

Somerset Invs. Corp. v Chreidi
2010 NY Slip Op 31113(U)
April 26, 2010
Supreme Court, Nassau County
Docket Number: 023125/2007
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice,**

TRIAL/IAS PART 8

SOMERSET INVESTORS CORP. D/B/A
SOMERSET MORTGAGE BANKERS,

Plaintiff,

INDEX NO.: 023125/2007
MOTION DATE: 02/18/2010
MOTION SEQUENCE: 002

-against-

SHAREEF CHREIDI A/K/A SHAREEF SHREIDI,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Affidavit in Opposition of Shareef Chreidi a/k/a Shareef Shreidi	2

PRELIMINARY STATEMENT

Plaintiff, Somerset Investors Corp. (“Somerset”), has moved for an Order striking defendant’s, Shareef Shreidi’s (“Shreidi”), answer and affirmative defenses, directing judgment for the plaintiff in the amount alleged in the complaint, or, alternatively, setting this matter down for an inquest on the issue of damages, and awarding sanctions to plaintiff.

BACKGROUND

This action arises out of the former employment relationship between plaintiff, Somerset, and defendant, Shreidi. Somerset’s complaint alleges Shreidi breached his duty of good faith and loyalty to his employer and breached his obligations to Somerset pursuant to a non-competition and a non-solicitation agreement. Plaintiff made the instant motion in response to defendant’s

repeated failures to appear at scheduled court conferences through counsel, in person, or via telephone. In an action entitled Shreidi, et al. v. Somerset Investors Corp., et al., Case No. 07-CV- 4656, pending in United States District Court for the Eastern District of New York, Shreidi is pursuing a case against Somerset involving wage, hour and commission claims. (*See Karen Affidavit*).

Plaintiff, in support of its motion, describes several instances where the defendant, or defendant's counsel, failed to appear at a conference. A short timeline of key events is as follows:

1. March 4, 2009: Defendants's attorney, Brian Neary, failed to appear at preliminary conference which had been previously adjourned by request of Mr. Neary. After citing law office failure as the reason for not appearing, a preliminary conference was conducted on the same date with Mr. Neary via telephone.
2. July 1, 2009: This Court issued an Order relieving Mr. Neary as defendants counsel.
3. August 20, 2009: a Conference was scheduled, but defendant requested a 2- week adjournment to September 3, 2009, and this Court granted defendant's request.
4. September 3, 2009: Defendant failed to appear at the scheduled conference.
5. October 29, 2009: Defendant failed to appear for this scheduled conference. This conference was adjourned by this Court until November 12, 2009. (*See Dillon Letter dated October 29, 2009*).
6. November 12, 2009: Defendant failed to appear for conference. On the morning of the conference, at 10:25 am(according to fax printout), defendant faxed a letter to the court requesting a 30 day adjournment because he was due to be admitted the hospital on that day for chemotherapy treatment. This conference was Adjourned to December 15, 2009.
7. December 15, 2009: Defendant failed to appear for conference. Conference was adjourned to January 25, 2010.
8. January 25, 2010: Defendant failed to appear and failed to contact plaintiff or Court. In response, plaintiff sought and obtained consent to make the instant motion.

Based on defendant's actions, plaintiff argues that this Court should grant a judgment by

default. Plaintiff cites Uniform Civil Rules for the Supreme Court Section 202.27 which states in relevant part:

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

(a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.”

Plaintiff argues the defendant’s actions amount to an attempt to manipulate the court and delay ultimate resolution of the matter.(Affirmation, Paragraph 8, lines 5,6). Plaintiff further argues defendant’s cancer treatment excuses have always proved self serving.(Affirmation, Paragraph 11, lines 1,2). On November 12, 2009, the date of a previously scheduled conference, defendant faxed to the court, at 10:25am, two letters.(see Exhibit E). The first letter explains he is being admitted to the hospital that day for chemotherapy treatment, explains that he is not represented by counsel, and requests an adjournment for at least 30 days. *Id.* The second letter is an unsworn letter by Dr. Matthew J. Matasar, M.D. which states Shreidi has a diagnosis of relapsed Hodgkins lymphoma, is presently under his care, and is currently undergoing chemotherapy treatments once every three weeks. Finally, plaintiff argues defendant’s failure to appear at the December 15, 2009 or January 25, 2010 conferences, combined with the failure to offer any excuse or notification, has greatly increased the costs and expenses plaintiff must bear to prosecute this action.

Plaintiff further argues it is entitled to sanctions citing Section 202.70 Rules of the Commercial Division of the Supreme Court, which states:

Rule 12. Non-Appearance at Conference.

The Failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction.

Section 130-2.1 of the Rules of the Chief Administrator states in relevant part:

“§ 130-2.1. Costs; Sanctions

(a) Notwithstanding and in addition to the provisions of

subpart 130-1 of this Part, the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court."

Plaintiff argues that it is entitled to sanctions because although the language of these rules speaks to the conduct of attorneys, these rules should extend to the conduct of a defendant litigant acting in a pro se capacity.

In response to plaintiff's motion, defendant submitted an affidavit in opposition dated February 12, 2010. Defendant provides several excuses for the failure to attend conferences. Defendant explains that he is battling Hodgkins Lymphoma, and that he has cancer growing within his lymph nodes and on his spine. He explains his chemotherapy treatment involved hospitalization for four days every three weeks and that at the end of the treatment he learned it was unsuccessful. In December 2009, he began a new experimental treatment.

Defendant explains that he has been recently residing in the United Arab Emirates because he has no close family in the U.S., and no one to care for him. He has only been returning one week each month to return for treatment. He further explains that the treatment he is undergoing weakens him and his immune system for approximately one week after each treatment. Shreidi says he was unaware of the December 15, 2009 and January 25, 2010 court dates and that he was out of the country for "most of December 2009 and January 2010" as he "was staying with [his] parents in the United Arab Emirates." (Affidavit, paragraph 11)

DISCUSSION

The Commercial Rules speak to, and relate only, to counsel. 22 NYCRR § 130-1.1 (a), however, authorizes the imposition of costs, including reasonable attorneys fees, against an attorney or litigant for frivolous conduct. Subdivision (b) further permits sanctions against either an attorney or a litigant.

The Court is sympathetic to defendant's serious illness and the requirement for heroic medical efforts on his behalf. It is nevertheless inappropriate for him to systematically fail to appear without adequate notice to his adversary so as to avoid the time and expense of an


unnecessary Court appearance. The Court regards this conduct as frivolous, and hereby awards to plaintiff costs in an amount to be determined upon a hearing before a Court Attorney/Referee. Upon receipt of an affidavit of services for appearances on days when defendant failed to appear without adequate advance notice, including the legal fees attributable to such appearances, the Court will appoint a Referee to hear and determine the amount of counsel fees to which plaintiff is entitled.

Under the circumstances, the Court determines not to impose sanctions or to strike the answer. Presumably, plaintiff is aware of the nature of its claims against defendant, particularly in view of the fact that it was able to reach a resolution of its dispute with at least one other defendant. Upon notification by plaintiff of its ability to certify the matter for trial, the Court will issue a Certification Order so as to enable plaintiff to file a Note of Issue and proceed to trial.

Despite defendant's repeated defaults, plaintiff is directed to continue to notify defendant, Shareef Chreidi a/k/a Shareef Shreidi, of further proceedings, at the last address available for him.

This constitutes the Decision and Order of the Court.

Dated: April 26, 2010



J.S.C.

ENTERED
APR 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE