

CVL Real Estate Holding Co. LLC v Weinstein

2010 NY Slip Op 30054(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 602868/07

Judge: Eileen Bransten

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

PRESENT: Bransten
Justice

PART 3

Index Number : 602868/2007
CVL REAL ESTATE HOLDING
vs.
WEINSTEIN, ELI
SEQUENCE NUMBER : 005
COUNSEL FEES, EXPENSES

INDEX NO. 602868/07
MOTION DATE 9/30/09
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

In this motion to/for _____

PAPERS NUMBERED
1
2
3

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-8-10

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK : IAS PART 3

-----X
CVL REAL ESTATE HOLDING CO. LLC,

Plaintiff,

Index No.: 602868/07
Motion Date: 9/30/09
Motion Seq. No.: 5

-against-

ELI WEINSTEIN,

FILED
JAN 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Defendant

BRANSTEN, J.:

In motion sequence number five, Plaintiff CVL Real Estate Holding Co. LLC (“CVL”) moves for an order pursuant to Uniform Rule 130-1.1(d) imposing sanctions and/or costs against the law firm of Shapiro & Shapiro LLP for frivolous conduct.

BACKGROUND

Plaintiff possesses a judgment against defendant Eli Weinstein (“Weinstein”) in the amount of \$7,209,807.26 (*CVL Real Estate Holding Co. LLC v Eli Weinstein*, Sup Ct, NY County, April 11, 2008, index No. 602868/07). Plaintiff subsequently served one subpoena duces tecum and one subpoena ad testificandum (collectively, the “Subpoenas”) upon Weinstein. Weinstein failed to respond to either subpoena and failed to appear in this Court as directed. As a result, on April 30, 2009 this Court issued an Order holding Defendant in contempt of court and ordering the Clerk of the Court to issue a warrant for

the arrest of Weinstein (*CVL Real Estate Holding Co. LLC v Eli Weinstein*, Sup Ct, NY County, April 30, 2009, index No. 602868/07).

The following day, May 1, 2009, Zachary L. Berman, Esq., an associate of the law firm Shapiro & Shapiro LLP, counsel for defendant, notified counsel for plaintiff Wallace Neel, Esq. that defendant had filed a Notice of Appeal of the bench warrant for Weinstein's arrest and further notified Neel that defendant planned to seek interim relief against the bench warrant that day at 3:00 p.m. (Affirmation of Wallace Neel "(Neel Aff)", Ex. A). Berman initially used an incorrect email address in his notification to Neel, and corrected the email three hours later, at approximately 12:45 p.m. (id.). Berman thus provided Neel approximately two hours to prepare for and appear at the emergency motion proceeding. Neel emailed Berman at 1:25 p.m. requesting Berman reschedule (Neel Aff., Ex. A).

Receiving no response from Berman, Neel arrived at the Appellate Division, First Department, and attempted to contact Berman via numerous email and phone calls (Neel Aff ¶¶ 10-23, Ex. A). Berman did not appear at the Appellate Division and did not respond to Neel until 4:00 p.m., one hour after Berman's stated motion time (Neel Aff ¶¶ 24-25, Ex. B). Berman did not address his failure to appear or notify Neel he would not be appearing (id.).

Shapiro & Shapiro then did not move this Court to stay the contempt order against Weinstein — which had resulted in the bench warrant against its client — for nearly four months, until August 25, 2009. This Court denied that motion upon Weinstein's continued failure to comply with the Subpoenas (*CVL Real Estate Holding Co. LLC v Eli Weinstein*, Sup Ct, NY County, August 27, 2009, index No. 602868/07). Shapiro & Shapiro again moved four months later for relief of the contemp order on December 1, 2009.

DISCUSSION

Plaintiff contends that Berman's actions of May 1, 2009 were frivolous and warrant the imposition of costs and/or sanctions upon the law firm Shapiro & Shapiro for Neel's preparation for and appearance at the Appellate Division on May 1, 2009 and costs and attorneys' fees associated with the instant motion.¹

Shapiro & Shapiro contends that plaintiff was not "required" to appear at the Appellate Division and that the stay of the warrant would not have affected plaintiff. Shapiro & Shapiro implies that plaintiff was responsible to request an explanation from Berman.²

¹ Plaintiff has withdrawn its motion for sanctions and/or attorneys' fees against Berman himself.

² Shapiro & Shapiro further alleges, without support, that the Appellate Division is the proper venue for this motion (McDonald Aff. ¶ 11). This motion is properly before this court pursuant to CPLR 2217 and 2215.

Pursuant to the Uniform Rules for the New York State Trial Courts (22 NYCRR § 130-1.1[a]), the court may impose financial sanctions upon a party or an attorney who engages in “frivolous conduct.” Conduct is “frivolous” under part 130 if “it is undertaken primarily . . . to harass or maliciously injure another” (22 NYCRR § 130-1.1[c][2]). Viewed in the context of the “circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct” (22 NYCRR § 130-1.1[c]), the actions taken on behalf of Shapiro & Shapiro on May 1, 2009 rise to the level of frivolous conduct under Section 130.

Berman, acting as an associate of and, thus, on behalf of Shapiro & Shapiro, provided extremely short notice to plaintiff’s counsel of his intention to move for an emergency stay of the bench warrant against defendant Weinstein. The bench warrant resulted from an Order of this Court finding Weinstein in contempt for failure to respond to the Subpoenas and for failure to appear. To lift such warrant would have relieved defendant from the immediate impetus to comply with the Subpoenas. The alleged motion for an emergency stay of the warrant thus directly affected plaintiff’s rights and plaintiff’s counsel had every need to attend the motion. Defendant’s failure to attend its own called-for motion or its failure to notify plaintiff of any decision to withdraw its application to stay the bench warrant lacks justification as well as professionalism.

Defendant’s subsequent failure to move against the bench warrant for nearly four months illustrates that defendant did not place great emphasis on immediate relief from

the bench warrant, let alone the need to comply with orders of this Court. The actions of Shapiro & Shapiro's associate were merely to harass its opponent and are therefore frivolous under the Uniform Rules of the New York State Trial Courts, section 130.

The Court concludes that the cost for plaintiff's counsel to prepare for and attend the claimed motion by defendant of May 1, 2009 is assessed against the law firm of Shapiro & Shapiro LLP in the amount of \$1,714.15. In addition, Shapiro & Shapiro LLP is to be assessed \$285.85 in fees and costs associated with plaintiff's preparation of the instant motion.

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Accordingly, it is

ORDERED that plaintiff's motion for sanctions is granted; and it is further

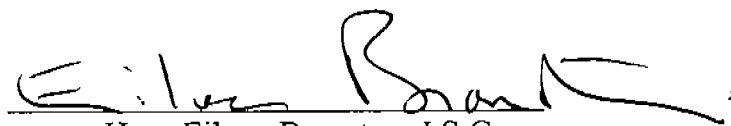
ORDERED that Shapiro & Shapiro LLP shall pay the sum of \$2000.00, accompanied by a copy of this decision and order, to the Lawyers' Fund for Client Protection, 119 Washington Ave., Albany, New York 12210; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 3 and counsel for plaintiff within 30 days after service of a copy of this order with note of entry.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 8, 2010

ENTER:



Hon. Eileen Bransten, J.S.C.

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