

Selletti v Liotti

2010 NY Slip Op 31721(U)

January 8, 2010

Sup Ct, Queens County

Docket Number: 11169/00

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
CHRISTOPHER SELLETTI,

Plaintiff,

-against-

THOMAS F. LIOTTI,

Defendant.
-----X

Index No.: 11169/00
Motion Date: 11/18/09
Motion Cal. No.: 41
Motion Cal. Seq.: 13

The following papers numbered 1 to 13 read on this motion by defendant Thomas Liotti for an order accepting the within-enclosed “Notice of Cross Motion” and “Affidavit in Support of Cross Motion,” as opposition papers to Motion Sequence 12 (plaintiff’s motion), and designating the Notice of Cross Motion as a separate motion, Motion Sequence 13; and upon this cross-motion by plaintiff Christopher Selletti for an order granting sanctions against defendant in the sum of \$10,000.00 to the Client Security Fund.

	PAPERS NUMBERED
Notice of Motion with annexed Cross Motion-Affidavit-Exhibits.....	1 - 8 ¹
Notice of Cross Motion-Affidavit-Exhibits.....	9 - 11
Reply.....	12 - 13

Upon the foregoing papers, it is ordered that the motion with annexed cross-motion and the cross-motion are disposed of as follows:

This is an action sounding in legal malpractice arising from the representation of plaintiff Christopher Selletti (“plaintiff”) by defendant Thomas F. Liotti (“defendant”), in an underlying federal copyright infringement action. The crux of the legal malpractice claim is the allegation that defendant’s negligent actions caused the imposition of a discovery sanction and the posting of a

¹Defendant moves for an order deeming this motion, with the annexed cross motion seeking dismissal for want of prosecution and sanctions, as opposition to the motion by plaintiff seeking vacatur of the 90 day notice and restoration of this action, which was submitted without opposition on October 14, 2009. By decision dated December 23, 2009, this Court held that motion in abeyance to be determined jointly with the instant motion.

bond, which ultimately served as the basis for the dismissal of plaintiff's federal action. By memorandum decision of the Court dated February 13, 2002 [Golia, J.], defendant's motion for summary judgment and dismissal of the legal malpractice claim was denied on the ground that "the decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of the copyright action does not by itself negate any elements of the plaintiff's cause of action for legal malpractice." Additionally, the court stated that "there are issues of fact concerning whether it was the defendant Liotti's own wrongful acts, attributed by the federal court to plaintiff Selletti, which furnished or contributed to the first and second grounds for dismissal of the copyright action." Thereafter, plaintiff moved for summary judgment on liability as to so much of the legal malpractice claim which alleges that defendant's actions caused the imposition of, inter alia, the discovery sanction. Defendant opposed that motion, contending that there are issues of fact for trial concerning plaintiff's credibility and conduct during the federal action. By order of the Court dated May 21, 2004 [Golia, J.], plaintiff's motion was denied, and in making its determination, the Court stated, in relevant part, the following:

Here, there are issues of fact concerning the conduct of Selletti during the prosecution of the federal action which must be resolved at trial. Such determinations cannot be based solely upon the various federal court decisions issued during the course of the federal action, or upon conflicting affidavits of the parties.

Subsequently, by decision and order dated January 9, 2006 [Satterfield, J.], plaintiff's motion for an order staying the trial of this action until the completion of depositions was granted solely to the extent that the parties were directed to appear for depositions, if necessary, within forty-five (45) days of service of a copy of that order with notice of entry, and the trial of this action was stayed until the completion of discovery. That order further provided that upon completion of discovery, "the parties shall submit a stipulation affirming that all discovery has been completed with an attached copy of this order to the trial rescheduling part, and the action shall be placed back on the trial calendar." Defendant subsequently moved for summary judgment, which was denied by order dated October 20, 2006. On or about July 6, 2009, defendant served a 90-day notice upon plaintiff; plaintiff, on or about August 21, 2009, sent to defendant a stipulation to restore the matter to the trial calendar, as required by the January 9, 2006 decision and order of this Court, which defendant allegedly refused to sign. Thereafter, plaintiff moved for an order, inter alia, vacating the 90-day Notice. By memorandum decision dated December 23, 2009, this Court held that motion in abeyance upon submission of the instant motion and cross-motion on November 18, 2009. In making its determination, this Court stated:

Plaintiff Christopher Selletti moves for an order vacating the 90-day Notice dated July 6, 2009, and modifying the order of this Court dated January 9, 2006 to vacate the stay, and directing the Calendar Clerk to place the matter on the Active Calendar. This motion was submitted without opposition on October 14, 2009. Thereafter, defendant moved this Court for an order seeking, inter alia, to

interpose opposition to this motion and allowing an annexed cross-motion to be deemed opposition thereto, which was fully submitted, along with plaintiff's cross motion for sanctions, on November 18, 2009.

