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Case Number 296,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOKOL HOLDINGS, INC. THOMAS SINCLAIR, and BRIAN SAVAGE	:	
Defendants and Counterclaim Plaintiffs Below, Appellants, Cross-Appellees	:	No. 296, 2017
v.	:	
MARGOLIS EDELSTEIN, MARCUS & AUERBACH, JEROME MARCUS, JONATHAN AUERBACH, and HERBERT MONDROS	:	Court below – Court of Chancery of the State of Delaware in and for New Castle County C.A. No. 3874-VCS
Plaintiffs and Counterclaim Defendants Below, Appellees, Cross-Appellants.	:	

REPLY BRIEF OF CROSS-APPELLANTS

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INTRODUCTION

Defendants Sokol Holdings Inc., Thomas Sinclair, and Brian Savage (collectively, "Defendants" or "Sokol") have failed to pay their former lawyers, Margolis Edelstein and Marcus & Auerbach ("Plaintiffs" or the "Lawyers"), who were the Plaintiffs in this case. During the course of this litigation alone, Defendants have also failed to pay two other other law firms they retained in this case, Biggs & Battaglia and Schwartz & Schwartz.

Defendants' present lawyer, Paul Gordon of the Colorado Bar, who was admitted in the trial court *pro hac vice,* failed to inform the trial court that, in London, his clients were prosecuting Dorsey & Whitney for the very claim which Defendants were claiming, in Delaware, that Plaintiffs had prevented Defendants from bringing.

When the trial court discovered this, the trial judge directed Defendants' counsel to explain why this information had not been provided. Defense counsel's response was that the London case was irrelevant. [LA195]. In this Court, however, Sokol's counsel offers a contrary explanation – that he was unaware of the London proceeding.[1]

The trial court agreed with Plaintiffs that the pendency of the London proceeding was not irrelevant. In light of that conclusion – which Defendants have

[1] The explanation is "offered" only in the sense that it is stated in a brief. Appellants' Reply Brief and Answer at 12, 13. No record evidence exists, and Defendants cite no evidence at all, in support of this claim.

not meaningfully challenged in this Court – Plaintiffs sought Rule 11 sanctions from the Defense counsel responsible for this omission and from the Defendants themselves.

The trial court did not address the merits of the motion. Its ruling includes no finding that the conduct at issue did not occur – on the contrary, the trial court agreed that the conduct at issue in Plaintiffs' Rule 11 motion *had* occurred, and had caused the trial court "grave concerns," but failed to determine whether that misconduct violated Rule 11. Instead, the trial court stated that the concerns were best addressed by the Office of Disciplinary Counsel. The trial court made no finding at all about the culpability of defendants themselves; and it did not address the factual or legal merits of Plaintiffs' motion.

ARGUMENT

THE TRIAL COURT'S FAILURE TO ADDRESS THE MERITS OF PLAINTIFFS' RULE 11 MOTION WAS LEGAL ERROR AND SHOULD BE REVERSED

The trial court's denial of Plaintiffs' sanctions motion is not challenged here as an abuse of discretion – the problem is that the trial court never addressed the motion, and so never exercised its discretion at all. While stating that it "has *grave concerns* over [Sokol's] counsels' unilateral decision not to disclose the existence of the lawsuit by Sinclair in England," the trial court did not address whether Sokol counsel's conduct violated Rule 11, concluding instead that "these concerns are best addressed by Disciplinary Counsel. [LA70-71].

This was error. The trial court should have addressed the motion on its merits. It did not do so. Thus, the trial court did not conclude that the facts were not as alleged as the basis for the motion; and it did not conclude that the facts do not constitute a violation of defense counsel's Rule 11 obligations. Indeed, the only "argument" Defendants make in their Opposition to Plaintiff's Opening Brief is that Plaintiffs have actively pursued only lead counsel, Mr. Gordon, and not local counsel, Schwartz and Schwartz, on this motion. Plaintiffs have proceeded this way because the undisputed evidence in the trial court has at all times shown that local counsel served only as local counsel, and relied on lead counsel for the judgments here at issue. Local Counsel's brief to this Court makes that clear. Indeed, Local

Counsel's submission to this Court shows that lead counsel was not only solely responsible for the decisions here at issue: it shows as well that Local Counsel was left as much in the dark as the trial court itself about the existence of the English action and about lead counsel's awareness of the pendency of that proceeding.

Defendants' brief to this Court, with its undocumented assertion, made for the first time on appeal, that lead counsel was unaware of the pendency of the English proceeding, makes clear that the attorney and client conduct at issue in this motion relates to a most serious breach of the most fundamental duty: that of candor to the tribunal. That issue, and the conduct giving rise to the Lawyers' motion for sanctions is on full display in Sokol's reply brief, which simply perpetuates Sokol's pattern of making of up factual assertions with absolutely no evidence in the record. Here, those assertions related to Sokol's lead counsel's newly minted claim that he did not know that, in England, his clients were prosecuting the very claim he, and his clients, were telling an American court had somehow been foreclosed. This is in marked contrast to how Sokol's counsel explained his gross omission to the trial court. There, Mr. Gordon said he did not disclose it because it was "irrelevant." [LA195].

Counsel's conflicting "reasons" for not disclosing this ("it was irrelevant;" or "I didn't know about it") cannot be reconciled. If the new explanation offered here had been correct, then counsel had a duty to provide it to the trial court, which directed counsel to provide the reasons for his conduct.

These irreconcilable representations to the Delaware Courts – made in the context of a Rule 11 motion – exacerbate the underlying Rule 11 violation: lack of candor to the Court.

This Court held long ago that "Absent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of a disciplinary proceeding." *In re Appeal of InfoTechnology, Inc.*, 582 A.2d 215, 221 (Del. 1990).

The negative inference is clear and has been enforced by Delaware's courts: when an attorney's misconduct *does* taint the proceedings, sanctions at the behest of the opposing party are appropriate and will be ordered.

Misleading, or speaking falsely or omissively to a court, constitutes misconduct that taints the proceedings. Sanctions are ordered by Delaware courts when such conduct, and such harm, are found. See *OptimisCorp. v. Waite,* 2015 Del. Ch. LEXIS 222, at 21-24 (Del. Chancery August 26, 2015); *Bessenyei v. Vermillion, Inc*, 2012 Del. Ch. LEXIS 264, 2012 WL 5830214 (Del. Ch. Nov. 16, 2012) (dismissing action as sanction where counsel had breached duty of candor to the tribunal); *Parfi Holding AB v. Mirror Image Internet Inc.*, 954 A.2d 911 (Del. Ch. 2008)(dismissing action and awarding attorney's fees for breach of duty of candor);.

While the determination of whether to impose sanctions is left to the trial court's sound discretion, the trial court here did not address the substance of the sanctions motion in any way, and so did not exercise its discretion. The trial court's failure to make this determination is error, and the judgment of the trial court denying the Lawyers motion for sanctions should be denied and the matter should be remanded to the trial court for further findings.

CONCLUSION

For all the foregoing reasons, the trial courts' denial of the Lawyers' Motion for Sanctions should be remanded to the trial court for further findings. In all other respects, the judgment of the trial court should be affirmed.

Respectfully Submitted,

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