Pavia & Harcourt LLP v Squire Sanders & Dempsey LLP
2013 NY Slip Op 34168(U)
June 26, 2013
Supreme Court, New York County
Docket Number: 103931/11
Judge: Louis B. York

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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PAVIA & HARCOURT LLP,

Plaintiff,

Index No. 103931/11

-against-

DECISION/ORDER

SQUIRE SANDERS & DEMPSEY LLP,

Defendant.

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LOUIS B. YORK, J.S.C.:

Plaintiff Pavia & Harcourt LLP ("Pavia") instituted this action for legal fees allegedly owed to it by defendant Squire Sanders & Dempsey LLP ("Squire Sanders"). Pavia's claim stems from an underlying action which Fendi Adele S.R.L., Fendi S.R.L., and Fendi North America, Inc. (collectively "Fendi") brought against Burlington Coat Factory Warehouse Corp. ("Burlington") for violation of a 1987 consent injunction which prohibited Burlington from selling any Fendi-branded products without Fendi's written consent ("the injunction"). Pavia represented Fendi from early 2005 through late June 2007.

Pavia initially performed this work pursuant to a retainer agreement; in the agreement, Fendi stated it would pay Pavia for its time according to its hourly rates. Pavia and Fendi subsequently entered into a new billing arrangement under which Fendi agreed to pay Pavia 1) its standard billable rates for only 50% of the time it billed up to $300,000 and 2) 35% of any recovery obtained by Fendi, minus any amounts

Fendi had paid to Pavia under paragraph one above.

On July 1, 2007, Fendi replaced Pavia with Squire Sanders. Pavia contends that Fendi replaced it because four of the attorneys who worked on the Fendi-Burlington litigation left Pavia and joined Squire Sanders. The two law firms, plaintiff and defendant here, agreed that they would share attorney's fees generated by the lawsuit based on the proportion of work done by each firm.

Pavia states that it provided substantial legal services in connection with Fendi's dispute against Burlington. In October 2005, Pavia wrote a cease and desist letter on behalf of Fendi to notify Burlington that it was in violation of the injunction. Subsequently, on January 5, 2006, Pavia filed a complaint against Burlington, seeking damages for civil contempt of the injunction. Pavia contends that it also prepared the client's motion for summary judgment, upon which Fendi prevailed in October 2007 after its relationship with Fendi had ended.

Squire Sanders also alleges that it performed extensive work on the Burlington matter. Among other things, it obtained broad discovery, opposed several motions, and prepared and filed a motion for partial summary judgment to find Burlington in willful contempt of the 1987 injunction. It claims that this work constituted at least over 50% of the work done in connection with the case. Moreover, Squire Sanders claims that the most intensive part of the litigation process began when it substituted for Pavia. Squire Sanders states that it had to file supplementary papers regarding the partial summary judgment motion Pavia had filed. It also prepared a summary of Fendi's costs associated with the proceeding and opposed Burlington's motion for reconsideration. In

December of 2007, when Squire Sanders determined that Burlington again was selling Fendi products, the firm brought further proceedings against Burlington on Fendi's behalf. According to Squire Sanders this took many hours of both attorney and expert time. The time records on the Burlington litigation show that Pavia billed 1,924 hours between April 1, 2006 and June 30, 2007, and Squire Sanders recorded 7,149 hours between July 1, 2007 and June 30, 2010.

In December 2010, the Fendi-Burlington litigation ended, and Fendi received approximately $10 million in full settlement of all claims. Pavia demanded that Squire Sanders pay to Pavia its proportionate share of the contingency fee, but allegedly Squire Sanders refused. Pavia alleges that it is entitled to over 50% of the attorney's fees, for a minimum of $1.6 million. It appears that, according to Squire Sanders, 1) it had agreed to reduce the fees by $200,000, so the attorney's fees were $3.3 million 2) Pavia's share of the fees had to be reduced by the $300,000 it already received from Fendi, 3) because of 1 and 2 above, Squire Sanders was to receive a proportionate share of $3.2 million, less the $300,000 it already had received, and 4) Squire Sanders performed most of the work so its share of the $3.2 million should be much larger than Pavia's. When the parties could not resolve their fee dispute, Pavia filed this action for legal fees.

