UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Roy Den Hollander

Plaintiff-Appellant, Docket No. 04-6700-cv

v.

Flash Dancers Topless Club, et al.,

Defendants-Appellees.

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REPLY TO MUNDY'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE CERTAIN DEFENDANTS-APPELLEES' BRIEFS OR STRIKE DESIGNATED PARTS OF BRIEFS AND FOR SANCTIONS.

Plaintiff-appellant, Roy Den Hollander, submits this reply to the response of defendants-appellees Kuba, Mundy & Associates, Nicholas J. Mundy and Peter Petrovich (collectively "Mundy") to the plaintiff's motion to strike certain briefs or sections of briefs and for sanctions.

Mixing Facts and Legal Arguments

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. Mundy's attorneys submitted a declaration ("Mundy Opposition"), which has the same legal effect as an affidavit under 28 U.S.C. §1746, in which they mix factual assertions and

legal arguments in violation of F.R.A.P. §27(a)(2)(B)(ii). The plaintiff requests rejection of the response filed by Mundy's 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 in a long line of violations of the rules.

Formatting

Mundy's attorneys admit that the right and top margins of their appeal brief are not within the requirements of F.R.A.P. §32(a)(4) and Local Rule §32(a).[1] Mundy Opposition ¶11. But because the plaintiff calls them on it, they try to turn the tables by whining about "the extent [plaintiff] will go to abusively litigate this matter," id. ¶11. How can a plaintiff be "abusive" if he holds the defendants to follow the same rules that he must follow? He can't, but that doesn't stop Mundy's attorneys from appealing to Orwellian logic when in reality, it is they who are abusing the rules by failing to submit a brief in the proper format. Plaintiff requests that their brief be rejected.

Spinning

Mundy's attorneys in the Mundy Opposition not only continue to fail to get the Complaint's allegations correct, but prevaricate and spin the procedural history of the Joint Appendix and misrepresent the Federal Rules of Appellate and Civil Procedure.

[1] Mundy's attorneys claim that the margins are off by 1/16th of an inch, but it's really 1/8th or 2/16th of an inch. An objective fact that they still dissemble about.

The Complaint does not allege the defendants are a "purported segment of the Russian mafia" ("the Enterprise"), Mundy Opposition ¶3, rather the Complaint's allegations "concern a portion of the Enterprise's activities in America, Russia, Cyprus and Mexico and some of its Members, the defendants, who are alleged to engage in money laundering, prostitution, pornography, white slavery …." (Complaint ¶15, A-26, emphasis added.) And the plaintiff, although pro se, is also an attorney, so this RICO case is treated under the Court's rules as a counseled case with no special pro se considerations.

The history of the negotiations over the Appendix is laid out in the four letters included as exhibits in plaintiff's reply to FlashDancers and Henning's responses to the Motion to Strike. Reply FlashDancers, Exhibits A-D, October 31, 2005.

Mundy's attorneys declare under the "penalties of perjury" that their June 15, 2005 letter, Reply FlashDancers, Exhibit A, requested the incorporation of 26 documents. Mundy Opposition ¶4 (emphasis added). That is false. Mundy and FlashDancers' attorneys were actually designating 54 separate documents of which 23 had been stricken by the District Court, Disqualify Order p.2-2, October 27, 2004, A-151. The trick they use in misleading this Court over the number of documents designated is that when Mundy's attorneys filed a paper in the District Court, they often included extraneous exhibits and many of those

exhibits had more than one document. When the 26 docket entries in the June 15, 2005 letter are examined, what Mundy and FlashDancers' attorneys actually designated were mixed legal argument and fact documents, 29 exhibits consisting of 54 separate documents totaling 178 pages and various orders for extensions of time.[2]

In the July 16, 2005 letter, Reply FlashDancers, 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.

The July 21, 2005 letter, Reply FlashDancers, Exhibit C, has Mundy's attorneys saying, "We [which includes FlashDancers and Shipilina's lawyers] do not have any objection to the documents you wish to include in the appendix …," and goes on to suggest the inclusion of two additional documents, which were added, but requests no others. This contradicts the claim of Mundy's attorneys that the Appendix documents were "unilaterally selected," Mundy Opposition ¶4.

[2] Plaintiff's Reply FlashDancers at p.2-3 mistakenly referred to six documents as legal memoranda when they were a mixture of legal argument and factual allegations and these documents did not comprise 168 pages but 20 pages.

In the July 23, 2005 letter [mistakenly dated July 16, 2005], Reply FlashDancers, Exhibit D, plaintiff specifically says he is not including the documents Mundy and FlashDancers' lawyers originally designated in the June 15, 2005 letter, except for the ones already agreed to.

Mundy's attorneys plead three reasons for their Joint Appendix nonfeasance, Mundy Opposition ¶4,: (a) F.R.A.P. §30(a)(2) states "[p]arts of the record may be relied on by the court or the parties even though not included in the appendix." This rule exists to prevent a procedural miscarriage of justice, not to allow attorneys to short circuit the purpose of a Joint Appendix or shift to this Court the expenses and burden of tracking down alleged support for defendants' factual averments that don't belong on a Fed. R. Civ. P. 12(b)(6) appeal; (b) Mundy's attorneys didn't want to "burden" plaintiff with the costs—no, they didn't want to burden their clients with the cost. F.R.A.P. §30(b)(2) requires that when the appellant, here the plaintiff, informs the appellees, here the defendants, that parts of their designations are unnecessary, it is the appellees' obligation to advance the costs to include those designations (emphasis added); and (c) Mundy's attorneys didn't want to engage in motion practice because, according to them, documents can simply be cited that are in the Docket Report. If that were the case, then there would be no need for a Joint Appendix or any Appendix as required by F.R.A.P. §30.

