

Doe v Ball
2023 NY Slip Op 31386(U)
April 21, 2023
Supreme Court, New York County
Docket Number: Index No. 950698/2020
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH

PART

18

Justice

-----X

INDEX NO. 950698/2020

JANE DOE

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 004

- v -

DAVID BALL,

**DECISION & ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 114, 115

were read on this motion to/for

DISMISS

Upon the foregoing documents, and as set forth in the Court's interim decision and order dated 1/30/2023 (NYSCEF Doc No 110), a hearing was scheduled on plaintiff's cross-motion for sanctions pursuant to 22 NYCRR 130-1.1.

As set forth in the affirmation of plaintiff's counsel, the alleged frivolous conduct of defense counsel includes:

- a. Refusing to sign a stipulation permitting Plaintiff to proceed anonymously, thus forcing Plaintiff to engage in motion practice, despite later admitting under oath, "Defendant agrees and acknowledges the current case law arising from New York's Child Victims Act ("CVA") (CPLR § 214-g) required this Honorable Court grant the plaintiff's petition to proceed under a pseudonym on January 13, 2021";
- b. Forcing Plaintiff to engage in motion practice by withholding all discovery under the false pretense that Defendant could not produce any discovery until it had received an order for anonymity and Plaintiff's college records (Defendant finally produced some, but not all, of the discovery once Plaintiff made the motion to compel);
- c. Falsely stating, under oath, in two separate motions, that Plaintiff's Bill of Particulars did not identify where the abuse occurred or what it entailed, despite the Bill of Particulars listing these exact details;
- d. Falsely stating, under oath, that Plaintiff was seeking "copies of all of defendant's publications and as well as his curriculum vitae," in pursuit of a protective order on a variety of discovery, despite Plaintiff never making any such demand;

- e. In the present motion, falsely stating, under oath, that Plaintiff claimed she was sexually abused in North Carolina in her Bill of Particulars, despite Plaintiff never even mentioning North Carolina in the Bill of Particulars or any other pleading;
- f. In the present motion, claiming that Plaintiff never treated for her injuries in New York State, despite Plaintiff providing authorizations for medical care in New York State, and records confirming that she was treated in New York State for the effects of the childhood sexual abuse; and
- g. Repeatedly making baseless assertions that this entire lawsuit is an extortion scheme despite no evidence of the same and no efforts made by Plaintiff to publicize the lawsuit.

(NYSCEF Doc No 89 at ¶ 30 [citations omitted]).

Rule 130-1.1 provides that a “court, in its discretion, may award to any party or attorney” reasonable attorneys’ fees and expenses, or impose a financial sanction upon an attorney that engages in frivolous conduct.

[C]onduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

... In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party”

(22 NYCRR 130-1.1 [c]).

The Court finds that the alleged conduct in subparagraph (a) is not frivolous. It is reasonable for an attorney to not stipulate to an application to proceed anonymously, but then later perhaps acquiesce to the same application (see, e.g., Ray v Ray, 180 AD3d 472, 474 [1st Dept 2020], lv to appeal dismissed, 35 NY3d 1007 [2020]). The conduct alleged in subparagraph (b) is troubling. Defendant’s reason for not providing discovery was because he allegedly needed more of plaintiff’s information to form his own responses

(see, e.g., NYSCEF Doc No 55, defendant's affirmation in opposition to plaintiff's discovery motion [motion sequence no. 003] at ¶ 5 ["Plaintiff is well aware that Defendant needs the plaintiff's college records in order to prepare his discovery responses"]; id. at ¶ 10; id. at ¶ 27 ["Because the plaintiff has failed to provide the records . . . defendant . . . cannot be expected to provide responsive pleadings in a Bill of Particulars regarding Defendant's affirmative defenses"]; NYSCEF Doc No 70, defendant's affirmation in support of defendant's cross-motion [motion sequence no. 003] at ¶ 15 [same]; see also id. at ¶ 45). But that is not how discovery works — each party is responsible for furnishing information within their own possession and/or based on that party's own knowledge, and it should have nothing to do with what information plaintiff exchanges first. Consequently, the Court finds defense counsel's position in that instance as entirely meritless and could constitute frivolous conduct (see, e.g., Borstein v Henneberry, 132 AD3d 447, 450-52 [1st Dept 2015]).

