Gordon v. DreamWorks Animation SKG, Inc. et al Doc. 51 Att. 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAYME GORDON,

Plaintiff,

v.

DREAMWORKS ANIMATION SKG, INC., DREAMWORKS ANIMATION LLC, and PARAMOUNT PICTURES CORP.,

Defendants.

Civil Action No. 1:11-cv-10255-JLT

[PROPOSED] REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR PLAINTIFF'S FAILURE TO APPEAR AT DEPOSITION

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INTRODUCTION

Plaintiff's Opposition Brief fails to provide the Court with any reason for his intentional failure to appear at his deposition and provide sworn testimony. Plaintiff attacks Defendants and their counsel, and complains about the conduct of a lawful investigation, but provides absolutely no good cause supporting the deliberate decision to unilaterally cancel his long-scheduled deposition. Two days before his deposition, Plaintiff's counsel announced that Plaintiff was refusing to appear and Defendants informed Plaintiff's counsel that they would be filing a motion to dismiss his Complaint for this failure to appear. Thereafter, Plaintiff filed an unsubstantiated Emergency Motion for a Protective Order that was nothing more than a maneuver intended to delay Plaintiff's deposition, prejudice the Court against Defendants' counsel and obtain a copy of whatever Defendants had discovered about Plaintiff.

Although Defendants considered Plaintiff's Complaint inherently suspicious upon receipt for numerous reasons,[1] these concerns were further heightened by the obvious deficiencies in his initial disclosures; Plaintiff appeared to be merely a scam artist. Based on this, Defendants' counsel, in absolute good faith, initiated a reasonable and lawful background investigation into Plaintiff.

Plaintiff's counsel, who previously admitted that Plaintiff (in Plaintiff's counsel's words) "discarded" material evidence that is the absolute core of his lawsuit, became aware of this investigation and apparently saw an opportunity: delay his long scheduled deposition, request a

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[1] As previously noted in this Motion and Defendants' Opposition to Plaintiff's Emergency Motion for a Protective Order (Dkt. No.34), Defendants and their counsel found Plaintiff's claim unbelievable due to the irrefutable preexisting evidence of independent creation of *Kung Fu Panda* in the Dunn matter, the filing of this action (without any prior claim or contact) almost three years after the release of the movie, the unsubstantiated and even bizarre theories of how/when Defendants had allegedly accessed Plaintiff's purported works, the vague allegations of what Plaintiff purportedly sent to Disney and DreamWorks, the dubious timing of the

copy of whatever Defendants had uncovered, and attempt to paint Defendants' counsel as unethical attorneys who only would have initiated an investigation to harass and intimidate Plaintiff. After Defendants set forth their numerous reasons for why they legitimately believe Plaintiff's claim is a complete scam that obligated them to investigate his background,[2] the response of Plaintiff's counsel was to use out of context and partial quotes from Defendants' pleadings to falsely accuse Defendants' counsel of making misrepresentations to the Court,[3] rely on Plaintiff's own self-serving, hearsay-ridden declaration and benign third party declarations to draw unsupported and inconsistent inferences about the background investigation into Plaintiff and, when even this appeared insufficient, submit a third pleading disclosing privileged and confidential settlement communications and falsely represent the content of these communications.[4]

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copyright registrations of his unpublished works and the many material allegations made on information and belief.

[2] In addition to the concerns set forth in Footnote 1, supra, Defendants also discovered that Plaintiff destroyed/discarded his computer and all of the electronic files associated with his 2008 and 2011 copyright registrations that he registered in anticipation of this litigation (i.e., the first time he registered any works containing "Kung Fu Panda Power" or "Five Fists of Fury"). Defendants also discovered that Plaintiff's counsel intentionally manipulated a *Kung Fu Panda* marketing image in order to mislead any reader of the Complaint into concluding that Defendants must have copied one of Plaintiff's unpublished works that was never submitted to Defendants or seen by anyone associated with the creation of the movie.

[3] Significantly, at no time has Plaintiff disputed that voluminous, irrefutable evidence of the independent creation of *Kung Fu Panda* exists and has been in the possession of Plaintiff's counsel for many months.

[4] For the avoidance of doubt and without further disclosing any privileged and confidential communications in this action, Defendants and their counsel object to Plaintiff's counsels' disclosures in the recent pleading (Dkt. No. 50-1) and completely reject their false characterization of these communications. Given that Plaintiff's counsel made this disclosure in a reply brief filed four Court days before the scheduled hearing, and on a motion that has nothing to do with these settlement discussions, Defendants will address this obvious violation of this Court's rules and the Federal Rules of Evidence in a subsequent motion.

Defendants' counsel initiated a lawful investigation into Plaintiff in good faith. There is no evidence of any improper purpose or any conduct that violates any law or ethical rule. Nothing about this investigation justified Plaintiff's refusal to appear at his deposition and his conduct and the content of his subsequent pleadings justifies the relief sought by Defendants.

ARGUMENT

Instead of submitting evidence showing that Defendants' investigation was not justified or that it caused the Plaintiff to be afraid to truthfully testify, Plaintiff continues to make unsubstantiated claims of "harassment and intimidation" and focuses on "misrepresentations" that he contends were made to this Court by Defendants. These so-called "misrepresentations" are nothing of the sort – and a closer view of Plaintiff's arguments shines a clear light on what this case is really about when the hysteria and hyperbole is stripped away.

A. Plaintiff Had No Justification For His Refusal To Appear At His Deposition.

Plaintiff claims that he refused to testify at his deposition so that he could seek a protective order – but his opposition fails to justify his own motion or even explain what conduct he was attempting to prohibit. Plaintiff submitted a conclusory declaration and statements from third parties who each testify that they were asked whether they knew the Plaintiff, none of which suggests that the "true purpose" of Defendants' conduct was to "annoy, embarrass, or oppress, or that there is no prospect that it will lead to the discovery of relevant evidence." *McCarron v. J.P. Morgan Sec., Inc.,* 2008 U.S. Dist. LEXIS 40059 at *7 (D. Mass. 2008) (Stearns, J.) (denying motion for protective order). Plaintiff's arguments and implications are not evidence and his own submissions make it clear that no one was lied to, harassed or intimidated.

Plaintiff's failure to provide any evidence of "harassment" speaks volumes about the true intention of his refusal to appear and testify, which was clearly a maneuver designed by

Plaintiff's counsel to delay his deposition, to prejudice the Defendants and their counsel with this Court and to obtain protected work product. Moreover, even by Plaintiff's counsel's own admission, this purported "harassment" did not cause his failure to appear. In Plaintiff's reply brief in support of his Motion for a Protective Order (Dkt. No. 51-1 at p. 3), counsel asserts that Mr. Gordon had "no intention of postponing the deposition" as late as October 14, weeks after discovering the fact that he had been observed, and that he only canceled the deposition because he was unsatisfied with a "noncommittal" response by Defendants. In opposition to this motion, however, Mr. Gordon offers the opposite explanation, stating that he was too "distracted" and "fearful" to proceed with his deposition "as a direct result" of the alleged misconduct of the investigator. Opp. Brief (Dkt. No. 46), p. 19. In fact, the primary objection of Plaintiff's counsel – that investigators were not covert enough in their attempt to figure out where, if anywhere, Plaintiff was employed as an artist or if he was involved in other scams – was alleviated when Defendants' counsel confirmed the observation of Plaintiff had concluded weeks before his long scheduled deposition. There was simply no reason he could not have testified at his deposition.

B. Plaintiff Has Provided No Evidence Of Any Harassment Or Illegal Activity.

Although Plaintiff accuses Defendants' counsel of a felony punishable by ten years in prison, his claims of "harassment and intimidation" are baseless and are supported only by a series of unexceptional statements concerning the background investigation at issue that he submitted with his opposition. Plaintiff's prior employers and associates were lawfully contacted and interviewed, and Plaintiff was observed but was never contacted.[5] There was

[5] Although Plaintiff baldly asserts the investigation was conducted in a misleading fashion, the evidence he submitted supports the opposite conclusion. His third party declarations demonstrate that no one was lied to, no one was threatened and, indeed, the investigators were entirely forthcoming, disclosing their names and the names of their firms to any third party they

nothing illegal about this conduct, nor was it designed, in any way, to "harass" anyone, including the Plaintiff.[6] Plaintiff's claims in this case appear to be fraudulent and provide a clear basis to investigate the Plaintiff, his employment and prior conduct, and his previous claims made against others and claims made against him.