Further, Local Rule §11(e) places on Mundy's lawyers 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 that, and the real reasons were (a) to shift their work to the Court, (b) shift their expenses to the Court, (c) consume the plaintiff's time and reply brief space with refuting their factual allegations that belong in an answer before the District Court, and (d) finesse this Court of Appeals into using extraneous material to reach a decision by including in their appeal brief these misleading defense allegations for which they point for support, usually without specific page cites, to hundreds of pages of documents, many unauthenticated.[3] "[T]he defendants seek to argue the merits … in the context of a 12(b)(6) motion to dismiss, which is not the purpose of the motion." T.S. Haulers, Inc. v. Town of Riverhead, 190 F.Supp.2d 455, 464 (E.D.N.Y. 2002)(citing *see* Villager Pond Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir.1995).

Mundy's attorneys object that by the Motion to Strike, the plaintiff is engaging in a "frivolous attempt to shield this Court from reviewing the full record…." Mundy Opposition ¶8. If this Court wants to read the hundreds of pages of documents filed by defendants, including documents the District Court

[3] The Mundy Brief ends up citing to over 35 documents of more than 380 pages not in the Joint Appendix and many not even designated in the Mundy June 15, 2005 letter, such as their two memoranda of law in the District Court that totaled 148 pages.

struck, or thumb through them to find the specific location of Mundy's alleged support for their defense allegations, that's its privilege. But to be fair to the plaintiff, he should be granted additional space in his reply brief and time to counter these irrelevant averments on this Fed. R. Civ. P. 12(b)(6) appeal and reimbursed the cost of the Joint Appendix, since under Mundy's argument, Joint Appendices are superfluous—all attorneys need do is cite generally to a district court docket entry number.

Mundy's attorneys at Mundy Opposition ¶10 argue in effect that if the "Statement of the Case" contains the elements required in F.R.A.P. §28(a)(6), it can also be packed with vitriolic vituperative attacks on the opposing party and misleading factual allegations that are irrelevant to an appeal of a complaint's dismissal. Just because F.R.A.P. §28(a)(6) requires "thou shall" rather than "thou shall not," I doubt that even former President Clinton would construe it to allow the inclusion of the type of matter that Mundy's attorneys do. Furthermore, their calumnies and irrelevancies still violate Local Rule §28.

Scandalous

The Mundy Opposition ¶9 inappropriately omits part of the application of Local Rule §28 to the Mundy Brief. Plaintiff's motion specifies the sections of the Mundy Brief that violate Local Rule §28 because they are "irrelevant" and those sections that breach the rule for being "scandalous" by using many ad

hominem vilifications of the plaintiff in the defendants' strategy of litigation by character assassination. To be sure there are some overlaps: scandalous is often irrelevant, but irrelevant not always scandalous. Still, the Memorandum of Law in plaintiff's motion at pp 4-3 to 6-1 delineates which sections of the Mundy Brief violate which. The response of Mundy's attorneys simply ignores their brief's name-calling.

The Bluebook

The case citations for which Mundy's attorneys fail to provide specific pages, Mundy Brief p.44-1, p.39-2 (Ideal Steel) and p.34-3 (Lerner), are not, as they claim, for general propositions but specific law: what constitutes a compensable RICO injury, proximate cause for exposure of or failing to assist in RICO acts and the RICO standing requirements. Mundy's attorneys also failed to include specific pages for an additional eight cases cited, Mundy Brief p.32-4 to p.33-1, but did include in parentheses what they claimed were the specific propositions those case supported concerning what didn't constitute "business" or "property" under RICO. Once again their strategy is to transfer their work and cost to this Court and overburden their opponent with tracking down their citations.

Sanctions

Finally, Mundy's attorneys use their favorite word "frivolous" again in describing plaintiff's request for sanctions and claim that by making such a request is itself "sanctionable." The plaintiff-attorney has spent around 30 hours on this motion and incurred mailing costs that would not have been necessary had Mundy's attorneys not tried to play fast and loose with the rules. Rules of procedure exist not just for the efficient administration of justice but to protect a person's due process rights under the Constitution. When attorneys try to game the system by picking which rules they will follow and which ones they will ignore, it not only wastes everybody's time, but if successful, makes suspect the system of justice.

Conclusion

This reply requests that the Mundy Opposition, Mundy's attorneys response to the Motion to Strike, by rejected for improperly mixing facts and legal arguments in an affidavit they label a "Declaration."

In addition to the relief requested in plaintiff's Motion to Strike Memorandum of Law, if the Mundy Brief is not rejected out right for formatting errors, Mundy's attorneys be required to provide the specific page cites for all the cases they cited without such.

In the event this Court rejects the Mundy Brief or grants any redactions, plaintiff requests an extension of time from November 9 to November 21 for filing his reply brief in order to make appropriate changes in its draft that will free up space for more complete arguments on the issues before this Court.

Dated: November 2, 2005
New York, N.Y.

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