

Kuzmin v Visiting Nurse Serv. of N.Y.

2007 NY Slip Op 31607(U)

May 23, 2007

Supreme Court, Queens County

Docket Number: 0013483/2001

Judge: James P. Dollard

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD
Justice

IA Part 5

TATIANA KUZMIN x

Index
Number 13483 2001

- against-

Motion
Date January 16, 2007

VISITING NURSE SERVICE OF NEW YORK,
et al.

Motion
Cal. Number _____

x

The following papers numbered 1 to 15 read on this motion by plaintiff pro se Tatiana Kuzmin for an order awarding attorneys' fees against the defendants' counsel, in the sum of \$30,000.00 together with interest from December 5, 2006. Defendants cross-move in opposition, and seek an order vacating the judgment of December 5, 2006, pursuant to CPLR 5015 and/or re-taxation of costs pursuant to CPLR 8404; compelling discovery, including a videotaped deposition performed by an independent legal videographer, in the presence of an a court appointed Referee, and directing plaintiff to pay one-half of these costs; and removing Visiting Nurse Service from the caption.

	<u>Papers Numbered</u>
Notice of Motion - Affidavit - Exhibits (1-48)	1-3
Notice of Cross Motion- Affirmation - Exhibits (A-K) ..	4-7
Opposing Affidavit -Exhibits (49-58)	8-10
Reply Affirmation	11-13
Affirmation of Good Faith	14-15

Upon the foregoing papers it is ordered that these motions are decided as follows:

Plaintiff pro se Tatiana Kuzmin seeks to impose sanctions against the defendants' counsel in the form of attorneys' fees for "frivolous conduct, persistent disinformation, and gross abuse of discovery and judicial process." In large measure, this motion is based upon plaintiff's successful appeal of a prior order of the

court dated March 12, 2004, which granted defendants Visiting Nurse Service and Oleg Beretsky's cross motion, pursuant to CPLR 3126(3) to dismiss the causes of action for assault and battery. The Appellate Division, Second Department reversed said order and reinstated the causes of action to recover damages for assault and battery asserted in the amended complaint against Oleg Beretsky, and awarded costs to the plaintiff (Kuzmin v Visiting Nurse Serv. of N.Y., 22 AD3d 643 [2005]).

The court, in its discretion, may award costs and financial sanctions against an attorney or party resulting from frivolous conduct (see 22 NYCRR § 130-1.1(a); Flaherty v Stavropoulos, 199 AD2d 301 [1993]). However, the fact that plaintiff prevailed on her appeal does not give rise to a claim for attorneys' fees. Moreover, plaintiff is not a lawyer, is no longer represented by counsel, and her prior counsel did not seek payment. Therefore, it is not possible for her to have earned or to have incurred the responsibility to pay attorneys' fees (see generally Leeds v Burns, 205 AD2d 540 [1994]). Plaintiff's request for attorneys' fees, therefore, is denied.

Plaintiff's claim that at her January 6, 2004 deposition, defendants' counsel, Ms. Gray, assaulted her, threatened to search her bag by force and conspired with the court reporter and translator to fabricate the transcript, is wholly unsubstantiated. It is noted that plaintiff was represented by counsel at the deposition, and Ms. Gray has denied these allegations. The court finds that defense counsel properly identified exhibits she utilized at the deposition, that the deposition was properly conducted, and that plaintiff was provided with the transcript of the non-party witness. In addition, statements made by defense counsel in prior pleadings and motion papers pertaining to defenses to the action were proper and are not subject to sanctions. Therefore, to the extent that plaintiff's motion seeks to recover sanctions for frivolous or improper conduct, this request is also denied.

That branch of defendants' cross motion which seeks judicial review of the taxation of costs, pursuant to CPLR 8404, is granted. The Appellate Division, in its decision and order of October 17, 2005, reversed the order of March 12, 2004 insofar as appealed from, on the law, with costs, denied the defendants' cross motion and reinstated the causes of action for assault and battery asserted in the amended complaint against Oleg Beretsky. Some 10 months later, on December 5, 2006, plaintiff submitted to the court an affidavit in support of a bill of costs and disbursements,

in which she sought to recover costs totaling \$720.00, and disbursements totaling \$6,672.20, including the cost of a Russian translator. It is undisputed that plaintiff taxed costs and disbursements without notice to the defendants and failed to serve a copy of the bill of costs, as required by CPLR 8403. Defendants, therefore, did not have an opportunity to raise any objections to the bill of costs prior to the entry of the judgment. The County Clerk entered costs of \$250.00 and disbursements of \$3,464.20, and disallowed certain costs and disbursements claimed by the plaintiff, including that of the translator.

