Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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LISA NAZARIO,

Petitioner,

-against-

JOHN J. CIAFONE, ESQ.,

Respondent.

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Index No: 22698/07
Motion Date: 10/31/07
Motion Cal. No: 18
Motion Seq. No: 1

The following papers numbered 1 to 9 read on this motion for an order compelling respondent to immediately deliver to incoming counsel, Ferro, Kuba, Mangano, Sklyar, Gacovino & Lake, P.C., the entire file regarding the motor vehicle accident involving Lisa Nazario, which occurred on September 22, 2004, in Queens County, including but not limited to, all investigative and medical documentation relating to that accident; imposing sanctions on the respondent for his deliberate refusal to comply with the numerous requests of incoming counsel, Ferro, Kuba, Mangano, Sklyar, Gacovino & Lake, P.C., to produce said file; and imposing the cost of bring this motion on the respondent, including but not limited to reimbursement of the costs of the Index Number and RJI fee.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Reply.....	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is a special proceeding commenced to compel respondent, an attorney substituted as counsel for Lisa Nazario ("Nazario"), plaintiff in the underlying action pending before the Court under Index Number 6865/07, to release her file to the incoming counsel, Ferro, Kuba, Mangano, Sklyar, Gacovino & Lake, P.C. ("petitioner"). The underlying action arises from a motor vehicle accident occurring on September 22, 2004, which subsequently resulted in respondent being retained. On December 21, 2006, Nazario retained petitioner and sent a "cease work" letter to respondent authorizing and directing him to deliver the file, as well as all communications, to petitioner. Thereafter, by certified mail, petitioner sent another copy of the Nazario letter along

with duly executed Consent to Change Attorney form, which was delivered on January 25, 2007. Upon respondent's failure to either return petitioner's phone calls placed to his office, or respond to the aforementioned letters, petitioner sent another correspondence on March 2, 2007, which requested deliverance of the file. The letter further stated that if petitioner did not hear from respondent within ten (10) days, it would " have no choice but to ask for the Court's intervention, including cost and sanctions." By letter dated March 8, 2007, respondent stated that the March 2, 2007 correspondence was the first time that he received communication from petitioner's office, and further requested that the Consent to Change Attorney form be forwarded to his office. As a result, the January correspondence was faxed to respondent on March 13, 2007, and again of June 21, 2007.

Thereafter, on June 25, 2007, petitioner called respondent's office and was allegedly advised that the file was being mailed on that day. Another request for the file was made by letter dated July 24, 2007, which also indicated that a motion would be forthcoming if respondent failed to comply. Petitioner contends that on August 9, 2007, respondent stated that the motion was unnecessary as the file would be forwarded immediately. Respondent also indicated that he had already commenced an action in this matter. Consequently, petitioner requested that respondent send a court stamped copy of the pleadings by facsimile, as the Statute of Limitations was due to expire on September 22, 2007. On August 9, 2007, respondent faxed an unstamped copy of the pleadings dated December 10, 2006. To date, respondent has failed to forward the file. It is upon the foregoing that petitioner moves for an order compelling respondent to immediately deliver the entire file of Nazario, with respect to the underlying motor vehicle accident; imposing sanctions on respondent for his deliberate refusal to comply with the numerous requests of petitioner to produce the aforementioned file; and imposing the cost of bring this motion on the respondent, including but not limited to reimbursement of the costs of the Index Number and RJI fee.

In response to the allegations asserted by petitioner, by Affirmation in Opposition, respondent states the following, it its entirety:

1. The movant has brought this frivolous motion in an attempt to avoid paying disbursements that our office generated on the case.

2. I have attempted to resolve that matter and called Attorneys [from petitioner's office], all whom have refused or neglected to return my telephone calls.[1]

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[1] Annexed to the Affirmation in Opposition is an undated original stipulation, signed by respondent only, which states, in relevant part, that petitioner reimburse "disbursements incurred by [respondent] in connection with this action in the sum of $614.98, of which $210.00 is the summons and complaint, $32.50 for photocopies, $8.78 for postage, Affidavits of Service $213.70, No Fault filing $150.00;" agree to an apportionment of the legal fee, and that respondent "has a retaining lien, charging lien, pursuant to § 475 of the Judiciary Law and seek a

3. I have at least one other matter with client, Lisa Nazario, which I communicate with often. In fact, even after she signed a substitution, Ms. Nazario told the movant to give our office additional time to work on her file.

