

Wrong Plaintiff? Wrong Defendant? Beware a Motion for Sanctions

BY LAZAR EMANUEL

Every lawyer who initiates an action should be careful to confirm that he has the right defendant, and, also, that his client has “standing” to sue this defendant. In an action to recover for personal injuries, for example, he should avoid naming anyone as a defendant until he has reasonable proof that the putative defendant caused or contributed to the accident, or was responsible for preventing it.

And if the lawyer – either because he fails in his obligation to investigate or stubbornly ignores the facts – receives notice from the defendant or his attorney, or in a pleading or deposition, indicating that he has named the wrong defendant or that his client lacks “standing,” he should immediately stop to determine whether he is justified in proceeding or whether the wiser course would be to discontinue.

The lawyer who ignores these basic principles risks both a motion for sanctions and the possibility of a disciplinary complaint.

Motion for Sanctions

The risk of judicial sanctions was illustrated by the decision of Supreme Court Judge Arthur M. Schack in *Robertson v. United Equities Inc.*, #35718/04, New York Law Journal, July 11, 2008. The proper defendant in the action was United Equities Corp. (“UEC”), not United Equities Inc. (“UEI”), as alleged by plaintiff. Relying on an affidavit by UEI’s president that UEC and UEI were not the same entity, Judge Schack awarded summary judgment to UEI and ordered a hearing to determine if plaintiff Robertson and his attorney, Regina Felton, had engaged in “frivolous conduct” by continuing the action against UEI.

The Court cited the following facts: 1) Ms. Felton had ignored documentary evidence absolving UEI and refused to acknowledge her mistake; 2) in his affirmation, defendant’s attorney had described his role in forming UEI and had denied that it had ever owned property in Kings County (apparently a fact essential to plaintiff’s lawsuit); 3) defendant’s attorney had called plaintiff’s attorney to tell her she had the wrong party, but she had insisted that defendant answer the complaint nevertheless; 4) one of defendant’s attorneys had sent numerous letters and faxes to plaintiff’s attorney showing her mistake; 5) plaintiff’s attorney had refused to discontinue the action even after she learned of her mistake.

The Court concluded:

Ms. Felton, for reasons unknown to the Court, persistently continued the action against UEI, the wrong defendant. This forced UEI to continue to litigate this matter and incur wasteful litigation-related expenses.

[Her] failure...to discontinue the instant action against UEI, after being presented with clear evidence that UEI was the wrong corporation sued, is ‘frivolous’ (citing 22 NYCRR § 130-1.1).

The Law of Sanctions

In the New York state courts, the award of sanctions is discretionary with the courts. Sanctions are controlled by 22 NYCRR § 130-1.1, which was adopted by the Courts in its current form on March 1, 1998. The rule provides:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding . . . 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 who appears in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

(b) omitted

(c) For purposes 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.

In other words, sanctions may come in two forms: 1) as reimbursement to the aggrieved party of his actual expenses and reasonable attorney's fees; and 2) in addition to or in lieu of costs, as a discretionary financial assessment or penalty against a party or an attorney who engages in frivolous conduct, in a sum not to exceed \$10,000.

When 22 NYCRR 130 was first adopted by the Courts on March 1, 1998 (*Stiffer Sanctions for Frivolous Litigation Conduct*, NYPRR April, 1998), Roy Simon predicted:

The amended rule will at first make law practice more difficult, especially for sole practitioners. But in the long run, if courts really enforce the new rule, it should cut down on frivolous litigation and frivolous litigation tactics. That should reduce the costs of litigation for clients and leave lawyers and judges more time to think about the merits of cases rather than by the methods by which they were litigated.

In Robertson, Judge Schack awarded defendant UEI costs and expenses in the amount of \$13,287.50 and directed that they be paid personally by Ms. Felton. The amount was based upon time sheets submitted by UEI's attorneys for time spent by them following the deposition of UEI's president (*supra*), when Ms. Felton learned conclusively that UEI was not a proper defendant. Defendant's attorneys had submitted time sheets totaling \$25,086.25, but some of that time was for services prior to the deposition.

Judge Schack denied defendant's application for financial sanctions:

The court, in its discretion, is only awarding costs to UEI, and not sanctioning Ms. Felton, because the \$13,287.50 award of costs is a sufficient penalty.

Cases Cited by the Court

Judge Schack cited several cases to support his decision. In *Guttridge v. Schwenke*, 155 Misc. 2d 317 (Sup Ct. Westchester Cty. 1992), plaintiff persisted in pursuing a claim for money due under a contract after the defendant presented documentary evidence that the claim had been paid. The court in *Guttridge* said:...

Plaintiffs' counsel must share the blame for such frivolous conduct as it was also his responsibility in preparing and verifying the complaint, and in conducting this litigation, to make diligent inquiry into the facts and to discontinue litigation when it became apparent it lacked any merit. The frivolous conduct by plaintiffs and their attorney has not only burdened defendant by forcing him to incur legal expenses in defense of needless litigation, it has burdened the court by having to intervene on defendant's behalf. An award of costs and sanctions is needed here not only to compensate defendant, but to deter abuse of the judicial system and to ensure the orderly administration of justice.

Most decisions awarding costs under Section 130.1-1 rely on the same two factors for support: 1) the financial burden imposed on the defendant by forcing him to defend against a spurious claim, and 2) the procedural and administrative burdens imposed upon the courts themselves in their inquiry into the merits of the complaint.

Thus, in *Levy v. Carol Management Corporation*, 260 aD2d 27 (1st Dept 1999), the court said, "22 NYCRR 130.1-1 allows us to exercise our discretion to impose costs and sanctions on an errant party" and "...[s]anctions are retributive, in that they punish past conduct. They are also goal-oriented, in that they are useful in deterring future frivolous conduct, not only by the particular parties, but also by the Bar at large."

Perhaps the strongest statement of a court's irritation with a frivolous claim occurred in *Weinstock v. Weinstock*, 253 aD2d 873 (2d Dept 1998). Holding that an appeal was "completely without merit," the court said, "[w]e therefore award the maximum authorized amount as a sanction for this conduct (see, 22 NYCRR 130-1.1) calling to mind that frivolous litigation causes a substantial waste of judicial resources to the detriment of those litigants who come to the Court with real grievances."

Judge Schack Speaks Again

Curiously enough, while I was in the process of writing this article, and less than a week after his decision in Robertson, Judge Schack decided another case involving frivolous pleading by a plaintiff and began his inquiry into possible sanctions against plaintiff's attorneys. *Wells Fargo Bank v. Reyes*, #5516/08, New York Law Journal, July 15, 2008. This time, the defendant was the right defendant, but the plaintiff was the wrong plaintiff.

Wells Fargo brought an action to foreclose on a mortgage affecting property in Brooklyn owned by defendant Reyes, who had allegedly defaulted in his payments. Unable to find and serve Reyes, Wells Fargo moved ex parte for service of a supplemental summons by publication.

Judge Schack conducted his own inquiry into the records of the automated City register Computer System (ACRIS) maintained by the New York City register and concluded that Wells Fargo did not own the Reyes mortgage and had never owned it. Indeed, the records showed that the mortgage was held by another mortgagor.

Judge Schack proceeded to deny Wells Fargo's motion for a supplemental summons with prejudice, and, adhering to the same policy he had used in *Robertson*, supra, he set the issue of possible sanctions against Wells Fargo's attorneys down for hearing.

Annoyed by what he called the "chutzpah" of Wells Fargo's attorney in challenging the efficiency of the office of the Kings County Clerk and in insisting on her interpretation of the rules controlling publication of the supplemental summons, Judge Schack said, quoting the attorney's own language:

Ms. McLoughlin needs to be cognizant that the making of a motion by an attorney who represents a client that alleges to be a plaintiff in a foreclosure action, and who in reality is not a plaintiff, imposes "an undue burden upon the Court's calendar and [the waste of the court's time] undermines judicial economy."

The Court is gravely concerned that it expended scarce resources on a motion by Wells Fargo, which is not the owner and has never been the owner of the Reyes' mortgage. Wells Fargo has no standing in the instant action. Ms. McLaughlin [sic] and her firm...will have to explain to the Court why this Court should not sanction them for making a frivolous motion pursuant to 22 NYCRR §130.1-1.

Judge Schack reviewed a line of cases holding that a plaintiff must have standing to sue before he may properly initiate a law suit against anyone. In actions to foreclose, for example, the plaintiff must show three distinct elements: 1) the existence of the mortgage and of a note establishing the debt; 2) that it is the owner of the mortgage; and 3) that the defendant has defaulted in his payments. *Campaign v. Barba*, 23 aD3d 327 (2d Dept 2005).

Judge Schack quoted Prof. David Siegel, NY Practice 4th Ed., § 136, p. 232:

[i]t is the law's policy to allow only an aggrieved person to bring a lawsuit....a want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

The Court was especially concerned to undo the *lis pendens* filed by Wells Fargo against the Reyes premises. Pointing out that a *lis pendens* is an extraordinary privilege designed to maintain the status quo ante in an action involving a dispute over real property, and that the 'privilege can be lost if abused' [*DaSilva v. Musso*, 76 NY2d 436 (1990), quoting Prof. Siegel], Judge Schack cancelled the *lis pendens* "in the exercise of the inherent power of the Court."

