

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. :

**MEMORANDUM**

**Juan R. Sánchez, J.**

**October 31, 2006**

Defendant Mark Schibanoff moves for sanctions under Federal Rule of Civil Procedure 11, alleging Plaintiff Brubaker Kitchens filed a Complaint in which “the allegations and other factual contentions” lacked “evidentiary support.” Fed. R. Civ. P. 11(b)(3). Brubaker responds it reasonably believed Schibanoff had conspired to harm its business. I conclude Brubaker’s claims against Schibanoff were frivolous and grant sanctions in accordance with Federal Rule of Civil Procedure 11.

**FACTS**

On December 19, 2005, Stephen M. Brown and Dean Gochnauer left Brubaker Kitchens, Inc. to start a competing firm. After Rita Berkowitz, Brubaker’s president, spent nine days investigating Brown’s and Gochnauer’s departures, Brubaker filed a Complaint against Brown, Gochnauer, Richard Welkowitz, and Mark Schibanoff. In the Complaint, Brubaker alleged the four Defendants entered into a competing venture now known as Ivy Creek.

Schibanoff’s company was previously a manufacturer’s representative for Brubaker, but Berkowitz ended the relationship several years before because she suspected Schibanoff “was trying

to steal Steve and Dean away from Brubaker Kitchens to form their own company.” Berkowitz Dep. 262:19-21. Even after Berkowitz terminated Schibanoff’s company as a Brubaker representative, Berkowitz acknowledged Schibanoff “continued to sell our cabinetry for many years after that.” *Id.* at 264:11-12. Schibanoff, though, ceased placing large orders with Brubaker prior to 2004 and turned elsewhere for cabinetry because, as Berkowitz testified, the finish on a soft maple job Brubaker prepared for Schibanoff “just looked horrendous.” *Id.* at 248:16-19. According to Berkowitz, the volume from Schibanoff went down significantly after this event, *id.* at 249:10-11, and, during 2005, Brubaker received less than \$1,000 worth of business from Schibanoff’s company, *id.* at 250:9-10.

Brubaker’s counsel consistently represented the inclusion of Schibanoff in the suit was based on Berkowitz’s assertion Schibanoff, and his business partner, Robert Scigliano, acted in concert with Brown and Gochnauer to open Ivy Creek.<sup>1</sup> This allegation was admittedly based on hearsay and speculation. During the hearing on the temporary restraining order, Berkowitz testified that, at the time the Complaint was filed, she based her belief Schibanoff was going into business with Brown and Gochnauer on a conversation she had with Ron Laughman. Although Berkowitz alleged Laughman led her to believe Schibanoff would be a partner in Ivy Creek, Laughman’s deposition testimony does not support this account. To the contrary, Laughman explicitly stated Gochnauer told him Schibanoff simply promised to have work for Ivy Creek.<sup>2</sup> Laughman shared this information

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<sup>1</sup>Both the Complaint, and the First Amended Complaint allege Schibanoff was a business partner with Brown and Gochnauer in the competing venture.

<sup>2</sup> In his deposition, Laughman further testified he had no knowledge that Schibanoff was providing any financial assistance to Ivy Creek, or that Schibanoff had provided any business advice to Brown or Gochnauer.

with Berkowitz the day after Brown and Gochnauer left Brubaker. At the hearing, Berkowitz stated she had no personal knowledge whether Brown or Gochnauer asked Schibanoff to provide financial support for Ivy Creek and instead indicated her belief Schibanoff was involved with Ivy Creek was based on her history with Schibanoff. At the hearing, Brubaker's counsel even admitted "we don't believe and we've never believed that Mr. Welkowitz or Mr. Schibanoff should be in this case. There's a conspiracy count against both of them. And Ironically, Mr. Welkowitz and Mr. Schibanoff have never met." Transcript of Hearing on Temporary Restraining Order at 17. Shortly after the hearing, Brubaker reiterated its claims against Schibanoff in the First Amended Complaint.

