

Matter of Armstrong v Itty
2014 NY Slip Op 33968(U)
January 3, 2014
Supreme Court, Kings County
Docket Number: 7272/09
Judge: Wayne P. Saitta
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January 2014.

P R E S E N T:

HON. WAYNE P. SAIITA

Justice.

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In the Matter of the Application of Rev.
Canon Dr. G. Llewellyn Armstrong,

Plaintiff,

- against -

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Rt. Rev. Johny Itty as Bishop in Residence at Calvary and St. Cyprian Episcopal Church, Brooklyn, Linda Watson Lorde as Senior Warden of Calvary and St. Cyprian Episcopal Church, Brooklyn, New York, Carl Holligan as Junior Warden of Calvary and St. Cyprian Episcopal Church, Brooklyn, New York, Rector, Wardens and Vestry of Calvary and St. Cyprian Episcopal Church, Brooklyn, New York, Rt. Rev. Orris Walker, Bishop of the Diocese of Long Island, the Episcopal Church Ven. Cannon Howard K. Williams, Archdeacon of Brooklyn, Diocese of Long Island, The Episcopal Church Trustees of the Estate belonging to the Diocese of Long Island,

Defendants.

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3</u> _____
Opposing Affidavits (Affirmations) _____	<u>4-5</u> _____
Reply Affidavits (Affirmations) _____	<u>6</u> _____

Upon the foregoing papers, defendants move for a protective order barring plaintiff, his attorney and their agents from contacting or attempting to contact Karl Holligan, Linda Watson-Lorde, Carmen Carter or any of the other defendants represented by defense counsel in this action (motion sequence no. 6). Additionally, defendants move for sanctions and an order awarding costs and attorney's fees incurred in bringing the motion (*id.*). Plaintiff cross-moves for a protective order, pursuant to CPLR 3103, striking the answers to plaintiff's deposition testimony and striking defendants' notice for discovery and inspection dated December 22, 2011 (motion sequence no. 7).

That part of defendants' motion requesting a protective order was granted in a decision and order dated October 10, 2013 (Saitta, J.). Plaintiff's cross motion was also resolved in that decision and order. Finally, that decision and order reserved ruling on defendants' request for sanctions and costs, which is resolved in this decision and order.

Background

The background and procedural history of this matter are set forth in the decision and order of this Court dated February 10, 2010 (annexed to defendants' motion as Exhibit E) and shall not be reiterated here. However, the background of the issue leading to the instant motion for sanctions involves proceedings that are not directly a part of this matter. On March 26, 2012, while the instant matter was pending, Karl Holligan, Linda Watson-Lorde, defendants in this matter, and Carmen Carter, a non-party, testified at an ecclesiastical trial that involved plaintiff. On October 25, 2012, and again on December 7, 2012, plaintiff's attorney sent letters to these three individuals informing them that if they did not recant their

testimony at the ecclesiastical hearing, her client (plaintiff in this matter) would commence a civil action against them “seeking damages in excess of a million dollars.” On December 19, 2012, defendants’ counsel, upon becoming aware of these letters, sent a letter to plaintiff’s counsel informing her that the persons to whom the letters were sent are represented or may be represented by counsel, and that her request for the recipients of the letters to recant their previous testimony could have a “chilling effect on the production of these witnesses at deposition and/or trial on the within lawsuit.” Defendants’ counsel further requested that plaintiff’s counsel advise the recipients that she would withdraw the letters. On December 21, 2012, plaintiff’s counsel responded that she would discuss the letters with her client and advise. Plaintiff’s counsel provided no further response. Defendants then made this motion for a protective order barring plaintiff’s counsel from contacting any of the defendants in this action and for sanctions and costs. As noted above, that branch of defendants’ motion for a protective order was granted. However, the court denies the request for sanctions and costs.

Discussion

The court’s authority in awarding costs and sanctions against an attorney are set forth in 22 NYCRR 130-1.1 (a), which provides, in pertinent part:

“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” (*id.*).

As applicable here, 22 NYCRR 130-1.1 (c) defines “frivolous conduct” as conduct that is “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.”

Defendants base their claim for sanctions on three grounds: (1) the letters to defendants Karl Holligan and Linda Watson-Lorde are a violation of rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0); (2) the letters to non-party Carmen Carter are a violation of rule 4.3 of the Rules of Professional Conduct (22 NYCRR 1200.0); and (3) the letters themselves threaten legal action with no basis in law or fact.

Rule 4.2 (a) provides in part: “In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter.” Here, plaintiff’s attorney communicated with two defendants in this matter about their testimony in the ecclesiastical hearing. While issues raised at the ecclesiastical hearing may be tangentially similar to the issues at bar (these issues are the subject of defendants’ counter claims), defendants’ attorney admits that the subject of the testimony of the defendants who received the letters was not relevant to the instant action. Further, although plaintiff’s attorneys’ communication with persons she knows to be represented by counsel was an error in judgment, it does not rise to a sanctionable offense because the content of the letters did not regard the “subject of the representation.” Similarly, plaintiffs’ attorneys’ communications with the non-party are not

sanctionable for the same reason. Moreover, since the ecclesiastical hearing was not an “action or proceeding before the court” Rule 4.2 is inapplicable to the circumstances presented.

As to the argument that the letters themselves were intended “to harass or maliciously injure” the witnesses, the court declines to impose sanctions on this ground as well. Again, the letters were a request to retract testimony in a separate matter in which the recipients of the letter were not represented by counsel, therefore it is not a sanctionable offense with regard to this matter. The court does not, however, opine on the legal validity of the letters nor does it endorse the content of said letters.

Accordingly, it is

ORDERED that that portion of defendants’ motion for sanctions and costs is denied.

The foregoing constitutes the decision and order of the court.



KINGS COUNTY CLERK'S OFFICE

JAN 08 2013

FILED

ENTER,



J. S. C.

HON. WAYNE P. SAIITTA
J.S.C.