous and dilatory."

In addition, plaintiff seeks relief pursuant to a Stipulation dictated on the record on June 16, 2005, and a Stipulation of the parties dated August 11, 2005. The Stipulation dictated on the record on June 16, 2005 provided that defendants would release NICOLE REUBEN from all claims once defendants paid their *pari passu* portion of the judgment. Pursuant to the Stipulation of the parties dated August 11, 2005, defendants deposited with plaintiff's counsel the sum of $3,500,000, in lieu of an undertaking from a surety, from which to satisfy the judgment. The Stipulation further provided that upon affirmance by the Appellate Division of the judgment, plaintiff's counsel was authorized to satisfy defendants' *pari passu* portion of the judgment and return the surplus of the escrow to defendants (approximately $942,000), but only after defendants released NICOLE REUBEN. The Court notes that the Stipulation of November 28, 2006 indicates that defendants have since delivered general releases in favor of NICOLE REUBEN, and that the parties have agreed to a disposition of the escrow monies pending a determination of the instant applications.

Plaintiff submits that the root of the instant application is the "duplicitous and unconscionable" conduct of defendant's attorney, RICHARD GABOR, ESQ., in drafting defendants' answer to the complaint, their opposition to plaintiff's motion for summary judgment, and their briefs on appeal. Plaintiff further submits that Mr. Gabor represented MINNIE RUBENSTEIN in the stock transfer transaction and drafted the note and ancillary documents which are the subject of the instant litigation. Plaintiff alleges that Mr. Gabor then "without any hesitation" represented defendants in this litigation wherein plaintiff seeks enforcement of the documents Mr. Gabor drafted at plaintiff's behest. Plaintiff alerts the Court that Mr. Gabor testified to the foregoing at his deposition which was conducted during a proceeding to contest plaintiff's will. Plaintiff argues that Mr. Gabor's representation of the defendants herein is a *per se* breach of his

fiduciary duty to the Estate and violates the disciplinary rule codified at 22 NYCRR 1200.27 [DR 5-108]. Plaintiff claims that the disingenuous defenses proffered by Mr. Gabor on behalf the defendants, as well as the appeal, were frivolous and sanctions of $10,000 and attorneys' fees of $39,121.61 should be imposed pursuant to 22 NYCRR 130-1.1. Plaintiff also seeks an additional award of counsel fees in the amount of $2,500 for fees incurred in connection with the instant application, on the theory that this application is analogous to an interpleader action pursuant to CPLR 1006, which authorizes a court to impose terms relating to the payment of expenses, costs and disbursements as may be just and which may be charged against the subject matter of the action (CPLR 1006[f]).

In response, defendants have filed a cross-motion seeking an Order denying the motion-in-chief in its entirety, as well as granting defendants attorneys' fees in the amount of $3,045.00 pursuant to 22 NYCRR 130-1.1. In support, defendants allege that the doctrine of *res judicata* bars plaintiff from raising the issue of sanctions. Defendants argue that plaintiff was aware of defendants' defenses since the inception of the case, and never sought sanctions either before the trial court or the appellate court. As the trial court entered judgment against defendants and the appellate court affirmed the judgment for reasons other than pursuant to 22 NYCRR 130-1.1, defendants claim that plaintiff is now barred from seeking sanctions after the conclusion of the litigation. Defendants note that if at any time during the litigation the trial or appellate courts believed that any of defendants' arguments or defenses were frivolous, those courts could have imposed sanctions *sua sponte*. Defendants argue that their defenses were raised in good faith and were not frivolous within the meaning of 22 NYCRR 130-1.1. Moreover, defendants' counsel argues that even if there was a conflict of interest with respect to his representation of the defendants herein, which conflict he claims his clients waived, the remedy would be disqualification, not sanctions. As such, defendants seek sanctions against plaintiff for filing the instant application for sanctions, arguing that the application is without merit.

Section 130-1.1 of the Rules of the Chief Administrator of the Courts provides in pertinent part:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, 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. In 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.
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both.
>
> (c) For purposes of this Part, conduct is frivolous 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.

22 NYCRR 130-1.1.

Pursuant to the above rule, a court may impose financial sanctions and/or reasonable attorney's fees upon any party or attorney in a civil action or proceeding who engages in frivolous conduct, but only if such conduct falls within one of the three definitions set forth in section 130-1.1(c). In the instant application, the gist of plaintiff's argument is that Mr. Gabor should never have represented the defendants in this action, nor proffered defenses and arguments on their behalf, given the fact that Mr. Gabor represented the decedent plaintiff in the stock transfer transaction and drafted the note and ancillary documents which are the subject of the instant litigation. Plaintiff argues that Mr. Gabor's representation of the defendants herein constituted a conflict of interest, in violation of the disciplinary rule codified at 22 NYCRR 1200.27 [DR 5-108], and now seeks sanctions. In response, Mr. Gabor argues that even if there existed a conflict of interest, the remedy would not be sanctions, but disqualification. This Court agrees. The Court of Appeals has held that "[i]f an attorney has

represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable" (*Solow v W.R. Grace & Co.*, 83 NY2d 303 [1994]; *see also Kassis v Teacher's Ins. & Annuity Ass'n*, 93 NY2d 611 [1999]; *Greene v Greene*, 47 NY2d 447 [1979]; *Cardinale v Golinello*, 43 NY2d 288 [1977]). As such, plaintiff's recourse was to make an application during the litigation to disqualify Mr. Gabor from representation of the defendants herein.

Moreover, the possible existence of a conflict of interest is distinguishable from a situation wherein an attorney's conduct is completely without merit in law, or is undertaken primarily to delay or prolong the litigation. The former may result in disqualification, while the latter may result in sanctions. Although it appears that a conflict of interest may have existed in the instant matter based upon Mr. Gabor's prior representation of the deceased plaintiff, plaintiff failed to move to disqualify Mr. Gabor. In any event, even assuming *arguendo* that a conflict of interest did exist, it would not serve as a basis for the imposition of sanctions pursuant to section 130-1.1. Accordingly, it is

ORDERED that the instant motion for an Order, pursuant to 22 NYCRR 130-1.1, imposing sanctions upon defense counsel, RICHARD GABOR, ESQ., and defendants, ARLENE RUBENSTEIN, as Executor under the Last Will and Testament of EDWARD RUBENSTEIN, and LESLIE RUBENSTEIN, in the amount of $10,000, and for an award of counsel fees in the amount of $39,121.61 and $2,500.00, is hereby **DENIED**. It is further

ORDERED that the instant cross-motion for an Order, pursuant to 22 NYCRR 130-1.1, awarding defendants attorneys' fees in the amount of $3,045.00 for fees incurred in connection with the instant applications, is also **DENIED**. The Court finds that the motion-in-chief was not frivolous within the meaning of section 130-1.1(c), and therefore a sanction in the form of attorney's fees is not warranted herein.

The foregoing constitutes the decision and Order of the Court.

Dated: March 15, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court