IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUBAKER KITCHENS, INC.	:	CIVIL ACTION
	:	
v.	:	No. 05-6756
	:	
STEPHEN M. BROWN, et al.	:	

SUPPLEMENTAL MEMORANDUM

Juan R. Sánchez, J. **December 11, 2006**

Robert A. Klein, Esq., and Berkowitz Klein, LLP, move for reconsideration of my Order of October 31, 2006, granting Defendant Mark Schibanoff's Motion for Sanctions, arguing my decision was based on a transcription error and asking me to consider new facts regarding the requisite "safe-harbor" period. While I agreed to open the record and consider additional facts, I find no reason to vacate my Order granting sanctions.

FACTS

As the parties are well aware of the facts, I will review them here briefly. On December 28, 2005, Brubaker Kitchens, Inc., by and through its attorney, Robert A. Klein, filed a Complaint alleging Stephen M. Brown, Dean Gochnauer, Richard Welkowitz, and Mark Schibanoff entered into a competing venture now known as Ivy Creek Custom Cabinetry, Inc. On February 21, 2006, Brubaker filed a Motion for a Temporary Restraining Order and a hearing was held the following day. At the hearing, Schibanoff maintained, through counsel, there was no basis to include him in the case and Rita Berkowitz, Brubaker's President, stated she had no reason to believe Schibanoff was providing any financial support to Ivy Creek. Nine days later, Brubaker filed the First Amended Complaint reasserting its claims against Schibanoff.

After the filing of the First Amended Complaint, Schibanoff continued to assert his lack of involvement in the case. On May 1, 2006, Charles V. Curley, Esq., Schibanoff's counsel, asked Klein what legal or factual basis existed for keeping Schibanoff in the case. On May 4, Klein responded to Curley's letter with a list of conditions for dismissing the claims against Schibanoff. Four days later, Rita Berkowitz, President of Brubaker, was deposed. In her deposition, Berkowitz stated her only basis for believing Schibanoff was involved with Ivy Creek was information she received from Ron Laughman, a truck driver for Brubaker, in December, 2005. Berkowitz also stated she had no idea how Schibanoff was involved with Ivy Creek and she never asked Laughman how Schibanoff was involved with Ivy Creek. Two days after Berkowitz's deposition, Klein sent another letter to Curley withdrawing his offer to dismiss the claims against Schibanoff.

On May 11, Curley sent a copy of the Motion for Sanctions to Klein pursuant to the "safe harbor" requirement under Federal Rule of Civil Procedure 11.[1] Seven days later, Brubaker filed a Motion for Leave to File a Second Amended Complaint reasserting its claims against Schibanoff and adding claims against Schibanoff's business partner, Robert Scigliano, and Schibanoff's business, Kitchen Brokers Inc. Shortly thereafter, Laughman testified in a deposition Gochnauer told him in December, 2005, Schibanoff simply promised to have work for Ivy Creek. Laughman explicitly stated he had no knowledge whether Schibanoff provided any financial assistance to Ivy Creek, or whether Schibanoff provided any business advice to

[1] Rule 11 requires a party who motions for sanctions to serve the motion on the opposing party, and the motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected." Fed. R. Civ. P. 11(c)(1)(A).

Brown or Gochnauer. Laughman shared this information with Berkowitz the day after Brown and Gochnauer left Brubaker's employ in 2005.

On June 19, 2006, Schibanoff filed a Motion for Sanctions, 39 days after Klein received a copy of the unfiled Motion for Sanctions. After a hearing, I granted Sanctions. In response to my Order Klein and his law firm, Berkowitz Klein, LLP, submitted a Motion for Reconsideration. During the hearing on the Motion for Reconsideration, Movants presented testimonial evidence of Klein's deliberation process before filing the First Amended Complaint, his career as an attorney, and his family circumstances. Schibanoff also presented evidence to show Klein never made an offer to withdraw Brubaker's claims during the safe harbor period.

DISCUSSION

A motion for reconsideration will be granted for any one of three reasons: "(1) an intervening change in the controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent a manifest injustice." *General Instrument Corp. of Del. v. Nu-Tek Electronic & Manuf., Inc.*, 3 F.Supp.2d 602, 606 (E.D.Pa. 1998) (quoting *Environ Products, Inc. v. Total Containment, Inc.*, 951 F.Supp. 57, 62 n.1 (E.D.Pa. 1996)). Due to the interest in finality, motions for reconsideration should be granted sparingly. *Rottmund v. Continental Assurance Co.*, 813 F.Supp. 1104, 1107 (E.D.Pa. 1992). "The parties are not free to relitigate issues which the court has already resolved." *Id.* (quoting *Johnson v. Township of Bensalem*, 609 F.Supp. 1340, 1342 (E.D.Pa.1985)) (internal punctuation omitted).