The Court finds that the conduct alleged in subparagraphs (c), (d), (e), and (f) constitute frivolous conduct because they are false statements. Defendant's counsel had ample time and opportunity to review the plaintiff's bill of particulars, pleadings, discovery demands and responses, yet for some reason made these false statements, on more than one occasion, when there clearly was no basis in fact to make such a statement (see NYSCEF Doc No 89 ¶ 30; id. at n 7, 8). Nor has defense counsel provided any reasonable explanation for the same. Accordingly, the Court finds that the foregoing conduct, in subparagraphs (c) through (f), if not also (b), in plaintiff's counsel's affirmation, is frivolous (see, e.g., Iacovacci v Brevet Holdings, LLC, 198 AD3d 565, 566 [1st Dept 2021]). The Court will award plaintiff's counsel's attorneys' fees and expenses as set forth below for opposing the defendant's cross motion in motion sequence no. 003 and making the instant cross-motion for sanctions (see 22 NYCRR 130-1.1 [a]).

Finally, plaintiff's counsel also alleges that defense counsel makes baseless accusations that this lawsuit is an extortion scheme. More specifically, such accusations include, e.g.:

- Plaintiff's is "bent on ruining the defendant's good name, professional standing, reputation and income (if her attempt at extorting money is unsuccessful";
- Plaintiff chose not to sue Defendant's Pennsylvania employer or his subsequent employer because, "[p]erhaps plaintiff thought that these large institutions represented by prominent law firms would be able to successfully combat these frivolous claims, but that a lonely individual, lacking the resources and staff of these universities and only represented by a solo practitioner in the Bronx would easily fall prey to plaintiff's false claims or yield to her extortionist blackmail," despite Plaintiff having no legitimate claims against those institutions;
- "[T]his is yet another not too subtle threat of extortion to ruin defendant and have him fall victim to 'cancel culture'";
- "[T]he most logical explanation for the demand [for employment records] is an attempt to engage in character assassination"; and
- Plaintiff's motion to compel discovery was made solely to keep Defendant's name in the public eye in a manner that "shows they intend on trial by extortion and embarrassment"

(NYSCEF Doc No 89 at 15, n 9, quoting NYSCEF Doc Nos 29 at ¶ 18; No 55 at ¶ 42; 70 at ¶¶ 48-49, 79).

Plaintiff's counsel's affirmation goes on to state: "Plaintiff is unaware of any news stories, websites, or other publications regarding this lawsuit, nor has Plaintiff threatened or done anything to court any news coverage of this litigation, despite Defendant's repeat allegations of extortion. Consequently, Defendant's consistent false and baseless allegations of extortion appear designed to scare, shame and silence Plaintiff" (NYSCEF Doc No 89 at 15, n 9).

Clearly, these statements fall within the purview of frivolous conduct as defined in Rule 130-1.1 (c) (2) and (3) in asserting potentially false statements, and/or asserted "primarily to . . . harass or maliciously injure another." Such salacious and inflammatory language will not be tolerated by this Court. The Court declines to impose sanctions for the statements at this time and instead will rely on the warnings provided to defense counsel during the hearing to ensure that counsel ceases making these unnecessary and inflammatory statements.

Accordingly, it is hereby ORDERED plaintiff's request for sanctions pursuant to Rule 130-1.1(a) is granted; and it is further

ORDERED that the motion is restored to the Part 18 Calendar on 5/15/2023 for the submission of papers only and at which time no appearance is required; and it is further

ORDERED that on or before 5/8/2023 plaintiff's counsel shall e-file an attorneys' affirmation and provide supporting proof of "actual expenses reasonably incurred and reasonable attorney's fees" for opposing defendant's discovery-related cross-motion in motion sequence no. 003 and for legal services related to motion sequence no. 004, i.e., opposing the motion to dismiss and cross-moving for sanctions; and it is further

ORDERED that on or before 5/15/2023, defense counsel may, if he wishes, e-file an attorney affirmation of no more than five (5) pages to contest the amount of the expenses and attorneys' fees requested by plaintiff's counsel.

This constitutes the decision and order of the Court.

4/21/2023

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

ALEXANDER M. TISCH, J.S.C.