SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652367/2010
AQ ASSET MANAGEMENT LLC (AS
vs.
LEVINE, (IN HIS CAPACITY AS
SEQUENCE NUMBER : 017
PUNISH FOR CONTEMPT

INDEX NO. _____
MOTION DATE 6/20/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 502-509

Answering Affidavits — Exhibits _____ | No(s). 614-620

Replying Affidavits _____ | No(s). 647

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 7/3/13

SHIRLEY WERNER KORNREICH J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

----------X

AQ ASSET MANAGEMENT LLC (as Successor to Artist House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM USA, INC. and EVAN ZIMMERMANN,

Plaintiffs,

Index No. 652367/2010

-against-

DECISION & ORDER

MICHAEL LEVINE, HABSBURG HOLDINGS LTD. and OSVALDO PATRIZZI

Defendants.

----------X

MICHAEL LEVINE,

Cross-claim plaintiff,

-against-

OSVALDO PATRIZZI, SIMON LEO VERHOEVEN, KERRY GOTLIB and MICHAEL HASKEL,

Cross-claim defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Defendant Michael Levine moves to hold cross-claim defendant and opposing counsel Kerry Gotlib in criminal contempt for making false statements to the court. While the court is extremely troubled by Gotlib's conduct, it denies Levine's motion.

I. Background

This action concerns, among other things, purchase money from a stock transaction that was held by Levine as escrow agent until he was granted leave to deposit the remainder into court in March 2013. Defendants Habsburg Holdings Ltd. (Habsburg) and Osvaldo Patrizzi have claimed that Levine colluded with plaintiffs to deny Habsburg and Patrizzi the benefit of the funds in escrow. On August 22, 2012, Gotlib, counsel for Habsburg and Patrizzi, seeking

reargument of a number of issues through a proposed order to show cause, filed an affirmation in which he informed the court that he had "recently learned" that Levine was "receiving payments of $30,000 per month from [plaintiff] Zimmermann, *via* [plaintiff Antiquorum USA, Inc.]'s account" (affirmation of Kerry Gotlib, August 22, 2012, ¶ 45). The court declined to sign the proposed order to show cause (*AQ Asset Mgt. LLC v Levine*, Sup Ct, NY County, Aug. 22, 2012, Kornreich, J., index No. 652367/2010).

On November 19, 2012, Levine moved for sanctions against Gotlib and his co-counsel, Michael Haskel, claiming that the allegation that he was receiving such payments was utterly frivolous and demanding to know the basis for it. In opposition, Gotlib stated that "[a] reliable source has imparted this information, which is and was the basis for the statement," but declined to otherwise elaborate (affirmation of Kerry Gotlib, Nov. 28, 2012, ¶ 28).

Oral argument on the sanctions motion was held on February 5, 2013. The following colloquy took place:

> THE COURT: Let's first focus on the issue of . . . Mr. Levine, according to you, getting improper payments of 30,000 a month. Is there any evidence that this is occurring?
>
> MR. GOTLIB: Your Honor, Mr. Verhoeven [a principal of Habsburg], during his trip to New York this summer, had lunch with a former employee in the payment office–in the payable office–of Antiquorum who imparted this information to Mr. Verhoeven. He's a very credible guy–
>
> THE COURT: That's double hearsay. That's double hearsay, and you're saying to me that that is the only basis for this?
>
> MR. GOTLIB: Judge, we asked, in this case–
>
> THE COURT: Did you speak to this person?

> MR. GOTLIB: Did I speak with him? No. I spoke to Mr. Verhoeven. We–we made this on the basis of Mr. Verhoeven's interview with this guy, who he also used to work with (transcript, Feb. 5, 2013, 14–15).

The court later returned to the issue, and Gotlib stated, "Judge, I have told you the basis for my making that allegation: based upon what I considered to be a person with personal knowledge who write–who wrote–the checks for this company and who imparted this information" (*id.* at 24).

The court granted Levine's motion against Gotlib and Haskel, and requested submissions from the parties to determine the amount of the sanctions award. Haskel's opposition papers included an affidavit by Verhoeven averring that around July 2012, he met with a former employee of Antiquorum named Seetal Ramcharran, who allegedly told him that Levine was receiving the payments at issue (affidavit of Leo Verhoeven, sworn to on March 7, 2013). In a footnote to Haskel's own affidavit, he noted that "the witness was contacted and did not corroborate the content of his conversation with Verhoeven" as related in Verhoeven's affidavit (affidavit of Michael Haskel, sworn to on March 14, 2013, ¶ 9 n 4).

Levine subsequently contacted Mr. Ramcharran himself, and obtained an affidavit from him. Mr. Ramcharran stated that he met with Verhoeven "in mid-2012", but that all he had told him was that Levine did legal work for Antiquorum USA, for which he was paid monthly (affidavit of Seetal Ramcharran, sworn to on March 21, 2013, ¶¶ 3–5). He further stated the following:

> About a week after I had lunch with Mr. Verhoeven, I received a call from an attorney named Mr. Gotlib. We spoke for two or three minutes. Mr. Gotlib asked me whether I had told Leo Verhoeven that I had made monthly payments for Antiquorum USA to

> Michael Levine of $30,000 at Mr. Zimmermann's direction, or whether I knew of any such payments going to Mr. Levine. I told Mr. Gotlib I had never said that, or anything like that, to Leo Verhoeven and there were no payments of anything near that amount that I was aware of that ever went to Mr. Levine (Ramcharran affidavit, ¶ 7).

Levine now moves to either hold Gotlib in criminal contempt or to impose sanctions, for falsely stating on the record on February 5 that he had not spoken with Verhoeven's source.

II. Standards

A court, in its discretion, may award costs or impose financial sanctions against any party or attorney who engages in "frivolous conduct" (Rules of Chief Admin of Cts [22 NYCRR] § 130–1.1 [a]). "Frivolous conduct" is defined to include the assertion of "material factual statements that are false" (*id.* at § 130–1.1 [c]). In determining whether the conduct was frivolous, the court should consider "whether or not the conduct continued when its lack of legal or factual basis was apparent" (*id.*). The maximum penalty for any instance of frivolous conduct is $10,000 (*id.* at § 130–1.2).

A person who engages in "[d]isorderly, contemptuous or insolent behavior . . . directly tending to interrupt [court] proceedings, or to impair the respect due to its authority" may be punished for criminal contempt (Judiciary Law § 750 [A][1]). Subject to certain exceptions, punishment for criminal contempt is limited to a fine of up to $1,000 or imprisonment for up to thirty days in the county jail (*id.* at § 750).

III. Discussion

Our laws grant litigants and their counsel an extraordinary amount of discretion in making allegations and using the court's authority to investigate claims. This power rests on the

basic assumption that representations to the court will be made with a good faith belief as to their truth. Attorneys therefore have the professional duty to ensure that what they tell the court is true, and have a continuing obligation to correct any statement previously made that turns out to have been false (Rules of Professional Conduct [22 NYCRR 1200.00] rule 3.3 [a][1]). The purposeful withholding of such information is the equivalent of an affirmative misrepresentation (*Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 229 [1st Dept 1999]). Attorneys could not be afforded the broad leeway in litigation and discovery that they currently enjoy if the court cannot trust that they are not intentionally misleading it. Otherwise, our rules of civil procedure, designed to arrive at the truth, would become a tool for harassment, and the attorney, supposedly an officer of the court, would in fact be nothing more than a licensed extortionist.

It is with this in mind that the court evaluates Gotlib's conduct in the matter described above. Gotlib concedes that he did in fact speak with Mr. Ramcharran well before the February 5 hearing, and that Mr. Ramcharran "denied making the statements that Verhoeven attributed to him" (affidavit of Kerry Gotlib, sworn to on May 24, 2013, ¶ 17). However, contrary to Mr. Ramcharran, who stated that his conversation with Gotlib took place "about a week" after his lunch with Verhoeven, which would place it, at latest, in the middle of August, Gotlib maintains that their conversation took place on September 27, 2012, more than a month after his August 22, 2012 affirmation was submitted (*id.*). Gotlib argues that on February 5, he understood the court to be asking whether he had based his August 22 affirmation on a conversation he had with the purported source, and he truthfully answered that he had not, but had rather "made this on the basis of Mr. Verhoeven's interview with this guy, who he also used to work with" (*id.* at ¶ 23; transcript Feb. 5, 2013, 14–15).

