

Gyorio v Minnesota United FC
2017 NY Slip Op 31795(U)
August 24, 2017
Supreme Court, New York County
Docket Number: 652281/2015
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

MOZZI GYORIO,

Plaintiff,

-against-

MINNESOTA UNITED FC, et al.,

Defendants.

INDEX NO. 652281/2015
MOTION DATE Mar. 2, 2017
MOTION SEQ. NO. 003
E-FILED

DECISION AND ORDER

The following papers, numbered 1, were read on this motion for attorneys' fees:

Papers

Papers Numbered

Notice of Motion-Affidavits-Exhibits	1
Notice of Cross-Motion-Affirmation	2
Affirmation in Opposition-Exhibits	3
Reply Affirmation-Exhibits	4
Reply Affirmation-Exhibits	5
Cross-Motion X YES	

Plaintiff Mozzi Gyorio (Gyorio), a professional soccer player, commenced this action on June 25, 2015 against defendant Minnesota United FC (MU) for breach of contract and against defendant North American Soccer League LLC (NASL) for tortious interference with contract. In lieu of answering the amended complaint, defendants MU and NASL moved to dismiss the pleading.¹ By decision and order dated July 11, 2016, this Court granted

¹Plaintiff failed to file an affidavit of service of his complaint or amended complaint within 120 days after commencement of this action upon defendant National American Soccer League LLC, which has not appeared, answered or moved with respect to the complaint or the amended complaint. CPLR § 306-b.

the motions and dismissed the complaint as to those defendants.

MU now moves for an award of its attorneys' fees (1) pursuant to the provisions of its contract with Gyorio, or, in the alternative, (2) for sanctions against Gyorio and his counsel, JS Barkats PLLC (the Barkats firm), jointly and severally, pursuant to 22 NYCRR § 130-1.1. The Barkats firm cross-moves for an order (1) joining non-party Marc Block, Esq. (Block), formerly with the Barkats firm, and (2) directing that Block indemnify the Barkats firm for any possible sanctions. Block opposes the cross-motion.

Facts, Contract and Procedural History

The underlying facts are set forth in this Court's decision and order dated July 11, 2016, and need not be repeated here.

The contract (Contract) between Gyorio and MU provides, in pertinent part,

Player and Club hereby agree that if either of them brings an action in any court of law or other forum to enforce rights hereunder without first exhausting their remedies under subparagraphs (a) and (b) above ...the prevailing party in any such action shall be entitled to recover from the non-prevailing party in any such action its costs and expenses, including reasonable attorneys' fees, incurred in connection with such lawsuit or proceeding.

Contract, ¶ 13[c] at 3 (Affirmation of Matthew D. Melewski dated October 9, 2015, ex. A).

To the extent relevant to this motion, the July 11, 2016

order granted dismissal of the action as against MU for lack of personal jurisdiction and on the additional ground that plaintiff's failure to pursue arbitration under the Contract's broad arbitration clause barred this action. Decision and Order at 8-11.

The Present Motion and Cross-motion

In response to MU's present motion, the Barkats firm offers not a shred of opposition to the portion of the motion grounded on the contract between MU, as the prevailing party, and Gyorio, as the losing party.

Although the Barkats firm remains Gyorio's counsel and does not seek to withdraw, the firm opposes only so much of the sanctions motion as seeks sanctions against the Barkats firm. It offers no defense on behalf of its client, Gyorio.

Instead, the firm asserts its opposition on the ground that it is now comprised of only one attorney, Sunny J. Barkats (Barkats), who claims that he is a transactional attorney and not a litigator. He seeks to shift the blame for the firm's actions to Marc Block, Esq. (Block), an attorney formerly with the firm.

Barkats states that upon receiving this motion, he notified Gyorio that he was not responsible for the conduct of this case and "that [he] would be forced to file appropriate legal papers

against [Gyorio] so that [Barkats would not be] made a financial scapegoat" (Affirmation of Sunny J. Barkats dated October 21, 2016 ¶ 19 at 6). Barkats then alleges that Gyorio, in order to avoid being sued by his own lawyer, "decided" to sign a release of Barkats and the Barkats firm regarding MU's application for its legal fees in consideration of the firm's foregoing any fees from Gyorio (*id.*; Barkats Reply Aff. dated November 3, 2016, ex. H). Importantly, Barkats does not allege that prior to extracting the release from Gyorio, his own client, he advised Gyorio (1) to consult independent counsel before executing such a release, (2) that the Barkats firm would offer no opposition on Gyorio's behalf to the present motion, or (3) of the conflict of interest of Barkats and the Barkats firm with that of Gyorio. Nor has the Barkats firm moved to withdraw as Gyorio's counsel in this action at any time either before or after Gyorio's execution of the release.

