SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.,	:	Index No. 105573/2011
Plaintiffs,	:	
- against -	:	
THE WASHINGTON POST, *et al.*,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION BY THE AMERICAN BAR ASSOCIATION, DEBRA CASSENS WEISS, AND SARAH RANDAG FOR COSTS AND REASONABLE ATTORNEY'S FEES

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INTRODUCTION

Plaintiffs' opposition to the instant motion for sanctions by the ABA Defendants[1] contains nothing new for this Court to consider. Nowhere in the opposition affirmation ("Goldsmith Aff.") do Plaintiffs or their counsel provide any cogent explanation for their decision not to withdraw the patently frivolous claims they filed and continue to pursue against the ABA Defendants. Plaintiffs and their counsel instead repeat the same unpersuasive arguments they presented at the June 28, 2012 oral argument on Defendants' motions to dismiss the Amended Complaint. And their few additional arguments either misrepresent the law or misrepresent the ABA Defendants' moving papers. In short, their opposition to sanctions is just as meritless as their case in chief.

The ABA Defendants did not bring the instant motion because Plaintiffs' claims merely lack merit. Rather, their allegations are so patently frivolous that any competent attorney would know they are without basis in law and fact. Nevertheless, Plaintiffs and their counsel continue to press forward even in the face of this Court's admonition that if they persisted, it would "look seriously" at whether sanctions are appropriate.[2] Their claims never should have been filed. At a minimum, Plaintiffs should have swiftly moved to voluntarily dismiss them following the June oral argument. Their continued failure to do so is simply bad faith.

Plaintiffs and their counsel appear to have no more respect for the procedural rules of this Court than they do for the substantive law of New York. They continue to use the judicial process to waste the Court's and the parties' time in what can only be described as vexatious activity, which has included the filing of three Orders to Show Cause and an application to the

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[1] The "ABA Defendants" are the American Bar Association, Debra Cassens Weiss, and Sarah Randag.

[2] *See* Transcript of June 28, 2012 oral argument, attached as Exhibit 8 to the November 28, 2012 Affirmation of Mark Harris ("Harris Aff."), at 90:1-2, 90:26-91:1, 91:15-16.

First Department *while a stay that they themselves requested was in place.* Harris Aff. ¶¶ 6-8. And as discussed in greater detail below, their cavalier disregard for proper procedure has extended to their briefing on this very motion. *See* January 15, 2013 Affirmation of Jennifer L. Jones ("Jones Aff."); January 16, 2013 Affirmation of Margaret A. Dale ("Dale Aff.").

The sum of Plaintiffs' and their counsel's conduct in this case overwhelmingly demonstrates that they do not and will not take the rules seriously, and thus the ABA Defendants request that there be consequences for their actions. Recovery of the costs and attorneys' fees expended by the ABA Defendants in defending this action is appropriate and necessary.

ARGUMENT

I. The ABA Defendants' Motion Demonstrates That Plaintiffs' Action Was Commenced and Is Continued in "Bad Faith"

Plaintiffs' argument that the ABA Defendants ignore the "bad faith" requirement of CPLR § 8303-a is specious. The very statute itself and Plaintiffs' own legal authority establish that frivolousness and bad faith are not separate elements to be proven; a frivolous motion is *by definition* brought in bad faith. As for the ABA Defendants' allegations, their opening brief asserts from the very first page that Plaintiffs brought and continued the instant action in bad faith. *See, e.g.*, Moving Brief at 1, 5.[3]

Under CPLR § 8303-a, a finding of "frivolousness" requires a finding of "bad faith." Specifically, "in order to find an action . . . frivolous," the court must find either that:

[3] For example, the moving brief argues: (1) "Plaintiffs brought claims against the ABA Defendants even though Mr. Rakofsky, an attorney, and his law firm knew or should have known that their frivolous claims had no basis in law or fact, and that there was no good faith argument for an extension, modification, or reversal of existing law that might support any of them." (Mov. Br. at 1); and (2) "It is now indisputable that not only did Plaintiffs commence this action against the ABA Defendants in bad faith, but it has been and is being continued by Plaintiffs and their Counsel in bad faith as well." (Mov. Br. at 5.)

> (i) the action . . . was commenced, used or continued in *bad faith* solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; [or]
>
> (ii) the action . . . was commenced or continued in *bad faith* without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

CPLR § 8303-a(c) (emphasis added). The ABA Defendants moved under subpart (c)(ii). *See* November 28, 2012 Memorandum of Law ("Mov. Br.") at 7.

The legal authority cited by Plaintiffs themselves (at ¶ 8) makes plain that a movant under CPLR § 8303-a(c)(ii) need only show that the opposing side knew or should have known that the action lacked merit in order to demonstrate bad faith:

> While sanctions for prosecuting a frivolous action are available to a defendant in a defamation action where application of the dispositive privilege is so obvious that the action is clearly without any basis in fact or law . . . , it is not enough that the action be meritless; it must be brought or continued in bad faith. *What is required, in effect, is a showing that the plaintiff and counsel knew or should have known that the action lacked merit.*

McGill v. Parker, 179 A.D.2d 98, 112 (1st Dep't 1992) (citing *Mitchell v. Herald Co.*, 137 A.D.2d 213, 218-219 (4th Dep't 1988)) (emphasis added).

Given not only the privileges available to the ABA Defendants as republishers, but also the *admitted truth* of the supposedly defamatory statements at issue and the uncontradicted documentary evidence, it is beyond question that Plaintiffs and Mr. Goldsmith knew or should have known that their action against the ABA Defendants was meritless. One needs only to read their Amended Complaint to learn that at the *Deaner* trial, (1) Judge Jackson "slandered Rakofsky's knowledge of courtroom procedure," Am. Compl. at ¶ 117; (2) Judge Jackson stated that "he was 'astonished' at Rakofsky's willingness to represent a person charged with murder

and at his [Rakofsky's] 'not having a good grasp of legal procedures,'" *id.* at ¶ 118; and (3) Judge Jackson stated that an email Mr. Rakofsky wrote "raises ethical issues," *id.* at ¶ 128.

If Plaintiffs had any question as to the merits of their case after reading the many motions to dismiss filed against them, the June oral argument should have removed that doubt from their minds. This Court, in no uncertain terms, made clear that the Plaintiffs should consider withdrawing their claims. *See* Harris Aff., Exhibit 8 at 90:1-2, 90:26-91:1, 91:15-16. Instead, Plaintiffs made clear to the Court that they had no intention of doing so. *Id.*, Exhibit 9. Their conduct throughout this case more than meets the bad faith standard set forth in both CPLR § 8303-a(c)(ii) and 22 NYCRR § 130-1.1(c)(1).

II. Plaintiffs' Entire Action Is Frivolous.

A. The Only Allegedly Defamatory Statements by the ABA Defendants Are Demonstrably True.

Contrary to Plaintiffs' protestations, there is no "issue" as to the truth of the allegedly defamatory statements made by the ABA Defendants. *See* Goldsmith Aff. ¶ 19. The truth of those facts is confirmed by the transcript and documentary evidence from the *Deaner* trial and, perhaps more importantly, from Plaintiffs' own concessions. Specifically, at the June 28, 2012 oral argument on the motion, Mr. Goldsmith conceded that it was fair for the ABA to report that the Judge believed Rakofsky's performance was "poor" and to report that Mr. Rakofsky had emailed an investigator asking him to "trick" a witness. To quote his own words at the hearing:

> Judge Jackson *believed that [Mr. Rakofsky's] performance fell below a reasonable standard . . . .*
> . . .
>
> With regard to the e-mail, the characterization of the word trick an old lady, "Please trick the old lady," *yes, that is a fair report of what the e-mail stated.*

Harris Aff., Ex. 8 (Tr. 54:14-23, 66:7-12) (emphasis added).

Remarkably, Plaintiffs do not now claim that Mr. Rakofsky performed competently at the *Deaner* trial, or deny that he sent the email asking his investigator to "trick" a witness.[4] They allege that the statements are false because Mr. Rakofsky's poor performance and the Court's review of the "trick" email did not trigger the mistrial; instead, Mr. Rakofsky's request to withdraw as counsel was supposedly the sole "cause" of the mistrial. *See* Goldsmith Aff. ¶¶ 16-17. These are the same patently frivolous arguments that Plaintiffs made at the June hearing.