Plaintiff asserts that defense counsel's legitimate intent to investigate his dubious allegations is "irrelevant" and that all that matters is his own subjective feelings. Both premises are false. The witness intimidation statute expressly requires a "willful" intent to intimidate or harass; "recklessness" bears only on the awareness of any possible effect on any testimony. Mass. Gen. L. c. 268 § 13B (2011). Gordon's detection of the unremarkable fact that his allegations and background were being investigated is hardly the basis for inferring a criminal intent to harass him. And the standard for judging the effect of counsel's conduct is its "ordinary effects on a reasonable person, not the personal reaction of the particular, potential witness." *Commonwealth v. Rivera,* 76 Mass. App. Ct. 530, 531 (2009), *rev. denied,* 457 Mass. 1103 (2010). Here Plaintiff only avers, with no rational basis, that he had a fleeting and quickly-dispelled concern for his family, which was nowhere near the events in question, and that he was "distracted," a condition for which, contrary to his unsupported assertions, the statute provides no remedy. Gordon did <u>not</u> allege that he was afraid to testify at his deposition or to do so truthfully. Rather, despite the fact that he knew that any observation of him had ended weeks earlier, he simply did not want to appear until he could attempt to learn what the investigation

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spoke to. In fact, the investigators even communicated by e-mail and included their contact information on their e-mail signature block.

[6] Defendants do not need to address each and every unsupported claim made by Plaintiff and his counsel, but there is no evidence of any unlawful entry to any location, any loud banging on any doors or any other incident at Plaintiff's mother's apartment complex.

might have uncovered. That gambit suggests that Gordon's only real fear was of being caught in lies at his deposition.

Similarly, Defendants have not located a single authority where conduct remotely related to that alleged by Gordon has given rise to sanctions for professional misconduct. No decision has ever been issued that would preclude the investigation that was conducted in this case – no relatives of the Plaintiff were contacted, no harassment or intimidation whatsoever took place, and no one was lied to or deceived into making any false statements. The fact that third parties were spoken to and provided truthful information is not, and cannot be, a violation of any rule or law.[7] Plaintiff's citation to *In Re Crossen* is inapposite as the facts of that case do not even bear a remote relationship to the background investigation conducted in this case.[8]

C. There Is No Dispute That Plaintiff Failed To Preserve Material Evidence After He Intended To Pursue This Claim.

It is undisputed that Plaintiff disposed of his computer that contained critical evidence directly relating to his claims after he was aware of *Kung Fu Panda*. Plaintiff's brief makes no attempt to explain or deny this fact other than to take issue with the term "threw away" and to argue that Defendants made a "misrepresentation" to the Court because, in truth, Plaintiff merely

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[7] Mr. Gordon's Opposition makes the unsubstantiated claim that DreamWorks' counsel also violated Mass. R. Prof. C. 4.3. However, the purpose of that rule is to prevent an unrepresented party's incorrect assumption "that a lawyer is disinterested in loyalties or is a disinterested authority on the law," and nothing of the kind is alleged. Mass. R. Prof. C. 4.3, Cmt. Moreover, the rule "does not require that lawyers disclose the identity of the client to the unrepresented person." Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS §4.3-1 (West 2011-2012).

[8] *In re Crossen*, 450 Mass. 533 (Mass. 2008) ("Crossen was a willing participant, and at times a driving force, in a web of false, deceptive, and threatening behavior designed to impugn the integrity of a sitting judge in order to obtain a result favorable to his clients. The scope of this misconduct has scant parallel in the disciplinary proceedings of this Commonwealth. This was not conduct on the uncertain border between zealous advocacy and dishonorable tactics, a border about which reasonable minds may differ.").

