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

--x

JOSEPH RAKOFSKY,

Plaintiff,

—against—

WASHINGTON POST COMPANY, *et. al.,*

Defendants.

--x

AFFIRMATION
IN OPPOSITION

Index No.: 105573/2011

MATTHEW H. GOLDSMITH, admitted to practice law in New York State, affirms the following under penalties of perjury:

1. This affirmation is submitted in opposition to the ABA Defendants' motion, dated November 28, 2012. Relevant portions of the Amended Complaint are annexed as *Exhibit A*.

Summary of the Arguments

I. Relief under CPLR § 8303-b is inappropriate absent a showing of bad faith, which is neither alleged by the defendants nor otherwise exists;

II. Those statements that defendants allege to be true are *not* the relevant defamatory publications set forth in the pleading, which are undisputedly false;

III. The defendants' motion is lacking for its failure to move against all causes of action asserted against it; and,

IV. The amount of sanctions requested are excessive in this case where no answer has yet been filed and little time spent.

(continued on next page)

Relevant Facts & Prior Proceedings

2. In April of 2010, the plaintiff, Joseph Rakofsky ("Rakofsky"), was retained as co-defense counsel for a murder trial. (*Ex. A*, ¶¶ 88-89, 113)

3. During that trial a conflict between Rakofsky and his client arose, prompting Rakofsky to move to withdraw as counsel before the presiding Judge Jackson, who granted the motion. (*Ex. A*, ¶¶ 109-119).

4. Subsequent to that motion being granted, an investigator previously hired by Rakofsky submitted, but did not formally file, a motion to the court alleging that Rakofsky made a request that he trick a witness into changing her testimony. (*Ex. A*, ¶¶ 119-120).

5. Upon Rakofsky's withdrawal as counsel, the ABA Defendant published two articles concerning the trial, stating in sum and substance, that: 1) a mistrial was declared after review of a court filing containing the investigator's accusations; and, 2) the mistrial was prompted by Rakofsky's poor trial performance. (*Ex. A*, ¶¶ 144-145).

6. Rakofsky thereafter commenced this action and alleged three causes of action by its Amended Complaint against the ABA Defendants for defamation, intentional infliction of emotional harm and violation of the New York Civil Rights Law §§ 50 & 51. (*Ex. A*).

7. With respect to the defamation cause of action asserted against the ABA Defendants, the Amended Complaint reads:

> "144. On April 4, 2011, [the ABA Defendants], with malice and hate, in a grossly irresponsible manner without due consideration for the standards of information gather and dissemination ordinarily followed by responsible parties, in reckless disregard for the truth, published an article in which they stated that: "The judge declared a mistrial after reviewing a court filing in which an investigator had claimed Rakofsky fired him for refusing to carry out the lawyer's emailed suggestion to 'trick' a witness, the story says.

old lady to say that she did not see the shooting or provide information to the lawyers about the shooting.'" However, the ABA article, which was communicated in whole or in part, to members of the ABA in a weekly email to its members was and is a complete fabrication that is factually untrue in all respects. Judge Jackson never declared a mistrial that was based, either in whole or in part, upon the "investigator's" "motion," which was never formally filed with the Court. Rather, the record is clear that RAKOFSKY moved to withdraw as lead counsel for the defendant because of a conflict existed [sic] between him and his client and that the only action taken by Judge Jackson was with respect to RAKOFSKY was to permit RAKOFSKY to withdraw as lead counsel for the defendant for reasons entirely unrelated to any claims of the "investigator" referred to by the ABA and its employees. At no time did Judge Jackson grant a mistrial after reviewing any "court filing in which an investigator had claimed Rakofsky fired him for refusing to carry out the lawyer's emailed suggestion to 'trick' a witness" as [the ABA Defendants] maliciously published." (*Ex. A*)

"145. On April 8, 2011, [the ABA Defendants], with with malice and hate, in a grossly irresponsible manner without due consideration for the standards of information gather and dissemination ordinarily followed by responsible parties, in reckless disregard for the truth, published their article, "Around the Blawgosphere: Joseph Rakofsky Sound Off; Client Poachers; and the End of Blawg Review" that "If anything had the legal blogosphere going this week, it was Joseph Rakofsky, a relatively recent law grad whose poor trial performance as defense counsel in a murder trial prompted the judge to declare a mistrial last Friday." However, the record is clear that RAKOFSKY moved to withdraw as lead counsel for his client and was so permitted, and that Judge Jackson granted RAKOFSKY's motion solely because RAKOFSKY moved for his own withdrawal because a conflict existed between him and his client. Judge Jackson never granted a mistrial base upon RAKOFSKY's trial performance, which was not "poor." (*Ex. A*).