CPLR 8301 provides that a party to whom costs are awarded on appeal is entitled to tax necessary disbursements. CPLR 5529(a) provides that briefs and appendices may be reproduced by any method that produces a permanent, legible, black image on white paper. The rules of practice of the Supreme Court, Appellate Division, Second Department provide that a party may elect to prosecute an appeal upon a reproduced full record (CPLR 5528(a)(5)); by the appendix method (CPLR 5528(a)(5); upon an agreed statement in lieu of record (CPLR 5527); or, where authorized by statute or this Part or order of the court, upon a record consisting of the original papers (22 NYCRR § 670.9). It is recognized that the cost of reproducing the record or appendix and briefs are proper disbursements, which may be taxed as disbursements as long as the charges are "reasonable and necessary" (see Shapiro v Aetna Cas. & Sur. Co., 73 AD2d 616 [1979]; Pauk v Pauk, 175 Misc 2d 561, 562-563 [1998]; East Thirteenth St. Community Assn. v New York State Urban Dev. Corp., 164 Misc 2d 589, 591 [1995]). This includes the cost of reproducing the record and briefs by offset printing (see CPLR 5529; Lipton v Mitchell, 145 Misc 2d 444, 445 [1989]) or even by use of a copy machine, if supported by invoices or other proof to substantiate the cost of such reproduction (see Arkin v Sunshine, 43 Misc 2d 849 [1964]). However, a party is not entitled to the cost of translating documents submitted on an appeal.

Here, the reasonableness of the charge of 20 cents per page is not challenged. Rather, defendant objects to the inclusion on the appeal of three copies of defendant Beretsky's deposition and various motion papers and documents relating to an unperfected appeal of a 2002 order. Although defendants' claim that most of the 13,026 pages plaintiff listed in her disbursements were irrelevant and unnecessary to prosecute the appeal of the 2004 order, they have only identified a total of 2,800 pages. The court finds that as the Appellate Division awarded plaintiff costs, which includes reasonable and necessary disbursements, defendants' request to limit plaintiff's costs to \$250.00 is denied. However,

as the record on appeal included materials that were neither relevant nor necessary for the appeal, defendants are not required to pay the cost of reproducing the identified 2,800 pages, which totals \$560.00. Plaintiff's request that defendants pay the cost of translating certain documents she submitted on the appeal is denied. That branch of defendants' motion which seeks to vacate the December 5, 2006 judgment for costs and disbursements and to re-tax costs is granted to the extent that the charges for reproducing 2,800 pages of the record on appeal is disallowed. The disbursement for reproducing the documents submitted on the appeal is reduced to \$2,045.20. In all other respects the taxation is allowed. Plaintiff shall submit a new judgment for costs and disbursements totaling \$3,154.20.

Defendant's request to conduct a further videotaped deposition of the plaintiff, supervised by a referee, in order to explore statements made by plaintiff and a non-party witness in affidavits seeking to amend the deposition transcripts, is denied. Plaintiff was deposed on July 10, 2003 and has offered a "rider" affidavit to her deposition transcript dated March 16, 2004, in which she submitted substantive changes, claiming that the transcript was inaccurate. Lola Smirnova was deposed on September 9, 2003 and plaintiff has submitted an affidavit dated March 9, 2005 from Smirnova containing substantive changes in her testimony. There is no evidence that either plaintiff or Smirnova's affidavits of correction were timely and they fail to establish good cause for the delay nor a sufficient explanation for the substantive change in their deposition testimony (see CPLR 3116; Kelley v Empire Roller Skating Rink, Inc., 34 AD3d 533 [2006]). Therefore, plaintiff and Ms. Smirnova may not make any changes to the deposition transcripts and these affidavits shall be disregarded. To the extent that defendant asserts that plaintiff failed to disclose all documents identified at her deposition, defendants may serve demands to produce said documents.

Defendants' request to removing Visiting Nurse Service from the caption is granted, as the action against this defendant was dismissed pursuant to an order dated November 13, 2002, and plaintiff failed to perfect her appeal of that order.

In view of the foregoing, plaintiff's motion for attorneys' fees or sanctions is denied. Defendants' cross motion is granted to the extent that the December 5, 2006 judgment for costs and disbursement is vacated and defendants' request to re-tax costs is granted to the extent that the disbursement for reproducing the documents is reduced to \$2,045.20. In all other respects, the

taxation is allowed. Plaintiff shall submit a new judgment for costs and disbursements totaling \$3,154.20, within 10 days after the service of a copy of this order together with notice of entry. Defendants' request to remove the name of Visiting Nurse Service from the caption is granted and the remainder of the cross motion is denied.

Dated: May 23, 2007