Consequently, in light of the extensive history in this matter and equally extensive motion practice, which will be detailed in a subsequent decision, the determination of the instant motion is hereby held in abeyance to be decided with the notice of motion by defendant and the cross motion by plaintiff, submitted at the November 18, 2009 motion calendar of this Court.

Thus, it is upon the foregoing that defendant moves for an order deeming this motion, with the annexed cross motion seeking dismissal for want of prosecution and sanctions, as opposition to the motion by plaintiff seeking vacatur of the 90 day notice and restoration of this action, which was submitted without opposition on October 14, 2009, and held in abeyance for determination by this Court with the instant motion. Moreover, plaintiff cross moves for sanctions in the amount of \$10,000.00, pursuant to Rule 130.

From the outset, it is so deemed by this Court that the cross motion for want of prosecution and sanctions will be considered opposition to the motion by plaintiff seeking vacatur of the 90 day notice and restoration of this action. Thus, defendant's motion for an order accepting the within-enclosed "Notice of Cross Motion" and "Affidavit in Support of Cross Motion," as opposition papers to Motion Sequence 12 (plaintiff's motion), and designating the Notice of Cross Motion as a separate motion, Motion Sequence 13, is granted to the aforementioned extent. In light thereof, this Court will first consider the motion by plaintiff for, inter alia, vacatur of the 90 day notice.

Here, in response to the 90 day notice served upon plaintiff on July 6, 2009, plaintiff sought to stipulate to restore the matter to the trial calendar on or about August 21, 2009, as required by the January 9, 2006 decision and order of this Court, to which defendant refused. By letter dated August 31, 2009, defendant stated, in pertinent part:

We decline to accept your acquiesce in allowing this case to tie up the Court's docket in perpetuity. I have been dealing with Mr. Selletti and later you, for approximately 14 years in a case that is completely frivolous. [] Your conduct is outrageous and unconscionable.

In light of your dilatory tactics, our office forwarded to you a stipulation of discontinuance along with the ninety day notice. Should you wish to pursue that course of action, we will still accept that signed stipulation from you.

In response thereto, plaintiff served the motion to vacate the 90 day notice. In opposition, defendant

cross-moves to dismiss this action, pursuant to Section 3216 of the CPLR, the statutory section which provides for dismissal for want of prosecution, and states, in pertinent part:

Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who is liable... or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

A plaintiff who has been served with a 90-day notice, pursuant to CPLR § 3216, is required to file a note of issue in compliance with the notice or move, before the default date, either to vacate the notice or to extend the 90-day period, and if the plaintiff does neither, then the plaintiff is required to provide a justifiable excuse for his delay and to demonstrate a meritorious cause of action. Primiano v. Ginsberg, 55 A.D.3d 709 (2nd Dept. 2008); Randolph v. Cornell, 29 A.D.3d 557 (2nd Dept. 2006); Sharpe v. Osorio, 21 A.D.3d 467 (2nd Dept. 2005); Garcia v. Roopnarine, 18 A.D.3d 607 (2nd Dept. 2005); see, also, Frazzetta v. P.C. Celano Contracting, 54 A.D.3d 806 (2nd Dept. 2008); Aquilar v. Nassau Health Care Corp., 40 A.D.3d 788 (2nd Dept. 2007)[to avoid dismissal plaintiff must “demonstrate a justifiable excuse for [the] failure to comply with the order and a meritorious cause of action (citations omitted)”]; Di Simone v. Good Samaritan Hosp., 100 N.Y.2d 632, 633 (2003)[“If a party fails to comply with a 90-day demand to serve and file a note of issue, but demonstrates a ‘justifiable excuse for the delay and a good and meritorious cause of action’ (CPLR 3216[e]), the trial court may not dismiss the action”].

CPLR 3216, however, is “‘extremely forgiving’ (citations omitted) in that it ‘never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed’ (citations omitted).” Primiano v. Ginsberg, *supra*. “While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (citations omitted), such a dual showing is not strictly necessary to avoid dismissal of the action (citations omitted).” Zito v. Jastremski, 35 A.D.3d 458 (2nd Dept. 2006); Tolmasova v. Umarova, 22 A.D.3d 570 (2nd Dept. 2005). Therefore, when exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action. Aquilar v. Nassau Health Care Corp., *supra*. Here, as plaintiff has moved for vacatur within the requisite time period, and before the October 6, 2009 default date, there is no need for plaintiff to demonstrate a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action in order to avoid the consequences of his woeful prosecution of this action. Thus, there is no basis, notwithstanding defendant’s contentions to the contrary, and plaintiff’s inaction over the last three years, for dismissal for want of prosecution.