Instead, the Barkats firm cross-moves to join Block for the purpose of obtaining indemnification by Block of Barkats and the Barkats firm for any sanctions that may be imposed by this Court.

Block, in response, alleges that he was an employee of, and later of counsel to, the Barkats firm, under Sunny Barkats' supervision. He states that Gyorio was not his client, but that

of the firm. Further, he alleges that Sunny Barkats was head of litigation at the firm. Finally, Block contends that the Court has no jurisdiction over him, as he was never served with process.

Legal Analysis

To the extent that MU seeks compensation from Gyorio as prevailing party under the contract and sanctions against him, such motion is denied without prejudice to renewal. In failing to respond to the motion on Gyorio's behalf, while remaining his counsel of record and simultaneously securing a release from him, Barkats and the firm deprived Gyorio of the opportunity to offer any opposition to this motion. Barkats and the Barkats firm breached their duty to their client to provide any representation, much less the competent, diligent representation required by the Rules of Professional Conduct (22 NYCRR 1200.0, Rules 1.1, 1.3[c]).

The Court now addresses the portion of this motion that seeks sanctions pursuant to 22 NYCRR § 130 as against the Barkats firm. In its discretion, a court may impose sanctions, including award of reasonable attorney's fees and other financial costs, against an attorney or a party to the litigation resulting from frivolous conduct (*Kamen v Diaz-Kamen*, 40 AD3d 937, 938 [2d Dept 2007][citation omitted]). "Conduct

during litigation is frivolous and subject to sanction [] under 22 NYCRR § 130-1.1 '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 or . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another'" (*Miller v Cruise Fantasies, Ltd.*, 74 AD3d 919, 921 [2nd Dept 2010], quoting 22 NYCRR § 130-1.1[c]; see *Lawrence Ripak Co., Inc. v Gdanski*, 143 AD3d 862, 863 [2d Dept 2016])). "In making that determination, the court must consider 'the circumstances under which the conduct took place' and 'whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent'" (*Glenn v Annunziata*, 53 AD3d 565, 566 [2nd Dept 2008], quoting 22 NYCRR § 130-1.1[c])).

The Contract between plaintiff and MU provided that all disputes were to be presented to the commissioner of the NASL for final resolution (Contract, ¶ 13[a]). A party dissatisfied with the League decision could proceed to binding arbitration (*id.*, ¶ 13[b]). The Contract barred any action in a court of law without first complying with the dispute resolution steps provided in subparagraphs 13 (a) and (b) (*id.*, ¶ 13[c]).

Previously, by decision and order dated July 11, 2016, this

Court found that Gyorio's failure to pursue arbitration under the Contract's broad arbitration clause barred this action (Decision and Order at 11). It is uncontested that the Barkats firm entered the picture at least as of September 29, 2014, when it served upon MU a demand for arbitration; that both sides agreed to hold in abeyance the arbitration proceeding pending plaintiff's appeal to the League of a second, related issue; and that MU's counsel contacted the Barkats firm on November 11, 2014 about proceeding with the arbitration, with no response from the Barkats firm. It is further uncontested that the Barkats firm never proceeded with arbitration, but instead commenced this action on June 25, 2015.

Both the original complaint and the amended complaint refer extensively to the provisions of the Contract. The Barkats firm knew that it had not proceeded with the arbitration. Nor did the Barkats firm have any reason to believe that MU intended to waive arbitration (*cf. W. J. Nolan & Co., Inc. v Daly*, 170 AD2d 320, 321 [1st Dept 1991][sanction denied for filing suit where not established that commencement of prior arbitration put petitioner on notice that subsequent claims were arbitrable as well]). In commencing this action before proceeding with the arbitration, the Barkats firm caused Gyorio, its client, to violate the Contract provisions. Its position was completely

without merit. Indeed, Barkats and the Barkats firm make no effort to argue otherwise. Thus, by commencing this action without resort to arbitration, the Barkats firm engaged in frivolous conduct.

