Mikhlyn et al v. Bove et al Doc. 160

VAL MANDEL, P.C.
80 Wall St., Suite 1115
New York, New York 10005
(212) 668-1700
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VADIM MIKHLYN, INGA MIKHLYN, and ABC ALL CONSULTING, INC. Plaintiffs -against- ANA BOVE, POLINA DOLGINOV ANNA BOVE COMPANY, LLC, ANA BOVE COLLECTIONS, INC. and ANNA BOVE EMBROIDERY SUPPLIES, INC. Defendants.	08 CV. 03367(ARR-RER)
ANA BOVE, ANNA BOVE COMPANY, LLC, and ANNA BOVE EMBROIDERY SUPPLIES, INC., Counter-Plaintiffs, -against- VADIM MIKHLYN, INGA MIKHLYN and ABC ALL CONSULTING, INC., Counter-Defendants.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO RULE 37

Dockets.Justia.com

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. Most of Defendant's Memorandum of Law is an irrelevant and Unreliable Attack on the Integrity of Plaintiffs and their Attorneys 2

II. Defendants Cannot Avoid Sanctions by Hiding Behind their former Attorneys 3

III. Plaintiffs' Have Fully Complied with Their Discovery Obligations 5

IV. Defendants' Have Repeatedly Failed to produce Documents in their Possession, Custody or Control 7

A. Defendants Failed to Produce Documents Under Their Control 7

B. Defendants have not Produced all of the Documents in Their Possession 8

i. Defendants Suppressed Their QuickBooks File 8

ii. Defendants Cannot Evade Their Deposition Testimony 9

iii. Defendants' Explanation for the Absence of Chat Records is False 10

iv. Defendants' Explanation for the Absence of E-mails is False 13

V. Default Judgments Must be Entered Against the Corporate Defendants 16

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES

Acme American Repairs, Inc. v. Katzenberg
2007 U.S. Dist. LEXIS 23097 (E.D.N.Y. March 29, 2007) 4

Babaev v. Grossman
2008 U.S. Dist. LEXIS 77731 (E.D.N.Y. Sept. 8, 2008) 7

Cine Forty-Second Street Theatre
602 F.2d 1062, 1068 & fn 10 (2d Cir. 1979) 4

Dayco Corp. v. Foreign Transaction Corp.
1984 U.S. Dist. LEXIS 15031 (S.D.N.Y. July 11, 1984) 4

EEOC v. Johnson and Higgins, Inc.
1998 U.S. Dist. LEXIS 17612 (S.D.N.Y. November 6, 1998) 10

Fierro v. Gallucci
2010 U.S. Dist. LEXIS 27664 (E.D.N.Y. March 24, 2010) 1

GPA Inc. v. Liggett Group.
1996 U.S. Dist. LEXIS 9644, 1996 WL 389288 (S.D.N.Y.
July 10, 1996) 4

Grace v. Bank Leumi Trust Co.
443 F.3d 180, 192 (2d Cir. N.Y. 2006) 17

In Re Flag Telecom Holdings, Ltd. Securities Litigation
236 F.R.D. 177, 180 (S.D.N.Y. 2006) 7

Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples.
Int'l Union
2004 U.S. Dist. LEXIS 17093 (S.D.N.Y. August 27, 2004306 F.3d
99, 106 (2d Cir. 2002) 4

Perez v. Siragusa
2008 U.S. Dist. LEXIS 51593 (E.D.N.Y. July 3, 2008) 4

Riddell Sports Inc. v. Brooks
158 F.R.D. 555, 558 (S.D.N.Y. 1994) 7

Salahuddin v. Goord
467 F.3d 263, 278 (2d Cir. 2006) 1

INTRODUCTION

Plaintiffs respectfully submit this reply memorandum of law in further support of their motion for sanctions against all defendants pursuant to Rule 37 of the Federal Rules of Civil Procedure and for a default judgment against the corporate defendants pursuant to Rule 55.[1]

ARGUMENT

As a preliminary matter, we are constrained to note that defendants' seventy six page memorandum of law consists almost entirely of unsworn and unsubstantiated factual assertions. The Court may ignore unsworn assertions even when they are made by pro se litigants. See Salahuddin v. Goord, 467 F.3d 263, 278 (2d Cir. 2006); Fierro v. Gallucci, 2010 U.S. Dist. LEXIS 27664 (E.D.N.Y. March 24, 2010).

There are several reasons why defendants' unsworn assertions should be ignored. First, Ms. Bove and Ms. Dolginov understand the need for sworn statements as well as how to prepare them. In fact, they both filed declarations along with

[1] Defendants' opposition memorandum is more than three times the length allowed under Your Honor's rules, and is one of a multitude of recent, related submissions from defendants, most of which were not authorized by Your Honor or Court rules. Although our reply memorandum at 17 pages also exceeds Your Honor's Rules, we believe it is reasonable given the volume and number of submissions we have had to deal with, and we ask Your honor to accept it.

their lengthy, unsworn memorandum. They just chose to omit most of their purported facts from those sworn declarations. These defendants have reviewed, signed and submitted a total of six affidavits during the course of this case. They fully understand the idea that assertions have to be backed up by an oath if they are to be given any weight by the Court.

Second, defendants, though unrepresented, are not proceeding without assistance. As noted in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Appoint Counsel (Docket No. 120), on P. 6, and as defendants' recent letter of September 9, 2010 confirms, they continue to receive informal assistance from the firm of Levisohn Berger, although the firm withdrew from the case on May 25, 2010. Defendants have also made clear in their letters to the Court that they have actively sought and obtained guidance from the pro se office.

I. Most of Defendants' Memorandum of Law is an Irrelevant and Unreliable Attack on the Integrity of Plaintiffs and their Attorneys

The core of Defendant's Memorandum of Law is a laundry list of "crimes" and "frauds" and "lies" supposedly perpetrated by plaintiffs and, at times, their counsel. Apart from being almost entirely conclusory and unclear, the accusations have no

apparent bearing on the legal analyses applicable to the motions made by defendants.

We will not be drawn into a point by point discussion of these irrelevant accusations. But it's worth examining one of defendants' points to demonstrate Ms. Bove's penchant for distortion and hyperbole. Twice, Ms. Bove quotes Vadim Mikhlyn's deposition testimony that "if it's in my basket, it belongs to me." Ms. Bove would have the Court believe that Mr. Miklyhn was invoking some rapacious, amoral personal code, i.e. if something is within my reach, I'll seize it and make it mine.

In fact, even the single out of context transcript page submitted as an exhibit by defendants shows that Mr. Mikhlyn was speaking narrowly about technical issues regarding the transfer, registration and ownership of internet domain names. The evidence will show that the "basket" Mr. Mikhlyn referred to was simply his account statement from a domain hosting company.

II. Defendants Cannot Avoid Sanctions by Hiding Behind their former Attorneys

The main theme of defendants' opposition to Rule 37 sanctions is that their former attorneys are to blame for any discovery violations. Defendants point a finger at their former attorneys no less than 30 times, and actually quote or

paraphrase attorney-client communications no less than 20 times, in their effort to pass the buck.

Defendants' blame strategy cannot work:

> A litigant chooses counsel at his peril, and... counsel's disregard of his professional responsibilities can lead to extinction of his client's claim... The acts and omissions of counsel are normally wholly attributable to the client.

Cine Forty-Second Street Theatre, 602 F.2d 1062, 1068 & fn 10 (2d Cir. 1979); see Perez v. Siragusa, 2008 U.S. Dist. LEXIS 51593 (E.D.N.Y. July 3, 2008); Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples. Int'l Union, 2004 U.S. Dist. LEXIS 17093 (S.D.N.Y. August 27, 2004); Dayco Corp. v. Foreign Transaction Corp., 1984 U.S. Dist. LEXIS 15031 (S.D.N.Y. July 11, 1984).

If the Court nonetheless believes that the apportionment of blame between lawyer and client is relevant, it must follow that defendants have waived their attorney client privilege, at least as to communications about discovery. "A waiver 'by assertion' occurs when a client puts otherwise privileged communications at issue in some way in litigation. See Acme American Repairs, Inc. v. Katzenberg, 2007 U.S. Dist. LEXIS 23097 (E.D.N.Y. March 29, 2007) (citing GPA Inc. v. Liggett Group., 1996 U.S. Dist. LEXIS 9644, 1996 WL 389288 (S.D.N.Y. July 10, 1996) (once a client discloses privileged communication, courts will generally

require disclosure of all otherwise privileged communications on the same subject). Defendants cannot use privileged communications as a sword to advance their position in this case, and then invoke the privilege as a shield to prohibit plaintiffs from testing defendants' assertions.

III. Plaintiffs Have Fully Complied with Their Discovery Obligations

Defendants argue that plaintiffs are equally at fault for the incomplete status of discovery, citing our "admission" that as of March 6, 2010, plaintiffs still owed the defendants their QuickBooks in native format. The history of QuickBooks discovery actually highlights the dramatic difference between the respective side's compliance with discovery obligations and Court orders.

When the parties appeared at an off the record conference with the Court on December 22, 2009, there was not a single discovery item allegedly owed by plaintiffs, notwithstanding plaintiffs' repeated pleas to defendants' counsel to provide us with a list of such items. At the same time, defendants still owed many items, including things like defendants' Spanish and Israeli bank records from 2002-2004, which they were ordered to produce on July 18, 2009.

During the December 22 conference, the Court, at defendants' request, directed plaintiffs to produce their QuickBooks in native format (even though plaintiffs had already produced detailed Profit and Loss reports from QuickBooks).

Following the December 22 conference, we communicated with defendants about how to arrange the production, given our clients' concerns about sensitive business information contained in the QuickBooks records. See the Akselrod Reply Declaration, Exhibit 1. As they had done so many times before (and after), defendants simply ignored our communications. They also failed to produce the many items of discovery that were long overdue from them despite the new leaf they were supposedly turning over at the time of the December 22 conference. The QuickBooks issue did not delay discovery - defendants simply dropped out of sight and showed no interest in moving the case along.

Notwithstanding (a) defendants' failure to communicate with plaintiffs about the QuickBooks records and (b) defendants' continued failure to turn over the many categories of documents and information that they owed, including native format versions of the MSN chat logs, plaintiffs unilaterally turned over their QuickBooks records in native format on April 6, 2010. See Akselrod Reply Declaration, Exhibit 2.

We respectfully submit that the history of the QuickBooks issue, along with every other discovery issue, shows one side

participating in discovery in good faith and the other side not participating at all.

IV. Defendants' Have Repeatedly Failed to Produce Documents in their Possession, Custody or Control

A. Defendants Failed to Produce Documents Under Their Control

The crux of defendants' argument about financial disclosure is that they provided all financial information in "in their possession," and that plaintiffs were offered the opportunity to pay for and/or subpoena financial records in the possession of third party financial institutions.

Defendants' argument is factually baseless and legally untenable. It is well established that if the producing party has the legal right or practical ability to obtain requested documents, then it is deemed to have "control" of such documents even if the documents are in the possession of a non-party. In Re Flag Telecom Holdings, Ltd. Securities Litigation, 236 F.R.D. 177, 180 (S.D.N.Y. 2006); Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994). A party's own bank records are unquestionably under its "control" for discovery purposes. See Babaev v. Grossman, 2008 U.S. Dist. LEXIS 77731 (E.D.N.Y. Sept. 8, 2008).

The notion that defendants offered to let plaintiffs pay for and/or subpoena the foreign financial records also is a

complete fiction. There is no such offer in the long history of this case, and such an offer would not make sense. The foreign banks used by defendants are beyond the subpoena power of the Court.[2] Plaintiffs found this out themselves when they served subpoenas (on their own initiative, not by invitation) on the United States branches of three Israeli banks. See Akselrod Reply Declaration, Exhibit 3.

B. Defendants have not Produced all of the Documents in Their Possession

i. Defendants Suppressed Their QuickBooks File

During discovery, defendants sought production of plaintiffs' QuickBooks files. The subject was raised at a number of conferences and eventually the Court directed plaintiffs to produce their QuickBooks files, subject to "Attorney Eyes Only" designation of sensitive business information based on the Protective Order in this case, entered on September 10, 2009, (Docket No. 84) and on the general principals of documents protection the Court outlined in previous conferences. See Akselrod Declaration, Exhibit 4, P. 51:13 - P. 52:8. The defendants, on the other hand, have repeatedly stated (under oath at times) that they maintained no QuickBooks files for

[2] As for the non-existent offer(s) to let us pay for the production of records in the possession of third parties, defendants either do not realize or have forgotten that plaintiffs have produced a far greater volume of documents and other materials than they have received from defendants. In any net accounting of costs, money would come from defendants to plaintiffs.

their companies. See Akselrod Reply Declaration, Exhibit 5, P. 56:19 - P. 57:6. Defendants repeated this denial as recently as August 20, 2010, in their Three Motions filing. See Three Motions (Docket #145), Page 3, Reason #4.

Plaintiffs', however, recently uncovered a file attached to an e-mail from Tatiana Skovish, defendants' accountant, produced belatedly on June 1, 2010 by defendants' former attorneys. The file, a Profit & Loss statement for Anna Bove Company, LLC, is an export from QuickBooks to Microsoft Excel. See Akselrod Reply Declaration, Exhibit 6 and Inga Mikhlyn's Reply Declaration ("I. Mikhlyn Reply Declaration"), ¶ 3. Ms. Skovish also testified that Anna Bove Company, LLC's tax returns were based in part on a QuickBooks statement prepared by the defendants' former accountant. See Akselrod Reply Declaration, Exhibit 7, P. 57:12 - P. 58:12.

ii. Defendants Cannot Evade Their Deposition Testimony

Defendants attempt to explain away their suppression of critical emails and internet chats cannot work. First, even if defendants advanced their new story about emails and chats in a sworn affidavit or declaration, they could not be used to contradict defendants' deposition testimony. Innumerable cases have held that an affidavit on a motion cannot be used to contradict, or create doubts about, the same witness's earlier deposition testimony. Although the principle is most often

cited in the context of summary judgment practice, it applies with equal force to other motions, including motions for sanction under Rule 37. See EEOC v. Johnson and Higgins, Inc., 1998 U.S. Dist. LEXIS 17612 (S.D.N.Y. November 6, 1998).

Furthermore, defendants' new story is not really a story at all but, rather, a series of hypotheticals and rhetoric about the supposed insignificance of the missing emails and chats. For example, defendants describe a serious of moves, and speculate that maybe some emails and chats somehow got "lost" along the way. The problem is, we are not talking about tangible objects that might have fallen out of a suitcase or moving box, but rather data on hard drives. Ana's unequivocal sworn deposition testimony shows that all of the relevant drives either survived or had their contents transferred to other data storage devices. See the previously filed Wertheim Declaration (Docket No. 132), Exhibit 20, P. 235:10 - P. 236:15 and P. 238:18 - P. 240.3.

iii. Defendants' Explanation for the Absence of Chat Records is False

Ana's attempt to give a technical explanation for the absence of chats - basically, that she did not save her chats - simply does not hold up. Defendants produced a small number of chat excerpts in Microsoft Word and .txt formats, which means that these chats exist in their native .xml format somewhere.

This is so because of the way that the MSN chat messenger works. A log is created by default locally on the user's computer - it is not a feature that has to be specially turned on as the defendants maintain. See Akselrod Reply Declaration, Exhibit 8.[3] Thus, the few chat files that defendants produced had to have been copied from the native .xml files. Why were none of these .xml files produced?

Over the course of discovery the defendants produced twelve files in Microsoft Word or .txt formats containing excerpts from various chats. The first four chats produced had two duplicative files, so that actually only three distinct chats were produced, all spanning November 2006 to November 2007. All of them were between Ana and Vadim or Ana and Inga. Not one was between Ana and Polina or Ana and her sister Mariana Tsigelman or anyone else.

The other eight chats produced (all of which were produced belatedly by Boris Kogan's office) are limited to the period of January 8, 2010 until February 12, 2010. Three of these files were marked "Attorney-Client Privilege" and were returned to Mr. Kogan's office pursuant to the Court's order of June 2, 2010 (Docket No. 109). Why these chats are limited to such a strange time period is not clear. The existence of these 2010 chats,

[3] It should be noted that this exhibit comes from the Microsoft Online Customer Service, who administer the software at issue, while in their opposition the defendants' rely on apocryphal excerpts from various forums not associated with Microsoft.

however, gives credence to what plaintiffs have been saying all along: the defendants have been habitually using various chat agents for years and have been customarily logging the history of these chats. Why then was not a single chat produced from the year 2009? Why were there no chats produced from 2008, be it before or after the breakup?

Furthermore, in her deposition, Ana said that she frequently chats with Polina. See Wertheim Declaration (Docket No. 132), Exhibit 20, P. 182:9-20. Ana also admitted that one document produced by her, a printout of her computer screen in April/May of 2008 (about a month after Ana and the plaintiffs separated), showed numerous chat windows open with Polina and Mariana Tsigelman, Ana's sister. See Akselrod Reply Declaration, Exhibit 9 and Exhibit 10, P. 171:10 - P. 172:7; P. 180:4-9; and P. 181:5 - P. 182:20.

No logs of such chats were ever produced other than the smattering of the strange files described above. Indeed, not a single chat from the year 2008 or 2009 was ever produced.

Tellingly, the defendants do not in their opposition deny that they have at least some chat logs.[4] In their opposition to

[4] Interestingly enough, and in absolute contravention to what the defendants are saying now, in a letter dated May 12, 2009, Boris Kogan boldly stated that "…our clients state that they have no further MSN chat logs or emails beyond what has been provided." Despite that statement, however, the Kogan firm later produced more MSN chat logs and e-mails, and the defendants, in their deposition, state that they gave more e-mails and MSN chat logs to the Kogan firm. See Akselrod Reply Declaration, Exhibit 11, 2009 letter, Page. 4.

the current motion, the defendants state that Ana received hard drives from her computers from Israel, plus files from her sister, Mariana Tsigelman, and Polina in native format and delivered these files to Boris Kogan's law firm. See Memorandum of Law in Opposition (Docket No. 146), P. 51-52. The plaintiffs never received such files.

iv. Defendants' Explanation for the Absence of E-mails is False

Among the many (mostly hypothetical) reasons offered by defendants for their lack of email records is that the abc.all@fusemail.com e-mails remained on plaintiffs' computer after Ana moved out in April, 2008. That is true - these e-mails remained under the plaintiffs' control. See I. Mikhlyn Reply Declaration, ¶¶ 4-5. What defendants evade, however, is that the "sent" e-mails were not saved on the server but locally on the sender's computer. See I. Mikhlyn Reply Declaration, ¶ 6. The defendants have actually produced many e-mails from this "sent" folder. Furthermore, a user could move any received e-mails from the server to a local hard drive on their personal computer, something Ana did routinely. See I. Mikhlyn Reply Declaration, ¶ 7.

As already noted in our moving papers, Ana herself testified that she first downloaded, and then wiped out, all the content of the computer she used while she was in business and

residing with the Mikhlyns. Wertheim Declaration (Docket No. 132), Exhibit 20, P.235:10 - P.236:15.

Ana also used the following e-mail addresses, which had nothing to do with the fusemail.com e-mails:

ana.bove@yahoo.com

AnnBove@hotmail.com

annb997@hotmail.com

AnnnBoveUSA@hotmail.com

annabove1@bezeqint.net

annabove@bezeqint.net

While some emails from some of those accounts were produced, it appears that the production was sanitized to reveal only innocuousness messages. For example, Ana never produced the e-mail called "conversation," sent from abc.all@fusemail.com to Inga Mikhlyn at vadinga@hotmail.com, on June 22, 2007. Such an e-mail should have been in her Israeli computer, the data from which Ana claims she produced. See Defendants' Memorandum of Law in Opposition (Docket No. 146), P. 45 and Akselrod Reply Declaration, Exhibit 12.

Attached to this "conversation" email was a file called "PolinaConvers.txt" which was a .txt excerpt of the MSN chat Ana had with Polina about Polina's departure from the business. Polina confirmed that this chat took place in her deposition testimony. See Akselrod Reply Declaration, Exhibit 13, P. 56:3-

9. This chat excerpt has tremendous value for the plaintiffs because it addresses the highly disputed issue of whether, when and why Polina left the business. The existence of this email is a double-whammy - first, it shows that this highly damaging e-mail was not produced by the defendants, and, second, it demonstrates that Ana knows how to log MSN chats and manipulate those files, contrary to he repeated assertions that she never saved chats.

It is also highly suspicious that defendants produced only one of the ten emails comprising their lengthy discussion about money laundering, which were discussed during Polina's deposition. See Wertheim Declaration (Docket No. 132), Exhibit 28. Can it possibly be the case that plaintiffs have these emails but that the senders and recipients of those damaging emails have only one of them?

Also not produced was the e-mail Polina accidentally sent to the Mikhlyn's on May 11, 2008 (more than a month after Ana broke with the Mikhlyns), in which Polina recounts various funds transferred to various parties in the years 2004-2005. See Wertheim Declaration (Docket No. 132), Exhibit 30. Given the sensitive time period (one month after Ana and Mikhlyns broke up and when Ana was setting up her new business) and the subject matter of the email (the tracking of various business funds) it is clear that Ana and Polina were corresponding about the

dispute at heart of this litigation. If, as logic dictates, such correspondence did take place, where are the other emails from that time period between and among Ana and Polina and Alex Sakirski regarding Ana's break with the Mikhlyns?

In her deposition, Ana herself said that she had over 20 e-mails addresses associated with the embroidery business. See Akselrod Declaration, Exhibit 10, P. 179:3-9. She further testified that Mr. Sakirski used the e-mail address alex@annaboveembroidery.com. See Akselrod Declaration, Exhibit 10, P. 179:16-23. No e-mails with that address were produced.

There is further evidence of suppression. In a chat with Inga Mikhlyn, Ana said that Polina is contacting her regarding access to the business' FTP servers and that that Ana wrote her with details of their previous conversation and asking why she needs access. See Akselrod Reply Declaration, Exhibit 14. This chat took place shortly after Ana and Polina had their falling out and Polina left the business. Whatever it was that Ana told Inga she wrote to Polina, be it via MSN chat or an e-mail, was never produced.

V. Default Judgments Must be Entered Against the Corporate Defendants

Defendants have advanced no cognizable legal arguments for avoiding or even delaying a default judgment against the

unrepresented corporate defendants. The Court has already denied defendants' bifurcation request, which was apparently aimed at delaying a default judgment against the corporate defendants. It is worth emphasizing that the corporate defendants are also counterclaim plaintiffs. Plaintiffs are not only entitled to a default judgment on their claims but also a judgment dismissing the corporate counterclaims. Grace v. Bank Leumi Trust Co., 443 F.3d 180, 192 (2d Cir. N.Y. 2006). It is the corporations, not the pro se defendants, who allegedly own the intellectual property at issue and, thus, have standing to bring the counterlcaims asserted in the Answer. See Akselrod Reply Declaration, Exhibit 5, P. 98:16 - P. 99:16; Exhibit 10, P. 153:23 - P. 154:11.

CONCLUSION

For the foregoing reasons, the plaintiffs request that their motion for sanctions and for a default judgment be granted.

New York, New York
September 17, 2010

Val Mandel, P.C.
Attorneys for Plaintiffs
80 Wall Street, Suite 1115
New York, NY 10005

By: _____
Daniel Akselrod (DA-2569)