

Seldon v Lewis, Brisbois Bisgaard & Smith, LLP

2012 NY Slip Op 32867(U)

October 11, 2012

Sup Ct, New York County

Docket Number: 111916/10

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

PHILIP SELDON,
Plaintiff,

INDEX NO. 111916/10

- against-

MOTION SEQ. NO. 004

LEWIS, BRISBOIS BISGAARD & SMITH LLP,
and WILSON, EISER, MOSKOWITZ,
EDELMAN & DICKER LLP,
Defendants.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4, were filed in this motion by defendant to dismiss the Second Amended Complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1,2,3</u>
Answering Affidavits — Exhibits (Memo)	<u>4</u>
Replying Affidavits (Reply Memo)	

Cross-Motion: Yes No

Motion sequence numbers 004 and 005 are hereby consolidated for purposes of disposition.

Philip Seldon (plaintiff), *pro se*, commenced this action on September 8, 2010 by the filing of a summons with notice against two law firms, Lewis, Brisbois Bisgaard & Smith LLP (Lewis) and Wilson, Elser, Moskowitz, Edelman & Dicker LLP (Wilson) (collectively, defendants), seeking damages for their purported violations of Judiciary Law § 487, fraud and fraud on the Court.

In motion sequence 004, Lewis moves, pursuant to CPLR 3211(a)(7), for an Order dismissing the Second Amended Complaint, seeking the imposition of sanctions against plaintiff for costs and expenses, seeking to have plaintiff labeled a vexatious litigator and enjoining him from filing and serving any litigation papers in this matter without the prior approval of the Court. In motion sequence 005, Wilson moves, pursuant to CPLR 3211(a)(7), for an Order dismissing the Second Amended Complaint, seeking the imposition of sanctions against plaintiff for costs and expenses, and also seeking to have plaintiff labeled a vexatious

litigator and enjoining plaintiff from commencing any further litigations against anyone within the State of New York without first obtaining leave of the Court.

BACKGROUND

The instant action has a lengthy procedural history, arising out of the defendants representation of Neil Brody, Kevin Pollack and the law firm of Brody Fabiani & Cohen (collectively "the Brody defendants"), in an action entitled *Magazines Unlimited & Philip Seldon v Neil Brody, et al.*, Index no. 123638/00, in which plaintiff asserted causes of action for, *inter alia*, conversion of property (see Lewis Memorandum of Law at 3). This action was later consolidated with an action entitled *Seldon v Neil Brody, Kevin Pollack and Brody Fabiani & Cohen*, Index no. 11085/02, which was eventually transferred to Civil Court under Index no. 300621-TSN-2006 (collectively, "prior litigation"). Wilson represented the Brody defendants until 2008, when the file was transferred to Lewis (see Wilson Memorandum of Law at 3). Ultimately, plaintiff was unsuccessful in the prior litigation even after exhausting his appellate remedies (see Lewis Memorandum of Law at 4; Lewis Attorney Affidavit, exhibit F).

Subsequently, on or about September 8, 2010, plaintiff brought the herein action by the filing of a Summons with Notice against the respective law firms that represented the Brody defendants, asserting violations of Judiciary Law § 487, fraud and fraud on the Court in connection with the prior litigation. After defendants made a demand for a complaint and filed various motions, plaintiff served his initial complaint dated June 21, 2011. On or about August 5, 2011, defendants each brought a pre-answer motion to dismiss, pursuant to CPLR 3211(a)(7). Lewis brought motion sequence 002 and Wilson brought motion sequence 003, however Wilson also sought the imposition of sanctions against plaintiff, and sought to have plaintiff labeled a vexatious litigator and enjoining plaintiff from commencing any further litigations against anyone within the State of New York without first obtaining leave of Court.

