

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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REPLY
TO FLASHDANCERS AND HENNING’S RESPONSES TO MOTION TO
REJECT CERTAIN DEFENDANT-APPELLEES’ BRIEFS OR STRIKE
DESIGNATED PARTS OF BRIEFS AND FOR SANCTIONS.

Plaintiff-appellant, Roy Den Hollander, submits this Reply to (1) Flash Dancers Topless Club, Jay-Jay Cabaret, Inc., Lynn Lepofsky, Barry Night Manager and Flash Dancers Manager 1 to 5 (collectively “FlashDancers”) and (2) Municipal or Robert Henning’s response to plaintiff’s motion to strike certain briefs or sections of briefs and for sanctions.

FlashDancers Response

The Federal Rules of Appellate Procedure (“F.R.A.P.”) §27(a)(2)(B)(ii) requires that an affidavit submitted with a motion “must contain only factual information, not legal argument” (emphasis added), and F.R.A.P. §27(a)(3)(A) applies this requirement to any response filed to a motion. FlashDancers’

attorneys submitted an affidavit titled “Declaration in Opposition to Motion to Strike, etc.” (“FlashDancers Opposition”) in which they mix factual assertions and legal arguments in violation of F.R.A.P. §27(a)(2)(B)(ii). Plaintiff requests rejection of this response filed by FlashDancers’ attorneys. Since the time to respond under F.R.A.P. §27(a)(3)(A) has now passed, they should not be permitted to correct this latest violation in their continuing disregard of the rules.

FlashDancers’ attorneys try to excuse the references in the FlashDancers Brief to documents not in the Joint Appendix by falsely claiming plaintiff wrongly declined to include them. FlashDancers Opposition ¶13. To support this assertion, they include in FlashDancers Opposition at Exhibit A only the first of four letters detailing the negotiations over the Appendix. Taken together, the letters show that the defendants-appellees ignored their obligations under F.R.A.P. §30(b) in determining the contents of the Appendix:

June 15, 2005 letter, Exhibit A: Mundy and FlashDancers’ attorneys designated six memoranda of law totaling 168 pages, 29 extraneous exhibits consisting of 54 separate documents totaling 178 pages of which 10 exhibits made up of 23 separate documents and 54 pages were stricken by the District Court, Disqualify Order p.2-2, October 27, 2004, A-151, and various orders for time extensions.

July 16, 2005 letter, Exhibit B: Plaintiff revises his designation of the Joint Appendix to six documents and three pages of quotes from his District Court Memorandum in Opposition, A 126-130, to which defendants subsequently agreed. In this letter, plaintiff asked whether defendants had finalized their designations for the Appendix following the CAMP conference on June 21, 2005.

July 21, 2005 letter, Exhibit C: Mundy, FlashDancers and Shipilina's attorneys stated through Mundy's attorney "We do not have any objection to the documents you wish to include in the appendix ...," and went on to suggest the inclusion of the docket entries and the notice of appeal but no other documents.

July 23, 2005 letter [mistakenly dated July 16, 2005], Exhibit D: Plaintiff specifically states he is not including the extraneous documents Mundy and FlashDancers' lawyers originally designated in the June 15, 2005 letter.

F.R.A.P. §30(b)(2) requires that when the appellant informs the appellees that parts of their designations are unnecessary, it is the appellees' obligation to advance the costs to include those designations. Not only didn't Mundy and FlashDancers' attorneys advance any cost, they didn't even respond to the plaintiff denying most of their designations. Given the conduct of appellees' attorneys, a reasonable man would conclude they agreed to the plaintiff's final designation. A realistic man, however, would conclude they were trying to set a

trap by which they could use the extraneous documents they filed in the District Court to fabricate support for their misleading and irrelevant allegations in their appeal briefs—all without the cost of printing these documents in the Joint Appendix. In effect, their strategy is to manipulate this Court into doing their work for them, but if this Court chooses not to thumb through over a hundred pages without specific cites to check defendants’ factual allegations, they hope this Court will still accept their ad hominem and misrepresentations on faith and use them in reaching its decision.

Under Local Rule §11(e), FlashDancers’ lawyers have an “obligation under F.R.A.P. §30 to reproduce in an appendix to their briefs ... exhibits ... to which they ‘wish to direct the particular attention of the court.’” They didn’t do this although they had the opportunity.

While F.R.A.P. §30(a)(2) states: “Parts of the record may be relied on by the court or the parties even though not included in the appendix,” (emphasis added), FlashDancers’ lawyers abuse this rule that exists to prevent a procedural miscarriage of justice. By citing to Mundy’s Memorandum of Law in the District Court, which in turn refers to 21 extraneous documents totaling 114 pages, FlashDancers’ attorneys disguise the real number of documents they rely on outside the Joint Appendix to five as opposed to the 21 plus three memoranda of law. This ruse in citing also allows them to avoid giving the page or

paragraph numbers for particular documents, once again shifting their work and expenses to the Court while making factual allegations that belong in an answer at the District Court level.

