

Galasso, Langione & Botter, LLP v Galasso
2009 NY Slip Op 30370(U)
February 6, 2009
Supreme Court, Nassau County
Docket Number: 010038/2007
Judge: Ira B. Warshawsky
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,****Justice.****TRIAL/IAS PART 9**

GALASSO, LANGIONE & BOTTER, LLP (formerly
known as GALASSO, LANGIONE, LLP) as Escrow
Agent for STEPHEN BARON on SIGNATURE BANK
Account No. 1500451064,

Plaintiff,

INDEX NO.: 010038/2007

-against-

ANTHONY P. GALASSO and SIGNATURE BANK,

Defendants.

GALASSO LANGIONE & BOTTER, LLP, PETER J.
GALASSO, individually, JAMES R. LANGIONE,
individually, GALASSO LANGIONE & BOTTER, LLP,
as Escrow Agents on SIGNATURE BANK Account
No. 15099451064 and Account No. 1500351639, and
M&T BANK Account No. 9835989485, on behalf of
STEPHEN BARON, ADELE FABRIZIO, THERESA
HALLORAN and THE ESTATE OF GEORGE CAROLL,

Plaintiffs,

INDEX NO.: 019198/2007
MOTION DATE: 01/21/2009
MOTION SEQUENCE: 001 and 002

-against-

SIGNATURE BANK, M&T BANK, ANTHONY GALASSO,
DANIEL SAMELA, CPA, CHRISTINE GALASSO,
MATTHEW MANZELLA, JEANNE MANZELLA, ROBERT
FRESELLA, DONNA FRESELLA and "JOHN & JANE
DOES 1 - 10",

Defendants.

GALASSO, LANGIONE & BOTTER, LLP,
PETER J. GALASSO and JAMES LANGIONE,

Plaintiffs,

-against-

INDEX NO.: 019276/2007

THOMAS F. LIOTTI,

Defendant.

THOMAS F. LIOTTI,

Third-Party Plaintiff,

-against-

FREDERICK K. BREWINGTON,

Third-Party Defendant.

The following papers read on this motion:

Order to Show Cause, Affidavit & Exhibits Annexed	1
Defendants' Memorandum of Law in Support	2
Notice of Cross-Motion, Affidavit, Plaintiffs' Memorandum of Law in Opposition to Order to Show Cause Seeking Consolidation and in Support of Cross-Motion for Sanctions and Costs & Exhibits Annexed	3
Affidavit in Reply of Thomas F. Liotti	4
Defendants' Memorandum of Law	5
Letter of Frederick K. Brewington, Esq. dated 1/16/2009	6

PRELIMINARY STATEMENT

Motion Sequence #1 is brought on by Order to Show Cause in which Thomas F. Liotti, Esq., counsel for Anthony Galasso, and, at the time of the making of the motion, counsel to Christine Galasso, Matthew Manzella, Jeanne Manzella, Robert Fresella and Donna Fresella, and

who is also the individually named defendant and third-party plaintiff in Index No. 019276/2007, seeks consolidation of the above-captioned actions pursuant to Civil Practice Law and Rules § 602 and scheduling future appearances in the consolidated action before this Part.

The cross-motion was erroneously designated as Motion Sequence #6 because it was filed under the Index Number of one of the cases sought to be consolidated, but has been re-submitted and is now Motion Sequence #2. By this motion the Plaintiffs in Index No. 019198/07 and 019276/2007 oppose consolidation and seek the imposition of sanctions against Thomas F. Liotti, Esq., together with an award of costs to them.

BACKGROUND

These motions arise from proceedings involving the misappropriation of more than \$4,000,000 by Anthony Galasso from Galasso, Langione & Botter, LLP, a law firm in which his brother, Peter J. Galasso, is a partner. As an outgrowth of the proceeding by the law firm to recover assets from, initially, Peter and Signature Bank, and subsequently Peter's wife, two sisters and their spouses, Liotti made public statements which the law firm and its partners allege to have been slanderous, and have commenced an action on that basis. This matter is assigned to Hon. Daniel Palmieri, sitting by designation in this Court.

