[* 1]

ORIGINAL

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

MAREK ROZEN, CHRISTINE ROZEN and GABRIELLE ROZEN,

Plaintiffs

INDEX NO.: 001148/2005
MOTION DATE: 06/27/2008
MOTION SEQUENCE: 008 and 009

-against-

THE NITE RIDER GROUP, INC., MOHAMED SH. OMAR and SALLY OMAR,

Action No. 1

Defendants.

MAREK ROZEN, CHRISTINE ROZEN and GABRIELLE ROZEN,

Plaintiffs,

INDEX NO.: 010776/2005

-against-

Action No. 2

CAIRO BUSINESS ENTERPRISES, LTD., MOHAMED SH. OMAR and SALLY OMAR,

Defendants.

The following papers read on this motion:

Order to Show Cause & Affirmation in Support	1
Exhibits for Hearing on Sanctions	2
Notice of Cross-Motion, Affidavit & Exhibit Annexed	3
Affidavit of Daniel P. Rosenthal, Esq. & Exhibits Annexed	4
Affidavit of Kenneth J. Lauri, Esq. & Exhibits Annexed	5
Affidavit of Jay Edmond Russ, Esq. & Exhibits Annexed	6

This motion by plaintiff for an order pursuant to 22 NYCRR § 130-1.1 awarding costs and sanctions against Russ & Russ P.C., Jay Edmond Russ Esq., Daniel Leventhal Esq., and Kenneth J. Laurie Esq, (hereinafter Russ & Russ), for engaging in frivolous conduct, and the cross-motion by defendant Sally Omar for the identical relief is determined as follows.

Plaintiffs' actions against Nite Riders and Cairo were both commenced in 2005; Russ & Russ was substituted as counsel for defendants in January of 2006. In July of 2007 the legal claims were tried to jury verdict before the undersigned. The approximate sum of $800,000 was awarded to the plaintiffs as the value of loans made by the Rozens to the defendant corporations, and individuals, which had not been repaid. The gravamen of the complaints in both actions is defendants' default on loans of cash made to defendants from 1999 to 2004, seemingly to maintain their taxi and livery businesses. There is also a claim for a violation of the Debtor & Creditor Law, which is still pending.

Defendants asserted that they had repaid the loans in cash, but had neither witnesses nor receipts. They also asserted that a land transaction in Suffolk County, whereby the Rozens took title to certain real property in lieu of foreclosure on a $200,000 mortgage loan, resulted in an agreement to waive all claims to any outstanding loans between the parties.

In March of 2006, the Omars commenced an action in Suffolk County to compel specific performance of a March 2001 option agreement (the Agreement) on the aforesaid parcel of real property, which is known as the Mattituck property. The Agreement, inter alia, permitted Sally Omar to compel plaintiff to reconvey title upon notice and payment of 5% of a purchase price set at current fair market value, plus execution of a 15 year purchase money mortgage agreement for the repayment of the 95% balance of value. That action is still pending.

Soon after the jury portion of the trial ended, it came to light that Sally Omar had given, and Russ & Russ, or it's agent or assigns had accepted, the assignment of an 80% interest in Sally Omar's option created in the Agreement. The news provoked an intense reaction by the Rozens as being an ethical and statutory violation, caused the Omars to terminate Russ & Russ as their attorney, resulted in the commencement of an action by the Omar's for legal malpractice, (Omar v Russ & Russ, et al., Index No. 01462/2008), the commencement of a second action by the Rozen's for a violation of Judiciary Law § 478, (Rozen v Russ & Russ, Index No. 19442/2007), and the bringing of the motion sub judice.

Plaintiff's basis for imposing sanctions is, first, that Russ & Russ did not convey global settlement negotiations to their client since it would impact the Mattituck Property in which they too have an interest, and, second, that he conducted the lawsuit in all instances in a manner calculated to delay and harass the plaintiffs and cause them to incur substantial legal fees. Although the jury believed the plaintiffs, the plaintiffs remain the holders of an unenforceable judgment, and that victory came with a large legal bill. It could be called a pyrrhic victory.