The effort of Barkats to shift blame to the firm's former employee Block, by bringing him into this case, was itself frivolous (*cf. Levy v Carol Management Corp.*, 260 AD2d 27, 35 [1st Dept 1999][citation omitted]). First, the Barkats firm's own exhibits show that firm attorneys in addition to Block worked on this action (including John P. Kaplan, Esq. [summons, complaint, amended complaint, stipulations dated October 21, 2015, October 16, 2015 [ex. C to Barkats reply aff.]; Susan Benjamin, Sunny Barkats, John Kaplan, Michael Wheeler time entries [ex. F to Barkats reply aff.]). Thus, this was always a litigation in which various employees of the Barkats firm participated.

Secondly, Barkats himself filed both the complaint and the amended complaint (Docs. 1, 2 in efiling). His present contention that he does not litigate is belied by his own filings both in this action and, as Block and MU show, in other actions in this court (Reply Affirmation of Matthew D. Melewski dated October 27, 2016, ex. E; affirmation of Marc Jonas Block dated October 27, 2016, ex. F). Finally, regardless of Barkats'

own competence as a litigator, as the primary shareholder, owner and manager of his firm, he bore an ethical obligation to supervise the work of his attorney subordinates (22 NYCRR § 1200, Rule 5.1 [c],[d]).

The purported cross-motion of Barkats and the Barkats firm is not actually a cross-motion, i.e. a motion against the party who made the original motion. A cross-motion is an improper vehicle for seeking relief from a non-moving non-party such as Block (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87-88 [1st Dept 2013]). Moreover, Block is correct that this Court has not acquired jurisdiction over him.

The Court grants so much of this motion as seeks sanctions against the Barkats firm in the amount of MU's legal fees for the defense of this frivolous and unnecessary action. As MU's counsel has established both the amount of its fees and that they were commensurate with the requisites of defending this case, and inasmuch as the Barkats firm does not contest such amount, the amount sought is granted.

Now the Court turns to the very troubling issue of the conduct of plaintiff's law firm in this action. It is apparent from Sunny J. Barkats' own admissions that the firm breached many of the duties owed to its client. There is no question that by commencing this litigation against MU instead of

proceeding with the arbitration, the Barkats firm exposed its client, Gyorio, to MU's claim for legal fees. Further, upon receipt of MU's present motion not only for contractual fees but also for sanctions against Gyorio and the Barkats firm, jointly and severally, it was the duty of the Barkats firm to move to withdraw from its representation of Gyorio, once it elected to abandon the client and defend only itself from sanctions, as its interests were now opposed to those of its client (22 NYCRR § 1200.0, Rule 1.7[a][2]).

Barkats compounded his firm's difficulties by seeking a release from its client without withdrawing from the case and without advising Gyorio to seek review of the proposed release by an independent lawyer (22 NYCRR 1200.0, Rule 1.8(h)(1) and (2): "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith").

Finally, by remaining as counsel of record yet failing to make any effort to defend Gyorio on this motion, the Barkats firm failed to provide competent representation to its client

(22 NYCRR 1200.0, Rule 1.1(a)).

In light of all of these failings, the Court sua sponte disqualifies the Barkats firm from representing plaintiff herein. In addition, the Court refers this matter to the First Judicial Department Grievance Committees for such action as it may deem appropriate.

It is therefore ORDERED that Sunny J. Barkats and the firm of JS Barkats PLLC are disqualified from representing plaintiff Mozzi Gyorio in this action; and it is further

ORDERED that Sunny J. Barkats and JS Barkats PLLC serve upon their former client, together with a copy of this order with notice of entry, a notice directing him to appoint substitute attorney within 30 days from the date of mailing the notice, if he so chooses, or otherwise proceed pro se; and it is further

ORDERED that no further proceedings may be taken against plaintiff Mozzi Gyorio without leave of this Court for a period of thirty (30) days after the service of this decision and order upon him with notice of entry as provided for herein; and it is further

ORDERED that so much of the motion as seeks the imposition of sanctions against JS Barkats PLLC is granted, and the Clerk is directed to enter judgment in favor of defendant Minnesota

United FC and against JS Barkats PLLC in the sum of \$41,651.78;
and it is further

ORDERED that the balance of the motion is denied without
prejudice to renewal; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that the balance of this action is severed and
shall continue.

This constitutes the decision and order of the Court.

Dated: August 24, 2017



Ellen M. Coin, A.J.S.C.

Non-final disposition