

Roth v Levy

2010 NY Slip Op 32025(U)

July 15, 2010

Supreme Court, Nassau County

Docket Number: 12832/08

Judge: Antonio I. Brandveen

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out that stipulation was incorporated in a divorce judgment. The defense counsel asserts the notice and demand to admit are deemed to be admitted which verify the plaintiff's perjury. The defense counsel avers the plaintiff twice committed crimes involving moral turpitude although only once was the plaintiff convicted of sexual abuse in the second degree. The defense counsel argues the plaintiff's statements involving 10 shares of RVK stock are perjurious contradictions. The defense counsel indicates the assets of RVK Automotive, Inc. were transferred in or about 2005; the plaintiff owned no shares in RVK Automotive, Inc. at that time; and that corporation no longer exists.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding

rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

22 NYCRR § 130-1.1 (a) provides:

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 Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 (c) provides:

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. Frivolous conduct shall include the making of a frivolous motion

for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) 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.

This Court carefully reviewed and considered all of the papers submitted with respect to this motion. This Court determines the defendants have made a *prima facie* showing of an entitlement to summary judgment as a matter of law. The defendant executed a net worth statement and a stipulation incorporated into a divorce judgment acknowledging he had no interest in the subject corporation. This Court considered whether the underlying action was completely without merit in law and can be supported by a reasonable argument for an extension, modification or reversal of existing law. The Court also considered whether the plaintiff brought the underlying action primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure the defendants; and whether the underlying action asserts false material factual statements. The Court finds the plaintiff brought the underlying action, supported by a verified complaint, primarily to harass or maliciously injure the defendants, and the underlying action asserts material factual statements which are false . The Court also finds the underlying action, supported by a verified complaint, is completely without merit in law, and it cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. The Court determines the defendants are entitled to a hearing on

the issue of damages for this frivolous action in a sum to be determined by the Court.

The plaintiff's attorney moves in motion sequence number 2 for an order pursuant to CPLR 321 (b) (2) to relieve defense counsel, and for a \$6,753.75 charging lien pursuant to Judiciary Law § 475 with respect to the underlying action. The plaintiff's attorney states, in an April 13, 2010 supporting affirmation, counsel can no longer continue to represent the plaintiffs. The plaintiff's attorney states the plaintiff failed to abide by the retainer agreement, and to fully cooperate with the affirmant by concealing necessary case information. The plaintiff's attorney indicates the plaintiff failed to make payments under that retainer agreement, and there is a breakdown in their attorney client relationship and communications.

The defense counsel states, in a May 3, 2010 affirmation, the defense takes no position with respect to plaintiff counsel's application for leave to withdraw as attorney in this matter, and consents to a 30-day stay of the proceedings to afford the plaintiff time to retain substitute counsel, but opposes an adjournment of motion sequence number 3 beyond June 18, 2010 without a final marking against the plaintiff, to wit a defense motion for summary judgment.

This Court carefully reviewed and considered all of the papers submitted with respect to this motion. CPLR 321 [b] [2] provides:

An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as

the court may direct.

CPLR 321 [c] provides:

If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

The Court finds the plaintiff's counsel has shown an inability to continue representation.

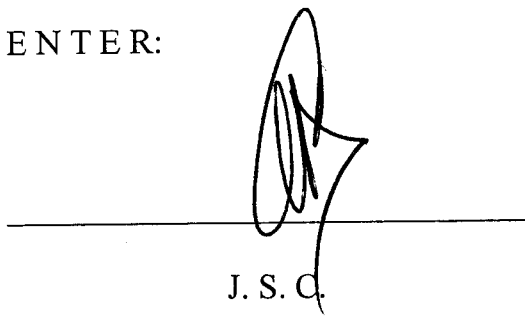
Accordingly, the defense motion sequence number 1 for summary judgment is granted but the issue of damages for frivolous litigation in a sum to be determined by the trial Court at a hearing is granted, but is stayed in accord with this decision. The plaintiff counsel's motion sequence number 2 is granted for an order pursuant to CPLR 321 (b) (2) to relieve defense counsel, and for a charging lien pursuant to Judiciary Law § 475 with respect to the underlying action. This CPLR 321 order and the hearing on damages for frivolous litigation are stayed for 30 days after service of a copy of this order with notice of entry upon all of the parties to afford the plaintiff an opportunity to obtain new counsel. This matter is referred to the Calendar Control Part, for the hearing on damages for this frivolous litigation to be held on September 16, 2010. The defendants shall file and serve a note of issue, together with a copy of this order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court at least 31 days after service of a copy of this order with notice of entry upon all of the parties. The directive with respect to a hearing is subject to the right of the Justice

presiding in the Calendar Control Part to refer this matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as the Justice presiding in the Calendar Control Part deems appropriate. If the plaintiff fails to appear within 45 days ready to proceed by counsel or *pro se* this stay is vacated.

So ordered.

Dated: **July 15, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
JUL 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE