

Wdowiak v Hewitt

2024 NY Slip Op 30851(U)

March 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 559/2023

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 14th day of March 2024.

HONORABLE FRANCOIS A. RIVERA

-----X
ERYK WDOWIAK (A.K.A. ERIC DOVIAK)

Petitioner,

- against -

MICHAEL THEWITT and MICHELLE J ANDERSON

Respondents.
-----X

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion, filed on January 16, 2024, under motion sequence number four, by petitioner Eryk Wdowiak for an order pursuant to Part 130 of Title 22 of the New York Codes, Rules, and Regulations, granting an award of costs and imposing sanctions for the frivolous conduct in the respondents' cross-motion. The motion is opposed.

- Notice of motion
- Affidavit in support
Exhibit O
- Memorandum of law in opposition
- Memorandum of law in reply
Exhibits Q-U

LAW AND APPLICATION

"CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor" (*Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2d Dept 2018]). CPLR 2214 (c) requires the moving party to furnish to the court all other papers not already in the possession of the court necessary to the consideration of the questions involved (*see Alizio v Perpignano*, 225 AD2d 723, 724 [2d Dept 1996]).

DECISION & ORDER

Index No.: 559/2023

Ms. 4

The petitioner's motion papers consist of a notice of motion, an affidavit in support, several annexed exhibits, and a memorandum of law in reply. The petitioner's affidavit in support refers to one annexed exhibit labeled exhibit O. Exhibit O is purported to be a tweet from New York State Attorney General Letitia James issued on January 11, 2024. The tweet is redacted. Petitioner also filed six exhibits labeled P through and including U. The petitioner's affidavit in support did not explain why these exhibits were annexed.

Petitioner seeks sanctions based on allegedly frivolous conduct in respondents' cross motion. Petitioner explains in his affidavit in support that the frivolous conduct is respondents' misrepresentation of a material fact by describing grievance hearings as disciplinary hearings.

Contrary to CPLR 2214 (c) petitioner did not annex the defendant's cross motion papers as part of the instant motion. The case was recently converted into the NYSCEF system, but the cross motion referred to by the plaintiff was not filed under NYSCEF. The cross motion containing the purportedly frivolous misrepresentation was a necessary document for consideration of the questions involved. The motion may be denied for this reason alone.

Pursuant to the Rules of the Chief Administrator of the Courts Part 130 as set forth in 22 N.Y.C.R.R. § 130-1.1, the court may award to any party or attorney in a civil matter cost in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees, resulting from frivolous conduct.

"For the purpose of this Part, conduct 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" (Rules of the Chief Administrator of the Courts (22 N.Y.C.R.R.) 130-1.1). If a court

awards costs or sanctions, it must be done in a written decision setting forth the offending conduct, why that conduct has been deemed frivolous, and why the amount awarded is appropriate. The decision as to whether to award sanctions is within the sound discretion of the court (*Cassagnol v Village of Hempstead*, 214 A.D.3d 766, 769 (2d Dept 2023) citing *Strunk v New York State Bd. of Elections*, 126 AD3d 779, 781 (2d Dept 2015); see *Matter of Glätzer v Glätzer*, 73 AD3d 1173, 1175 [2d Dept 2010], citing *Wagner v Goldberg*, 293 A.2d 527, 528 [2d Dept 2002]).

To impose sanctions, the court must find that the offending party's motion asserts material falsehoods or is without legal merit and undertaken primarily to delay or prolong the litigation, or to harass or maliciously injure another (*Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]).

"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" (*Marrero v New York City Tr. Auth.*, 150 AD3d 1097 [2d Dept 2017] citing 22 NYCRR 130-1.1 [c]).

In the instant action, the petitioner does not allege any action by the respondents that could be recognized as frivolous or harassing behavior.

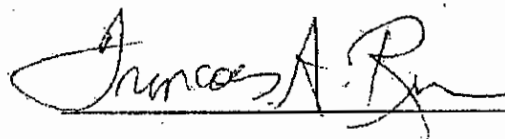
CONCLUSION

The motion by petitioner Eryk Wdowiak filed under motion sequence number four, for an order pursuant to Part 130 of Title 22 of the New York Codes, Rules and Regulations, granting

an award of costs and imposing sanctions for the frivolous conduct in the cross-motion of respondents Michael T Hewitt and Michelle J Anderson is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

A handwritten signature in cursive script, reading "Francois A. Rivera", written over a horizontal line.

J.S.C.

HON. FRANCOIS A. RIVERA