Brubaker filed its First Amended Complaint on March 3, 2006, alleging the Defendants, including Schibanoff: (1) infringed Brubaker's copyrighted catalogue (Count I); (2) conspired with other Defendants to harm Brubaker (Count III); (3) tortiously interfered with contractual relations between Brubaker's customers and its employees (Count IV); (4) tortiously interfered with Brubaker's prospective advantage (*i.e.*, Brubaker's prospective customers and employees) (Count V); (5) induced at-will employees of Brubaker to leave their employment (Count VIII); and (6) procured information by improper means (Count X).<sup>3</sup> In response to Schibanoff's Motion for Summary Judgment, Brubaker contended only four of its claims were directed against Schibanoff: Count III; Count IV; Count V; and Count VIII. Finding Brubaker had essentially conceded Count I and Count X, on August 15, 2006, I granted summary judgment in favor of Schibanoff and against Brubaker on the remaining four counts.

On June 19, 2006, Schibanoff filed a Motion for Sanctions against Brubaker's counsel and

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<sup>3</sup>A Second Amended Complaint was filed on May 18, 2006 which is not relevant to this proceeding because it was filed after Schibanoff's Motion for Sanctions.

on September 18, 2006, a hearing was held to resolve this issue.<sup>4</sup>

## DISCUSSION

Rule 11 authorizes the Court to impose “sanctions upon the signer of any pleading, motion or other paper that was presented for an improper purpose, e.g., ‘to harass or to cause unnecessary delay or needless increase in the cost of litigation.’” *Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir. 1995) (quoting Fed. R. Civ. Pro. 11(b)(1)). A finding of bad faith is not necessary to impose Rule 11 sanctions. *Id.* at 1264. “The correct Rule 11 inquiry is ‘whether, at the time he filed the complaint, counsel . . . could reasonably have argued in support’ of his legal theory.” *Pensiero v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1994) (quoting *Teamsters Local Union No. 430 v. Cement Exp., Inc.*, 841 F.2d 66, 70 (3d Cir. 1988)). An attorney’s conduct should be tested under a standard of what was “objectively reasonable under the circumstances.” *Simmerman v. Corino*, 27 F.3d 58, 62 (3d Cir. 1994). “To comply with this standard, counsel ‘must conduct a reasonable investigation of the facts and a normally competent level of legal research to support the presentation.’” *Id.* (quoting *Pensiero*, 847 F.2d at 94).

The standard for imposing sanctions under Rule 11 is one of “reasonableness under the circumstances.” *Martin*, 63 F.3d at 1264 (quoting *Landon v. Hunt*, 938 F.2d 450, 453 n.3 (3d Cir. 1991)). The First Amended Complaint was filed on March 2, 2006, more than three months after

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<sup>4</sup> This Motion is properly before the court as Schibanoff complied with the Rule 11 safe harbor provision and the Motion was timely filed. *See Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 158 (D.N.J. 1999) (“Rule 11’s ‘safe harbor’ provision, however, provides that a party seeking sanctions must serve the motion papers on his adversary, but not file the motion for 21 days after service to give his adversary an opportunity to withdraw the offending pleading or motion.”); *see also Pensiero v. Lingle*, 847 F.2d 90, 92 (3d Cir. 1994) (“counsel seeking Rule 11 sanctions must file their motions before entry of final judgment in district court.”).

the original Complaint was filed and more than one week after a hearing was held on the temporary restraining order. By March 2, 2006, it was unreasonable for counsel to believe Brubaker had a case against Schibanoff. At the hearing, counsel for Brubaker admitted that Schibanoff did not belong in the case. When asked about Schibanoff at the hearing, Berkowitz stated she had no personal knowledge Schibanoff was providing financial support to Ivy Creek. 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.<sup>5</sup> “The Third Circuit has utilized Rule 11 to filter out frivolous pleadings that are legally unreasonable or that lack factual foundation.” *Becker v. Sherwin Williams*, 717 F.Supp. 288, 297 (D.N.J. 1989) (citing *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985)). Applying the “reasonable circumstances” test, I find that when counsel filed the First Amended Complaint, he knew full well Mr. Schibanoff did not belong in the case. Counsel admitted as much at the hearing less than two weeks before filing the First Amended Complaint. “[A] ‘complaint filed in federal court is not a vehicle for airing rumor, suspicion, or mere hostility.’” *Id.* at 297 (quoting *MGIC Indemnity Corp. v. Wisman*, 803 F.2d 500, 505 (9th Cir. 1986)). Instead, Rule 11 places an affirmative duty on counsel; one which was clearly in this case when counsel filed a complaint asserting claims he knew were unfounded.

