

Rusek v Sirata

2018 NY Slip Op 31670(U)

March 16, 2018

Supreme Court, Kings County

Docket Number: 502794/13

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of March, 2018.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

WLODZIMIERZ RUSEK,

Plaintiff,

DECISION / ORDER

- against -

Index No. 502794/13
Mot. Seq. # 6, 7

WIESLAW SIRATA, EWA GRAJZER, JAN
BERSZAKIEWICZ and WHITE EAGLE AUTOMOTIVE,
INC.,

Defendants.

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2 3-4

Opposing Affidavits (Affirmations) _____

4 5

Reply Affidavits (Affirmations) _____

5

Upon the foregoing papers, plaintiff, Wlodzimierz Rusek (Rusek), seeks an order: (1) awarding him “costs in the form of reimbursement for actual expenses and reasonable attorney’s fees incurred in the instant action, in an amount to be determined at inquest, resulting from Defendants’ frivolous conduct throughout the instant action,”¹ pursuant to 22

¹ See Rusek’s June 19, 2017 notice of motion.

NYCRR 130-1.1 (Part 130), and (2) awarding him reasonable attorneys' fees "to restore Plaintiff to the position [he] was in prior to the frauds committed by Defendants . . ."

Defendants, Wieslaw Sirata (Sirata) and White Eagle Automotive, Inc. (White Eagle), cross-move for an order: (1) imposing Part 130 sanctions and awarding them attorneys' fees, and (2) dismissing the complaint for lack of prosecution.

Background

The relevant facts regarding this action for breach of an oral agreement are described at length in this court's October 26, 2016 decision (Trial Decision), which was issued after a bench trial conducted before this court on September 23, 2016 and September 26, 2016. In the Trial Decision, this court determined and ordered that plaintiff Rusek may enter judgment against defendants Sirata and White Eagle, jointly and severally, for \$24,081.00 and \$31,265.00, with interest as to each amount.

The parties have now filed a post-trial motion and cross motion, both of which seek Part 130 sanctions in the form of an award of costs and attorneys' fees. Rusek also seeks an award of costs and attorneys' fees on the ground that he is the prevailing party in this action. In addition, defendants Sirata and White Eagle cross-move for an order dismissing the complaint for failure to prosecute, on the ground that Rusek has failed to submit a proposed judgment for entry to the County Clerk nine months after the Trial Decision was issued.

Discussion

(1)

The Motion And Cross Motion For Part 130 Sanctions

Rusek moves for an order, pursuant to Part 130, awarding him litigation costs and attorneys' fees because "Defendants undertook litigation strategies including unnecessary, meritless, and factually erroneous motion practice primarily to delay and prolong the ultimate resolution of this action." Rusek further argues that the imposition of Part 130 sanctions are warranted because "Defendants frivolously denied any knowledge or information about their own personal transactions with Plaintiff [in their answer] in clear bad faith."

Defendants Sirata and White Eagle cross-move for an award of attorneys' fees and the imposition of Part 130 sanctions on the ground that Rusek has failed to submit a proposed judgment for nine months after the Trial Decision was issued.

Pursuant to Part 130, the court, in its discretion, may award a party to an action "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part," and, in addition to awarding such costs, may impose financial sanctions upon a party.

Conduct constitutes "frivolous conduct" under Part 130 where it "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or where "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 NYCRR 130-1.1

(c) provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

Here, the parties have each failed to demonstrate that the other’s conduct in the litigation of this action rose to the level of frivolous conduct within the meaning of Part 130. Accordingly, the parties’ motion and cross motion for the imposition of Part 130 sanctions and an award of costs and attorneys’ fees are denied.

(2)

Rusek’s Motion For An Award of Attorneys’ Fees

Rusek also asserts that he is entitled to an award of attorneys’ fees “because Plaintiff only commenced the underlying action as a direct result of Defendants’ patently fraudulent conduct which ultimately induced Plaintiff to rely on an oral agreement Defendant never had any intention in keeping.” Essentially, Rusek seeks an award of attorneys’ fees on the ground that he is the prevailing party in this breach of contract action.

The Court of Appeals has held that “[u]nder the general rule in New York, attorneys’ fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties” (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]; see also *Hooper Assocs., Ltd. v AGS Computers,*

Inc., 74 NY2d 487, 491 [1989] [holding that “[u]nder the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule”]; *Rosenthal v Rosenthal*, 151 AD3d 773, 774 [2017] [same]).

Here, Rusek has failed to demonstrate his entitlement to an award of attorneys’ fees on the basis of applicable statute, court rule or written agreement between the parties. Consequently, denial of Rusek’s motion for an award of attorneys’ fees is warranted.

(3)

Defendants’ Cross Motion for Dismissal

Defendants Sirata and White Eagle also cross-move for an order dismissing this action for “failure to prosecute” on the ground that Rusek has as yet failed to submit a proposed judgment for entry to the County Clerk nine months after this court issued the Trial Decision. Notably, defendants fail to cite any statute or case law supporting this branch of their cross motion.

While it is true that, in a case movant cites, it was held that an 18-month delay in submitting a proposed post-trial divorce judgment, where the order required the judgment to be settled on notice, justified a trial court’s discretionary dismissal for failure to prosecute (*See Madigan v Klumpp*, 173 AD2d 593 [2d Dept 1991]), that decision is inapplicable herein. The Second Department has recently held that the Supreme Court should have denied a defendant’s motion to vacate a judgment entered ten years after an order granting plaintiff

damages following an inquest (*see Shamshovich v Shvartsman*, 110 AD3d 975, 976-977 [2d Dept 2013] [“Here, the order dated September 6, 2000, which awarded judgment to the plaintiff, contained no direction to settle or submit a judgment on notice. Thus, contrary to [movant’s] contention, the 60-day rule of 22 NYCRR 202.48 is inapplicable because no judicial action was necessary before entry of the money judgment”]; *Peerless Ins. Co v Casey*, 194 AD2d 411 [1st Dept 1993] [Seven years from order to entry of judgment]).

Accordingly, it is

ORDERED that Rusek’s motion for an award of costs and attorneys’ fees is denied; and it is further

ORDERED that the branch of Sirata and White Eagle’s cross motion for an award of costs and attorneys’ fees is denied; and it is further

ORDERED that the branch of Sirata and White Eagle’s cross motion seeking to dismiss this action for failure to prosecute is denied.

This constitutes the decision and order of this court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**