UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STENOGRAPH CORPORATION,

Plaintiff,

v.

BOSSARD ASSOCIATES, INC., *et al.*,

Defendants.

District of Columbia
Civil Action No.95-0141 (NHJ)

FILED

AUG 2 O 1997

Clerk, U.S. District Court:

MEMORANDUM ORDER

Before the Court is the issue of whether or not to sanction defendants' counsel, John E. Drury , for violation of Federal Rule of Civil Procedure 11 for his conduct in filing a motion for sanctions against plaintiff's counsel in this case.

Preliminarily, the Court finds that it is able to reach this matter though two defendants have filed for bankruptcy and the two other motions remaining in this case must be stayed. The language of the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362, does not suggest that this type of action, one against the debtors ' attorney personally, should be stayed. A proceeding to impose Rule 11 sanctions is not automatically stayed under the bankruptcy code. See 11 U.S.C. § 362(b)(4); Alpern v. Lieb, 11 F.3d 689,690 (7th Cir. 1993); O'Brien v. Fischel, 74 B.R. 546,550 (D. Haw. 1987).

The Court now turns to the issue at hand. On June 25, 1996, before the trial in this case, defendants' attorney filed a motion for sanctions against one of plaintiff's attorneys. The motion requested sanctions "for the blatant intimidation of Karen Brynteson, a witness identified by defendants in their pretrial statement." Defs. ' Mot. for Sanctions at I. Because of the

seriousness of these allegations, the Court held an evidentiary hearing on this motion on August 6, 7, and 9, 1996, at which Ms. Brynteson and her attorney testified and plaintiff's counsel proffered to the Court a description of the relevant events. Mr. Drury did not call plaintiff's attorney, whom he had accused of misconduct, to testify .

The Court denied defendants' motion for sanctions. At the conclusion of the hearing, after denying the motion, the Court suggested that plaintiff prepare a proposed order to show cause why defendants' counsel should not be sanctioned for bringing his motion. The Court held a hearing on January 21, 1997, which included argument on the issue of whether defendants' counsel should be sanctioned. On February 10, 1997, the Court issued an order to show cause to defendants' counsel why he should not be sanctioned pursuant to Rule 11. The parties have both responded to that order in writing.

The case underlying this matter involves claims of copyright infringement, trade secret misappropriation, and conversion. Plaintiff Stenograph Corporation claimed that defendants had unlawfully obtained plaintiffs computer software protect keys, which enable the use of plaintiff's court reporting software. Ms. Brynteson, a court reporter, had apparently purchased a software protect key from one of plaintiff's salesmen under circumstances similar to defendants' purchases of its keys. She was on defendants' list of witnesses to appear at trial, and plaintiff's counsel called her to interview her during his trial preparation. During the course of that interview, plaintiff s counsel discovered Ms. Brynteson' s purchase of the software protect key, which he believed to violate the law. He conveyed that belief to Ms. Brynteson during the telephone call.

In their motion for sanctions, defendants stated that, in this telephone call to Ms. Brynteson, plaintiff's counsel "pointedly and repeatedly accused her of ‘illegal activity."' Defs.' Mot. for Sanctions at 1-2. The motion charges that there was a "frightening and intimidating element carefully employed by counsel to induce the witness not to testify." Id. at 2 (emphasis in original). Moreover, states the motion, Ms. Brynteson was so intimidated that she hired an attorney, who spoke with plaintiff's counsel; plaintiff's counsel allegedly told that attorney that his client had a claim against Ms. Brynteson that it would settle for $3,995.00. The motion calls this conduct "a very crafty form of intimidation.” Id.

In relevant part, Rule 11 provides as follows:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of that person' s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ...the allegations and other factual contentions have evidentiary support. . .

Fed. R Civ. P. 11(b)(3). The Rule requires an attorney to conduct a "reasonable prefiling inquiry" into the facts and law underlying a motion. Hilton Hotels Corp.. v. Banov, 899 F .2d 40, 41-42 (D.C. Cir. 1990).

In addition, before it was amended effective December 1,1993, Rule 11 did not impose a continuing obligation on the signer to update previously filed pleadings. E.g., Griffen v. Oklahoma City, 3 F.3d 336,339 (l0th Cir. 1993); Dahnke v. Teamsters Loca1 695, 906 F.2d 1192, 1200 (7th Cir. 1990); see also Hilton Hotels Corp. v. Banov, 899 F.2d 40,44-45 (D.C. Cir. 1990). The latest version of Rule 11, however, states that, "[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . .is certifying that ...the allegations and other factual contentions have evidentiary support . . ." Fed. R. Civ. P. 11(b)(3) (emphasis added).

The Advisory Committee Notes to the 1993 Amendments to Rule 11 state:

> [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.
>
> * * * *
>
> [I]f evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention.

Fed. R. Civ. P. 11 Advisory Committee's Note to 1993 Amendments. "Thus, litigants may be sanctioned under the amended rule for continuing to insist upon a position that is no longer tenable." Ridder v. Springfield, 109 F.3d 288,293 (6th Cir. 1997).

Upon consideration of the evidentiary hearing and the oral and written arguments of counsel, the Court finds that defendants' counsel, John E. Drury, failed to perform an adequate pre-filing investigation of the facts underlying his motion for sanctions and failed to withdraw his motion for sanctions after it became clear that it lacked a factual basis. The Court makes the following findings of fact in support of this conclusion.

