Mikhlyn et al v. Bove et al Doc. 238

Ana Bove, Polina Dolginov (pro se Defendants)
Alex Sakirski

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VADIM MIKHLYN, INGA MIKHLYN, AND ABC ALL CONSULTING, INC., Plaintiffs, v. ANA BOVE, POLINA DOLGINOV, ANNA BOVE COMPANY, LLC, ANNA BOVE COLLECTIONS INC., AND ANNA BOVE EMBROIDERY SUPPLIES, INC, Defendants.	Index No. CV 08 3367 J. ROSS M. J. REYES
ANA BOVE, ANNA BOVE COMPANY, LLC, AND ANNA BOVE EMBROIDERY SUPPLIES, INC, Counter-Plaintiffs, v. VADIM MIKHLYN, INGA MIKHLYN, AND ABC ALL CONSULTING, INC., Counter-Defendants.	OBJECTION TO REPORT AND RECOMMENDATION OF MAGISTRATE REYES

Dear Judge Ross,

We file this letter seeking a fair decision, since we believe that the decision of Honorable Judge Reyes in his REPORT & RECOMMENDATION (Doc 227 , dated 08.03.11) is incorrect and unsupported, due to the reasons outlined below.

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PART A.

1. In an essence, when making his decision, Honorable judge Reyes basically accepted Mr. Kogan's position. See footnotes 1 and 2 in Doc 227, that “...the Kogan Firm’s position generally at the time was that the remaining discovery issues and their withdrawal resulted from the defendants’ conduct alone.”. This is 100% untrue.

Honorable Judge Reyes accepted some statements of Mr. Kogan as true facts, while we know that these statements are untrue. Jusge Reyes never had Mr. Kogan testify in Court about them, which should have been cross-examined.

Mr. Kogan, just like the Defendants, from the very beginning was certain that this will be a short case since we thought that Plaintiffs won't wish to disclose their criminal infringements regarding multiple plunders and tax evasion, taking place during the years of Inga Mikhlyn's management of financial accounting of the embroidery business. In hopes for a short end of this case, and of receiving a high compensation, Mr. Kogan agreed for a contengency. Namely because of this reason Mr. Kogan didn't send us even a single invoice for his services within his two years of work (2008-2010), and we didn't pay such invoices. We were paying only for the services of other firms (for translations etc). The contengency agreement was

oral.

Mr. Kogan was dealing with our case very unwillingly (only his law clerk Yossi was dealing with it). After that moment, the office of Mr. Kogan (his mother) demanded from us to pay $20,000. We didn't have this kind of money. We naively thought that Mr. Kogan should be leading the case, according to our agreement. But Mr. Kogan didn't need this case any longer, it was only a headache for him.

Much later we realized that namely from this moment, Mr. Kogan started deliberately leading us to a default, for which we would be liable. Mr. Kogan stopped responding to Plaintiffs' letters and demands about discovery, stopped complying with Court orders, and started to infringe and many times extend discovery deadlines.

Mr. Kogan requested Alex to count up absolutely all documents on all computers (of Anna, Polina and Alex, including drafts and copies, and also Russian and English versions of absolutely all documents related to the case. He might need to review all this, and therefore a lot of time will be needed to finish discovery. Namely due to this request, and Mr. Kogan's reminder about Court request #3, there appeared that email of Alex (dated 21 February, 2010), with numbers like 65,000 and 15,953 and others related to emails. See Exhibit #1. Also see Exhibit #2 – email of Alex dated February 24/25? , which explains that all of

these large numbers relate to absolutely all documents related to the case (including filings of Plaintiffs and Defendants, and all the rest), located on all of our computers.

From the text of these emails it's clear that we don't conceal anything. The email dated 21 February 2010 was written for the Judge and for Plaintiffs, and we were writing it to serve as a proof that we don't hide anything and gave everything. Perhaps, it's less clear in the English version than it was in the Russian.

We believe that already then, in January-March 2010, Mr. Kogan was deliberately and willfully preparing our case for a default, and was preparing Defendants to look responsible for what Mr. Kogan himself did. We couldn't even suspect that we may be held liable for the behaviour of our lawyer. Mr. Kogan was behaving so defiantly, and repeatedly broke decisions of the Judge and didn't answer inquiries of Plaintiffs, just because he wasn't afraid of responsibility.

Namely thus Mr. Kogan was deliberately withholding all of the documents which Defendants provided to him yet in January-February 2010, thus infringing discovery rules, despite of numerous complaints of Mr. Wertheim. By doing this, Mr. Kogan was basically helping Plaintiffs to fulfill their threat of Rule 37 sanctions. Namely thus at the very end Mr. Kogan deliberately formally disobeyed the order

of Judge Reyes to provide all the documents in his hands prior to May 26, 2010. After sitting upon a mass of documents for many months, but without doing anything with them, when already not being our lawyer, Mr. Kogan turned these documents over in such a manner that Plaintiffs received them only on June 1, 2010 – therefore he deliberately and formally disobeyed the order of Judge Reyes, and delayed the documents for 5 more days after the allowed deadline. Thanks to such deliberate actions of Mr. Kogan Plaintiffs had their basis for filing Rule 37 sanctions motion for default.

Within his first Report & Recommendation Honorable Judge Reyes acknowledged namely this formal infringement of Mr. Kogan, as a sanctionable infringement. However afterwords, Judge Reyes interpreted an email written by Alex dated Feb 21, 2010 (Exhibit #1) as a new piece of information, contradicting the previous testimony of Defendants. We believe that the untruthful explanations of Mr. Kogan and of Plaintiffs' lawyers about the nature of 65,000 documents and other stuff, as well as incorrect interpretation of what exactly was specified in that email of Alex.

This email was a simple, open and honest reply of Alex to Mr. Kogan, regarding the Judge's question. See the beginning of this email:

«

3.Reyes wants to know what volume of chats/emails exist post April '08, and what would be involved in reviewing them to determine which are privileged.

»

Perhaps it's bad English or confusing description of facts, but this email doesn't include a single word or hint about concealing or withholding documents. On the contrary, the conversation here is about our readiness to turn over these or other documents. Per our belief, many of the documents specified here had already been give back then to Mr. Kogan, but in any case, there was over a month left until the end of discovery, and then it got extended again until May 3, 2010.

See point "Forth" in Alexe's email:

a) We have prepared and burnt 2,579 strictly-business emails for the "post-April-2008" period (80MB), which we are already ready to give them, in exchange for their correspondence.

b) Also, we've prepared 15,953 emails (1.25 GB), including trade secrets (addresses and emails of our clients, and also secrets of the sole designs production). Probably Boris will need to look through them, to make sure and to classify them?

c) I think, we shouldn't give neither (a) nor (b) to Mikhlyns. After all, they didn't give their emails for the "post-April-2008".

Alex expresses to Mr. Kogan his opinion that these documents shouldn't be turned over to Plaintiffs, because Plaintiffs didn't

provide similar information of their own. But that's only what Alex "thought" - the decision and the turn-over was always done by Mr. Kogan.

In point "Fifth" of this email:

> **a)** 1,475 emails = 1GB of Russian e-mails with attachments in Russian. And also:
>
> **b)** 65,700 documents = 12GB. These documents were received by Anna Bove, Polina Dolginov, Alex Saklrski, and also written by us regarding the case, including drafts, re-sendings to each other, translations and different versions. A huge lot of them are in Russian language. After all, for nearly two years we're amicably, all together writing and sending to each other documents regarding this case.

Alex counted up all of the documents on all computers, including the Court filings of all parties, bank documents, and generally everything related to the case. All of this was already in our counsel's office, since it streamed from them to us. Since 2008-2010 there were no pro se defendants, and all we've been writing and translating, was given to our lawyers. Most of these documents were open, and Plaintiffs surely had them.

Indeed Alex made a mistake when he thought that all of this required a privilege log, and that Mr. Kogan should look through this, but should Defendants be killed for this mistake?
Already in his next email, sent to Mr. Kogan 4 days later (on February 25, 2010) Alex requested a meeting with Mr. Kogan, and said that the entire privilege log could be done in a couple of hours.