The court finds this explanation less than satisfying. It would be one thing if Gotlib, in keeping with his professional duty to correct prior statements, had informed the court after speaking with Mr. Ramcharran that the supposed source for his August 22 statement was now denying that he had ever said anything of the kind. If that had been the case, then perhaps it would have been reasonable to assume that the court's inquiry in February was limited to the question of whether the August 22 affirmation had been *made* in good faith, it having been conceded that its basis was now extremely suspect. But Gotlib did not do so; rather, he reaffirmed the August 22 statement, stating in his papers (submitted after he admits he spoke with Mr. Ramcharran) that his information came from a reliable source, who "*is* and was" the basis for the claim (Gotlib affirmation, Nov. 28, 2012, ¶ 28) (emphasis supplied). At oral argument, when the court inquired whether Gotlib had any evidence that Levine was receiving the payments as he claimed, Gotlib again cited to the still unnamed former Antiquorum employee, stressing his credibility and personal knowledge (transcript, Feb. 5, 2013, 14, 24). At no point did the court direct its inquiry specifically towards the August 22 affirmation, because at no point did Gotlib indicate that after making that affirmation he had uncovered any evidence that undermined it. Thus, when the court asked whether double hearsay was "the only basis for this," there was no reason for Gotlib to believe that the court was specifically asking about the August 22 affirmation, and when Gotlib answered that he "made this on the basis of Mr. Verhoeven's interview with this guy, who he also used to work with," there was no reason for Gotlib to think that the court would understand that he was limiting his response to stating the basis for his August 22 statement rather than the improper payment claim as a whole, which he continued to levy against Levine and which he never withdrew.

On these facts, it would be entirely reasonable to conclude that Gotlib purposefully omitted the fact that he had spoken with Mr. Ramcharran, in the false hope that a statement based on double hearsay would be less sanctionable than a statement based on double hearsay which he knew the primary source had disavowed. If this were the case, then it could be found that Gotlib misled the court, denying that he had ever spoken with the person whom he claimed was and *continued to be* the reliable and credible source for his allegations against Levine. Gotlib's behavior, and his explanation for such behavior, gives troubling indications that he does not understand the level of candor that an attorney owes the tribunal.

Nevertheless, even if the court were to find that Gotlib's conduct was frivolous, the imposition of sanctions, or for that matter in criminal contempt, would not serve the best interests of the parties. The proceedings up until this point have been marked by an unusual level of rancor between counsel. Discourteous behavior and repeated attempts to trap an adversary on petty procedural points have unfortunately become the norm and have caused all parties and the court much frustration. Gotlib's original allegation about Levine receiving improper payments was part of a proposed order to show cause which the court refused to sign. The court has already punished Gotlib for mounting a frivolous attack on Levine's reputation. To once more penalize him would not further the court's goal of encouraging counsel to focus on the merits of their clients' respective cases as opposed to each others' behavior. The court has no desire to participate in the parties' mutual campaigns of harassment based on tangential issues of little ultimate import.

Nonetheless, the court now cautions all parties that it expects them to proceed with discovery, granting each other all the courtesies normally extended by and between litigants. It

expects deadlines to be observed, or, if necessary, extensions to be sought at a reasonable time prior to such deadline. It will not tolerate acts whose primary purpose appears to be the harassment of an adversary or the impeding of discovery. Accordingly it is

ORDERED that the motion of defendant Michael Levine to hold cross-claim defendant Kerry Gotlib in criminal contempt or to impose sanctions upon him is denied.

Dated: July 3, 2013

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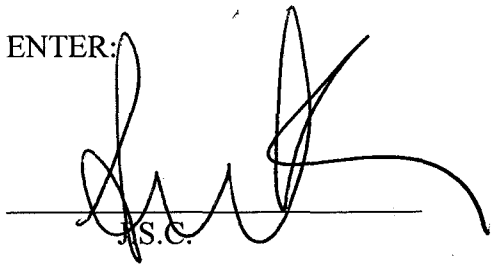

J.S.C.