First, the foundation of Mr. Drury's motion for sanctions was that plaintiffs counsel had attempted to induce Ms. Brynteson not to testify at the upcoming trial. However, Ms. Brynteson did not testify that plaintiff s counsel in any way suggested that she not provide testimony in the upcoming trial. Nor did she testify that she felt intimidated into not testifying at trial. In fact, Mr. Drury never attempted to elicit any testimony from her to support his allegations that plaintiffs attorney attempted "to induce the witness not to testify in this case." or "to frighten her off the stand." Defs.' Mot. for Sanctions at 2 (emphasis added).

Second, the Court finds that plaintiff's counsel had no knowledge as to what Ms. Brynteson would testify to at trial before he called to interview her. Ms. Brynteson had not yet

been deposed, and there was no evidence adduced in the hearing that plaintiff s counsel knew the substance of what she would testify to at trial. These findings are contrary to Mr. Drury's allegation that plaintiff's attorney "kn[ew] full well that the witness [would] give important contrary evidence unfavorable to plaintiff." Id. at 2.

Third, Ms. Brynteson did not testify that plaintiff's counsel "pointedly and repeatedly accused her of illegal activity," as Mr. Drury had alleged. Id. at 1-2. Instead, she testified that plaintiff's counsel advised her that what she had done "could constitute illegal activity ." Transcript of Aug. 7,1996 hearing, at 2A-6, 2A-7, 2A-13.

Fourth, Ms. Brynteson testified that plaintiffs counsel had offered to settle this matter, and that once the settlement offer was communicated to her through her attorney, she no longer felt threatened. Id. at 2A -10. While she was concerned that she might have some liability to plaintiff, she no longer felt threatened by this liability after she discovered that she might be able to settle the matter for under $4000. Mr. Drury filed his motion for sanctions for witness intimidation on June 25, 1996, several days after the offer was communicated, when Ms. Brynteson no longer felt threatened.

Fifth, Mr. Drury asserted in an opposition filed June 24,1996, that Ms. Brynteson's counsel suggested that "he is considering filing a motion for sanctions before this Court." Defs. Opp. to Pl.'s Mot. in Limine at 1 n.l. Ms. Brynteson's counsel testified that it never occurred to him to file such a motion. Moreover, Mr. Drury attached to his motion for sanctions a letter from Ms. Brynteson's counsel to plaintiffs counsel in which Ms. Brynteson's counsel states that the decision to file a motion for witness intimidation "is not in my power; it is a decision to be made by defendant."

Finally, and most egregiously, even when presented with the contradictory testimony or the lack of testimony of witnesses at the hearing, Mr .Drury did not withdraw his motion for sanctions. There was no evidence at the hearing that plaintiff's counsel attempted to induce Ms. Brynteson not to testify at trial. There was no evidence that plaintiff's counsel knew what Ms. Brynteson would testify to at trial. There was no evidence that plaintiff's counsel "pointedly and repeatedly accused [Ms. Brynteson] of illegal activity." There was no evidence that Ms. Brynteson felt intimidated by plaintiff's counsel at the time of the hearing. And there was no evidence that Ms. Brynteson' s counsel considered filing a motion charging witness intimidation. Yet Mr. Drury continued to press. his motion, despite it being apparent that his allegations were unsupported.

The Court will impose a sanction "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). Mr. Drury filed a motion for sanctions that contained very serious accusations against plaintiff's counsel without properly verifying its factual foundation and failed to withdraw that motion when it became apparent it was baseless. As a result of this conduct, the Court will impose the following sanctions against Mr. Drury: (1) $1,000.00, to be paid to the United States District Court for the District of Columbia; and (2) the amount of reasonable expenses incurred by the plaintiff because of the baseless filing (including reasonable attorneys' fees), to be paid to the plaintiff. ld.; see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,110 S. Ct. 2447,2461 (1990) (stating that Rule 11 should be limited to "expenses directly caused by the filing"). The Court will direct the plaintiff to file with the Court an accounting of all expenses directly caused by the baseless filing. Id. Mr. Drury will be given an opportunity to challenge any expenses sought by

the plaintiff; but only to the extent that such expenses are not reasonable or were not incurred directly as a result of the baseless motion.

Accordingly, it is this 20th day of August 1997,

ORDERED that John E. Drury be, and hereby is, sanctioned personally in the amount of $1,000.00; in addition, he shall pay any and all reasonable expenses incurred by the plaintiff because of the baseless filing, including reasonable attorneys' fees; and it is

FURTHER ORDERED that the $1,000 sanction against Mr. Drury be paid into the registry of the Court no later than 4:00 p.m. on September 29, 1997; and it is

FURTHER ORDERED that the plaintiff shall file with the Court no later than 4:00 p.m. on August 29, 1997, an accounting of any and all expenses incurred by the plaintiff as a result of Mr. Drury's baseless motion; and it is

FURTHER ORDERED that Mr. Drury shall file any and all opposition to the plaintiffs accounting no later than 4:00 p.m. on September 10, 1997; and it is

FURTHER ORDERED that the Court will determine the final amount of expenses to be paid by Mr. Drury as sanctions after consideration of the aforementioned papers.