With regard to the respective applications for sanctions, pursuant to 22 NYCRR § 130-1, each party alleges that the other has engaged in frivolous conduct and should be sanctioned for their

actions. Part 130 of the Uniform Rules for the New York State Trial Courts authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. []

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

© For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law 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; or
- (3) it asserts material factual statements that are false.

The “intent of [Part 130.1] is to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics.” Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept. 1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); Wesche v. Wesche, 51 A.D.3d 909 (2nd Dept. 2008); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006). The Rule further provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances

under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a “broad pattern of [] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation [].” Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452 (2nd Dept. 2004). “Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted).” Id. at 34 (1st Dept.1999).

Here, the gravamen of defendant’s claim for sanctions is plaintiff’s clear “abuse of the judicial process.” He asserts that this action has been frivolous from the outset and proceeds to espouse case law on the doctrine of collateral estoppel. He states:

Plaintiff is collaterally estopped from proving one of the essential elements of his case, to wit: that the plaintiff would have been successful in the underlying action had the attorney exercised due care.

Judge Chin ruled that plaintiff’s case had no merit in 1998. This case was nonetheless brought in 2000. Due to Justice Chin’s decision of January 20, 1998, this legal malpractice case is ‘completely without merit in law.’

Defendant further asserts that the actions of plaintiff “in stalling discovery for over three years” has been a delay tactic to prolong the resolution of this action.

Defendant’s assertions with regard to why plaintiff should be sanctioned, however, has unwittingly set the stage for why sanctions should be imposed against him. Defendant has made the frivolity and issue preclusion arguments in varying degrees for years, to no avail. By memorandum decision of the Honorable Justice Joseph G. Golia dated February 13, 2002, defendant’s motion for summary judgment was denied on the ground that “the decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of the copyright action does not by itself negate any elements of the plaintiff’s cause of action for legal malpractice.” The Court further found triable issues of fact with regard to whether it was defendant’s “own wrongful acts” which contributed to dismissal of the first and second grounds of the copyright action. By further order of Justice Golia dated May 21, 2004, plaintiff’s motion for summary judgment on liability, which defendant ironically opposed on the basis that there are issues of fact for trial concerning plaintiff’s

credibility and conduct during the federal action, was denied on the ground that triable issues exist concerning defendant's conduct during the prosecution of the federal action. The Court stated, in pertinent part, that "such determinations cannot be based solely upon the various federal court decisions issued during the course of the federal action, or upon conflicting affidavits of the parties." Subsequent thereto, plaintiff moved for an order staying the trial of this action based upon outstanding discovery, and defendant moved for an order granting in limine relief limiting plaintiff's proof and evidence in this action, and upon granting of the application, dismissing plaintiff's remaining cause of action for alleged legal malpractice. In support of his motion, defendant asserted that there was a full and fair hearing on the issues raised in the federal action, thus collateral estoppel precluded this matter from being further litigated, and should be dismissed. This Court, in its January 9, 2006 order [Satterfield, J.], determined that the underlying findings of Justice Golia were the law of the case, and stated, in relevant part, the following:

"The law of the case doctrine 'is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned' [Martin v. City of Cohoes, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687, 332 N.E.2d 867(N.Y. 1975).]" Oyster Bay Associates Ltd. Partnership v. Town Bd. of Town of Oyster Bay, 21 A.D.3d 964, 966 (2005); see, Mosher-Simons v. County of Allegany, 99 N.Y.2d 214 (N.Y. 2002). Indeed, it is fundamental that one Judge may not review or overrule an order of another Judge of coordinate jurisdiction, and the decision of the Judge who first rules in a case binds all courts of coordinate jurisdiction as the law of the case, regardless of whether a formal order was entered. See, Messinger v. Messinger, 16 A.D.3d 562 (2005). Consequently, it is this Court's finding that collateral estoppel is inapplicable, and it is the law of the case that there are issues of fact to be determined with respect to plaintiff's legal malpractice claim, which were not conclusively resolved by any of the federal actions. Moreover, contrary to defendant's contentions, although the federal District Court expressed disapproval regarding plaintiff, his claims and the manner in which the federal matter was prosecuted, this Court declines to take the position that Judge Chin made findings of fact with respect to the matters set forth in defendant's motion in limine, which would compel this Court to grant such relief.² Thus, the

² Pursuant to Judge Chin's January 20, 1998 memorandum decision, after a hearing he indicated that for several reasons he was "firmly convinced" that plaintiff's allegation with respect to the purported copyright infringement was a "complete fabrication." Nevertheless, Judge Chin stated the following:

motion by defendant granting in limine relief, limiting plaintiff's proof and evidence in this action, and upon granting of the application, dismissing plaintiff's remaining cause of action for alleged legal malpractice, hereby is denied in its entirety.

