

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RENE VARGAS on behalf of himself and all
other similarly situated persons, known and
unknown,

Plaintiffs,

v.

TOMMY'S REDHOTS, INC.;
TOMMY'S/LAKE IN THE HILLS, LTD.;
TOMMY'S/MCHENRY, LTD.;
THOMAS GRIECO, individually; and
DONALD GRIECO, individually.

Defendants.

Case No. 14-CV-7144

Judge Andrea R. Wood

Magistrate Judge Michael T. Mason

RESPONSE TO MOTION FOR SANCTIONS PURSUANT TO SECTION 1927.

Now Comes Attorney Robert T. Hanlon with his response to Plaintiff's motion for sanctions pursuant to 28. U.S.C 1927 and asks this court to deny the relief sought by Plaintiff's counsel.

Introduction

It is often said that a party that has to respond to accusations of making false statements has lost in a way because of the mere fact that they have to deny them. This is one of those cases. Attorney Hanlon has never been sanctioned by any court for making any false statement and has made no such false statement to this Court. **Ironically, Attorney Hanlon is defending a sanctions motion that Plaintiff's counsel represented to the court he would not file. See Plaintiff's Exhibit F page 15) Addressing this Court Mr. Caffarelli stated "Judge, I'm not going**

to file a sanction motion.” Apparently, that statement was not true, because here we are. He even went on with “I think there is a special place in hell for lawyers who try to sanction other lawyers”. As such, a review of the federal docket shows that Attorney Cafferalli is no stranger to filing motions for sanctions. If the court desires, Defendants counsel will provide a list of such cases in which Attorney Caffarelli filed such motions. Accordingly Defense counsel agrees with Plaintiffs counsel on the limited point that there is such a special place for attorneys that use sanctions as a litigation tactic.

Plaintiff’s motion for sanctions can be broken down into four primary parts: First Attorney Hanlon was unwilling to engage in discovery dispute conferences at a time when no discovery had been issued, nor authorized by the court; Second, Attorney Hanlon purportedly threatened Plaintiffs counsel with scary words outside the presence of the Court and not in any pleadings; Third, attorney Hanlon purportedly lied to the Court; and Fourth, Plaintiff’s disbelieve Attorney Hanlon had any computer related issues.

Plaintiff alleges that Plaintiff purportedly undertook over \$20,000 in expenses related to what are purportedly inflammatory threats, and false statements, all before discovery commenced in this case and all because Mr. Hanlon is a purported bad guy¹. In reality, this whole case is about the Plaintiff’s counsel harassing the Defendants and advancing a lawsuit without any facts to back it up. Nowhere in Plaintiffs’ Motion does Plaintiff show any record of any item that demonstrates that any of these items cost plaintiff \$20,000. Plaintiff fails to point to a single item of time spent that reflects this amazing \$20,000. No time records, no causation, no nothing to connect the alleged behavior and this mysterious \$20,000 claim. Frankly, the entire claim is specious including the purported basis for Plaintiffs claims. Plaintiff has not had to do

¹ It is noteworthy that Plaintiff filed a motion for a protective order related to discovery before discovery commenced.

anything with respect to any purported threat or purported harassment or purported claim in this case.

Background

Early on in this case, Defendants asked Plaintiff for the basis of the Plaintiff's economic claims. A simple and straight forward item to inquire about. As a result, Plaintiff and Defendants exchanged 26(a) disclosures. (Mr. Poper was originally counsel for the Defendants and communications were directly with Mr. Poper, it was Mr. Poper who was to respond to the initial 26 (a) as shown in the e-mail of March 23, 2015 attached to Plaintiff's Motion in Exhibit A). However, Plaintiff's initial 26(a)'s had no actual calculation of damages. See Exhibit A. Thereafter, Plaintiff produced documents alleging that Plaintiff had not purportedly been paid \$1,475. While the Court was considering Defendants' motion to dismiss the original complaint², the Defendant sent to Plaintiff a check for \$1,875 gross (withholding taxes deducted from that amount), basically figuring that the claim had been satisfied. Thereafter, this Court dismissed the original complaint. Surprisingly, Plaintiff then filed a First Amended Complaint detailing a vast alleged scheme to avoid making payment of overtime. On countless occasions Defendant attempted to obtain a calculation from Plaintiff for the purported wages that the Plaintiff had not been purportedly paid. One such attempt was the e-mail by Attorney Hanlon to Ms. Martin of February 10, 2015 that so severely traumatized Ms. Martin that she cannot talk to Attorney Hanlon any more.(sarcasm intended) See Plaintiff's Group Exhibit A. Examination of said E-mail revealed no such traumatizing statement. Rather it was a communication between attorneys in the course of litigation.

² This court granted Defendant's motion to dismiss the original complaint.

Only after the court gave Plaintiff instructions that it wanted Plaintiff to address the issue of providing a calculation did Plaintiff revise its 26(a) disclosure with a method of calculation and not an actual calculation of alleged non-payment despite the language of Fed. Rule Civ. Pro. 26(a). See Exhibit B. Counsel for the parties appeared in open court and Plaintiff's counsel appeared and stated to the Court that he would attempt to provide the information Defendants sought.

Immediately after court on 1/28/16, Defense counsel approached Plaintiff's counsel and conducted a 37.2 conference and Plaintiffs counsel again stated that he wanted the Defendants to respond to discovery not yet served as a condition to respond to the Request for the amount of Plaintiff's damages in the 26(a) disclosures already served, but yet to be supplemented. Defense counsel then stated "You filed a federal lawsuit, surely you have a basis for filing suit." Plaintiff's counsel then responded "I file a lot of federal lawsuits! The 37.2 conference ended with no meaningful resolution. Attorney Hanlon had to follow Attorney Caffarelli in the courthouse, down a hallway, in an elevator, and down another hallway to conduct the 37.2 because neither Mr. Caffarelli nor his associate would take calls from attorney Hanlon. Because of the statements made by Plaintiff's counsel it was clear that no calculation would be forthcoming. Defendants filed a motion because it was clear the Plaintiff was not going to provide a calculation in the subsequent 26(a) disclosure. As predicted, Plaintiff provided no such calculation. See Exhibit B. Defendants then propounded discovery on Plaintiff to address this very simple question. Plaintiff then answered Defendants discovery and learned that the original \$1,475 claim that was paid prior to the filing of the First Amended Complaint was the basis for the Plaintiff's claim for damages in the First Amended Complaint. See Exhibit E. In essence,

there is now an overpayment and the Defendants are still defending a lawsuit and Plaintiff is crying foul.

Plaintiff complains that Defendants' counsel was playing a game when he articulated he could not see anything on Pacer reflecting the Amended Complaint. Even though this Court articulated that others were experiencing the same or similar problems, Plaintiff did not relent. And this now forms a basis for a sanctions motion. Additionally, Defendants' counsel actually took a video of the attempt open the First Amended Complaint which such video demonstrated that the CM/ECF system was producing a blank page.³ Having this video, Attorney Hanlon sent the video to Attorney Cafferalli, along with a request for an apology. In a typical fashion, Mr. Cafarelli ignored the request and now complains to this court that it is impossible for these matters to arise.

A. E-mails of the Plaintiff's Counsel

A substantial portion of Plaintiffs motion focuses on an allegation that Plaintiff's counsels had sent to Attorney Hanlon various e-mails and that the e-mails definitively show non-response or purported false statements to the court. This is simply not true and inaccurate. Most of Plaintiffs emails relate to a discussion in which Attorney Hanlon did not want to deal with objections over discovery that was never propounded. Such a discussion would be a complete waste of time and serves only to pad hours in this case and would have no legitimate basis for attorney Hanlon to continue that discussion, unless he was interested in unethical billing. As the Plaintiff's counsel articulated in open court, Plaintiff's counsel would not engage in telephonic conversations with Defense counsel. Absent e-mail, there was no way to communicate with Plaintiff or his associate. However, during the later part of 2015, commencing in late October or thereabouts, Attorney Hanlon experienced numerous problems with CM/ECF and E-mail which

³ Said Video is available for examination by the court.

continued into the new year. This was communicated in open court that he was having these issues and Plaintiff still refused to address Attorney Hanlon by telephone.

Attorney Hanlon's network was infected with malware and ransomware⁴. See Exhibit C. The particular variant of computer virus encrypted files on Attorney Hanlon's computer, including e-mails which did not alert Defense counsel to the issue of any of Plaintiff's concerns or issues. See Exhibit C. Later, after expending resources of Defense counsel to counter the impact of the ransomware Plaintiff's e-mails were located. During the period of time Defense counsel was experiencing these problems, Plaintiff's counsel would, knowing that Attorney Hanlon was having these kind of problems, send him e-mails and complain of a non-response, and he would not extend the common courtesy to call and make an inquiry, after all telephonic conversations were impossible.

B. Purported failure to engage Ms. Martin.

Defense counsel on numerous occasions called Plaintiff's attorneys and was informed by the receptionist that Ms. Martin would not talk to Attorney Hanlon. This much was admitted by Mr. Caffarelli in open court, yet in his motion he articulates that Hanlon refused to engage Ms. Martin. No affidavit or declaration is attached to Plaintiff's motion as to Attorney Hanlon's unwillingness to engage, rather, this notoriously false accusation is made before this court.

C. False and Misleading Allegations contained in Plaintiff's Motion.

⁴ Ransomware is a term to describe a particular virus that encrypts files and data making them invisible to the user. These forms of attack provides links to various web sites that show the encryption is virtually unbreakable and an encryption key could be purchased (see Hobbs act extortion) from the creator of the virus to restore the computer. Thus, the computer is held hostage for a money ransom. It is believed that these ransomware virus originate in Russia and target business in the United States. Defense counsel was an unlucky victim. Making matters worse after the initial attack, the virus sends "Ip address" information to the computer-naper to victimize the same user again. One such repeat occurred on March 23, 2016. In response Defendants' counsel ordered new Domains, new E-mail addresses and new computers, all at significant expense.

The following is a summary of numerous false and misleading statements contained in Plaintiffs motion.

1) Plaintiff alleges that Attorney Hanlon failed to engage in a discussion to resolve a discovery dispute. See Motion Pg 2. This is one of many of Plaintiff's lies to this Court. At the time complained of by Plaintiff, no discovery had been propounded. See Plaintiff's Exhibit A – e-mail from R Hanlon dated 2/10/15 clearly articulating that the issue of immigration status was not yet in play and articulated “Unless and until I propound discovery in this case, your objections are misplaced”... At that time, discovery had not commenced. In fact, it wasn't until much later that discovery was allowed in this case. So Plaintiff alleges in essence its bad that attorney Hanlon was not going to waste his time with resolving a dispute that involves discovery that was never issued in the first place.⁵

2) Plaintiff's counsel e-mail of February 10, 2015 suggesting a meet and confer conference is completely disingenuous. The Plaintiff's counsel stated that she would be available for a discussion that day, yet absolutely refused to talk with Attorney Hanlon as later acknowledged in open court by Mr. Cafferalli. See Plaintiff's Exhibit F at page 10. There Mr. Cafferalli articulates that his associate, Ms. Martin refuses to speak with him [Attorney Hanlon]. Nowhere in the written material does Plaintiff articulate that they refuse to talk to Attorney

Hanlon in correspondence to Attorney Hanlon. It is only later admitted in open court by Attorney Caffarelli.

⁵ Plaintiff filed a motion for a protective order that was unopposed by Defendants. Perhaps if Plaintiff was so concerned about the legal status of his client his concern was fueled by the legal status as opposed to any improper discovery that was propounded.

3) Plaintiff Alleges that Attorney Hanlon failed to respond to an e-mail dispatched to him in mid afternoon on the day that a status report was due. See Motion page 2 item 4. Perhaps Plaintiff should not have waited until the very last minute to actually send something he wanted an immediate response.

4) Plaintiff has made it all too clear that Plaintiff's counsel would not meet and confer on any issue. See Plaintiff's Exhibit F at page 10. Again Mr. Cafferalli acknowledged that attorneys with appearances in this case refused to talk to Attorney Hanlon. Somehow that becomes actionable by Plaintiff when Attorney Hanlon fails to talk with Plaintiff's counsel by the scheme designed by Plaintiffs counsel to prevent those discussions, especially when they claim they are seeking a response when they know full well Attorney Hanlon was experiencing problems with e-mail and computers.

5) Plaintiff alleges that Defendants failed to respond to the First Amended Complaint timely. True but misleading. As explained to the court, all that appeared on the CM/ECF system was a blank screen of white nothing. Attorney Caffarelli and Martin refused to talk to Attorney Hanlon and therefore the matter was raised with this Court. This Court even instructed Mr. Cafferalli that attorneys in this case with appearances needed to talk to the opposing side. Honestly, when is it appropriate for any attorney with an appearance in a case to say "I'm not talking to you"? In the same vein is it remotely proper to allege that its traumatizing to the attorney for not receiving a communication?

6) Attorney Hanlon did not object to the discovery plan and Plaintiff's counsel filed the discovery plan, this Court adopted the discovery plan. How did this hurt Plaintiff? How did Plaintiff feel harassed by that approach? How is it that Plaintiff suffered?

7) Plaintiff alleges that Attorney Hanlon filed a motion to compel too early. The very reason for the motion to compel has been born out in the subsequent discovery in this case. That is the Defendant was playing games with the 26(a) disclosure in failing to compute a claim of damages. Now after discovery has commenced, Defendants learn the basis for Plaintiff's suit is the wage claim Plaintiff voluntarily paid six months before the First Amended Complaint was even filed.

8) Plaintiff alleges that Attorney Hanlon's e-mail of February 10, 2015 was a response of hostility. This is utter nonsense. The February 10 e-mail from Attorney Hanlon clearly articulated a position. It is likely true Plaintiff doesn't like the position taken. But the reality is that we are a year and a half into litigation and the plaintiff has alleged damages that were paid before the First Amended Complaint was filed.

9) Contained in paragraph 2 of plaintiff's "threats section" it was reported to attorney Hanlon that an act of witness intimidation occurred. This potential misconduct was raised to the counsel of the party that purportedly engaged in the misconduct. If taken as true, then there is a serious issue. That issue was raised with the Plaintiff's attorney. Any attorney learning of a threat of physical harm to a potential witness is

serious and has an obligation to address it with opposing counsel. At no time did Attorney Hanlon say it was an absolute fact but rather he had learned of this and wished to discuss it and disclose the item to opposing counsel. Plaintiff denied the allegation. Again this is not a threat but a reasonable way to discuss an allegation of serious misconduct if true.

10) At no time did attorney Hanlon file with this court any document accusing the Plaintiff of suborning perjury. However, if what Attorney Hanlon was being told was true the interest of justice required that the matter be flushed out. Again it's not harassment for one attorney to tell another attorney that such an act would be bad and that he had received a report of such conduct.

11) Plaintiff alleges that Defendant was dishonest with the Court related the filing of an answer. Plaintiff claims that the voice mail attorney Hanlon left was nine minutes after he received notice of the motion filed by Plaintiff for Default. Defendant's counsel simply remembers it the other way around. It is unknown to Defendant if the voice mail system of Plaintiff's counsel is synced to the time of the CM/ECF system. The CM/ECF notice message was in fact time stamped 4:01am, six minutes apart from the alleged time of the voicemail. See Exhibit D. There was no false statement to the Court.

Outrageously enough, the Plaintiff alleged that Attorney Hanlon had an "imposter" appear in open court the day Mr. Poper withdrew, claiming that a man in his 30's appeared posing as Mr. Poper. See Plaintiff's motion Exhibit F pg 7-8. However, no such young man appeared. Rather, Mr. Poper's partner, Steve Hauck, (another man in

his 70's) appeared and presented the motion on behalf of Mr. Poper. Mr. Cafferalli's allegation of an imposter being present in the courtroom is such an incredulous lie that it is unfathomable. Although Mr. Cafferalli makes this allegation he failed to attach the transcript of the hearing which he could have done if he didn't think that lie of his would be exposed. But the court is supposed to Sanction Attorney Hanlon when Attorney Caffarelli feels free to cast about such awful claims before this court with no factual basis to support them.

12) Plaintiff claims that Attorney Hanlon lied to the court related to the non-receipt of the First Amended Complaint. This too is not true. Plaintiff points to an e-mail that Plaintiff claims was a basis for the delivery of the complaint. This is the same issue addressed earlier. Simply put, at the time Attorney Hanlon appeared in open court, he did not have the complaint. Additionally, the Plaintiff alleges that the complaint sent did not have its Exhibit D attached. This is an absolute fact that the mailed copy did not have an Exhibit D attached to the complaint. In failing to be scrupulous Plaintiff alleges that Defendants counsel altered the document received by mail. This is a specious claim by Plaintiff. In fact, this is such an egregious accusation that shocks the consciousness of any person that is involved in the court system. It is the Plaintiff that failed to attach the proper Exhibit D and the document received in Defense counsel's office read with the gibberish contained on the purported exhibit. The whole reason for the delivery by Plaintiff to Defendant a copy of the complaint was that the item on CM/ECF appears as a blank white page on the computer of Attorney Hanlon. Attorney Hanlon took a video and sent the video to opposing counsel, yet he still contends that it is attorney Hanlon

falsifying material to the court, when in fact the statements made by Attorney Hanlon were true. A review of the transcript of the court proceedings of January 28, 2016 show the erroneous Exhibit D was sent to Attorney Hanlon in error. See Plaintiff's Motion Exhibit F pg 3. It is for the very reason that Ex D had a computer error message that the question was raised.

13) Plaintiff alleges that Defendants counsel representation that he did not contact Plaintiff's counsel to meet and confer was a false statement to the Court contained in the Pleading when Defendants moved to compel a calculation in the 26(a) disclosures. In the response to the pleading, the Plaintiff did not raise this issue. How quickly he forgets that in his rush to leave the courtroom at the prior occasion on January 28, 2016, Attorney Hanlon tracked him down and followed Attorney Cafferalli to his next court appointment and conducted the meet and confer in the courthouse first in the hallway, then the elevator, and then in the hallway of a lower level in the Dirksen building. This was specifically done when Plaintiff had refused to talk on the phone. As such, defense counsel took advantage of the fact the two attorneys were in the courthouse together at the same time so as to have such a discussion. Importantly, the attorneys met and conferred. Now the allegation that no such meeting occurred is yet another example of Plaintiff's false statements to this Court.

Interestingly enough, Plaintiff has alleged that Attorney Hanlon has repeatedly attacked plaintiff's counsel and purportedly engaged in a vast campaign to harass plaintiff. In actuality,

plaintiff received one e-mail in which Attorney Hanlon disagreed with the need to conduct a 37.2 more than a year ago before discovery commenced.

Plaintiff fails to include any affidavit in support of his positions, no declaration and no sworn testimony. Such allegations of tampering with documents and purportedly lying to the court about meeting which were actually had in this courthouse are in and of themselves lies by Attorney Cafferalli.

C) Plaintiff's Mysterious \$20,000

Plaintiff concludes his motion with a statement indicating that he incurred \$20,000 in fees because on Attorney Hanlon's purported silence, or harassment. One e-mail took a position that said that the case is meritless and that he would dispatch a safe harbor letter. If that constitutes harassment, then the practice of law has utterly changed and is to be practiced by weak and infirm people of small minds that lack fortitude to represent their clients.

ARGUMENT

A. SANCTIONS GENERALLY

Whether a case is weak or difficult to prove, does not render it objectively unreasonable. A sanction motion is not to be employed as a test of the sufficiency of legal pleadings. *Harter v. Iowa Grain Co.*, 202 F.3d 272 (Table); 1999 WL 754333 *4 (7th Cir. 1998). Court looks with disfavor on a party's use of sanctions or the ethical rules as combative tools; rules governing the ethical conduct of lawyers are too important to be trivialized and used in baseless mud-slinging. *Autrey v. U.S.*, C.A.11 (Ga.) 1989, 889 F.2d 973, rehearing denied 897 F.2d 537. Even arguments that may appear weak are not sanctionable if they are reasonable. *Bilharz v First Interstate Bank of Wisconsin*, 98 F.3d 985 at 989 (7th Cir. 1996). If a claim made in the

complaint “was supportable on any theory,” it is not sanctionable. *Divane v. Krull Elec. Co.*, 319 F.3d 307, 316 (7th Cir. 2003) (emphasis added). “Sanctions and Rule 11 are principally designed to prevent baseless filings.” *Brunt v. Service Empl. Int’l Union*, 284 F.3d 715, 720 (7th Cir. 2002). The primary purpose is to deter baseless filings and curb abuses of judicial system, not to reward parties who are victimizing others by way of litigation. *Tidik v. Ritsema*, E.D.Mich.1996, 938 F.Supp. 416.

In contrast to the obligations of counsel in asserting claims of misconduct against opposing counsel Attorney Cafferalli has utterly failed to be scrupulous when advancing this Sanction’s Motion. See *In re Kelly*, 808 F.2d 549 (7th Cir.1986) see also *Heritage Pullman Bank & Trust Co. v. Carr*, App. 1 Dist.1996, 219 Ill.Dec. 136, 283 Ill.App.3d 472, 670 N.E.2d 814. In this case, Plaintiff brings its sanction motion without adhering to the principles articulated Kelly. In order to be scrupulous when advancing a motion, Plaintiff ought to plead a false statement to the court with particularity and back it up with sworn statements. However, Plaintiff relies upon innuendo and speculation and fails to consider that even if a party is wrong, they may verily believe the position to be true. Here, the unjustified attack fails to comport with the above authority.

As shown above, Plaintiff fails to articulate any causal connection between the mysterious \$20,000 and the acts complained of by Plaintiff. Importantly, Plaintiff fails to allege Attorney Hanlon breached any duty in his non-response to Attorney Caffarelli in responding to e-mails and the like. The likely reason is that Plaintiff suffered no such injury and Attorney Hanlon did not violate any such rule.

This is because Attorney Hanlon did not engage in misconduct. Rather, there were impediments to the filing of a timely answer because legitimate computer issues compromised the ability to do so. Moreover, Plaintiff's claims of a lack of communication were the direct result of Plaintiff attempting to take advantage of computer issues that plagued attorney Hanlon's office. There were no false statements to the Court by Attorney Hanlon. Rather, the false statements of attorney Caffarelli to the court were and are clearly ascertainable. To wit Mr. Caffarelli stated the following false statements among others: 1) I'm not going to file a sanctions motion, 2) there was a 30 year old who stepped up and said "I'm Michael Poper." 3) Attorney Hanlon didn't meet and confer before filing the motion to compel, 4) "Judge I don't believe this is a Rule 23 class".⁶

Assuming it is true that Attorney Hanlon informed Ms Martin of the reported threat against another employee, it did not mean that the communication of receiving such information was improper, unethical, or even morally wrong. Its easy enough for an attorney to say something like: "I will talk with my client and make sure that the conduct did not occur and will not occur." But not Ms Martin, this so traumatized her that she thought Mr. Hauck was in his 30's.

Clearly, attorney Caffarelli could be mistaken about Exhibit D to the First Amended Complaint, but to contend attorney Hanlon altered the document is specious. It was his computer that printed the complaint. My office merely scanned

⁶ First amended Complaint alleges in paragraph 33 reads "This action is brought as a class action under Federal Rule 23."

it into a PDF. Clearly, Attorney Hanlon and Attorney Cafarelli may have mutually exclusive perceptions. That in if itself is not a basis to pursue sanctions this early in litigation.

Respondent suggests that Mr. Caffarelli sees his world via his desires, but clearly no act was engaged in that constitutes harassment, no knowingly false statement was made to the court, and certainly Plaintiff has not incurred \$20,000 worth of legal work over what is included in his list as misdeeds of Defense counsel when in fact there was no misconduct and nothing that warrants sanctions. Importantly, this court granted leave to file a petition only on the issue of a default motion. Despite the false and misleading statements by Plaintiffs counsel, Defendants have resisted the desire to sanction Plaintiff's counsel.

Respectfully submitted,

Dated: March 25, 2016

/s/ Robert T. Hanlon

One of Defendant's attorneys

Robert T. Hanlon
Law Offices of Robert T. Hanlon
And Associates P.C.
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CERTIFICATE OF SERVICE

The undersigned, Robert T. Hanlon, hereby certifies that on March 25, 2016 he electronically filed Defendants', TOMMY'S REDHOTS, INC.; TOMMY'S/LAKE IN THE HILLS, LTD.; TOMMY'S/MCHENRY, LTD.; THOMAS GRIECO, individually; and DANIEL GRIECO, individually, **Response to Motion for Sanctions** with the Clerk of the Court using the CM/ECF system which sent notification to the following:

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