The Cross-motion for sanctions is premised on DR 5-102 (22 NYCRR § 1220.21), which prohibits an attorney from accepting an engagement in which it is likely that he will be called as a witness. In the defamation matter, Justice Palmieri has already decided that the statements made by Liotti were false, and the remaining issue is as to whether or not they were recklessly made. In order to avoid that determination, Liotti, the named Defendant, will be required to testify as to the basis for his alleged good-faith belief for the allegations of financial chicanery by the firm, that is, the statements of his own client.

DISCUSSION

In seeking consolidation, counsel must establish that the actions involve common questions of law or fact. These simply do not. The defamation action involves whether or not Liotti knew the statements were erroneous when made, or if not, whether he was reckless in making them. This is totally divorced from the issues in the other two remaining actions. They seek recovery from Anthony and others who may have knowingly received the proceeds of his

theft from the trust account maintained by the firm

Nothing is more unseemly or untenable then for an attorney representing one or more defendants in an action to also represent himself in a consolidated or joined action. The permutations and combinations of ethical conflict are too numerous to recount. When the attorney/defendant speaks, is he speaking as a defendant or as the attorney for the other defendants? When he testifies, does this sworn witness now speak as an attorney under oath merely for himself or as an attorney swearing to some part or parcel of a defendant's case?

To relieve his non-Anthony Galasso clients from guilt he must proffer Anthony as having lied to them. Thus, arguing to the Court that his client whom he previously contended is an honest person is a dishonest person.

The Court will spend no further time recounting the possible conflicts that would occur by the joining of the cases pending before this Court and the defamation action pending before Justice Palmieri. Though there are similar facts underlying all the cases, that is not sufficient to support the joinder or consolidation of the cases.

To prevent the unnecessary waste of time that would occur with duplicative depositions, the Court orders, but only with the consent of Justice Palmieri, that whatever depositions are needed of any of the parties or non-parties in any or all of the above captioned matters they should be conducted in a consolidated fashion to prevent duplication of effort. Just to be clear, no one is to be deposed more than once. In addition, plaintiffs' request for sanctions is granted.

The making of this motion, by an experienced litigator, amounts to frivolous conduct. Such conduct is defined in 22 NYCRR § 130-1.1(c) as follows:

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law or fact, 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;

(3) it asserts material factual statements that are false.

Mr. Liotti knew, or should have known, that the proposed consolidation would violate

the advocate-witness rule, would obviously cause jury confusion (which perhaps would be desired by defendants), and that the underlying facts of the defamation action are dramatically different from the plenary action pending before this Court. (There are NO common questions of law.) Thus, the motion is completely without merit in law or fact and there is not even an attempt to address the argument against it.

This Court believes that the acts of Mr. Liotti are so far beyond the pale of zealous representation that they cry out for sanctions. Mr. Liotti comments on Mr. Galasso's complaint of having to draft and submit replies to Mr. Liotti's motions and states that Mr. Galasso should have Mr. Goidell respond for him if he doesn't want to respond for himself.

An interesting response from an attorney who lifts, verbatim, numerous paragraphs from his reply affirmation in support of cross-motion of December 10, 2008 and inserts them into this affidavit in reply. Furthermore, Mr. Liotti's memorandum of law submitted with his affidavit in reply to the plaintiffs' cross-motion for sanctions parrots his memorandum of law in response to the disqualification motion (Motion Sequence #4 of Index No. 010038/2007). To be more accurate, he repeats the first six pages of the earlier document even down to repeating the request for the disqualification of Mr. Goidell as counsel to the Peter Galasso plaintiffs, and that Mr. Goidell's motion to disqualify him be denied. Thus, the first 6 $\frac{1}{8}$ pages of the memorandum of law in this motion repeat verbatim the first 6 $\frac{1}{4}$ pages of the memorandum of law in the disqualification motion, including the relief requested.