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<sup>5</sup>A finding of conspiracy would require a finding of malice on the part of the defendant, and the intention to perform an unlawful act. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979). A finding of tortious interference with current or prospective contractual relations would require a finding that the conduct at issue was not only intentional, but also improper. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein* 393 A.2d 1175, 1183 (Pa. 1978). Finally, a defendant can only be liable for inducing an at-will employee to leave if the plaintiff can show the employee was systematically induced to leave their job. *Morgan’s Home Equipment Corp. v. Martucci*, 136 A.2d 838, 847 (Pa. 1957). This lone fact would not support any one of these claims.

Rule 11 holds that if an attorney filed an offending document, then the “court . . . shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee.” The primary purpose of the Rule, however, “is not wholesale fee shifting but correction of litigation abuse.” *Gaiardo*, 835 F.2d. at 483. Therefore, “[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)).

Although the court uses an objective test to impose sanctions, the Advisory Committee Notes state the court should take into account the attorney’s knowledge at the time the Complaint was filed. *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157-158 (3d Cir. 1986). “Thus, the conduct of an experienced lawyer or of a lawyer who acted in bad faith is more apt to invite assessment of a substantial penalty than that of a less experienced or merely negligent one.” *Id.* at 158. In the present case, I find Brubaker’s counsel is an experienced attorney who admitted the claims against Schibanoff lacked merit.<sup>6</sup> I will grant Schibanoff’s request for fees, limiting the sanction to those fees which were incurred as a direct result of the Rule 11 violation. *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.”).

When imposing a penalty, the sanction is governed by principles announced in *Doering*. *See*

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<sup>6</sup>According to his biography, Robert A. Klein is an experienced attorney who has been barred in the Commonwealth since 1985. Furthermore, Klein’s practice is focused primarily on litigation and he once served as a law clerk to Judge McGlynn on this Court.

*Jones v. Pittsburgh National Corporation*, 899 F.2d 1350, 1359 (3d Cir. 1990) (remanding an award of sanctions for further consideration by the district court). 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.

The court must then consider various 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;
- (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.

*Id.* at 195-197 (citations omitted). After reviewing the Lodestar calculation and any mitigating circumstances, the court must determine whether the primary purpose of the sanctions, deterrence, can still be satisfied by a lesser monetary award to the prevailing party. *Id.*

To ensure compliance with *Cooter & Gell* and *Doering*, I will direct the parties to submit additional documentation to supplement the record. More specifically, I will request Schibanoff to submit a detailed accounting of his legal expenses and request Klein to describe any mitigating circumstances I should consider before awarding Schibanoff attorney’s fees.

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**ORDER**

AND NOW, this 31<sup>st</sup> day of October, 2006, Defendant Mark Schibanoff's Motion for Sanctions (Document 62) is GRANTED.

It is further ORDERED that within seven days of the filing of this ORDER, Defendant Schibanoff shall submit a detailed accounting of all attorneys fees<sup>7</sup> and Plaintiff's counsel shall submit a letter detailing any mitigating circumstances in accordance with the attached memorandum.

BY THE COURT:

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

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<sup>7</sup>This accounting shall list the billing attorney, the rate charged, a description of the task performed, the amount of time spent on each task, and date on which each task was performed. Counsel shall submit only those fees which were assessed as a result of the filing of the First Amended Complaint.