Conason v Megan Holding, LLC

2013 NY Slip Op 30806(U)

April 18, 2013

Sup Ct, New York County

Docket Number: 106560/11

Judge: Arthur F. Engoron

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SCANNED ON 4/22/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron Justice

PART 37

JULIE CONASON and JEFFREY BRYANT, Plffs.,

-v-

MEGAN HOLDING, LLC and EMMANUEL KU, Defts.

INDEX NO. 106560/11

MOTION DATE 3/26/13

MOTION SEQ. NO. 8

The following papers, numbered 1 to 3, were read on this motion to/for cos/s.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/18/13

HON. ARTHUR F. ENGORON, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

----------x

JULIE CONASON and JEFFREY BRYANT,

Plaintiffs,

- against -

MEGAN HOLDING, LLC and EMMANUEL KU,

Defendants.

----------x

Index Number: 106560/11

Sequence Number: 008

Decision and Order:

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on this motion for 22 NYCRR Part 130 costs:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	3

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NEW YORK

Upon the foregoing papers, the motion is denied.

The instant motion compels this Court to address a perennial and thorny question: where to draw the line between mere discourtesy and sanctionable misconduct. Under current law and practice, the acts and omissions here at issue fall, fairly clearly, into the first category. However, the day may come when legislators or administrators or trial judges, on their own initiative and/or at the behest of litigators and litigants, move the goal posts, so to speak, and what is now acceptable will no longer be so.

Background

The background facts are not significantly in dispute, and the Court will set them forth only as it finds them necessary (or at least relevant) to the decision. In or about June 2011 plaintiffs commenced the instant action for alleged rent overcharges. Issue was joined in or about September 2011. In a Decision and Order dated October 10, 2012 (Moving Exh. A), Justice Joan M. Kenney granted summary judgment in favor of plaintiffs on the issue of liability and directed an assessment of damages and a subsequent assessment of attorney's fees (although the parties appear to be assuming, as does this Court, that both of these assessments will commence on the same date and in essence be part of the same hearing) (collectively, "the damages hearing"). On December 3, 2012 defendants perfected an appeal of this decision to the Appellate Division, First Department. On December 7, 2012 defendants moved the Appellate Division for a stay of the

damages hearing. By Order dated January 10, 2013 the Appellate Division stayed the damages hearing, conditioned solely on defendants posting a $67,449.19 undertaking.

In a January 11, 2013 e-mail (Moving Exh. E) plaintiffs' counsel asked defendants' counsel, "will your client be posting the undertaking required by the Court?" An hour later, defendants' counsel responded (id.), "We have not made that determination as of yet." (At oral argument on April 3, 2013, defendants' counsel stated that that response was true when made.)

On January 14, 2013, the parties attended a "blockbuster" pre-trial conference. According to plaintiffs' counsel (Moving Aff ¶ 19), defendants' counsel "expressly advised that the defendants were not seeking to obtain the undertaking." According to defendants' counsel (Opposing Exh. 19), he "maintained that [defendants] had not yet made the determination as to whether they would be posting the undertaking."

Interestingly, defendants' counsel states (Opposing Aff. ¶ 21) as follows: "At no time did Plaintiffs' counsel request to be notified if the Defendants made the determination that they would seek an undertaking. I note that if Plaintiffs' counsel had made such a request, I would have advised him that such request would not be honored." As best as this Court can determine, defendants' counsel is correct that plaintiff did not make such a request.

The Court scheduled the damages hearing for February 26. On January 18 plaintiffs' counsel attempted to serve, by e-mail, a document subpoena on defendants' counsel. The subpoena sought documents related to the amount of defendants' counsels' billings, which plaintiff hopes will prove the reasonableness of his own billings (an obvious issue in the damages hearing). After various procedural thrusts and parries (Moving Aff. ¶ 23-26), on or about February 13 defendant moved to quash the subpoena. On February 20 the parties orally argued the motion, and this Court issued a decision granting it in part and denying it in part; for the most part, this Court would say, the subpoena withstood defendants' challenge. That same day, February 20, an insurance company issued the undertaking. One day later, defendants notified plaintiffs that they had posted an undertaking in the required amount (although whether the undertaking is otherwise proper apparently is being litigated in the Appellate Division), and they served plaintiffs with a copy and filed a copy with the court.

