



Cited

As of: Feb 17, 2012

**KARIMONA INVESTMENTS, LLC, Plaintiff, -against- DAVID WEINREB,  
Defendant.**

**02 Civ. 1792 (WHP)(THK)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

**2003 U.S. Dist. LEXIS 3559**

**February 11, 2003, Decided**

**March 11, 2003, Filed**

**DISPOSITION:** [\*1] Plaintiff entitled to reasonable costs and expenses as sanction.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff sued defendant for breach of contract and fraud. Plaintiff sought sanctions against defendant for his conduct at his deposition pursuant to *Fed. R. Civ. P. 30*.

**OVERVIEW:** Plaintiff's counsel inquired in advance to defendant's deposition, whether defendant intended to invoke his *Fifth Amendment* rights. Defendant did not respond. At the deposition, plaintiff's counsel was informed that defendant's attorney intended to seek a stay of the deposition. Therefore, at the deposition, on the advice of counsel, defendant refused to provide responses to virtually all of the substantive questions posed to him. His refusal was not premised on the actual invocation of any privilege, but rather on the grounds that responses might jeopardize defendant's ability to protect his *Fifth Amendment* rights. The court found that the deposition

was a complete waste of time and money and plaintiff was entitled to reimbursement for the attorneys' fees and costs reasonably incurred in attending the deposition. However, fees for the motion to compel defendant's deposition testimony would not be awarded. Although the court denied defendant's motion for a stay of his deposition, that motion was not frivolous, and thus the costs of seeking further deposition testimony would not be awarded.

**OUTCOME:** Plaintiff was entitled to the reasonable costs and expenses incurred in relation to defendant's conduct as his deposition.

**LexisNexis(R) Headnotes**

*Civil Procedure > Discovery > Methods > Oral Depositions*

*Civil Procedure > Discovery > Misconduct*

*Legal Ethics > Client Relations > Attorney Fees >*

**General Overview**

[HN1] Sanctions, including costs and attorney's fees, may be awarded under *Fed. R. Civ. P. Rule 30* for conduct that the court determines has frustrated the fair examination of the deponent. In all proceedings, including those governed by the Federal Rules of Civil Procedure governing discovery, there is a duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and that action may be litigated in an orderly manner.

**COUNSEL:** For Karimona Investments, LLC, PLAINTIFF: Lee Gordon Dunst, Gibson, Dunn & Crutcher, LLP, New York, NY USA.

For David Weinreb, DEFENDANT: George Bochetto, Bochetto & Lentz, PC, Philadelphia, PA USA.

For David Weinreb, COUNTER-CLAIMANT: George Bochetto, Bochetto & Lentz, PC, Philadelphia, PA USA.

For Karimona Investments, LLC, COUNTER-DEFENDANT: Lee Gordon Dunst, Gibson, Dunn & Crutcher, LLP, New York, NY USA.

**JUDGES:** THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE.

**OPINION BY:** THEODORE H. KATZ

**OPINION****MEMORANDUM OPINION AND ORDER**

**Theodore H. Katz, United States Magistrate Judge**

This action, for breach of contract and fraud, was referred to this Court for general pretrial supervision. At a conference held on February 13, 2003, the Court determined that Defendant, David Weinreb, should be sanctioned for his conduct at his deposition, held on February 8. The basis for the Court's determination is briefly summarized here.

Plaintiff's counsel was put to unnecessary expense in traveling to, preparing for, and conducting the deposition. He specifically inquired in advance of the [\*2] deposition whether Weinreb intended to invoke his *Fifth Amendment* rights, but received no response from

Weinreb's attorney. It was only at the deposition that he was informed that Weinreb's attorney intended to seek a stay of the deposition. Therefore, at the deposition, on the advice of counsel, Weinreb refused to provide responses to virtually all of the substantive questions posed to him. His refusal was not premised on the actual invocation of any privilege, but rather on the grounds that responses "might jeopardize Weinreb's ability to protect his *Fifth Amendment* rights." Deposition of David Weinreb, Feb. 8, 2003, at 19. Weinreb thus tried to have it both ways, by refusing to respond to questions, while evading the consequences of a refusal in which he actually invoked his *Fifth Amendment* rights.<sup>1</sup>

1 In a separate Opinion and Order, the Court has denied Weinreb's motion for a stay of his deposition (made subsequent to the February 8 deposition), which was premised on his claim that he may be the subject of a criminal investigation. See Memorandum Opinion and Order, March 6, 2003.

[\*3] The deposition was a complete waste of time and money. Accordingly, the Court has determined that Plaintiff is entitled to reimbursement for the attorneys' fees and costs reasonably incurred in attending the deposition. See *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 53 (S.D.N.Y. 2001)([HN1] "Sanctions, including costs and attorney's fees, may be awarded under *Rule 30* for conduct that the Court determines has frustrated the fair examination of the deponent.")(internal quotation marks omitted); *Learning Int'l, Inc. v. Competence Assurance Systems Inc.*, 1990 U.S. Dist. LEXIS 16810, No. 90 Civ. 2032(MBM), 1990 WL 204163, at \*3 (S.D.N.Y. Dec. 13, 1990) ("In all proceedings, including those governed by the Federal Rules of Civil Procedure governing discovery, there is a duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and that action may be litigated in an orderly manner.") (citation omitted).

Plaintiff's counsel, Seth Miller ("Miller"), is an associate with the firm of Gibson, Dunn & Crutcher LLP ("Gibson Dunn"), and he works in Gibson Dunn's Los Angeles office. He has submitted a declaration setting forth [\*4] the time he spent preparing for, traveling to, and conducting the deposition, as well as his hourly billing rate. In addition, he has submitted his contemporaneous billing records. Miller's hourly billing

rate is \$ 435. *See* Declaration of Seth Miller, Feb. 19, 2003 ("Miller Decl.") P 5. He spent at least nineteen client billable hours traveling to and from New York, preparing for, and taking Weinreb's deposition. <sup>2</sup> The deposition itself consumed three hours. Plaintiff therefore incurred no less than \$ 8,625.00 in attorneys' fees in connection with the aborted deposition. *Id.* In addition, Miller's flight to and from New York cost \$ 2005.76, and he spent two nights at a hotel, costing \$ 318.00 in total. *Id.* P 6. <sup>3</sup> Finally, he was advised by the reporting service that the court reporting and videographer's fees for the deposition will total approximately \$ 1500.00. *Id.* Thus, in total, Plaintiff incurred attorneys' fees and other costs in connection with Weinreb's February 8 deposition of at least \$ 12,088.76. Miller also seeks another \$ 5,220.00 in fees in connection with researching and drafting the motion to compel Weinreb's further deposition testimony. *Id.* P [\*5] 8.

<sup>2</sup> This figure is corroborated in Miller's daily work sheets.

<sup>3</sup> Although Defendant claims that Miller would have incurred the costs of coming to New York in any event, because he conducted another deposition here, Miller asserts that the deposition was far less significant than Weinreb's and that it would have been conducted by an associate in Gibson Dunn's New York office had he known that Weinreb would refuse to answer any substantive questions. *Id.* P 9.

Fees for the motion will not be awarded. Although the Court has denied Weinreb's motion for a stay of his deposition, that motion was not frivolous, and thus the costs of seeking further deposition testimony will not be awarded. However, as set forth above, the motion was untimely. Had it been brought before the deposition, Plaintiff would not have incurred the expense of the deposition.

Plaintiff is therefore entitled to the reasonable costs and expenses incurred in relation to the deposition. The Court has reviewed counsel's time records and [\*6] declaration and concludes that it is reasonable to require Weinreb to bear two-thirds of Plaintiff's costs and fees. Although counsel has stated that he would not have traveled to New York if he had known that Weinreb's deposition would not proceed, while in New York he did conduct another deposition. Moreover, although Plaintiff has the right to retain counsel in California, where it is located, the Court does not find it reasonable to impose the full cost of that choice on Defendant. Accordingly, Weinreb shall reimburse Plaintiff in the amount of \$ 8,067.00 (two-thirds of \$ 12,099.76).

SO ORDERED.

THEODORE H. KATZ

UNITED STATES MAGISTRATE JUDGE

Dated: February 11, 2003