4. I essentially had to beg the movant to pay our disbursements and the movant made one excuse after the other.

5. The movant not only filed this frivolous motion but purchased a new Index Number even though it has received a copy of my summons and complaint with the Index Number that could and should be used in this motion.

6. In view of their most inappropriate and unethical behavior the movant now seeks to get disbursements from us for filing this frivolous motion.

7. In fact the movant once again acted most inappropriately in commencing another action on behalf of Lisa Nazario.

8. Why didn't the movant use the Index Number? The movant even served the defendants even though the movant has not been properly substituted.

9. Our office is not a creditor and can not [sic] wait to get our disbursements at the conclusion of the case.

10. The movant is only attempting to prevent our office from receiving a lien on the file.

11. The Order to Show Cause of the movant should be denied in its entirety.

In reply to aforementioned affirmation, petitioner states that it was compelled to bring this motion to produce the file that respondent "deliberately withheld for almost a year despite being substituted as attorney." Petitioner further states that respondent's statement, that "even after [Nazario] signed a substitution, [she] told [petitioner] to give [respondent's] office additional time to work on her file," is a complete fabrication. Petitioner contends that upon consulting Nazario with respect to this allegation, she advised that respondent requested more time to work on the file upon receipt of the cease and desist letter in December of 2006, which request she declined. Petitioner states that the Court records further show that respondent filed a Summons and Complaint in March 2007, subsequent to being notified that he was substituted as

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(...continued)

percentage of lien on the above matter, and shall be deemed a lien against any proceeds received in this action;" and agree to "keep respondent reasonably advised as to the status of the claim and any related action commenced in connection therewith."

counsel for Nazario in December of 2006. Notwithstanding, petitioner asserts that "respondent now requests that before releasing the file, he be reimbursed for the costs of that improper act." Thus, petitioner contends that respondent's actions have been, and continue to be improper. This Court agrees.

Part 130.1 of the Rules of the Chief Administrator of the Court, authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

> (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 Subpart. []
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> (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. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.
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> (c) For purposes of this Part, conduct is frivolous if:
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> > (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;
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> > (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
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> > (3) it asserts material factual statements that are false.

The "intent of [Part 130.1] is to prevent the waste of judicial resources and to deter [vexatious] litigation and dilatory or malicious litigation tactics." Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept.1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006). The Rule further provides that "[i]n determining whether the conduct undertaken was frivolous, 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, should have been apparent, or was brought to the attention of counsel or the party."

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a "broad pattern of the [defendant's] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation []." Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452, (2 Dept. 2004) "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted)." Id. at 34 (1st Dept.1999).

From the outset, it is noted by this Court that in response to the litany of evidence supporting petitioner's exhaustive attempt to obtain Nazario's file, respondent's affirmation in opposition, which this Court cited in its entirety, is woefully lacking in substance, merit and veracity. Indeed, the only exhibit proffered to support this submission is the undated, unilaterally executed document purporting to be respondent's diligent attempt to settle this matter. Of the statements made in this Affirmation, none raise a viable issue as to the credibility of the allegations contained in the moving papers. As a matter of fact, the allegations asserted therein do little, if anything, to either refute the facts asserted by petitioner, or proffer a reasonable excuse as to why respondent selected the legal posture that he continues to maintain. Moreover, respondent seems to hold steadfast to the propriety of his dubious actions by asserting that his "office is not a creditor and can not [sic] wait to get our disbursements at the conclusion of the case." Despite respondent's protestations in his Affirmation in Opposition, which this Court rejects outright as obstructive, vexatious and lacking in probative value, it is clear that respondent allowed the file to languish without taking the rudimentary step of commencing an action, which this Court finds was subsequently done after his substitution as a remedial effort to disguise his inaction. Nevertheless, to add insult to injury, respondent proffers a stipulation seeking to secure an apportionment of legal fees, of which he has not earned, and to which he is not entitled, as it appears to this Court that any work done on this file by respondent was reactive to the substitution letter of Nazario. Clearly such posture runs counter to the well established tenets upon which the ethical cannons for professional conduct are based.