This once again proves that Mr. Kogan was already holding all of the documents, and the missing ones were going to arrive to him within the next couple of days. See Exhibit #2.

> *« 02.24.10.*
> *Marina, Boris, hello!*
> *In last email (that specifies a large amount of documents, located on our computers), I forgot to say that 90% of the documents in Russian language have english translations, and were once sent to you, since they are materials of our case. Except of that, there are many versions of the same documents there (on different stages of their writing), before they were sent to you.»*

I think that if we (I and Anna) will sit together with you (Marina or Boris) to look through them, with the purpose of determining their privileges, this may take not so much time at all. In fact, the priveleges of many of them may be determined just by the name, e.g. even without opening.
Alex “

Point “Fifth” of Feb-21-Email from Alex (point (c)) absolutely doesn't say that we deleted chats from Skype, like Honorable Judge Reyes assumed. It says that we divided these chats to ones that bear

Attorney-Client-Privilege, from all the rest, but being afraid that we might be mistaken, we offer Mr. Kogan to check this out.

> **c)** There's also our correspondence in Skype (chats). We've removed a lot from there since it's Attorney-Client privilege. But probably you'll need to check - whether we didn't remove an excess. All of this is also in Russian. Generally 99% of correspondence of Anna and Polina with me – it's Attorney-Client privilege. Overall, the majority of our communications are namely regarding this case, and not business. I nearly don't participate in business correspondence.

Defendants believe that all of the above-said doesn't contradict in any way what they told earlier.

2.

Defendants declare that they have provided to Mr. Kogan all they believed they should have provided, and did so within discovery deadlines set by the Court.

Defendants declare that they were sure that Mr. Kogan also turned everything over to Plaintiffs. For a long time Defendants didn't know that Mr. Kogan was willfully withholding all these documents. Mr. Kogan admitted by himself that he was withholding them by his own initiative.

Defendants declare that they didn't know that Mr. Kogan was awaiting for any additional documents from them. From the emails of Alex dated February 21 and 24 it's clear that we concealed nothing both from Mr. Kogan and from the Court. Mr. Kogan had a complete list of all we had

on our computers. So why didn't he write to us and say that he was awaiting for some “important documents” from us? Mr. Kogan didn't provide any single proof of informing us that he was awaiting for any documents from us, without which he couldn't or didn't wish to turn over to Plaintiffs the documents which he already had in his office.

Plaintiffs also didn't prove with any facts that we didn't provide, concealed or deliberately deleted anything.

Except of the naked statements and references to a wrongly interpreted email of Alex, there are no other proofs that Defendants have deliberately or numerously concealed or deliberately deleted anything. There is also not a single proof that Defendants personally, and not their lawyer, disobeyed at least one Court Order.

3. Defendants are 100% sure that Judge Reyes mistakingly took for a fact Mr. Kogan's untrue allegation, saying that Mr. Kogan showed us an article in law journal, which said that we may be forced to pay if we won't follow the rules.

Ana and Alex state under oath that Mr. Kogan has never (neither with a journal, nor without it) explained us any mechanisms and details about punishments for infringing discovery rules. At the same time, defendant Polina lives in Israel, and Mr. Kogan surely didn't show

her any magazines either (Polina declares this under oath).

Mr. Kogan never explained us discovery rules, and didn't explain us about our rights and obligations.

Mr. Kogan also never explained us that we can be held liable for deliberate infringements of our attorney, and also in case these infringements were done by our attorney for the benefit of the opposing party.

Mr. Kogan never explained us that it's our duty to do everything to preserve data, if there is any threat of it's loss. For example, when having the malfunctioning and computer “freezing” or when reinstalling software like Skype, which is responsible for the information which, as it appeared, we should have done everything to preserve.

Mr. Kogan never expressed any interest in what and how we were doing, didn't help us to avoid mistakes, and hardly informed us about his work matters regarding our case. For example, for a very long time (nearly until the default motion was filed against us), we didn't know that we had serious discovery issues. We thought that everything was OK.

Mr. Kogan didn't have time and desire for us, in fact we were a low-perspective or absolutely non-perspective contengency, and didn't use to pay on regular basis. Often we couldn't schedule an appointment or a phone call for weeks and months, to get replies from Kogan about more simple questions.