The allegations were set out in an earlier decision of this court and are repeated here in full:

> It is alleged that the conduct of the moving parties undermined the integrity of the judicial process and increased the legal fees of the plaintiffs. Specifically that: "It was the intention of the Russ & Russ Attorneys to take the option to the Mattituck property from the Omars and then cause the Rozens to incur extensive delays and

> expense so that they would relinquish their rights to the Mattituck property without the knowledge that the Russ & Russ Attorneys sought to develop and profiteer from the property." Rosen OSC dated March 18, 2008, ¶ 11.
>
> It is also claimed that the Russ attorneys instructed the Omars not to divulge any financial or personal information and not to produce any bank records, nor tax returns, neither corporate or personal, or corporate books or records, and that such refusal was "part of a deliberate and designed pattern of conduct to prolong this litigation, cause the Plaintiffs to incur costs and legal fees, and frustrate the Plaintiffs' prosecution of this matter." Rosen OSC ¶ 30.

In sum, it is alleged that Russ & Russ delayed litigation, displayed lack of candor in addressing the court, manifested indifference to the expenses incurred by plaintiffs, and asserted affirmative defenses that were devoid of merit, and, because the Omars assigned the option to them, did not disclose plaintiffs' settlement offers that involved the Mattituck property. Rozen v Nite Riders, page 3, (May 30, 2008).

The lawyers who joined Russ & Russ P.C. in representing defendants are included in the charge of misconduct. They are, hereinafter, referred to collectively as Russ & Russ. Russ & Russ argues against sanctions on the grounds that there are motions pending in the two plenary actions which also are concerned with Judiciary Law § 475, and any finding in this court in the context of sanctions will have a collateral estoppel effect on those lawsuits. They submit that they did not instruct their clients not to answer questions, nor to withhold documents. They explain that their trial strategy was a judgment made after assessing the personalities and the aggressive feelings between the litigants in context of the records available to be introduced into evidence. They further submit that in the face of an inability to produce documents, and based on the plaintiff's suspicion that defendants were defrauding them, Mr. Gertler engaged in hyperactive but ineffectual litigation.

Plaintiff's charge that Russ & Russ engaged in frivolous conduct by taking an interest in real property that was the subject of the litigation and then impeded settlement since it would affect their interest shall be addressed first.

A review of the complaints filed in the above captioned action discloses no cause of action concerned with the Mattituck Property. The defendant's action in Suffolk County is, and it is venued there for obvious reasons. The private sub rosa feelings or hunches of the litigants about what motivates a law suit cannot be a basis for a decision of this court, which must be based on the record before it.

The parties argue that Russ & Russ violated section 487 of the Judiciary Law which makes it a misdemeanor for a lawyer to deceive or "consent to any deceit or collusion with intent to deceive the court ..., or wilfully delay his client's suit with a view to his own gain." This charge depends upon whether the Disciplinary Rules have been breached, i.e. whether the attorney has obtained an interest in the very property in dispute. DR-5-103. On the surface it appears that Russ & Russ obtained an interest in Sally Omar's option on the Mattituck Property. However, if the agreement between the attorney and the Omars is predicated on contingency, it is not unethical, and is subject to the exception for that purpose.

For example, in a case where the attorney was given a 30% contingency fee on revenues from a patent that he attempted to recover in a lawsuit, the court found as long as the fee was reasonable and agreed upon, the attorney did not violate his ethical responsibility against acquiring an interest in the subject matter of the litigation. The court held: "However, defendants fail to show that Beatie's compensation actually was increased under the settlement agreements from that obtained under the contingency fee agreement. The claim that Beatie received an interest in the patents themselves for the first time under the settlement documents is unsupported. Under both the 1984 contingency fee and the 1985 settlement documents, attorney Beatie's interest was essentially 30% of revenues generated by the patents. The contingency fee agreement's provision for a lesser amount based upon standard time charges was rendered moot by plaintiff's devotion of 1,700 hours to the case. Defendants failed to demonstrate there was any violation of Code of Professional Responsibility DR 5-103, against obtaining an interest in the litigation, but rather it is clear that this arrangement

was within the exception thereto relating to contingency fees. Payment to Beatie was not "guaranteed" anywhere in the settlement documents or mentioned in client DeLong's release, as contended by defendants." Beatie v. DeLong, 164 A.D.2d 104, 109 (1st Dep't 1990).