The disregard of the rules by FlashDancers’ attorneys led them to citing three memoranda of law, Flash Dancers Brief p.2-1,2, n. 1-3, p.3-1, n. 4-5, p.9-1, p.13, n.9, and even arguing that a quote, FlashDancers Opposition ¶6, from Mundy’s memorandum to dismiss comparing the Complaint to a Tom Clancy novel, FlashDancers Brief p.2-1, had independent relevance.

Flash Dancers’ attorneys quote Local Rule §28(1) but for some reason omitted the word “irrelevant.” FlashDancers Opposition ¶8. That’s what this motion accuses them of doing by making factual allegations irrelevant to the issues at hand. It does not accuse them of failing to submit admissible evidence as they indicate with the phrase “untrue or/and irrelevant,” id. ¶¶7, 8. And no, I’m not conceding their mountain of documents is admissible. The appeal before this Court is not from a summary judgment or trial verdict—no evidentiary hearing is needed by a panel of judges as FlashDancers’ attorneys request. Id. ¶¶8, 9. The legal remedy this motion requests is not a decision on whether FlashDancers’ factual allegations are true, but whether their allegations have any place on a Fed. R. Civ. P. 12(b)(6) appeal—which they don’t. In an

appeal of a Rule 12(b)(6) dismissal, this Court restricts its inquiry to “facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.” Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991); see also Fed. R. Civ. P. 10(c). A search of over a hundred pages of documents is not necessary for this Court to reach a decision—just look to the Joint Appendix.

The FlashDancers Brief exposes another ploy also used by Mundy’s lawyers to shift their work to this Court, hide their misleading statements and which, in part, made the plaintiff’s motion necessary. FlashDancers’ lawyers rely on 14 cases, four of them are imbedded in block quotations from cases, which leaves 10 that they actually cite in their narrative. In seven of these 10 cases cited, they leave out the specific pages. The incomplete citations with their page and paragraph locations in the FlashDancers Brief are: Old Time Enters p.7-2, Lubin p.8-1, Glenn p.14-3, Correa-Martinez p.14-5, The Dartmouth Review, p.15-3, West 79th Street Corp. p.15-4, In re MasterCard Int’l Inc. p.19-1. FlashDancers’ attorneys know better, they have Blue Books that call for specific page citations “to allow the reader [Court] to locate a cited source accurately and efficiently.” Blue Book, §§1.2 to 1.4 (17th ed.). Yet, they disregard even these rules.

FlashDancers' attorneys fault the plaintiff for engaging in motion practice, but when an opposing party violates rules of procedure, it's better to resolve those violations before submitting a reply brief.

Henning's Response

The City's attorneys fault the plaintiff for not indicating in what manner the caption of the case on their brief in opposition is incorrect. Are they blind? All they need do is go to PACER, copy off the caption, Exhibit E, and compare it to their cover. Or they can compare the caption on the Henning cover to the correct one on the Mundy, FlashDancers or Shipilina briefs.

Henning's attorneys omitted the following defendants: Dima-Husband of Anastasia Vasilyeva, Krasnodar Prostitutes 1 to 3, Stephanos-Bank Employee, Melios Athanasiou Agencies, IRINIS 182C Entertainment Company, Melios Athanasiou-Owner and CEO Melios Athanasiou Agencies and IRINIS 182C, Irina Athanasiou-Owner and Executive of Melios Athanasiou Agencies and IRINIS 182C, Marios Athanasiou-Manager Zygos and Tramps Cabarets, A. Charalambous-Cyprus Immigration Chief, Julia Heart Agency, Maria-Prostitute Recruiter for Julia Heart Agency, The Men's Club, Mexico City, Roberto & Rosa Elina Quilan-Managers Men's Club, Max Gracia Appedole, Juginta Raszyukevichina a.k.a. Azul, Salvador-Partner Phodes Studio, Alfredo Ibarra Sotelo, Mexican Organized Criminal Gang 1.

Henning's attorneys list Alina A. Shipilina and Cybertech Internet Strip Club or Cybertech Internet Solutions as defendants when they are appellees.

Conclusion

The strategy of FlashDancers and Henning's attorneys is clear: (1) make factual allegations that are irrelevant on the appeal of a Rule 12(b)(6) dismissal, (2) fill those allegations with lies, prevarications and dissemblings in the hope they will influence the Court, and (3) make it practically impossible for the Court to check these allegations by citing without page references to the mass of documents they filed in the District Court but failed to include in the Joint Appendix.

WHEREFORE, plaintiff requests FlashDancers' attorneys submit a brief that redacts the sections cited in the plaintiff's October 20, 2005 Memorandum of Law, pp 8 to 10, monetary sanctions levied for the violations of F.R.A.P. §30 and Local Rule §28 and reject FlashDancers Opposition for mixing fact and legal arguments in its declaration in violation of F.R.A.P. §27(a)(2)(B)(ii).

AND, the plaintiff requests the Henning Brief be rejected for filing a brief with the wrong case caption. In the alternative, Henning's attorneys redact p.4-2 & 3, n.2 from their brief and monetary sanctions be levied.

AND, if this Court rejects the Henning Brief or grants any redactions in the FlashDancers or Henning Briefs, plaintiff requests an extension of time from

November 9 to November 21 for filing his reply brief in order to make appropriate changes that will free up space for more complete arguments on the issues before this Court.

Dated: October 31, 2005
 New York, N.Y.

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