Most disquieting to this Court is the baselessness and patent misrepresentations made in a document by an Officer of the Court which affirms the content of such under penalty of perjury. Respondent, by letter dated March 8, 2007, stated that the March 2, 2007 correspondence of petitioner seeking turnover of Nazario's file, was the first time that he received communication from petitioner's office, which by inference, respondent contends that he was unaware of the substitution. However, that inference is belied by Nazario's contention that in December of 2006, she denied respondent's request, upon receipt of her cease and desist letter, for more time to work on the file. This contention is further bolstered by respondent's belated and glaringly improper action of commencing the underlying matter three months after his knowledge of the substitution of petitioner, and thereafter holding the file hostage for payment of disbursements that were inappropriately incurred.

Regrettably, this is not the first encounter of this Court with respondent's frivolity, dilatoriness, incredulous statements and impermissible standard by which he governs himself, avoids accountability, and engages in the practice of law. This Court has intimate knowledge of a pattern of behavior that lacks professional courtesy, at best, and at worst, stands on the precipice of disciplinary intervention. Although sanctions are retributive in nature and seek to eradicate the scourge that frivolous conduct and vexatious litigation place upon the legal profession, this Court is mindful that it is not the intent of the Rule to punish respondent for any and all transgressions which he may, or may not, have committed throughout his legal career. Nevertheless, as sanctions are goal-oriented in that the imposition of such may be helpful in deterring future frivolous conduct by respondent, it is necessary to impart to the legal community that the actions found in the instant record cannot be countenanced. Accordingly, it is determined by this Court that respondent has engaged in frivolous conduct within the meaning of 22 N.Y.C.R.R. 130-1.1 (c), which provides for sanctions to be impose for conduct that is dilatory, vexatious, and harassing, and statements that are materially false.

Under the circumstances, the motion by the law firm of Ferro, Kuba, Mangano, Sklyar, Gacovino & Lake, P.C., is granted in its entirety, for an order compelling respondent to immediately deliver to it, the entire file regarding the motor vehicle accident involving Lisa Nazario; imposing sanctions on respondent for his deliberate refusal to comply with the numerous requests to produce said file; and imposing the cost of bring this motion on the respondent, including but not limited to reimbursement of the costs of the Index Number and RJI fee. Ferro, Kuba, Mangano, Sklyar, Gacovino & Lake, P.C., as substituted counsel for plaintiff in the place and stead of John Ciafone, Esq., is directed to serve a copy of this order with notice of entry upon defendants in the underlying action, and the outgoing attorney. As John Ciafone, Esq., is not entitled to disbursements in this matter, John Ciafone, Esq., is directed to transfer the complete file of plaintiff within ten (10) days of such service. Further, petitioner is awarded costs and reasonable attorneys' fees associated with the commencement of a special proceeding and the making of this motion to compel the underlying file, in an amount to be determined by order of this Court upon the submission of an Affirmation of Services Rendered, detailing the fees, including counsel fees, associated with this matter. The affirmation, along with proof of service upon respondent, shall be served upon this Court within ten (10) days of service of notice of entry. John Ciafone, Esq. is directed to remit payment to the respective firm in the amount

determined by further order of this Court within twenty (20) days from the date a copy of the subsequent order determining fees is served upon him with notice of entry. Moreover, John Ciafone, Esq. is directed to remit payment in the amount of $5,000.00, payable to the Lawyers' Fund for Client Protection, and it is direct that judgment be entered in accordance with 22 NYCRR 130-1.2, against John Ciafone, Esq. in that amount.

Dated: January 8, 2008

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J.S.C.