

Ray v Ray

2013 NY Slip Op 31586(U)

July 15, 2013

Supreme Court, New York County

Docket Number: 604381/98

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART 53

Index Number : 604381/1998
RAY, AMES
vs.
RAY, CHRISTINA
SEQUENCE NUMBER : 010
PRECLUDE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
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.*

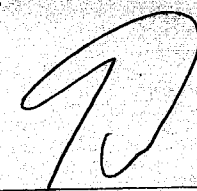
FILED

JUL 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/18/13


_____, J.S.C.

CHARLES E. RAMOS

- 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: COMMERCIAL DIVISION

-----X
AMES RAY,

Plaintiff,

-against-

CHRISTINA RAY,

Defendant.
-----X

Index No.
604381/98

FILED

JUL 18 2013

Charles E. Ramos, J.S.C.:

COUNTY CLERK'S OFFICE
NEW YORK

In motion sequence 010, the defendant Christina Ray ("Christina") moves for sanctions based on the spoliation of evidence, to exclude certain evidence, and for adverse inferences against the plaintiff Ames Ray ("Ames").

Background

This action arises out of a confession of judgment, dated April 13, 1993 (the "Confession") and a letter agreement, dated September 5, 1993 (the "Letter Agreement") executed between the parties.

On September 9, 1998, Ames commenced this action seeking to enforce the Confession.

For a full recitation of the facts, please see this Court's decision, entered January 18, 2008.

On April 30, 2013, during oral argument, this Court granted Christina's motion in part, awarding sanctions for the failure of plaintiff's counsel, Mr. Peter C. Alkalay ("Alkalay") to implement a litigation hold and preserve the litigation file

related to a previous action between the parties in Suffolk County, involving real property located in Sagaponack, NY (Trans., Apr. 30, 2013, 15:15-16).

However, the Court reserved decision on the remaining portion of Christina's motion that sought an adverse inference for Alkalay's failure to preserve the files relating to the creation of the Confession and the Letter Agreement (together, the "Documents").

In the Confession, Christina admits that she owes Ames \$532,288.10 as a result of a promissory note and credit card debt. The Letter Agreement provides that Christina is to provide Ames with certain notarized financial information until the debt is repaid or accrue an additional \$50 per day in debt until the financial information is delivered.

Both Documents are a part of the record, but the files containing the correspondence between the parties and Alkalay during their creation, or the drafts of the Documents, have not been produced (the "Files").

Discussion

Christina argues that the Files clearly should have been preserved because the nature of the Confession gives rise to a reasonable anticipation of litigation.

This Court agrees.

It is well settled "that preservation obligations arise at

the point in time when litigation is reasonably anticipated whether the" party is commencing the litigation or a target of it (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012][internal quotations omitted]).

When a party "is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation", a reasonable anticipation of litigation arises (*id.*).

Alkalay and Ames clearly had a duty to preserve the Files. A confession of judgment, by its nature, creates a reasonable anticipation of litigation because it contemplates that legal proceedings may be required to enforce the judgment. In addition, the parties provided for an award of legal costs associated with enforcing the Confession. That is more than sufficient to put Ames and Alkalay on notice of the potential for future litigation. Thus, Alkalay should have implemented a litigation hold.

Another factor is that Alkalay drafted the Confession and both Ames and Christina state that Alkalay acted as attorney for both of them.

In opposition, Ames argues that the Files were not destroyed because they do not exist. However, when Alkalay was previously asked in his deposition if he or his firm searched or reviewed

the files in responding to Christina's discovery demands, he testified that he could not locate the files (Watnick Aff., Ex. G, 60:11-17; 265:11-17). Such an answer presumes that there was a file.

Alkalay further testified that he faxed a draft of the Confession to Christina that differs from the executed Confession (*id.*, 296:4-297:10; Ex. O). However, the draft was not produced by Ames or Alkalay. In addition, Alkalay has testified that he sent Christina a draft of the Letter Agreement as well, which was also not produced by Ames or Alkalay (*id.*, 382:12-16; Ex. R).

The testimony clearly indicates that the Files did exist at one point in time. At the very least, Alkalay should have had a copy of the draft Confession that was sent to Christina and copies of the correspondence relating to the Letter Agreement.

Moreover, it is undisputed that Alkalay did not implement a litigation hold (Trans., Apr. 30, 2013, 10:15-26). The failure to implement a litigation hold when there is a duty to do so is grossly negligent (*VOOM* at 48). "The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence..." (*VOOM* at 45).

Christina has sufficiently demonstrated her entitlement to spoliation sanctions by establishing that Alkalay and Ames clearly had an obligation to preserve the Files and failed to do

so, that the Files were destroyed as a result of Alkalay's gross negligence in failing to implement a litigation hold when he had a reasonable anticipation of litigation, and that the Files are entitled to a presumption of relevance as a result of Alkalay's gross negligence (*Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 482 [1st Dept 2010]; *id.* at 48).

Moreover, Christina is entitled to an adverse inference that the Files support her defenses of lack and failure of consideration and duress (*VOOM* at 45). All disputed issues relating to the Documents should be resolved in her favor and Ames is barred from presenting evidence or arguing at trial that Alkalay's representation of Christina was *de minimus*.

The issue of attorney's fees related to the initiation of the instant motion will be determined at the trial.

The Court has considered Ames' remaining arguments and finds them unpersuasive.

Accordingly it is,

ORDERED that the defendant's motion to preclude is granted in its entirety, and it is further

ORDERED that the parties contact the Clerk of Part 53 and schedule a conference to schedule a date for trial.

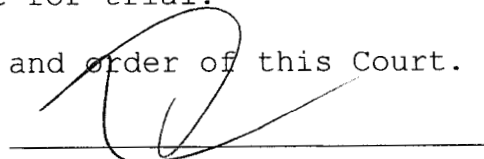
This shall constitute the decision and order of this Court.

Dated: July 15, 2013

FILED

JUL 18 2013

COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.

CHARLES E. RAMOS