

General Credit Corp. v Guidice

2008 NY Slip Op 32033(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0602379/2002

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49M

General Credit Corporation, G.S. Capital Corporation, Carly Holding, Inc., and General Armored Corporation

Michael Giudice, Gregory E. Roxan, and Goddard, Roxan, & Benken, L.L.P.

INDEX NO. 602379/02
MOTION DATE _____
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/15/08 [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
GENERAL CREDIT CORPORATION, G.S. CAPITAL
CORPORATION, CARLY HOLDING, INC.,
and GENERAL ARMORED CORPORATION,

Plaintiffs,

-against-

Index No. 602379/02

MICHAEL GUIDICE, GREGORY E. RONAN,
GODDARD, RONAN & DINEEN, L.L.P.,
and "JOHN AND JANE DOES" NO. 1-10,

Defendants.

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HERMAN CAHN, J.:

Plaintiffs move to strike the answers of defendants Michael Guidice, Gregory E. Ronan and the law firm of Goddard Ronan & Dineen, L.L.P. (GR&D), CPLR 3126, and resolving all issues in favor of plaintiffs, as a result of the claimed destruction by defendants of computers and other relevant evidence during the pendency of this litigation, and their pattern of obstructive conduct and testimony with respect to the matter.

For the reasons stated herein, the motion is granted, in part, with respect to defendants Ronan and GR&D as to the fourth cause of action of the Amended Complaint seeking damages for charging General Credit Corporation excessive legal fees between 1998 and 2002, and denied with respect to the remaining causes of action and with respect to defendant Michael Guidice.

Ronan's deposition testimony establishes that defendants Ronan and GR&D have not met their discovery obligations in this case, that relevant evidence relating to the plaintiffs' over billing claim has not been turned over or was destroyed after the commencement of the action, and that plaintiffs have been severely prejudiced in their ability to prosecute their claim.

After Ronan was terminated as General Credit's counsel on June 25, 2002, General Credit demanded that he return all of its corporate books, records and legal files. Under compulsion of court order, Ronan claimed to have turned over all of the files in his possession. However, plaintiffs allege that he did not turn over any corporate books or records and that many of the litigation files he turned over were incomplete. See Am. Compl., ¶ 29.

In response to plaintiffs' initial document demand dated August 6, 2004, defendants served a belated one-sentence response claiming that "Defendants have no documents responsive to requests numbered 1-34 inclusive other than documents previously filed in the Court in this action." Rader Aff., Exh. A. Plaintiffs moved to compel discovery. On December 17, 2004, the Court directed defendants to provide separate verified responses to each and every document request and to provide copies of any responsive document in their possession by January 7, 2005. Defendants' response was to merely repeat their prior one-sentence response. They produced no documents. This response turned out to be false, since Ronan was able to locate some (but not all) invoices from GR&D to General Credit on a computer disc at the offices of GR&D the day before his April 5, 2005 examination before trial simply by questioning the office receptionist. Ronan EBT, at 13-14.

Ronan testified that GR&D's policy with respect to retaining and archiving documents was to "retain documents until the files are closed and the documents are no longer necessary. We retain [final] bills forever, we don't throw out bills. They are maintained electronically on the computers." Id., at 17, 27. He testified that legal documents were kept only in hard copy. Id., at 24-25. However, he admitted that the computers used at GR&D between 1998 and 2002 were not still running, had been discarded and replaced with new computers. Id., at 21.

Although he claimed that all of the information on the old computers was downloaded and put on discs (id., at 24), there is no adequate explanation as to why the only invoices he could find were for the time period July 5, 2000 to June 3, 2002 (Rader Aff., Exh. F) when General Credit became a client of the firm in 1998. Ronan's extremely vague and confusing testimony suggesting that the remainder of the invoices might have been on a Compaq computer that "went down" at some unknown point in time (Ronan EBT, at 13-14) conflicts with his present claim that "all" firm electronic data was properly transferred to new computers (Ronan Aff., ¶ 9).

What is even more disturbing is that the GR&D bills that were produced contain detailed time descriptions of the work performed by all attorneys except for Ronan. Id. Absent the production of contemporaneous time records to justify the hours he billed, the evidence is almost inescapable that his time entries are fabricated, because the amount of hours he allegedly worked is reported, in almost every invoice, ending in the number "1." For example, for the months of June, July, August, September, October, November, December of 2000 and January and February of 2001, Ronan billed General Credit for 91 hours, 41 hours, 81, 71, 61, 71, 91, 101 and 91 hours, respectively. Id. However, Ronan testified that all back-up material used to prepare the final bills and calculate the hours he worked has been thrown out. Ronan EBT, at 29-30, 32-33.

After Ronan testified that office computers had been discarded, he was admonished by the Court and informed that it would be a serious matter if computers had been destroyed during the pendency of this litigation. At that time, Ronan claimed that he found the "Compaq" computer in storage and was ordered by J.H.O. Beverly Cohen to produce the computer for inspection. However, according to the affidavit of plaintiffs' computer expert, Peter Platowski, the computer "was not used for business purposes [and] was not utilized during the time frame of

1998-2002.” Rader Aff., Exh. H at ¶ 5.

Under CPLR 3126, if a court finds that a party destroyed evidence that “ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just.” Ortega v City of New York, 9 NY3d 69, 76 (2007). A party clearly has a duty to preserve evidence when it has notice of pending litigation. Sage Realty Corp. v Proskauer Rose LLP, 275 AD2d 11 (1st Dept 2000), lv dismissed 96 NY2d 937 (2001); Squitieri v City of New York, 248 AD2d 201 (1st Dept 1998); Kirkland v New York City Housing Authority, 236 AD2d 170 (1st Dept 1997). Where appropriate, a court can impose the ultimate sanction of striking responsive pleadings, thereby rendering a judgment by default against the offending party. See, e.g., Bear, Stearns & Co., Inc. v Enviropower, LLC, 21 AD3d 855 (1st Dept), appeal dismissed 6 NY3d 750 (2005); Baglio v St. John's Queens Hospital, 303 AD2d 341 (2d Dept 2003); DiDomenico v C & S Aeromatik Supplies, Inc., 252 AD2d 41 (2d Dept 1998).