First, Plaintiffs are wrong as a matter of fact. There is no evidence that the mistrial was based "solely" on Mr. Rakofsky's motion to withdraw rather than his trial performance and the trick email. This is clear from the transcript of the April 1, 2011 proceeding, wherein Judge Jackson went on at length regarding Mr. Rakofsky's poor performance and mentioned the "trick" email on the record. Throughout the proceeding, Judge Jackson reiterated his decision to grant the motion for a mistrial, including *after* discussing the "trick" email and *after* stating his opinion that Mr. Rakofsky displayed "not a good grasp of legal principles and legal procedure" and advising that "[i]f there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110." *See* Harris Aff., Exhibit 1 at 4:18, 5:20.

Second, the de facto "cause" of the mistrial is entirely irrelevant to whether or not there can be a cause of action for defamation in this case. Even if it were false to imply that the mistrial was triggered by something besides Rakofsky's motion, that implication would not be a basis for defamation. To be defamatory, a statement need not only be false but must also "tend

[4] After they served their opposition, Plaintiffs sent a letter to the Court attempting to backtrack from the admissions they made at the June oral argument by claiming that the "old lady" referenced in the "trick" email was never a "witness." *See* Letter from Matthew H. Goldsmith, Esq. (January 8, 2013). That in itself is an utterly frivolous argument. The email from Mr. Rakofsky directed his investigator "to trick the old lady *to say that she did not see the shooting.*" The only reason she did not actually testify is that the mistrial was declared first. In any event, the ethical concerns surrounding Mr. Rakofsky's conduct are identical whether the "old lady" testified or not.

to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, ad to deprive him of their friendly intercourse in society." *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 (1st Dep't 1999). The statements that Mr. Rakofsky's performance was deficient and that he had arguably instructed an investigator to act unethically were the ones that injured his reputation, not some academic question about whether those judicial conclusions caused the mistrial. Plaintiffs have never responded to either of these arguments because they have no response.

B. The ABA Defendants' Motion Seeks Fees and Costs for the Filing and Continuance of the Entire Action Against Them.

Plaintiffs' entire case rests on the theory that the statements made by the ABA were defamatory; if that claim fails, all their claims fail. *See Dillon*, 261 A.D.2d at 41-42 (additional torts based on defamatory statements, such as claims for intentional and negligent infliction of emotional distress and negligent, fail if the allegedly defamatory statements are true). This point and additional reasons why each of the claims Plaintiffs alleged against the ABA Defendants must fail were briefed at length in the ABA Defendants' memoranda in support of their motion to dismiss the Amended Complaint and their opposition to the proposed Second Amended Complaint. *See* March 29, 2012 Memorandum at 13-16; June 8, 2012 Reply Memorandum at 6-12. Moreover, it is apparent from the first page of the ABA Defendants' memorandum in support of the instant motion that the ABA Defendants seek recovery of costs and fees for the frivolousness of the *entire action* filed against them. Mov. Br. at 1 (requesting an order that Plaintiffs and their counsel "pay the costs and reasonable attorney's fees incurred by the ABA Defendants in defending against Plaintiffs' *lawsuit*") (emphasis added).[5]

[5] *See also* Point Heading I ("*The Action* Plaintiffs Commenced and Have Continued Against the ABA Defendants is Patently Frivolous") And Point Heading II ("The ABA Defendants are Entitled to Recover

Plaintiffs' contrary argument is factually meritless and is not supported by a single legal citation. Goldsmith Aff. ¶¶ 22-23. It should be rejected.

III. The Amount of Cost and Reasonable Attorneys Fees the ABA Seeks to Recover Is Appropriate and Authorized Under New York Law

Plaintiffs argue that the amount of sanctions sought by the ABA Defendants is "excessive" because "only one pre-answer [sic] to dismiss has been filed, for which the attention of only two judges on two separate occasions have been required, and not unnecessarily . . . ." Goldsmith Aff. ¶ 26.

Once again, Plaintiffs misrepresent the procedural history of the case. Mr. Rakofsky has repeatedly engaged in frivolous motion practice, including (1) an October 13, 2011 Order to Show Cause, (2) an October 24, 2011 motion for twelve various orders (including discovery orders and orders to amend the complaint, for default judgment, and for sanctions), (3) a December 23, 2011 Order to Show Cause (which also sought twelve separate orders), and (4) an application for relief pursuant to CPLR 5704(a) to the First Department, which Mr. Rakofsky filed after Justice Goodman dismissed the December 23 motion as "incomprehensible." Harris Aff. ¶¶ 6-8 & Ex. 5. All of these motions were filed by Plaintiffs while a stay was in place—a stay that they requested. Harris Aff. ¶¶ 4-6, 11. Moving to dismiss the Amended Complaint, and preparing and conducting oral argument on that motion, required considerable time and expense. Even when the ABA Defendants have not been required to respond in writing to Plaintiffs' filings, reviewing and attending to those filings has been burdensome.[6]

All of the Costs and Reasonable Attorney's Fees They Have Incurred and Will Subsequently Incur in Defending Against *This Frivolous Action*"). Mov. Br. at 6, 11 (emphasis added).