I. Relief under CPLR § 8303-b is inappropriate absent a showing of bad faith, which is neither alleged by the defendants nor otherwise exists

8. Sanctions under CPLR § 8303-a for prosecuting a frivolous action are available to a defendant in a defamation action if commenced "without any basis in fact or law ... [*and*] *brought or continued* in bad faith (emphasis added)." McGill v. Parker, 179 A.D.2d 98, 112, 582 N.Y.S.2d 91, 100 (1st Dep't 1992)("it is not enough that the action be meritless"), *citing*, (Grasso v. Mathew, 164 A.D.2d 476, 480, 564 N.Y.S.2d 576, *app.dism.*,

645, 578 N.E.2d 443; CPLR 8303-a[c][ii]); *see also*, Entertainment Partners Group, Inc. v. Davis, 198 A.D.2d 63, 64, 603 N.Y.S.2d 439, 440 (1st Dep't 1993)(SLAPP suit held frivolous where untimely *and* commenced to restrict first amendment rights).

9. The ABA Defendants choose to ignore the "bad faith" requirement of CPLR § 8303-a, but instead misleadingly and/or incorrectly imply that "*mandatory* sanctions" are warranted *only* "upon a court's finding that a plaintiff commenced or continued a frivolous claim in a personal injury action." (Harris Memo, p. 6).

10. As a threshold matter, the ABA Defendants cite no legal authority to support its purported position that sanctions are appropriate under CPLR § 8303-a absent a showing of bad faith. Notwithstanding this deficiency, a plain reading of its motion reveals that no bad faith on the part of Rakofsky is proven or even speculated. The ABA Defendants' motion for sanctions under CPLR § 8303-a in the amount $30,000 is therefore deficient and without merit for failure to allege either a tenable legal or factual basis.

11. [Plaintiff addresses the "frivolous" element in the next section].

II. The statements that defendants argue to be true in support of its motion are *not* the relevant defamatory statements alleged in the pleading, which are undisputedly false

12. While not requiring a showing of "bad faith," conduct may alternatively be held frivolous under 22 NYCRR § 130-1.1, "if:

> 1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> 2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> 3) it asserts material factual statements that are false."

13. The ABA Defendants contend that since plaintiff's defamatory statements are

citing, Kirschfeld v. Daily News L.P., 271 A.D.2d 386, [1st Dep't 2000]). It frames the issue for this Court's determination by alleging that those statements under consideration include plaintiff's: 1) poor trial performance; and, 2) his request that an investigator "trick" a witness. (Harris, Memo at p. 8). The ABA Defendants continue by attempting to prove the truth of both statements it offers by referencing the underlying trial transcript and the undersigned's own argument, wherein Judge Jackson's statement is repeated that: "[Mr. Rakofsky's] performance fell below a reasonable standard ... ." (Harris Memo of Law, p. 9).

14. In sum, the ABA Defendants conclude, "[b]ecause the characterization of Mr. Rakofsky's performance at trial was 'poor' and the statement that Mr. Rakofsky sent an email asking an investigator to 'trick' a witness were clearly based on statements made by Judge Jackson on the record, no defamation claim can succeed." (Harris Memo, p. 9).

15. The ABA Defendants' error in reasoning lies in its recitation and consequential narrow analysis of the defamatory statements it offers and alleges to be true. The Amended Complaint asserts that the plaintiff was defamed by the ABA Defendants' publication of statements that: 1) Judge Jackson declared a mistrial *after* reviewing a *court filing* containing accusations that Rakofsky fired an investigator for not tricking a witness as he requested; and, 2) Rakofsky's poor performance *prompted* a mistrial." (*Ex. A*, ¶¶ 144-145). However, the ABA Defendants do not address or prove the truth of either statement as a whole, but rather fallaciously argue that since two non-dispositive components of those statements may be true, it follows that the truth of both statements in their entirety are true and hence frivolous.

16. For the purpose of argument by *reductio ad absurdum*, plaintiff concedes that

characterized his trial performance as "poor" (although this point is disputed *infra*). Even accepting these assumptions, the ABA Defendants' motion fails to establish the truth of, let alone address: (1) that the mistrial was declared *upon a review* of a court filing that contained the relevant accusations, or even that any such court filing ever existed; and, (2) that Rakofsky's poor performance *prompted* the mistrial. Both published by the ABA Defendants.

17. As clearly alleged in the Amended Complaint and undisputed by the trial transcript or the ABA Defendants, the mistrial was ordered solely upon Rakofsky's motion to be withdrawn, not upon the Court's review of the accusations against Rakofsky or prompted by his "poor" trial performance. Moreover, and also set forth in the pleading, the investigator's accusations were not even considered until *after* the motion to withdraw was granted and therefore could not have temporally served as its basis. (*Ex. A*, ¶¶ 119-120). Additionally, the Amended Complaint alleges that the named accusations were not contained in any court filing, but rather a court "submission," another undisputed and operative fact. (*Ex. A*, ¶¶ 119-120).