The only thing that Mr. Kogan told us about discovery obligations is that we mustn't delete case-related information from hard drives.

However, Defendants have always been doing their best to fulfill everything that the Court ordered, and what our ex-counsel Mr. Kogan told us, and also followed what we personally percieved as our discovery obligations, and we did all of this on time.

Below are outlined some examples of our timely and compliant turnover of data to Mr. Kogan on CDs, the majority of which can be confirmed documentally.

On March 27, 2009 we provided 8 CDs to Mr. Kogan.
On August 23, 2009 we provided 8 CDs to Mr. Kogan.
Since September 16, 2009 through September 30, 2009 we provided 60 CDs to Mr. Kogan.
On October 2009 we provided 20 CDs to Mr. Kogan
On January 25, 2010 we provided 3 CDs to Mr. Kogan

In total, by January 25, 2010 we have provided 103 CDs to Mr. Kogan. This is about 95% of all CDs given to Mr. Kogan.
Defendants have earlier declared that they gave 90% of all the documents to Mr. Kogan by January 25, 2010.
Since February through March 2010 we gave 5 CDs to Mr. Kogan.
This is less than 5% of all CDs given to Mr. Kogan.
Before December 2009 Mr. Kogan was also turning over on regular basis everything we gave him.

Namely since December 2009 Mr. Kogan has actually stopped being our attorney. He stopped forwarding the information which he received from us, started to systematically disobey Court instructions, started delaying all discovery deadlines, systematically stopped responding to Plaintiffs' emails and calls. Three days before the end of discovery he left, and deliberately infringed upon the latest discovery deadline. So why should be liable for this...

Since December 2009 Mr. Kogan stopped turning over to Plaintiffs the data he received from us.

Defendants believe that it's incorrect that Honorable Judge Reyes didn't allow a chance for us and Mr. Kogan to be heard under oath, and instead of this Mr. Kogan's allegations were accepted as if they were facts.

Based on the outlined above we respectfully request Your Honor to cancel or not make a decision about sanction fees against us, or significantly reduce Defendant's share of the fine because Defendants didn't infringe discovery rules, and there was an error in such a decision made by Honorable Judge Reyes.

PART B.

In case even a small fine will be awarded against Defendants, we respectfully request Your Honor to delay the payout of this fee until the Court rules out regarding the ownership of some disputed property, which consists of:

Intellectual Property – the database of clients of the embroidery business, totalling 250,000 clients, which was accumulated since 2002 throu March 2008.

Embroidery supplies and materials accumulated in the embroidery business since 2004 through March 2008.

Our request is supported by the following events, arguments and facts:

B1. Plaintiffs paid their attorney fees and other case expenses not with their money and loans, but with the money from Defendants' assets, which they grasped (in April 2008), and which are a subject of dispute in current litigation.

Namely due to the outlined above Defendants are now in the pro se mode, and Plaintiffs are paying their attorneys on proper and regular basis.

Your Honor, we declare that namely due to Plaintiffs' misconduct, and because of their illegal activities, we appeared to be in such a difficult financial situation. Therefore, we respectfully request not to rule about immediate payment of even a small fine, because this will cause an unreparable damage to us and to our business.

PART C.

Your Honor, we also respectfully request to deny Plaintiffs demand for immediate payment of sanction fees, until a final decision is made regarding the claims of this case.

I know that we have asked that you hold off that we pay the sanctions fine. Levisohn Berger LLP has been assisting us in this matter as counsel for the corporate defendants. They showed us a case called Cunningham v. Hamilton County, 527 U.S. 198 which says that if anyone has issues with Rule 37 sanctions that they are to be addressed when the final judgment is given out when the case is finished.

CONCLUSION

Due to the outlined above, we respectfully request the Court to reverse Judge Reyes' Rulings and Recommendation or if it should keep Judge Reyes' decision, delay the decision about awarding sanction fees until a final decision is made regarding the main claims of this case.

Thank you very much for your consideration.

Respectfully submitted,

Ana Bove

Alex Sakirski

Polina Dolginov

09.08.2011
Date