[6] The ABA Defendants will submit competent evidence of the costs and reasonable attorneys' fees incurred to date should the instant motion be granted.

Plaintiffs' proclivity to engage in vexatious and duplicitous litigation tactics has continued even into the briefing on the motion for sanctions itself, as described at greater length in the Affidavits of Jennifer Jones and Margaret Dale, accompanying this reply. At Plaintiffs' request, Plaintiffs' counsel and counsel for the ABA Defendants entered into a briefing stipulation governing the filings on this motion. Not only did Plaintiffs' counsel proceed to violate the stipulation—thereby gaining more than three weeks to file their opposition, *see* Jones Aff. ¶¶ 2, 8, 14—but he later admitted that he never had any intention of obeying that stipulation, *see id.* ¶¶ 4-7, 16.

That would have been bad enough on its own. But the way Plaintiffs' counsel managed to gain the additional time was by misleading a partner at Proskauer Rose into accepting Plaintiffs' papers although they were submitted after the calendar call of the motion. As set forth in the Dale and Jones Affirmations, after Plaintiffs' counsel failed to show up for the calendar call of this motion, it was initially submitted without opposition on December 21, 2012. Dale Aff. ¶ 3; Jones Aff. ¶ 10. In order to rectify his error, Plaintiffs' counsel avoided counsel for the ABA Defendants, Ms. Jones, with whom he had negotiated the stipulation, and instead made a request for an extension to a Proskauer partner, Ms. Dale, who is not involved with this matter. Dale Aff. ¶¶ 2-4; Jones Aff. ¶ 17. Ms. Dale agreed to Mr. Goldsmith's request after (1) he failed to inform her that he was in violation of a stipulation requiring service of his papers one week prior, (2) failed to inform her that Ms. Jones works on this matter (and that he had failed to contact Ms. Jones with his request); and (3) falsely stated that his opposition had been served the day prior.[7] Dale Aff. ¶¶ 3-7; Jones Aff. ¶¶ 11, 13-14. Counsel for the ABA Defendants has informed Mr. Goldsmith that the ABA Defendants object to Plaintiffs' and their counsel's

[7] Mr. Goldsmith also submitted a false affirmation of service stating that his opposition papers had been served on December 20, 2012 when in fact they were served on December 21, 2012.

submission of their untimely filing, which was submitted under false pretenses, yet Plaintiffs' counsel has done nothing to rectify the situation. *See* Jones Aff. ¶ 12.

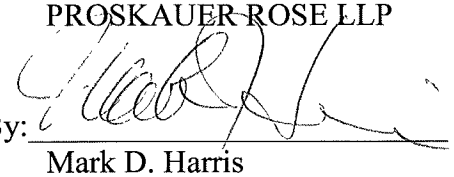
Plaintiffs and their counsel have created a circus, and they continue to disclaim any responsibility for having done so. Far from being "excessive," a reasonable award would compensate the ABA Defendants the unnecessary costs and reasonable attorneys' fees they have expended and continue to expend in response to Plaintiffs' frivolous conduct.

CONCLUSION

For the reasons set forth above, the ABA Defendants respectfully request that this Court (1) find that the claims and causes of action Plaintiffs commenced and have continued against the ABA Defendants are frivolous; and (2) as an appropriate sanction against Plaintiffs and their Counsel, order payment of the ABA Defendants' costs and reasonable fees (a) by Plaintiffs from the filing of this lawsuit until the date on which Counsel was retained, and (b) by Plaintiffs and their Counsel from the date of Counsel's retention through the date on which the ABA Defendants are dismissed from this matter. The ABA Defendants also request that this Court enter such other and further relief as may be just and proper.

Dated: January 16, 2013
New York, NY

PROSKAUER ROSE LLP

By: 

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