18. The only relevant case cited by the ABA Defendants' on this point is Krischfeld, though a recitation of its facts is omitted. In Kirschfeld, alleged defamatory statements included that: 1) the Manhattan district attorney's office was investigating the plaintiff for plotting a murder; and, 2) the plaintiff was indicted for tax fraud. *See*, Kirschfeld v. Daily News L.P., 269 A.D.2d 248, 249, 703 N.Y.S.2d 123, 124 (1st Dep't 2000). The Court held that evidence establishing that the plaintiff had been indicted for tax fraud and that a Grand Jury was hearing evidence in connection with an allegation that he may have

[illegible] finding [illegible] "should have been apparent to plaintiff" at the time his

appeal was filed and granted sanctions. Id., at 250 (citations omitted).

19. Comparatively, if an issue of as to the truth of a defamatory statement exists, sanctions are unwarranted. Themed Rests., Inc. v. Zagat Survey, LLC, 4 Misc.3d 974, 983, 781 N.Y.S.2d 441 (Sup. Ct. NY Co. 2004), *citing*, (CPLR 8303-a; 22 NYCRR part 130; Entertainment Partners Group v Davis, 155 Misc.2d 894, 897-901 [Sup. Ct., NY Co. 1992, Lebedeff, J.], *aff'd*, 198 AD2d 63 [1st Dept 1993]).

20. Here, no evidence is provided by the ABA Defendants, or otherwise exists, to establish that the mistrial was granted as a result of accusations contained in a court filing or due to Rakofsky's "poor" performance. The undisputed evidence instead proves that the mistrial was based on plaintiff's motion to withdraw and that no court filing ever existed. Moreover, while the ABA Defendants' equate the characterization of a trial performance that "fell below reasonable standards" with "poor," it is submitted that not only is "poor" far down along the spectrum of quality from "reasonable" to encompass differing concepts, but also that unlike Kirschfeld, such a distinction can not and has not been proven factually.

21. Therefore, while the plaintiff need only make a showing that an issue as to the truth of a defamatory statement exists in opposition to a motion for sanctions, here the falsity of the ABA Defendants' statements are affirmatively established and undisputed.

III. The defendants' motion is lacking for failure to move against all the causes of action asserted against it

22. In addition to denial of relief under CPLR § 8303-a and 22 NYCRR § 130 when an issue as to the truth of an alleged defamatory statement exists, it "has bearing upon [a] sanctions request [when the moving party] [does] not oppose" causes of action asserted

at 450.

23. By its motion, the ABA Defendants move for sanctions alleging the truth of only portions of the statements underlying plaintiff's defamation cause of action asserted against it, yet fail to consider relevant portions of and the statements as a whole. Further, the ABA Defendants request that this Court deem plaintiff's entire action as frivolous, but fail to argue or address either the causes of action asserted against it for intentional infliction of emotional harm or violation of the New York Civil Rights Law §§ 50 & 51.

IV. The amount of sanctions requested are disproportionate in this case where no answer has yet been filed and little time has been spent

24. While the ABA Defendants' motion is without legal or factual basis on the aforementioned grounds, its request for $10,000 under 22 NYCRR § 130-1.1 is nonetheless excessive. (Harris, Memo, p. 11).

25. The Court of Appeals in the Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v. 198 Broadway, awarded $2,500 for frivolous motion practice where it occurred, "for a protracted period and that the time and attention spent of more than a dozen Judges [ ] ha[d] been diverted unnecessarily." 76 N.Y.2d 411, 415, 559 N.Y.S.2d 866 (1990). Similarly, in Hirschfeld, cited by the ABA Defendants', the Court awarded $1,100 in sanctions against the plaintiff on the ground that his previous indictment and pending indictment alleging a murder plot should have been apparent. 271 A.D.2d at 386.

26. Considering that only one pre-answer to dismiss has been filed, for which the attention of only two judges on two separate occasions have been required, and not

and thus not be readily apparent as true, an award of sanctions in the amount of $10,000 is excessive, as well as unwarranted.

Conclusion

27. Plaintiff respectfully requests that the ABA Defendants motion be denied in its entirety, as its request is improper under CPLR § 8303-a for failure to establish that Rakofsky acted in bad faith; it fails to offer an accurate recitation of the statements at issue, but instead merely focuses on portions of thereof, which even if deemed true still renders each defamatory when viewed in their entirety; the motion is lacking for failure to move against all causes of action asserted against the ABA Defendants; and, the request for sanctions, while unwarranted, is nonetheless excessive.

DATED: New York, New York
December 20, 2012

Respectfully Submitted,

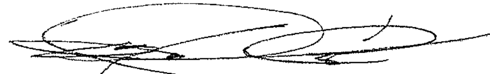

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EXHIBIT A