The imposition of sanctions against defendants Ronan and GR&D in the form of striking a portion of their pleading relating to the over billing claim is justified. This lawsuit was brought on June 27, 2002 only two days after GR&D was notified in writing that it was being terminated as counsel for General Credit and that an accounting for all services rendered since the inception of the firm’s representation might be demanded. See Rader Supp. Aff., Exh. B. Thus, as early as June 27, 2002, these defendants were on notice of the relevance of all documents and materials regarding the legal fees the firm billed to General Credit. Sanctions are particularly warranted since these defendants are attorneys admitted to practice and deemed to be aware of both their legal obligation to preserve relevant evidence and their ethical obligations under the Code of

Professional Responsibility regarding fees for legal services.¹ It is difficult to believe that GR&D could have, in good faith, prepared and sent invoices for Ronan's time without providing any break-down of the time he billed or an explanation of what matters he may have worked on, on General Credit's behalf.

However, sanctions pursuant to CPLR 3126 are warranted on this record only with respect to the over billing claim. To be sure, defendants' claim that neither Ronan nor GR&D had any documents stored electronically such as correspondence, notes, drafts, memoranda, etc. regarding General Credit as of the filing of this lawsuit is not credible. However, plaintiffs have not met their burden of showing that any such documentation is "key evidence" needed to establish their claims concerning Ronan's alleged conflict of interest and malfeasance concerning the 2002 transaction between General Credit and Guidice. There is no support in the record for counsel's claim that any correspondence between Ronan and Guidice concerning their relationship "would have been on these computers" (Rader Aff., ¶ 5), particularly since Guidice testified that he worked out of his car, his home and a gun shop in Patterson, New Jersey (Guidice EBT, at 15-16, 32-22, 53-54) and that the deal was negotiated by telephone with Ronan and Zellermaier (*id.*, at 54-56). In addition, Ronan's failure to produce any corporate books or records of General Credit merely lends support to plaintiffs' claim that he failed, in his capacity as a director of the company, to keep adequate corporate records. See Am. Compl., ¶ 15.

¹ An attorney is obligated by the Code of Professional Responsibility not to charge or collect an excessive fee. DR 2-106(A). Without any time records or even description of the legal work performed, neither the client nor a reviewing court can determine whether a fee is excessive because one of the key factors to be considered is the "time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly." DR 2-106(B)(1).

Accordingly, the Court grants plaintiffs' motion to the extent of striking the answer of Ronan and GR&D with respect to the fourth cause of action which seeks damages based on the alleged over billing of General Credit for legal services rendered by GR&D from 1998 to 2002. The issue of the amount to be awarded on the fourth cause of action is referred to a Special Referee to hear and report. The Referee is directed to take into account the settlement of the adversary proceeding in Bankruptcy Court for \$102,796.00 with respect to the 58 payments to GR&D between July 24, 2001 and July 5, 2002 and to deduct any legal fees attributed to hours billed by attorneys and/or legal assistants at the firm (e.g., John P. Kapsalis, Pamela Grief and Leon Divinsky) for which time records have been produced by defendants or which were in the files of General Credit when this lawsuit was commenced.²

With respect to Guidice, a lay person, plaintiffs have not met their burden of showing the deliberate or negligent "loss, destruction, or alteration of key evidence to a lawsuit." Squitieri v City of New York, 248 AD2d 201, 202 (1st Dept 1998). Guidice testified in a decidedly forthright manner that Bridgeview Bank never lent him the \$1 million and Guidice never lent it to General Credit because the 60-day time period referenced in paragraph 3 of the May 23, 2002 agreement never came to pass (Guidice EBT, at 65-66, 97); that he terminated his relationship with General Credit within three to four weeks of May 23, 2002 after Guidice was refused signature authority on General Credit's bank accounts and Irwin Zellermaier locked him out of the offices of the company (id., 113-114); that he retained no files for deals, like this one, that "go bad" (id., at 51-53); that his personal computer used in 2002 is "long gone" because he buys

² The Amended Complaint dated May 12, 2004 makes clear that General Credit was in possession of some billing records from GR&D prior to the production of the invoices in April 2005.

a new computer periodically (id., 132-34); that the only data he keeps is financial records, checkbook records, correspondence, and, again, he keeps no documents for dead deals (id., 134); that he assumed this litigation was moot once General Credit filed for bankruptcy on July 19, 2002 (Guidice Aff., ¶ 7); and that when Irwin Zellermaier locked Guidice out of General Credit's offices, all of his General Credit files were locked up too, including a briefcase, and he was denied access to these things (Guidice EBT, at 75-76, 105).

For the foregoing reasons, it is

ORDERED that plaintiffs' motion, pursuant to CPLR 3126, for an order striking the answers of the defendants is granted, in part, by striking the answer of defendants Gregory E. Ronan and Goddard Ronan & Dineen, L.L.P. to the fourth cause of action, and is denied in all other respects; and it is further

ORDERED that the amount to be awarded plaintiff General Credit Corporation on the fourth cause of action is referred to a Special Referee to hear and report in accordance with this decision and order; and it is further

ORDERED that counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the remaining causes of action in the Amended Complaint are hereby severed and shall continue.

Dated: July 15, 2008

ENTER:



J.S.C.

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JUL 21 2008
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