Mr. Gertler states that "Certainly had the Omars been made aware of the Rozen's settlement offer, to wit: relinquishment of their interest in the Matttituck Property and payment of $200,000, (of the $250,000 they had netted from the sale of their house) the case would have settled." Reply Aff in Support of Plaintiffs' Application for Costs and Sanctions, ¶ 6.

Mr. Gertler's statement assumes two things: such an offer to settle was clearly made and the Omars would have accepted it had they known. To the view of the court it is hard to decide if it is a fair offer without knowing the value of the interest the Omars would have surrendered.

In short, the proof required on the issue of whether Russ & Russ' acceptance of an interest in the option on Mattituck is an ethical violation because it is accepting an interest in the subject of the litigation, is too different from the details of determining whether Frivolous Conduct infected these lawsuits. Furthermore, even if there was an ethical violation, the preferred remedy is not a sanction for frivolous conduct which has as it's goal deterrence or punishment of such conduct. In this regard Rozen has sued to rescind the assignment and that is relief available in the plenary actions if at all. Finally, there are many factual unknowns about communications about settlement and motivations in making or accepting them, which are not appropriate for testing in the motion sub judice.

The second component of plaintiffs' motion is the charge that Russ & Russ delayed and prolonged the litigation. 22 NYCRR § 130-1.1(c)(2).

To demonstrate by way of example the low level of intellect to which this case has sunk the case is summarized, as gleaned from the papers submitted by the parties, that the Judge was biased in the opinion of the defendants, plaintiffs' attorney was

incompetent and disorganized, and, of course, defense counsel is guilty of a misdemeanor - and stealing beyond stalling the case for his own personal gain. As the justice presiding over this matter it can be said with absolute certainty that those judgments are subjective, and the issue of bias was never raised with the court.

The delicate part of discerning frivolous conduct is identifying differences in people acting as lawyers. And, it is weighing competing ethical norms as is done in accommodating a clash of constitutional values.

It is well to start on firm ground. "Conduct is frivolous and can be sanctioned under 22 NYCRR 130-1.1 if it is 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law' or it is 'undertaken primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another' (22 NYCRR 130-1.1[c][1][2]'see Stow v Stow, 262 A.D.2d 550 (1999); Matter of Gordon v Marrone, 202 A.D.2d 104 (1994); Tyree Bros.Envtl Servs. v Ferguson Propeller, 247 A.D.2d 376 (1998.) Offman v Campos, 12 A.D.3d 581, 582 (2d Dept 2004). A written decision must issue setting forth the grounds, and a sanction may be made payable to the Clients Security Fund or a fine imposed payable to the opposition, which taken together shall not exceed the amount of $10,000.

A comprehensive review of case law discloses no court created objective standard to add content to the recited statutory words. Each case relies upon the plain wording of the statute and each depends on the facts. Glenn v Annunziata, 2008 W.L. 2747178, *1 (2d Dept July 15, 2008). Most cases emphasize the trial judge's discretion. Those cases where a decision by the trial court have been reversed turn on procedural errors, Watson v City of New York, 178 A.D.2d 126 (1991), or a lack of basis found in the record. Guarnier v American Dredging Co., 79 N.Y.2d 846 (1992). Occasionally errors in judgment are noted at the appellate level. Sakow v Columbia Bagel, Inc., 2006 N.Y. Slip Op 6363, 1-2 (A.D. 1st Dept 2006).

Plaintiffs would say that the substantive aspect of Russ & Russ' conduct is the

primary concern here, as it is the lien on the Mattituck property that impedes their recovery of the loans. Yet, the procedurally fraught verbs of delay and prolong have become the focal point. As this court has held that it cannot examine whether the assignment of an interest in Sally Omar's option on Mattituck affected these actions since it has not been determined that Russ & Russ' retainer was an ethical violation, the task then is to decide whether Russ & Russ' conduct offended our historic distaste for justice delayed. See e.g. CPL § 30.30 (The speedy trial rule).