Exactly when defendants applied for the bond is somewhat shrouded in mystery (a mystery of defendants' counsel's making, as plaintiffs' would have it). Plaintiffs' counsel states (Moving Aff. ¶ 25) that on February 25 Anie Sawh, "the attorney in fact for the insurance company that issued the undertaking," told him that defendants had applied for the bond "in early to mid-February." Defendants' counsel states (Opposing Aff. ¶ 32) that defendants applied for the bond "in mid-February." So as early as January 10, when the Appellate Division conditioned a stay of the damages hearing on the undertaking, and no later than early or mid-February, defendants decided to, and did, apply for an undertaking.

In view of the dispute about the sufficiency of the undertaking, the parties and the court agreed to adjourn the damages hearing pending determination by the Appellate Division of those issues. Plaintiffs now move for costs of some $15,000 for attorney's fees, essentially claiming that defendants' failure to inform them that defendants were applying for a bond caused plaintiffs unnecessary work in litigating the subpoena, which they would not have done had they known the damages hearing might or would be stayed, and in preparing for the damages hearing, which, if it is held at all, will be down the road some, necessitating duplicative preparation for the hearing.

The Law

Plaintiffs rely on 22 NYCRR § 130-1.1, which provides that a court may sanction as "frivolous" conduct that "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." As plaintiffs note, in Levy v Carol Mgt. Corp., 260 AD2d 27 (1st Dept 1999), the court stated as follows:

> 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.

Id. at 34 (citation omitted). This Court is not aware of any authority particularly on point with the instant case.

Discussion

Several of the parties' arguments can be rejected out of hand. Plaintiffs' argument that the motion to quash had no merit is itself without merit. Although, as noted above, plaintiff is getting the documents it needs, if not quite the documents it wants, the decision significantly narrowed the subpoena. Defendants' argument that disclosing that they were applying for an undertaking that they never, in fact, received could lead to their being criticized for misrepresentation is bogus; you cannot be criticized for falsity by telling the truth (and any assumption that an application would necessarily result in an undertaking would be at plaintiffs' own risk). Likewise without merit is plaintiffs' contention that defendants's secretiveness could have been "undertaken primarily to delay or prolong the resolution of the litigation." However many hoops defendants forced plaintiffs to jump through, the end point of the litigation will remain the same (what is "prolonging" the litigation at this point is the Appellate Division stay). Both sides are overstating their arguments as to the significance of plaintiffs possibly having to prepare twice for the damages hearing; double preparation would not, as plaintiff's argue, be doubly costly, but also not, as defendants argue, cost the same as a single preparation.

However, what is worth considering is the following: at the particular point in time (somewhere between early January and mid-February) when defendants decided to apply for an undertaking, while actually or constructively knowing that plaintiffs would, or at least might, waste money

litigating a subpoena that might become moot and preparing for a hearing that might be delayed or abrogated, were defendants under an affirmative duty to inform plaintiffs of this decision? Simply put, can a party be sanctioned for failing to save its adversary money (when doing so will not prejudice itself)?

In normal civil society, the failure to save someone else money is bad form. At the other extreme, in warfare, attrition is good strategy. Where is litigation situated on this continuum? Given that courts can sanction conduct that is "undertaken primarily to ...harass or maliciously injure another," litigation is apparently closer to normal civil society than to warfare.

However, this Court finds that the conduct here at issue is not sanctionable for several reasons. First, 22 NYCRR Part 130 easily could have, but does not, expressly provide that failing to save an adversary money is sanctionable. On a more practical level, a code of conduct that prohibited causing an adversary to waste money would be very difficult to interpret and enforce. Commencing five separate actions for the same relief, each one being dismissed seriatim, is clearly "undertaken primarily to ...harass or maliciously injure." But can we put in the same category, and label as easily, not informing an adversary that resolution of an issue may become moot? Furthermore, attorney-client privilege issues might arise (what if the attorney wants to inform the adversary but the client does not?). In the instant case, there is no evidence that anything defendants or their counsel said was untrue. Indeed, plaintiffs' are complaining not about what defendants said, or did, or did not do, but about what they did not say. What if an attorney simply forgets to inform an adversary of a way to save money? Must attorneys be ever vigilant lest something they do not say causes an adversary to waste money?

However, although the conduct here at issue is far from sanctionable, the day may come when the law takes a more moralistic, one might say "holistic," approach. For example, one purpose of tort law is to have loss fall on the party that could have prevented it. See generally, Waters v New York City Hous. Auth., 69 NY2d 225, 229 (1987) ("The common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss."). Here, defendants' failure to speak caused plaintiffs' loss. Although litigation is by nature an "adversarial" system, we all gain when nobody is allowed gratuitously to cause another's loss. What in normal civil society is common courtesy may some day in law become ethical obligation.

However, as that day has not arrived, the instant motion is denied.

Dated: April 18, 2013

Arthur F. Engoron, J.S.C.

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