Thereafter, plaintiff withdrew his complaint and filed an Amended Complaint with the

Court on December 6, 2011,¹ containing twenty-four causes of action. The first through twelfth causes of action assert violations of Judiciary Law § 487 on the basis that "defendants to this action intentionally deceived and/or attempted to deceive the courts by making false, fraudulent, deceptive and misleading statements . . . with the intention of deceiving and defrauding the courts into making an [sic] adverse decisions against [plaintiff]" (see Second Amended Complaint ¶ 12). Causes of action thirteen through twenty-four allege fraud (*id.* at 13). In sum plaintiff avers "the defendants violated Judiciary Law § 487 by intentionally deceiving and/or attempting to deceive the court via fraudulent statements or submissions in various litigation papers filed [in the prior litigation] and subsequent appeals" (Lewis Affidavit in Support ¶ 28), and but for the fraudulent conduct plaintiff avers that he would have prevailed in the prior litigation. In response, defendants each filed pre-answer motions to dismiss the Second Amended Complaint, motion sequences 004 and 005, respectively.

In support of their motions, defendants proffer: (1) that the allegations contained within plaintiff's Second Amended Complaint do not give rise to a cause of action under Judiciary Law § 487 because the conduct alleged by plaintiff was not intentionally fraudulent or false but made in the course of advocacy of their client; (2) plaintiff fails to plead his claims with sufficient specificity to support causes of action for fraud or deceit and are insufficient to state a claim under the Judiciary Law § 487; and (3) plaintiff fails to plead any facts which tend to establish that defendants' conduct proximately caused him damages and that but for the alleged fraudulent acts of defendants plaintiff would have prevailed in the prior litigation. Moreover,

¹ In their respective motions both Wilson and Lewis move to dismiss plaintiff's Second Amended Complaint (see Wilson Affirmation in Support at ¶ 2; Lewis Attorney Affirmation in Support at ¶ 2). Although plaintiff only filed one Amended Complaint with the Court, in both of their affirmations in support Lewis and Wilson aver that plaintiff served an Amended Complaint on or about September 20, 2011, and then served a Second Amended Complaint via fax on or about September 23, 2011, and attach same to their motion papers (see Wilson Affirmation, exhibit C and D; Lewis Attorney Affidavit, exhibit I and J). Although there are procedural issues with the manner in which plaintiff sought to amend his complaint, the defendants do not raise same and as such, the Court deems the Amended Complaint filed on December 6, 2011 to be plaintiff's Second Amended Complaint for purposes of this decision.

defendants contend that these causes of action are frivolous and brought without merit such that sanctions against plaintiff are warranted. In its Memorandum of Law Wilson submits a partial list of over 100 cases commenced by plaintiff over approximately the past forty years, which Wilson claims were frivolous, meritless and burdened the Court (see Wilson Memorandum of Law at 3-7). Lewis also submits a similar list of over 76 actions that plaintiff has commenced, also alleging that these actions were meritless and frivolous (see Lewis Memorandum of Law at 5-6). Plaintiff files opposition to the motions, but does not dispute the list of cases contained within each defendant's respective Memorandum of Law. Plaintiff, in each motion, files a sur-reply without prior Court permission and as such the sur-replies were rejected by the Court and will not be considered. On February 1, 2012, this Court heard oral argument on the motions and denied defendants' original motions to dismiss, Motion Sequences 002 and 003, as moot.

STANDARD

CPLR 3211(a), provides that:

"a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the

pleading states no legally cognizable cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

Judiciary Law § 487

New York Judiciary Law § 487 states in pertinent part that an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party is guilty of a misdemeanor and subject to forfeiture of treble damages to the injured party which may be recovered in a civil action."

DISCUSSION

The Court finds that plaintiff's Second Amended Complaint fails to plead fraud with the requisite specificity (*see* CPLR 3016[b]) and plaintiff also fails to state sufficient factual allegations which tend to show that defendants alleged deceit or fraud was the proximate cause of plaintiff's damages (*see Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297-98 [1st Dept 2004]). In looking to the substance of the pleading rather than to its form (*see Foley v D'Agostino*, 21 AD2d at 64), and in viewing the complaint in the light most favorable to the plaintiff and affording the plaintiff the benefit of every possible inference (*see*

Leon v Martinez, 84 NY2d at 87-88), the Court finds that plaintiff's claims are insufficient to state a cause of action pursuant to Judiciary Law § 487 as a matter of law (see *Briarpatch, Ltd., L.P.*, 13 AD3d at 297-298).

The Court now turns to the portion of defendants' motions seeking to label plaintiff a vexatious litigator, enjoin him from filing any further litigation and the defendants' request for the imposition of sanctions against plaintiff. Part 130 of the Rules of the Chief Administrator permits courts to sanction an attorney and/or a party for engaging in frivolous conduct, and such conduct is frivolous if it is: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (see 22 NYCRR § 130-1.1[c]; *Grayson v New York City Dept. of Parks and Recreation*, ___AD3d___, 2012 NY Slip Op 06559 [1st Dept 2012]; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Moreover, 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" (*id.* at 524-525).

Given plaintiff's extensive litigation history, particularly *pro se*, the Court concludes that he is a knowledgeable litigator and is familiar with Court orders and rules, including Rule 130. Among the many litigations in which plaintiff was a party, in the prior litigation he was enjoined from filing and serving any litigation papers without prior Court approval (see Lewis exhibit K, Order dated September 4, 2002, J. Kapnick). Plaintiff has also been sanctioned previously in the amount of \$9,032.50, pursuant to 22 NYCRR part 130, for engaging in frivolous conduct (see *Seldon v Bruno*, 204 AD2d 180 [1st Dept 1994]). Furthermore, proceeding *pro se* is not a license to ignore Court orders or rules (see *Couri v Siebert*, 48 AD3d 370 [1st Dept 2008]).

Moreover, plaintiff was forewarned about the possibility of sanctions from the prior litigation and from Motion Sequence 003 in the herein action, in which Wilson sought, among other things, the imposition of sanctions.

At this time, the Court exercises its discretion to impose sanctions and costs on the plaintiff for bringing this action (*see* 22 NYCRR § 130-1.1[a]) as it is completely without merit in law and undertaken primarily to harass or maliciously injure the defendants (*see* 22 NYCRR § 130-1.1[c][1], [2]), and as a policy, frivolous and baseless litigation will not be tolerated by this Court. Here, plaintiff chose to amend his complaint, requested that the Court dismiss Wilson's original motion as moot and then proceeded to prosecute his claims, even after defendants' motions for sanctions and an injunction were filed. Thus, plaintiff was given ample notice and opportunity to withdraw his claims to avoid sanctions and an injunction, and continued his conduct after it was apparent that a legal basis to do so was lacking (*see Fowler v Conforti*, 194 AD2d 394, 394 [1st Dept 1993] ["the imposition of the maximum sanction of \$10,000 for frivolous conduct was appropriate in this circumstance since plaintiff was forewarned about the dubious nature of this action and further because the plaintiff has repeatedly engaged in vexatious litigation"]).

The Court also finds it appropriate to label plaintiff a vexatious litigator and enjoin him from filing any further litigation papers in connection with the herein action without prior Court approval (*see Dimery v Ulster Savings Bank*, 82 AD3d 1034 [2nd Dept 2011] ["Public policy generally mandates free access to the courts . . . [h]ere, however, the record reflects that the plaintiff forfeited that right by abusing the judicial process through vexatious litigation. Accordingly, it was not improper for the Supreme Court to enjoin the plaintiff from bringing any further motions regarding the subject matter of the instant action without its permission"]).

Accordingly, the portions of motion sequence numbers 004 and 005 brought by defendants to dismiss the Second Amended Complaint, for the imposition of sanctions against

plaintiff for costs, and to have plaintiff labeled a vexatious litigator and enjoining plaintiff from filing and serving any further litigation papers in this matter without prior Court approval, are granted. However, the portion of motion sequence 005 seeking to enjoin plaintiff from commencing any further litigations against anyone within the State of New York without first obtaining leave of the Court is denied as overly broad.

CONCLUSION

Accordingly, it is

ORDERED that the portion of Lewis' motion (motion sequence 004) for an order dismissing the Second Amended Complaint, pursuant to CPLR 3211(a)(7), is granted and the Second Amended Complaint as asserted against it is hereby dismissed with costs and disbursements to Lewis as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the portion of Lewis' motion (motion sequence 004) seeking the imposition of sanctions against the plaintiff for costs and expenses, is granted; and it is further,

ORDERED that the portion of Lewis' motion (motion sequence 004) seeking to have plaintiff deemed a vexatious litigator and enjoining plaintiff from filing and serving any litigation papers in this matter without prior Court approval is granted; and it is further,

ORDERED that the portion of Wilson's motion (motion sequence 005) for an order dismissing the Second Amended Complaint, pursuant to CPLR 3211(a)(7), is granted and the Second Amended Complaint as asserted against it is hereby dismissed with costs and disbursements to Wilson as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the portion of Wilson's motion (motion sequence 005) seeking the imposition of sanctions against the plaintiff for costs and expenses, is granted; and it is further,

ORDERED that the portion of Wilson's motion (motion sequence 005) seeking to have

plaintiff deemed a vexatious litigator and enjoining plaintiff from commencing any further litigations against anyone within the State of New York without first obtaining leave of the Court is granted to the extent that plaintiff is deemed a vexatious litigator, but is otherwise denied; and it is further,

ORDERED that plaintiff is enjoined from filing and serving any litigation papers on the defendants in this matter, in their individual or representative capacities, against their agents or employees, or the attorneys that represented them without prior Court approval; and it is further,

ORDERED that any new actions brought by plaintiff against the defendants in this matter, in their individual or representative capacities, against their agents or employees, or the attorneys that represented them, that were commenced prior to the signing of this Order are hereby stayed; and it is further,

ORDERED that the issue of the amount of reasonable attorneys fees and actual expenses reasonably incurred by defendants Lewis Brisbois Bisgaard & Smith LLP and Wilson, Elser, Moskowitz, Edelman & Dicker LLP in the defense of the herein action, to which they are entitled pursuant to Section 130-1.1 of the Rules of the Chief Administrator, is hereby referred to a Special Referee to hear and determine; and it is further,

ORDERED that pursuant to Section 130-1.1 of the Rules of the Chief Administrator, plaintiff is hereby sanctioned in the amount of \$10,000.00 and shall deposit said amount with the County Clerk, together with a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; it is further,

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 7 and opposing counsel within 30 days after service of a copy of this order with Notice of Entry; it is further,

ORDERED that, in the event that such proof of payment is not provided in a timely

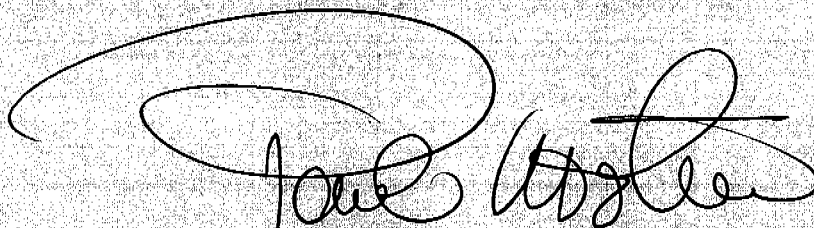
manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against plaintiff in the aforesaid sum, and it is further;

ORDERED that counsel for Lewis directed to serve a copy of this Order with Notice of Entry on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee, and it is further;

ORDERED that counsel for Lewis is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly, within 30 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 10/11/12


Paul Wooten J.S.C.

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