In directing that the issue of sanctions be determined at a special hearing, Judge Schack retraced the history of 22 NYCRR 130.1-1 and discussed some of the same cases he had relied on in the Robertson matter. (See, *Levy v. Carol Management Corporation*, supra.) The hearing in Wells Fargo is scheduled for August 1. We will report the outcome.

Violation of Disciplinary Rules

Omitted from both his opinions (Robertson and Wells Fargo, supra), was any discussion by Judge Schack of at least two other rules which bear on the issue of frivolous conduct, and, therefore, on the issue of sanctions.

DR 7.102 of the New York Code provides as follows:

A. In the representation of a client, a lawyer shall not:

1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
3. Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal. ...
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.
8. Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary rule

DR 7.102(a)(1) and (a)(5) are especially crucial because, together, they compel a lawyer to investigate the facts thoroughly before he initiates a law suit. Otherwise he cannot later disclaim knowledge of facts which make it "obvious" that his action would "serve merely to harass or maliciously injure another." If the plaintiff's attorney in Robertson, supra, had stopped to think, she would have recognized that two different corporations might have the same name except for the corporate appellations "Inc." or "Corp."; and if the attorney for Wells Fargo had stopped to think, she would have searched the title records to confirm that they listed Wells Fargo as the Reyes mortgagee.

DR 7.102(a) must be interpreted in the light of 22 NYCRR 130-1.1-a.(a),(b), which require a lawyer who serves a complaint on another party to sign the complaint, and which construe the lawyer's signature as certification that "to the best of [his] knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not

frivolous as defined in section 130-1.1(c) of this Subpart..." (see, definition of the term "frivolous conduct," supra.)

Also relevant to any inquiry into sanctionable conduct are DR 2-109(a)(1) and DR 2-110(B)(1). DR 2-109(a)(1) prohibits a lawyer from representing a new client if she "knows or it is obvious" that the client "wishes to bring a legal action, conduct a defense, or assert a position in litigation...merely for the purpose of harassing or maliciously injuring another person." The difference between DR 2-109(a)(1) and DR 7-102(a)(1) is that it controls whether a lawyer accepts an engagement in the first place, while DR 7-102(a)(1) applies to the lawyer's conduct in litigation.

DR 2-110(B)(1) and (2) control two of the circumstances requiring a lawyer's mandatory withdrawal from employment whenever (1) he is representing a client before a tribunal (with the court's permission if permission is required by its rules), or (2) he is representing a client in other matters. The circumstances are:

1. The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
2. The lawyer knows or it is obvious that continued employment will result in violation of a disciplinary rule.

These rules reinforce a lawyer's obligation to make sure of the facts his client is relying on before he serves his complaint and also his obligation to respond reasonably to opposing counsel who raises questions about the plaintiff's standing or about the defendant's responsibility in the matter. Of the two, the obligation to respond to a reasonable request for discontinuance by opposing counsel is the more critical. Courts are apt to excuse a mistake which is recognized and rectified; they are not as sympathetic when a mistake is confirmed but perpetuated.

But the courts generally have not extended their efforts to control frivolous litigation by referring offending lawyers to the disciplinary authorities. They have been satisfied to use the pressure of the pocketbook instead of the pain of discipline.

In his annual commentary and review of decisions on the Disciplinary Rules (*Simon's New York Code of Professional Responsibility Annotated*), Roy Simon cites only a handful of cases in which sanctions have led to discipline. Few of these cases involved a frivolous pleading, whether by a plaintiff who lacked standing, or by a plaintiff against the wrong defendant. Sanctions, however, can be a powerful disciplinary weapon. In *Haas v. A. C. and S. Inc.*, NYLJ, April 6, 2004, the firm of Weitz and Luxenberg was sanctioned \$500 for failure to discontinue a claim after it became clear that the plaintiff lacked standing. In *Ferraro v. Gordon*, 1 a.D.3d 595 (2d Dept 2003), the Court reversed the denial of sanctions where the proceeding was frivolous and was designed to harass various defendants.

On September 17, 1997, the four appellate Divisions adopted appendix a to 22 NYCRR Part 1200. Entitled Standards of Civility, the appendix defines the conduct expected of New York lawyers. The Preamble to the appendix emphasizes that the Standards are:

principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the ... Code of Professional responsibility and its Disciplinary rules, or any other applicable rule or requirement governing conduct.

Several of the Standards defining a lawyer's duties to other lawyers, litigants and witnesses are, however, relevant to the interest of the courts in discouraging frivolous litigation. Among a lawyer's duties as expressed in the Section entitled Lawyers' Duties to other Lawyers, Litigants and Witnesses are:

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

IX. Lawyers should not mislead other persons involved in the litigation process.

Conclusion

A lawyer who plans to institute a new litigation and who wishes to avoid the threat of sanctions and of professional discipline should be sure of two facts: 1) that his client has standing; and 2) that the defendant in his sights is the right defendant.

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