Woodie v Azteca Intl. Corp.
2007 NY Slip Op 31690(U)
June 13, 2007
Supreme Court, New York County
Docket Number: 0603582/2004
Judge: Shirley W. Kornreich
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.

SCANNED ON 6/19/2007

[* 1]

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

PRESENT: Shirley Werner Kornreich, PART 54
Justice

Index Number : 603582/2004
WOODIE, PHILLIP R.
vs
AZTECA INTERNATIONAL
Sequence Number : 009
COUNSEL FEES, EXPENSES

INDEX NO.
MOTION DATE 3/22/07
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for Sanctions

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: ☒ Yes ☐ No

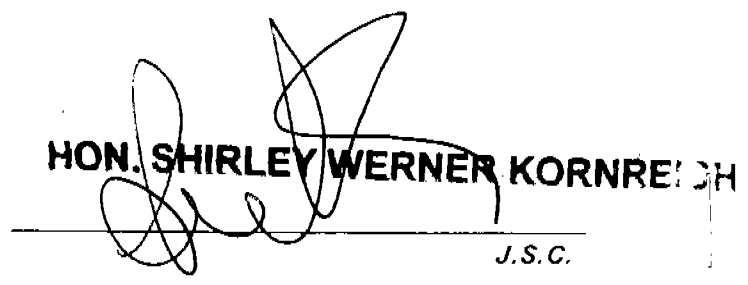
Upon the foregoing papers, it is ordered that this motion

FILED
JUN 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: June 13, 2007



HON. SHIRLEY WERNER KORNREICH
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: PART 54

---X

PHILLIP R. WOODIE

Plaintiff,

Index No.: 603582/04

DECISION and ORDER

-against-

AZTECA INTERNATIONAL CORPORATION, d/b/a AZTECA AMERICA; LUIS J. ECHARTE, Individually and as CEO of AZTECA AMERICA; JORGE JAIDAR, individually and as Chief Operating Officer, AZTECA AMERICA; TV AZTECA, S.A. de C.V.; MARIO SAN ROMAN, COO of TV AZTECA, S.A. de C.V.,

Defendants,

---X

KORNREICH, SHIRLEY WERNER, J.:

In this action for employment discrimination, misappropriation of trade secrets and conversion, the parties move and cross-move to impose sanctions for frivolous conduct, pursuant to 22 NYCRR §130-1.1.

Factual Background

Familiarity with the court's prior decisions in this action is presumed and the facts will be repeated here only as necessary to determine the motions before the court.

I. Facts Relating to Defendants' Motion

Plaintiff worked for Azteca International Corporation ("Azteca"), a Spanish language television station, from May 15, 2002 to October 31, 2003. Plaintiff brought this action after Azteca terminated his employment as president of sales and marketing. Prior to working for

Azteca, plaintiff had worked for Univision, another Spanish language television station. Defendants seek sanctions against plaintiff based upon allegedly false statements made during this litigation regarding his contact list and the date on which plaintiff first learned that Azteca was insisting on a sales target of $7.75 million for 2003 ("Sales Target"). Defendants claim that the alleged falsehoods prolonged the litigation and increased their expenses. They ask the court to order sanctions in the amount of their attorneys fees and costs, to be determined by motions at the close of the case.

A. The Contact List

Plaintiff claimed in his verified complaint that defendants misappropriated and converted his proprietary contact list, which he had kept at his home in a "secure location." The complaint alleged that plaintiff only had one hard and one electronic copy of the contact list, that in 2003 defendants induced him to mail his disk to Azteca in Mexico City for use in creating a mailing list for an advertising event, that defendants promised to return the list after making mailing labels, and that the contact list contained e-mail addresses and phone numbers. At plaintiff's first deposition in December of 2005, plaintiff identified a document, which was marked as Woodie Exhibit 3, as his contact list. Exhibit 3 did not have telephone numbers or e-mail addresses. Plaintiff also testified at his first deposition that he had never lost his electronic copy of the contact list.

Subsequently, defendants found a document in their offices, which, except for the heading "Univision Guest Management System" on the top of each page, was identical to Exhibit 3. Defendants moved for and took a further deposition of plaintiff in April 2006. The new document ("Univision List") was marked as Woodie Exhibit 30. In an errata sheet to his first

deposition, plaintiff produced a list, which again only had mailing addresses, which he designated as Woodie Exhibit 31. At his second deposition, plaintiff said that Exhibit 31 was his real contact list, not Exhibit 3. He testified that he accidentally took Exhibit 3 from his files when he produced it in discovery as his contact list. Plaintiff further testified at his second deposition that during his employment at Univision, prior to his employment by Azteca, his contact list was stored on a disk and, contradicting his complaint and his first deposition, he said he misplaced his disk of the contact list before he went to work at Azteca. Plaintiff's assistant at Azteca, Gladys Abreu, confirmed in an affidavit that plaintiff did not have an electronic copy of his contact list when he prepared the mailing list for Azteca in 2003. *See,* Affidavit of Gloria Abreu, sworn to on October 26, 2006. Plaintiff and Abreu stated that the disk sent to defendants was created by Abreu from Exhibit 31 and plaintiff's handwritten notes, which contradicted plaintiff's original story, that he sent his secure disk that he kept at home to Azteca.