"discarded" this crucial evidence after he knew that he would be filing this lawsuit. Opp. Brief (Dkt. No. 46), pp. 6-7.[9]

D. Defendants' Purported "Misrepresentations" To The Court Do Not In Fact Exist, And Are Nothing More Than Out Of Context Or Partial Quotes From Defendants' Motion.

In addition to asserting "threw away" is somehow different than "discarded," Plaintiff took selected, out of context or partial quotes from the Motion To Dismiss to argue that Defendants presented a false impression of Plaintiff's discovery misconduct in this case. In his opposition, Plaintiff claims Defendants misled the Court about his destruction of material electronic evidence by repeatedly citing to his production of "over 5,000 files."[10] In truth, these files relate to Plaintiff's 1999/2000 websites and Defendants' motion expressly acknowledged that Plaintiff had produced them. See Motion, n.4, Zavin Decl., ¶5 ("…aside from files that relate to the electronic information that was included on Gordon's websites in or about 1999/2000, which files have no bearing on the claim that Plaintiff ever created either "Kung Fu Panda Power" or the "Five Fists of Fury", none of Plaintiff's electronic files containing his artwork or stories were turned over in this lawsuit."). Plaintiff's counsel ***deliberately excluded the first half of this sentence*** to support his argument that Defendants mislead the Court by

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[9] Plaintiff took the opposite approach in his most recent pleading to support the assertion that "observation" has the same meaning as "investigation." By giving these two different terms the same meaning, Plaintiff was able to disingenuously argue that Defendants' counsel made a misrepresentation to the Court that they had ceased investigating Plaintiff when the Defendants had clearly said that any "observation" of the Plaintiff (which is supposedly what upset Plaintiff) had ceased. (Dkt. No. 50-1, pp. 4-5).

[10] As a threshold matter, this statement in itself is a gross exaggeration. In fact, Plaintiff produced thousands of electronic files that were identical or virtually identical (e.g., the exact same image saved in different file formats), and the number of unique images and stories actually a faction of the 5,000 cited by Plaintiff's counsel. In any event, these files do not include the "Kung Fu Panda Power" or "Five Fists of Fury" works that are the core of this lawsuit and they do not contain a single image or story that could possibly serve as a legitimate basis for an infringement claim involving *Kung Fu Panda*.

asserting “none of Plaintiff’s electronic files containing his artwork or stories were turned over in this lawsuit.” Opp. p.8.

It is undisputed that Plaintiff ”discarded” his computer, and that relevant electronic documents were on that computer. Plaintiff’s counsel acknowledges that Plaintiff used a computer to prepare his 2008 and 2011 registrations of his “Kung Fu Panda Power” and “Five Fists of Fury” artwork and stories with the Copyright Office, and acknowledges that these files no longer exist. Opp. Brief (Dkt. No. 46), p. 9. So, (1) Plaintiff learned of the film *Kung Fu Panda*; (2) Plaintiff used his computer to create art work relating to a work called “Kung Fu Panda Power” that included his “Five Fists of Fury”; (3) Plaintiff registered these “Kung Fu Panda Power” works with the Copyright Office in 2008 and 2011; (4) Plaintiff discarded his computer and the key electronic files at issue; and (5) Plaintiff filed this lawsuit. Nowhere in Plaintiff’s papers are these facts disputed.

Plaintiff’s repeated reference to the other, immaterial electronic files that he did retain is nothing more than a transparent ploy to distract from the fact that the key evidence in this case that would support or refute Plaintiff’s claims was destroyed (“discarded”) by Plaintiff after he knew he would be making a claim against Defendants.

CONCLUSION

Defendants request that the relief requested in the Motion To Dismiss be granted.

Dated: November 14, 2011

Respectfully submitted,

DREAMWORKS ANIMATION SKG, INC.,
DREAMWORKS ANIMATION, LLC, and
PARAMOUNT PICTURES CORP.,

By their attorneys,

/s/ *John A. Shope*

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/s/ *David A. Kluft*