He then addresses a narrow issue of res judicata and finally reaches plaintiffs' claim for sanctions. Mr. Liotti's response to the sanctions motion is to quote the statute (22NYCRR § 130-1.1) and a Supreme Court case from Allegheny County which recites factors to be considered by the Court in considering sanctions. At no time does Mr. Liotti address the substantive issues raised by the plaintiffs involving the conflict he would face if this Court granted his consolidation motion.

At no time does he address the factors he himself cites from the Allegheny County case (Steiner v. Bonhamer, 146 Misc.2d 10 (Supreme Court, Allegheny County, 1989)) and compare those factors to his own actions in the consolidation motion. His sole paragraph related to sanctions is (page 8 (bottom) to top of page 9):

Frivolous conduct shall include the making of a frivolous motion for cost or sanctions under this section 22 NYCRR 130-1.1(c). Galasso's (or perhaps Goidell's) sole strategy at this point is to seek sanctions for every motion made by the undersigned in each case. This court should take affirmative action in ending the plaintiffs' wasteful and frivolous conduct.

This is non-responsive. And how does Mr. Liotti conclude this memorandum of law in response to the cross-motion for sanctions, and I quote:

In accordance with the above-referenced legal standards and facts provided, Mark Goidell should be disqualified as plaintiffs' counsel, Thomas Liotti should not be disqualified, and summary judgment should be granted along with such other and further relief as this court may deem just and proper.

An exact quote of the penultimate paragraph from the December 10, 2008 memorandum of law.

The overwhelming majority of Mr. Liotti's memorandum of law on this motion is a cut and paste job from the one he filed on December 10, 2008 in reply to the disqualification motion and, in fact, concludes with the exact same paragraph from that memorandum of law with the exact same prayer for relief; not the relief requested in the instant motion. The Court seriously wonders if Mr. Liotti ever read what he signed or was this intended to be a direct insult to the Court's intelligence?

Mr. Liotti's defense to the request for sanctions is found in paragraph 15 of his affidavit in reply.

Sanctions are unwarranted in this case because the contentions herein are reasonably believed to be both meritorious and warranted by application of existing law by the undersigned.

Let us be clear, the mere fact that an attorney says it is so does not make it so, especially with absolutely no statutory or case law support, as in the instant case.

The Court finds that there is no basis for the consolidation motion considering all the facts and claims in the cases pending before Justice Palmieri and this Court. That Mr. Liotti is fully aware of all the facts surrounding these cases including the pending appeals of Justice Palmieri's decisions. That he is deemed to be knowledgeable of the Code of Professional Responsibility, the witness-advocate rule, and the morass of problems that would be brought

about by such a consolidation; that he has failed to respond in any substantive way to the claim of frivolous conduct; that upon receiving the cross-motion, which raised the problem that would be caused by consolidation, instead of withdrawing his motion, he proceeds to submit two documents that are themselves frivolous in nature due to their lack of content and the duplication of a prior memo addressed to other issues.

The Court further finds that the actions of counsel were undertaken primarily to delay or prolong one or both actions by involving these parties and himself as litigant, and possibly to “judge shop” and remove his personal case from a judge that has sanctioned him.

The Court is unable to conclude whether Mr. Liotti has made material factual statements that are false in either his motion or his opposition to the sanctions motion. Such a finding is not required for the Court to conclude that Mr. Liotti’s conduct was frivolous or that it was sanctionable.

The Court sanctions counsel costs and attorney fees expended by plaintiffs in responding to the consolidation motion.

The issue of fees and costs is hereby referred to Court Attorney/Referee Thomas Dana (Room 206, Second Floor, telephone 516-571-1476) to hear and report on this matter. The parties are directed to appear before Mr. Dana on March 23, 2009, at 10:00 A.M. Two weeks prior to that date, plaintiffs are to submit to Mr. Dana and Mr. Liotti time records reflecting work done in response to this motion.

Counsel for plaintiffs shall serve defendants and file with the Clerk of the Court a Notice of Inquest and Note of Issue and pay all appropriate fees for the filing thereof on or before March 9, 2009.

Dated: February 6, 2009


J.S.C.

ENTERED

FEB 13 2009