

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Roy Den Hollander

Appellant-Plaintiff,

Docket No. 04-6700-cv

v.

Flash Dancers Topless Club, et al.,

Appellees-Defendants.

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**AFFIRMATION OF FACT IN OPPOSITION TO DEFENDANT FLASH
DANCERS' REQUEST—AFTER THE DEADLINE HAS PASSED—TO
FILE A BILL OF COSTS AND AFFRIMATION IN SUPPORT OF
PLAINTIFF'S MOTION FOR SANCTIONS**

I, Roy Den Hollander, am the attorney plaintiff-appellant, am familiar with the matters within, submit this affirmation in opposition to defendant-appellee Flash Dancers' request—after the deadline has passed—for an extension of time to file a bill of costs and submit this affirmation in support of a motion for sanctions against Flash Dancers' attorneys, the firm of Zane and Rudofsky.

1. The Second Circuit's Summary Order in this case was entered February 3, 2006.

2. Flash Dancers' attorneys had until February 17, 2006 to serve and file a bill of costs—they didn't.

3. The three member firm of Zane and Rudofsky blames its nonfeasance on a trip to California by Mr. Rudofsky and his overlooking a decision by the Second Circuit that was mailed to him, recorded in the New York Law Journal and listed on this Court's Pacer web site.

4. Zane and Rudofsky now seek that this Court punish plaintiff-appellant for that law firm's failure to perform its duty towards its client Flash Dancers.

5. Zane and Rudofsky's also seek that this Court charge plaintiff-appellant for more expenses then allowed: the bill improperly inflates the number of copies necessary and inappropriately includes delivery charges for serving and filing.

6. Granting Zane and Rudofsky's motion for an extension of time will prejudice plaintiff-appellant to the amount of \$446.51 that will be levied against him in violation of his due process rights as protected by the F.R.A.P. just to absolve Zane and Rudofsky of their negligence.

7. In order to respond to Zane and Rudofsky's motion, plaintiff-appellant was required to put in six and one half hours of work to draft, serve and file his opposition and incurred transportation and mailing expenses.

WHEREFORE, plaintiff-appellant Hollander requests that this Court:

(1) deny defendant-appellee Flash Dancer's motion for an extension of time to file the submitted bill of costs after it was due;

- (2) provide affirmative relief against the firm of Zane and Rudofsky in the form of sanctions for its obvious failures to abide by F.R.A.P. and the Local Rules that have wasted this Court and plaintiff-appellant's time and caused unnecessary expenses; and
- (3) schedule oral argument on Zane and Rudofsky substantive motion and plaintiff-appellant's motion for sanctions.

Executed under the penalty of perjury.

Dated: New York, New York
 February 27, 2006

Attorney plaintiff-appellant

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**MEMORANDUM IN OPPOSITION TO FLASH DANCERS
MOTION FOR EXTENSION OF TIME TO FILE BILL OF COSTS**

The plaintiff-appellant, Roy Den Hollander, strongly opposes any extension of time for Flash Dancer’s attorneys, the firm of Zane and Rudofsky, to submit a bill of costs after the time allotted for filing has already passed.

Federal Rules of Appellate Procedure (“F.R.A.P.”) § 39(d)(1) states “A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk ... an itemized ... bill of costs.” (Emphasis added). “Must” means to be obliged, required, compelled or commanded to do something.

American Heritage Dictionary, 2d College Ed. The three member firm of Zane and Rudofsky failed to comply with the rules.

Mr. Rudofsky tries to excuse the violation of this rule on a trip he took to California and inadvertently overlooking a decision by the Second Circuit that was mailed to him, recorded in the New York Law Journal and listed on this Court’s

Pacer web site. (Rudofsky Declaration ¶ 4). Mr. Rudofsky works for a three member firm—he is not a sole practitioner. Exhibit A. It seems unlikely that when Mr. Rudofsky is out-of-town or dealing with other cases, his firm does not have any procedures in place to prevent legal deadlines from falling due without appropriate action. At the very least someone must open his mail and keep him apprised of court decisions, as was the case here since the notification as to the submission of costs accompanied the Second Circuit’s Summary Order.

Of course, Zane and Rudofsky may not have procedures in place for tracking cases or may have failed to execute them—but that is not the fault of the plaintiff-appellant. Zane and Rudofsky are simply trying to shift the consequence of their negligence onto the plaintiff-appellant by asking this Court to suspend the F.R.A.P. for that firm’s mistake. This is not fair, and violates the plaintiff-appellant’s due process rights as protected by the F.R.A.P. The Plaintiff-appellant does not represent Flash Dancers— Zane and Rudofsky do! What harm may flow to Flash Dancers because of its attorneys nonfeasance is not the fault of plaintiff-appellant.

Mr. Rudofsky claims there will be no prejudice to any party by allowing for an extension of time. (Rudofsky Declaration ¶ 6). That’s false! The plaintiff-appellant will be prejudiced to the amount of \$446.51 that will be levied against him in violation of his rights under the F.R.A.P. just to absolve Zane and Rudofsky of their mistake.

Mr. Rudofsky not only asks this Court to off-load the consequences of his error onto the plaintiff-appellant but also to excuse his other violations of the local rules.

Mr. Rudofsky claims he failed to contact the plaintiff-appellant before making his motion for an extension of time because “[i]n light of [plaintiff-appellant’s] *pro se* status and the nature of his claims [Mr. Rudofsky did] not feel that it would be appropriate to discuss the matter with [the plaintiff-appellant].” (Rudofsky Declaration ¶ 7). Plaintiff-appellant is an attorney representing himself; therefore, this is not a *pro se* case under the Court’s rules but a “counseled” case. Mr. Rudofsky knows that. He also knows that throughout these proceedings, the lead attorneys for the defendants, Bradley E. Dubin and Anne P. Richter, have contacted the plaintiff-appellant numerous times on various matters. Those discussions have always been courteous, professional and without rancor. To the extent that Mr. Rudofsky implies his failure to contact the plaintiff-appellant was because it would somehow result in a difficult situation or be inappropriate is false, and he knows that.

Mr. Rudofsky’s bill of costs violates this Court’s requirements as set out in the letter from Clerk Roseann B. MacKechnie, Exhibit B. “[D]elivery charges,” of papers should not be included in a bill of costs, Exhibit B(8), but Mr. Rudofsky included such costs under “Service and Filed (7)” in the amount of \$106, Exhibit

_. In addition, only the number of “necessary copies” should be included in a bill of costs, Exhibit B(6), which in this case were 26 not 30 as claimed by Mr. Rudofsky, Exhibit C.

In conclusion, appellant-plaintiff Hollander requests that this Court:

- (1) deny defendant-appellee Flash Dancer’s motion for an extension of time to file the submitted bill of costs after it was due;
- (2) provide affirmative relief against the firm of Zane and Rudofsky in the form of sanctions for its obvious failures to abide by F.R.A.P. and the Local Rules that have wasted this Court and the plaintiff-appellant’s time and caused unnecessary expenses; and
- (3) schedule oral argument on Zane and Rudofsky substantive motion and the plaintiff-appellant’s motion for sanctions.

Dated: February 27, 2006

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