It is ingrained in our common law history that a trial is a civilized way of solving disputes between people in a modern world, and anything that turns a trial into an opportunity to harass or inflict injury born of sheer malice, whether by intent or effect, is toxic to our constitutional democracy. Indeed, more than just frivolous.

Rules of civility pertaining to personal behavior often push against each other in complex situations. An attorney is required - at all times - to be honest and forthright, § 1200.3(4), including when he/she is representing the client with zeal and exercising his/her professional judgment as to the assertion of a right or position, § 1200.32, all the while heeding the caveat that the confidences of the client shall be kept secret. § 1200.19.

Not surprisingly there is one section of the Disciplinary Rules, § 1200.33, which overlaps section 130-1.1 of NYCRR; an attorney is admonished not to "file a suit, assert a position, conduct a defense , delay a trial, or take other action on be half of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another. § 1200.33(1). The definition of Frivolous Conduct appears to read this last cited section of the DR right into 22 NYCRR and authorizes a justice who witnesses, in his judgment, conduct which is antethical to the norm to control, stop, or prevent it by imposing a monetary sanction or fine. The remedy is of course not exclusive; there remains the Grievance Committee and the power of contempt. See Casey v Chemical Bank, 245 A.D.2d 258 (1997); Kernisan v Taylor, 171 A.D.2d 869 (1991).

The duty of an IAS or trial justice is, inter alia, to allow the litigants to reach a final resolution of their dispute. The justice is required to "stamp out" conduct designed to "delay" or "prolong," but is not to stop zealous representation not curtail the exercise of a lawyer's individual judgment.

Firmer standards for measuring annoying conduct, although comforting would ruin the statute. The timing, the litigation style of the lawyers, the relative bargaining power of the litigants and the pre-litigation formality between the parties are relevant in deciding whether Russ & Russ engaged in Frivolous Conduct.

The sina qua non of Frivolous Conduct is delaying or prolonging resolution of a dispute. From the time Russ & Russ was substituted as counsel in early 2006 to the time of trial in July of 2007 there were few wasted months. There were arguments and conferences too numerous to count but not because defendants were not participating in the litigation. It was because plaintiff's needed to engage in an exhaustive search to be sure that documents that one would think would exist did not exist. The same for answers to questions when the answers that were given were incredible and misleading.

The styles of litigation are probably as numerous as there are litigators. If one was right, as the saying goes, we would all be rich. When one enters into combat with an adversary whose style is the opposite of ones own, he or she is not, a priori, engaging in frivolous conduct. Only after the differences are accepted, and the individual behavior accounted for, and it seems that the case is stalled - if not going backwards - can it be said that there is delay. No useful purpose can be served by particularizing the styles of these litigation counsel. To the extent that one counsel was kept waiting for a ruling after an EBT, it is off set by the delay another counsel experienced waiting for the presentment of an ill fated Order of Attachment.

Finally, the Rozens and Omars did not do business in the same way. When Rozen loaned money he took a promissory note. When Omar paid it back, allegedly, he got no receipt. He let Rozen keep track of their accounts and didn't question. Yet

they were friends, and continued to lend and borrow until they became hostile to each other. Having had no mechanism for reconciling their accounts in good times, they had no mechanism for resolving even a legitimate dispute, so they turned to angry fighting - each feeling betrayed. That one did not acquiesce to the other in the process of discovery under such circumstances, but instead fought back does not necessarily equate with conduct intended to delay or prolong.

Looking over the history of the case, in its totality, it is the conclusion of the court that Russ & Russ upheld its duty to use the court as a means for resolving a legal dispute and not as a means to inevitably delay an accounting of the monies loaned to defendants, at least not to the extent that would rise to the standard of Frivolous Conduct.

On the basis of the foregoing the motion is denied.

Dated: August 1, 2008

J.S.C.