Earlier in this litigation, Squire Sanders moved to strike various portions of the complaint. Pavia cross-moved for sanctions, alleging that Squire Sanders made its motion in bad faith. The Court denied both motions. With respect to Pavia's cross-motion, the Court found:

> Under 22 NYCRR § 130-1.1, conduct is sanctionable if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." 22 NYCRR §130-1.1. Sanctions should not be imposed where a party "asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure." Yenom Corp. v. 155 Wooster Street, Inc., 33 A.D.3d 67, 70, 818 N.Y.S.2d 210, 213 (1st Dept. 2006). Moreover, the court has "wide latitude" in determining appropriate sanctions. Pickens v. Castro, 55 A.D.3d 443, 444, 867 N.Y.S.2d 47, 48 (1st Dept. 2008). In this case, Pavia has failed to show convincingly that Squire Sanders made its motion in bad faith. Therefore, although this court has found Squire Sanders' arguments unconvincing, in its discretion it does not impose sanctions.

Pavia & Harcourt v. Squire Sanders & Dempsey, Index 103931/2011 (Sup. Ct. N.Y. County Dec. 23, 2011)(filed January 3, 2012) (Mo. Seq. No. 1, at *7-8).

Subsequently, Pavia sought extensive discovery relating to Squire Sanders and Fendi's emails and other documents concerning the fee arrangement. Squire Sanders refused to turn over some of the documents on the ground of attorney-client privilege. The parties resorted to motion practice to resolve the dispute. As is relevant here, the Court directed an in camera inspection of the documents at issue.

At this point, Squire Sanders states, it determined that rather than continuing to litigate this issue, it wanted to resolve it. Accordingly, on November 16, 2012, Pavia wrote to the Court, stating that although Squire Sanders had not provided all the information Pavia sought in the motion, but that it was sufficiently satisfied with the production to withdraw the motion.

A few months later, Pavia brought this motion for sanctions, arguing that Squire Sanders had wrongfully and without legal basis withheld the documents in question,

resulting in unnecessary motion practice and a delay in the litigation. Squire Sanders opposes the motion, stating 1) Pavia already has made, and lost, one motion for sanctions, 2) only one document was in dispute – rather than two documents as Pavia states, 3) though it held a good faith belief that attorney-client privilege applied and it still maintains that the document is privileged, it agreed to turn over the one document rather than continuing to litigate this issue, and 4) Pavia's conduct, in settling the dispute only to file a motion due to the dispute, escalated the problems and delays in and the expenses of this litigation. This motion is currently before the Court.

Under 22 NYCRR § 130-1.1, conduct is sanctionable if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." 22 NYCRR §130-1.1. Sanctions should not be imposed where a party "asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure." Yenom Corp. v. 155 Wooster Street, Inc., 33 A.D.3d 67, 70, 818 N.Y.S.2d 210, 213 (1st Dept. 2006). Moreover, the court has "wide latitude" in determining appropriate sanctions. Pickens v. Castro, 55 A.D.3d 443, 444, 867 N.Y.S.2d 47, 48 (1st Dept. 2008).

In this case, Pavia has shown that Squire withheld one or two allegedly discoverable documents based on a claim of attorney-client privilege, that it opposed Pavia's motion to compel, and that, once this Court ordered an in camera inspection of the document or documents, the parties resolved their dispute by stipulation. Pavia contends that the document or documents were not subject to the privilege Squire Sanders asserted; Squire Sanders disagreed but states it did not want to prolong the

dispute. Unfortunately, the Court cannot locate an unredacted copy of the material in question, so it cannot opine on the subject. The Court was unable to definitively resolve the issue of privilege on the first motion papers and sought an in camera inspection, showing that this material is necessary for a fair evaluation. Thus, on the evidence before the Court, Pavia has not shown convincingly that Squire Sanders without the material or opposed the motion to compel in bad faith.

"Generally, the imposition of sanctions involves a more persistent pattern of repetitive or meritless motions." *See Sarkar v. Pathak*, 67 A.D.3d 606, 607, 889 N.Y.S.2d 184 (1st Dept. 2009). Here, it appears that the parties exchanged other discovery, and that Squire Sanders only withheld those requested documents to which it articulated a specific objection. Subsequently, it opposed Pavia's motion, but then stipulated to provide the discovery at issue. Squire Sanders has not engaged in the kind of excessive motion practice or delay tactics that usually merits sanctions; and, moreover, it resolved the motion at issue by stipulation to avoid further litigation on the subject. Indeed, Pavia's motion is the cause of the current delay in this lawsuit.

Based on the above, it is

ORDERED that Pavia's motion is denied.

ENTER:

Dated: 6/26/13

Louis B. York, J.S.C.