Movants argue I should reconsider my Order granting sanctions because the Order was based on a transcription error from the TRO hearing of February 22, 2006. In my Memorandum and Order, I reasoned Klein filed the Amended Complaint in clear violation of Rule 11 because

he admitted Schibanoff did not belong in the case at the TRO hearing, less than two weeks prior to filing the Amended Complaint. This assertion was based on an error in the transcript attributing the statement, "we don't believe and we've never believed that Mr. Welkowitz or Mr. Schibanoff should be in this case," Tr. of TRO Hr'g at 17, to Klein. Instead, this statement is appropriately attributed to Michael J. Torchia, counsel for Brown and Gochnauer.

While I agree my Order granting sanctions should not be based on a transcription error, Movants are wrong to believe I found a violation of Rule 11 based solely on this fact. To the contrary, by the time the First Amended Complaint was filed, "the only substantiated allegation against Schibanoff was that Gochnauer told Laughman Schibanoff had promised to do business with Ivy Creek. Based on this information alone, Brubaker lacked the factual basis to support its claims against Schibanoff." Mem. at 5.

Movants argue it was reasonable for Klein to include allegations against Schibanoff in the First Amended Complaint based on Berkowitz's statements to Klein and her affidavit of February 15, 2006, swearing Schibanoff was a shareholder or business partner with Brown, Gochnauer, and Welkowitz in the business competitive with Brubaker. Berkowitz also stated in her affidavit Schibanoff intentionally directed activities alleged in the Complaint at Brubaker.[2] These conclusory statements were based on a conversation Berkowitz had with Laughman in December, 2005. While Berkowitz stated in her deposition Laughman claimed Gochnauer told him Schibanoff was going to be involved with Ivy Creek, Berkowitz stated she never asked

[2] In the Memorandum in support of the Order granting Schibanoff's Motion for Summary Judgment, I narrowed the claims against Schibanoff to: (1) infringement of Brubaker's copyrighted catalogue; (2) conspiracy to harm Brubaker; (3) tortious interference with contractual relations; (4) tortious interference with prospective advantage; (5) inducement of at-will employees to leave their employment; and (6) procurement of information by improper means.

Laughman if he knew how Schibanoff was going to be involved with Ivy Creek. At his deposition, Laughman stated Gochnauer told him Schibanoff had agreed to do business with Ivy Creek and that he shared this information with Berkowitz in December, 2005. Laughman testified he had no knowledge Schibanoff was providing any financial assistance to Ivy Creek, or that Schibanoff had provided any business advice to Brown or Gochnauer.[3]

Klein never spoke with Laughman before filing the First Amended Complaint.[4] By March 3, 2006, the day the First Amended Complaint was filed, it was unreasonable for counsel to continue relying on Berkowitz's speculation Schibanoff was a partner with Ivy Creek. First, Klein should have been on notice Berkowitz's affidavit was questionable regarding her knowledge of Schibanoff's involvement because the statements in her affidavit were speculative and conclusory. Next, Schinbanoff represented through counsel at the TRO hearing there was no basis for including him in the Complaint. Finally, when asked about Schibanoff at the hearing, Berkowitz stated she had no personal knowledge Schibanoff was providing any financial support to Ivy Creek.

The courts have made clear "[b]lind reliance on the client is seldom a sufficient inquiry." *Mike Ousley Productions, Inc., et al., v. Cabot*, 130 F.R.D. 155, 158 (S.D. Ga. 1990) (quoting *Southern Leasing Partners, LTD. v. McMullan*, 801 F. 2d 783, 788 (5th Cir. 1986)). In *Mike Ousley Productions, Inc.*, the court found sanctions were appropriate where counsel improperly

[3] While both Laughman's and Berkowitz's depositions occurred after the filing of the First Amended Complaint, their testimony explicitly covered their knowledge of the facts in December, 2005. Furthermore, Berkowitz testified, as of the date of the deposition, she continued to lack evidence of Schibanoff's involvement with Ivy Creek.

[4] Klein argued this was reasonable because Berkowitz is his longtime friend and the wife of his law partner, Gerald S. Berkowitz. If anything, it is clear from the record this relationship clouded Klein's judgment.

relied on hearsay statements regarding a defendant's involvement in the suit. More specifically, "[a]n attorney has not made a 'reasonable inquiry' concerning the facts . . . if he has relied only on his client, when time permitted him to make a further investigation." *Id*. at 159 (quoting *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D. Ky. 1987)). In *Mike Ousley Productions, Inc.*, as in the case at hand, counsel had plenty of time to confirm the accuracy of his client's statements.[5] In the present case, counsel should have followed up with Laughman regarding his conversation with Gochnauer which would have revealed the lack of evidence supporting Berkowitz's claims. Although counsel may claim it was reasonable to believe Berkowitz's speculation, counsel should have been on notice after the TRO hearing the accuracy of Berkowitz's statements was seriously in question. Despite counsel's claims otherwise, Berkowitz did admit at the TRO hearing she had no specific knowledge whether Schibanoff was providing any financial support to Brown and Gochnauer. Furthermore, Schibanoff denied any involvement with Ivy Creek. As the court in *Mike Ousley* held, it is unreasonable for counsel to rely on hearsay statements to join a defendant where there is no other evidence he should be included in the case and the record includes statements denying his involvement. *See* 130 F.R.D. at 159.

Movants also suggest the Court take into account additional information which was not previously part of the record. At the hearing on the Motion for Reconsideration, Movants submitted evidence of discussions between Klein's partner, Gerald Berkowitz and Curley's

[5]Klein argued it was unreasonable to expect him to follow up with Laughman prior to filing the First Amended Complaint because he did not want employees of Brubaker to be concerned by an attorney's presence in the office. I find this argument without merit because the First Amended Complaint was filed more than two months after the original Complaint and Klein stated during the hearing on the Motion for Reconsideration he discussed the case with another attorney outside the firm because this case was the "hottest topic you could have on your table." Tr. Audio Recording.

partner, Ethan Halberstadt, Esq., during the Rule 11 safe harbor period. These discussions, it was argued, are evidence Klein attempted to dismiss the claims against Schibanoff. While I agreed to open the record to consider these additional facts, I find it was proper for Schibanoff to file the motion for Rule 11 sanctions because the First Amended Complaint was neither withdrawn nor appropriately corrected by the end of the 21-day safe harbor period.

In 1993, Rule 11 was amended to require a party who motions for sanctions to serve the motion on the opposing party, and the motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected." Fed. R. Civ. P. 11(c)(1)(A). The advisory committee notes clarify, "a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation." Fed. R. Civ. P. 11 advisory committee's note. The stated purpose of this requirement is to encourage parties to abandon claims without risk of being sanctioned. *Id*.

Movants argue Klein tried to withdraw the claims against Schibanoff through an oral offer made by Gerald Berkowitz.[6] Gerald Berkowitz testified during the first hearing on the Motion for Sanctions he approached Curley's partner, Halberstadt, on multiple occasions with offers to dismiss the case. I did not discuss this testimony in my earlier Order and Memorandum because I did not find Mr. Berkowitz's statements that he offered to dismiss the case credible. Instead, I find Halberstadt's testimony during the Motion for Reconsideration hearing credible.

[6] Gerald Berkowitz attested to this fact during the original hearing on the Motion for Sanctions held on September 18, 2006.

Halberstadt testified Gerald Berkowitz, an old friend, tried to discuss settling the case once immediately following Laughman's deposition and once during the safe harbor period in Halberstadt's office. More specifically, Gerald Berkowitz asked whether there was anything that could be done to "get rid" of the case. In response, Halberstadt vividly recounted telling Gerald Berkowitz he would be happy to pass the message along to Curley. Declining to discuss the case, Halberstadt maintained Schibanoff was Curley's client and Curley was the only attorney in a position to discuss settlement or dismissal of the claims. Halberstadt also testified Gerald Berkowitz never specifically stated Brubaker was willing to unconditionally dismiss the claims against Schibanoff and never presented Halberstadt with a formal offer to settle.

Movants argue these informal discussions between Halberstadt and Gerald Berkowitz were sufficient to preclude Schibanoff from filing the Motion for Sanctions. I disagree. The advisory committee notes are clear, a party is precluded from brining a motion for sanctions only if (1) the opposing party withdraws its position or (2) acknowledges candidly it does not have evidence to support a specified allegation.

Movants suggest once Gerald Berkowitz broached the topic of settlement in the case, the burden shifted to Curley to pursue dismissal of the claims before filing the Motion for Sanctions. This requirement cannot be found in Rule 11 and is contrary to the purpose of the 1993 Amendment. As the advisory committee notes suggest, Curley informally notified Klein on May 1, 2006 he believed there was no basis for Brubaker to include Schibanoff in the case. In response, Klein sent a letter to Curley listing conditions for withdrawal of the claims against Schibanoff on May 4. Six days later, Klein wrote another letter to Curley stating the offer to

settle of May 4 was withdrawn.[7] On May 11, Curley forwarded the Motion for Sanctions to Klein in compliance with Rule 11 and seven days later, during the safe-harbor period, Klein filed a Motion for Leave to File a Second Amended Complaint on behalf of Brubaker reasserting its claims against Schibanoff.[8] Contrary to Movants assertions, these actions do not suggest Brubaker was interested in withdrawing the claims against Schibanoff. Instead, these actions suggest either Klein, through his partner, Gerald Berkowitz, attempted to abuse Halberstadt's relationship with Mr. Berkowitz to elicit information that would be helpful in obtaining a *quid pro quo* for the dismissal, or that Klein and Gerald Berkowitz were working at cross purposes. Klein previously made clear Brubaker would be interested in dismissing the claims against Schibanoff only if Schibanoff would agree to certain conditions.[9] I find it is reasonable to infer these conversations between Halberstadt and Gerald Berkowitz were an attempt by Brubaker, through its attorneys, to pursue concessions from Schibanoff to help them in their case against Brown and Gochnauer in exchange for dismissing Schibanoff from the case.[10]

[7] Although irrelevant to the determination to award sanctions, it is instructive that this letter was sent two days after Rita Berkowitz testified to her lack of knowledge whether Schibanoff was involved in Ivy Creek.

[8] Klein argues this was appropriate because Brubaker had recently discovered Brown and Gochnauer's business plan which stated Schibanoff and his company had agreed to purchase cabinetry from Ivy Creek. While Brubaker has maintained this is evidence of a conspiracy, I find the business plan only proves Schibanoff agreed to do business with Ivy Creek.

[9] Halberstadt testified Brubaker's counsel represented it would be difficult to settle the case because Rita Berkowitz "hates" Schibanoff.

[10] Brubaker's case against Brown and Gochnauer was scheduled to proceed to trial in early October, 2006 and the parties settled shortly after receiving my Order granting Schibanoff's Motion for Summary Judgment.

Klein's posturing during the safe harbor period is not withdrawal as required by Rule 11. Klein could have unilaterally withdrawn the claims against Schibanoff or could have communicated directly with Curley during the safe harbor period if he wished to stipulate to the dismissal of the claims. He did not. Klein also could have acknowledged candidly Brubaker did not have evidence to support the specified allegations against Schibanoff. He did not. Therefore, I find Schibanoff complied with the requirements of Rule 11 and properly filed the Motion for Sanctions on June 19, 2006, 39 days after forwarding the Motion to Klein.

While I considered new evidence presented in the Motion for Reconsideration, I find no reason to vacate my previous order on this ground. Finding no intervening change in the controlling law, and no need to correct a clear error of law and no need to prevent manifest injustice, I find no reason to vacate my previous order on these alternative grounds.

As discussed in my previous memorandum, Rule 11 holds if an attorney files an offending document, the court shall impose an appropriate sanction, "and [if] warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attroneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). I previously found Klein to be an experienced attorney who knew or should have known his client lacked a factual basis for its claims against Schibanoff. Furthermore, I find Klein lacks any remorse for his actions. During the hearing on the Motion for Reconsideration, Klein stated his actions were justified and, if given the opportunity, he would again pursue the claims against Schibanoff. Based on this statement, I find any sanction other than a grant of attorney's fees would be insufficient to deter Klein from repeating his actions here.

In granting attorney's fees, I am mindful the primary purpose of the Rule, "is not wholesale fee shifting but correction of litigation abuse." *Gaiardo v. Ethyl Corp.*, 835 F.2d. 479,

483 (3d Cir. 1987). Schibanoff was forced to pay tens of thousands of dollars to defend against baseless claims. "A district court's choice of deterrent is 'appropriate when it is the minimum that will serve to adequately deter the undesirable behavior.'" *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (quoting *Eastway Const. Corp. v. City of New York*, 637 F.Supp. 558, 564 (E.D.N.Y. 1986)). Klein was on notice additional research into the facts was required at the time the First Amended Complaint was filed, but his unwillingness to withdraw the claims after he received the motion for sanctions exacerbated the harm to Schibanoff already caused by Klein's aggressive litigation strategy.[11] I will limit the grant of attorney's fees to those incurred by Schibanoff as a direct result of the filing of the First Amended Complaint, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) ("Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing."), after Klein received the Motion for Sanctions, including the cost to litigate the Motion for Sanctions, Fed. R. Civ. P. 11(c)(1)(A) ("[i]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.").

The starting point for determining reasonable attorney's fees is the lodestar calculation, which "is the product of the number of hours reasonably expended in responding to the frivolous paper times an hourly fee based on the prevailing market rate." *Doering*, 857 F.2d at 195. In calculating the lodestar, the Supreme Court has held the "market rate in the relevant community" is the reasonable rate to use. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The Third Circuit has stated the "market rate" can often be calculated based on a firm's normal billing rate since, in

[11] Klein's website previously referred to him as a gloves off litigator. After the hearing on the Motion for Reconsideration, the website with this reference was removed.

most cases, a firm's billing rates reflect market rates. *Student Pub. Interest Research Group, Inc. v. AT & T Bell Laboratories*, 842 F.2d 1436, 1445 (3d Cir. 1988). In this case, Schibanoff's lead counsel, Curley, billed at a rate of $250 an hour; Curley's partner, Halberstadt, billed at the same rate; and another attorney, Scott Rothman, billed $200 an hour. I find these rates reflect the market rates charged in Montgomery County, Pennsylvania, in 2005 and 2006.

Schibanoff is requesting compensation for a total of 124.46 hours of work. I will discount this number to exclude 37.65 hours which were billed prior to service of the Motion for Sanctions on Klein on May 11, 2006. Furthermore, I find 14.5 hours of time requested by Schibanoff to be time counsel spent on defendants Scigliano and Kitchen Brokers, and therefore not a direct result of the filing of the First Amended Complaint.[12] Therefore, I find 72.31 hours were expended by Schibanoff's attorneys as a direct result of the filing of the First Amended Complaint after Klein was served with the Motion for Sanctions, resulting in a total of $16,875.28 in fees at an average billing rate of $233.37 per hour. Additionally, I find $1,370.62 in costs were incurred as a direct result of the filing of the First Amended Complaint after Klein was served with the Motion for Sanctions for a total sanction of $18,245.90.

This Court must then consider mitigating factors in its calculation of the total monetary sanctions, including:

> (1) the impact of the monetary sanctions on the attorney against whom the sanctions are to be assessed, including the attorney's ability to pay;
> (2) whether the attorney is or will be the subject of any adverse press scrutiny as a result of the sanctions imposed by the court;

[12] "In making a petition for attorneys' fees, the petitioner has the burden of showing that the fees and costs requested are reasonable by producing evidence that supports the hours and costs claimed." *Clarke v. Whitney*, 3 F.Supp.2d 631, 633 (E.D. Pa.1998).

> (3) whether the attorney is or will be the subject of any disciplinary action; and
> (4) any evidence which would indicate the attorney will be deterred from future conduct in violation of Rule 11.

Doering, 857 F.2d at 195-197 (internal citations omitted). During the hearing on the Motion for Reconsideration, Klein stated a finding of sanctions without monetary penalty would have a profound effect on his legal career and would deter him from filing similarly baseless claims in the future. I also heard testimony from Klein's friends and colleagues attesting to the quality of Klein's character and questioning the wisdom of the Court in granting sanctions in this case. Statements regarding the wisdom of the court and Klein's character are inapplicable to the *Doering* factors. Additionally, I do not credit Klein's statements that simply a finding of a violation of Rule 11 will be sufficient to deter him from future misconduct because Klein testified he would bring the claims against Schibanoff again based on the same lack of evidence, given the opportunity. Klein also argued a monetary penalty would be difficult for him to afford as he has four children, two of whom are in college. I am sensitive to Klein's ability to pay attorney's fees, but Klein presented no evidence of his income and no evidence what size monetary fine would be overly burdensome. These bald assertions are not proof of his inability to pay and therefore I find no reason to reduce the sanctions based on the *Doering* factors.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUBAKER KITCHENS, INC.	:	CIVIL ACTION
	:	
v.	:	No. 05-6756
	:	

STEPHEN M. BROWN, et al.

ORDER

AND NOW, this 11th day of December, 2006, Robert A. Klein, Esq. and Berkowitz Klein, LLP's Motion for Reconsideration (Document 129) is hereby GRANTED to consider additional evidence received. It is FURTHER ORDERED the relief prayed for is DENIED and Robert A. Klein, and his law firm, Berkowitz Klein, LLP, shall be jointly and severaly responsible for payment of $18,245.90 to defendant Mark Schibanoff, and shall make full payment within thirty (30) days of the date of this Order.[13]

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

[13] "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Fed. R. Civ. P. 11(c)(1)(A).