Plaintiff also admitted at his second deposition that he personally had created Exhibit 3 by xeroxing the Univision List, which he obtained from a former colleague at Univision, Judy Kenny, so as to delete the Univision name at the top. The Univision List is 141 pages long. A deposition of Judy Kenny confirmed that she gave plaintiff the Univision List. This court's ruling on the motion for summary judgment dismissed plaintiff's misappropriation of trade secrets claim on the grounds that plaintiff voluntarily sent the disk Abreu created to defendants, had not taken steps to erase the list from defendants' computer, and had contradicted his own sworn deposition testimony.

B. The Sales Target Meeting

Plaintiff submitted sworn statements that he was unaware until a July 28, 2003 meeting

that defendants had set the Sales Target. The issue was relevant to whether the Sales Target was imposed in order to set-up plaintiff to fail as a pretext for his termination. Defendants have produced e-mails to and from plaintiff, dated May 22 and July 16, 2003, which discuss 2003 sales targets. Plaintiff argues that it is unclear whether the documents attached to the pre-meeting correspondence were the same sales projection document that plaintiff identified as the one presented to him for the first time at the July 28 meeting. However, the $7.75 million Sales Target for 2003 was in the body of an e-mail to plaintiff sent on July 16, 2003.

II. Facts Relating to Plaintiff's Motion

Plaintiff contends that defendants should be sanctioned because their lawyer, Jessica Feingold, swore in an affirmation that she had done a page by page comparison of Exhibit 3 and Exhibit 31 and found that they were "almost identical." Plaintiff contends that this is sanctionable. In addition, plaintiff argues that defendants improperly argued in their motion for summary judgment, pursuant to CPLR §3212, that plaintiff's claim for conversion of business expenses owed to him should be dismissed because they was no identifiable fund for the expenses. Plaintiff asserts that, by making that argument, defendants violated the doctrine of law of the case and attempted to deceive the court by not mentioning that on a prior motion to dismiss, pursuant to CPLR §3211, the court had ruled that plaintiff had stated a claim for conversion of the business expenses. In addition, in deciding the summary judgment motion, the court corrected its ruling on the motion to dismiss and granted summary judgment dismissing the conversion claim relating to business expenses on the ground urged by defendants.

Discussion

A court has discretion to award to a party in any civil action costs in the form of

reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in 22 NYCRR §130-1.1. For purposes of 22 NYCRR §130-1.1, "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." The court may order the costs and fees to be paid by the party who engages in frivolous conduct. *Id.*

It is clear that plaintiff's conduct was frivolous because he asserted material factual statements that were false. It is simply not believable that plaintiff innocently copied the 141 page Univision List to delete the heading identifying its source as Univision and then mistook it for his secret contact list. Furthermore, it is clear that plaintiff was not truthful about the confidentiality of the disk that he sent to defendants. The allegations in his complaint and his first deposition gave the impression that he gave defendants his only electronic copy of a list that he had compiled over many years, before he worked for Azteca, when in fact he later admitted that the disk was created on Azteca's computer in 2003. These misstatements went to the substance of plaintiff's claim that defendants misappropriated valuable and confidential proprietary information.

However, the court does not agree that the record supports the ineluctable conclusion that plaintiff lied when he said that he first learned about the Sales Target at the July 28 meeting. It is unclear from the documents whether plaintiff was told that the Sales Target was $7.75 million before July 16, and it cannot be said with certainty whether plaintiff's position was dishonest or merely the product of faulty recollection.

Sanctions are appropriate where a party has given false sworn statements that cause delay. *Birch v. Carroll*, 210 A.D.2d 119, 120 (1st Dept. 1994)(fraudulent scheme and false testimony caused substantial expense and delay); *Sanders v. Copley*, 194 A.D.2d 85, 88 (1st Dept. 1993)(false sworn testimony and affidavit on material issue). Attorneys' fees and costs may be awarded after a hearing. *Sanders v. Copley, supra.*

In this case, attorneys' fees and costs to be paid by plaintiff are appropriate. Plaintiff's false statements about the contact list required defendants to move for and take plaintiff's second deposition and to depose Joan Kenny, the source of the Univision List. The action was delayed as a result, and attorneys' fees and costs were incurred.

The court does not agree that defendants' conduct should be sanctioned. A court should "avoid the imposition of sanctions in cases where the appellant asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure." *Yenom Corp. v. 155 Wooster St., Inc.*, 2006 NY Slip Op 5732, 4 (1st Dept. 2006). The statement by defendants' counsel that Exhibit 3 and Exhibit 31 were "almost identical" did not delay the action or prejudice plaintiff, who had provided defendant with both documents. The argument was colorable as the exhibits contain substantial overlap. Counsel's exaggeration of their similarity caused no harm and could not deceive, as the documents were available to all for purposes of comparison.

Plaintiff is incorrect that the denial of a motion to dismiss bars a later motion for summary judgment on the same ground under the doctrine of law of the case. *Radix v. City of New York*, 4 A.D.3d 242, 245 (1st Dept. 2004)(law of case inapplicable where summary judgment motion follows motion to dismiss); *Transport Workers Union of America Local 100 AFL-CIO v.*

[* 8]

Schwartz, 2006 NY Slip Op 6473, 4 (1st Dept. 2006)(denial of motion to dismiss not law of case as to summary judgment motion based on record developed after discovery). Moreover, the court determined on the motion for summary judgment that defendants' argument about conversion of business expenses was meritorious. Accordingly, it is

ORDERED that defendants' motion for sanctions is granted solely to the extent that the issue of the reasonable attorneys' fees and costs incurred by defendants due to plaintiff's false statements about his contact list 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 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of attorney's fees and costs; and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied.

Dated: June 13, 2007

FILED
JUN 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.