Notwithstanding this clear pronouncement that issue preclusion is inapplicable to this case, and in complete disregard to three orders of the Court essentially stating that there are triable issues with regard to plaintiff's legal malpractice claim, defendant inexplicably argues that plaintiff should be sanctioned because this action is frivolous and precluded by collateral estoppel. Defendant has asserted a plethora of spurious claims and made successive summary judgment motions in support of his efforts to dismiss this legal malpractice action. In addition to unnecessarily expending the judicial resources of the Appellate Court, defendant has wasted the judicial resources of this Court by engaging in vexatious and meritless motion practice, notwithstanding the clearly articulated determinations of this Court. Indeed, the instant cross-motion to dismiss for failure to prosecute can easily be viewed by this Court as frivolous in light of the fact that plaintiff not only appropriately and timely responded to the 90 day notice. Moreover, this Court set the process for restoration of this case to the trial calendar by stipulation, a process that defendant refused to follow. Thus, it is this Court's determination that pursuant to Part 130.1, defendant has engaged in frivolous conduct by engaging in vexatious litigation which is completely without merit in law, and undertaken to delay or prolong the resolution of this litigation. Consequently, sanctions are appropriate.

Sanctions are likewise appropriately imposed upon plaintiff for engaging in, regardless if by design or by capitulation, behavior that caused an overwhelming pattern of delay which has unnecessarily prolonged the resolution of this action for more than three years. Indeed, allegations abound with regard to plaintiff's intention, or lack thereof, to proceed with this action. Nevertheless, even with this Court disregarding the respective, contentious arguments, it is clear that this action, commenced in 2000, has languished in the system for almost a decade. Although this Court readily acknowledges that delays in the prosecution of this matter are also attributable to defendant, plaintiff, as the allegedly aggrieved party, is charged with the responsibility to prosecute this action, and at best, plaintiff has been less than vigorous and zealous in seeking redress for the alleged failings of defendant. This is particularly so in light of plaintiff's three year delay in responding to this Court's 2006 order, which directed the parties to submit a stipulation affirming to the completion of discovery in order to have this action restored to the trial calendar. Indeed, plaintiff asserts in his cross-motion for sanctions that all discovery is complete, and takes exception to defendant's contention that he never intended to complete discovery, stating:

I note that in reaching the conclusion that Selletti's claims are without merit, I have not engaged in the fact-finding as I would if I were trying the case on the merits, nor have I sought to determine whether Selletti is likely to prevail if he were permitted to pursue his claims. Rather I have limited myself to determining whether there is some merit to his claims. I conclude that there is not.

There was no discovery to complete. Defendant is notorious for fabricating statements, providing back-up, and then filing reply papers to make up a new story. If there were discovery, what was it and where is the enforcement attempt by defendant to obtain such discovery post note of issue?

This statement begs the question, in light of plaintiff's failure to have this matter restored to the trial calendar within the last three years if there was no discovery to complete. More pointedly, to varying degrees, frivolity and delay fall at the feet of both parties, who both must be sanctioned.

Accordingly, as a result of the foregoing, the motion by plaintiff to, inter alia, vacate the 90 day notice served on July 6, 2009, which was submitted on October 14, 2009, and held in abeyance for determination herein, is granted in its entirety. The stay imposed by the January 9, 2006 order of this Court hereby is lifted, this matter is restored to the active calendar, and the parties are hereby directed to appear in the Trial Scheduling Part for trial on February 15, 2010. That branch of the cross motion by defendant for dismissal based upon want of prosecution is denied. Based upon the underlying facts and circumstances before this Court, the branch of defendant's cross motion and plaintiff's cross motion, both seeking sanctions against the other party, are granted, and it is

ORDERED, that pursuant to 22 NYCRR § 130-1.1, sanctions in the amount of \$2,500.00 hereby is imposed upon Jeffrey Levitt, Esq., counsel for plaintiff Christopher Selletti, for engaging in frivolous conduct undertaken to prolong the resolution of this litigation; and it is further

ORDERED, that pursuant to 22 NYCRR § 130-1.1, sanctions in the amount of \$10,000.00 hereby is imposed upon defendant Thomas Liotti, Esq., for engaging in frivolous conduct and vexatious litigation undertaken to prolong the resolution of this litigation; and it is further

ORDERED, that Jeffrey Levitt, Esq., is directed to remit payment in the amount of \$2,500.00, payable to the Lawyers' Fund for Client Protection, and it is directed that judgment be entered in accordance with 22 NYCRR 130-1.2, against Jeffrey Levitt, Esq. in that amount; and it is further

ORDERED, that defendant Thomas Liotti, Esq., is directed to remit payment in the amount of \$10,000.00, payable to the Lawyers' Fund for Client Protection, and it is directed that judgment be entered in accordance with 22 NYCRR 130-1.2, against defendant Thomas Liotti, Esq., in that amount.

Dated: January 8, 2010

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J.S.C.