UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff,	Lead Case No. 02-C-5893 (Consolidated)
- *against* -	CLASS ACTION
HOUSEHOLD INTERNATIONAL, INC., ET. AL., Defendants.	Judge Ronald A. Guzmán

DECLARATION OF JOSHUA M. NEWVILLE IN SUPPORT OF DEFENDANTS' (1) OPPOSITION TO PLAINTIFFS' MOOT AND FRIVOLOUS MOTION TO STRIKE AND (2) REQUEST TO CANCEL JULY 23, 2009 PRESENTMENT AND (3) FOR AN AWARD OF RELATED COSTS AND FEES FOR UNREASONABLE AND VEXATIOUS MULTIPLICATION OF PROCEEDINGS, BAD FAITH AND FRIVOLITY

I, JOSHUA M. NEWVILLE, declare as follows:

1. I am a member of the bar of the State of New York, admitted to practice before this Court *pro hac vice* in connection with the above captioned matter, and associated with the firm Cahill Gordon & Reindel LLP, attorneys for Household International, Inc., William F. Aldinger, David A. Schoenholz and Gary Gilmer, Defendants in this action. I submit this declaration to place before the Court certain information in support of Defendants' (1) Opposition to Plaintiffs' Moot and Frivolous Motion to Strike and (2) Request to Cancel July 23, 2009 Presentment and (3) for an Award of Related Costs and Fees for Unreasonable and Vexatious Multiplication of Proceedings, Bad Faith and Frivolity.

2. On July 20, 2009 I participated in a telephonic meet-and-confer with Michael J. Dowd and Spencer A. Burkholz, counsel for Plaintiffs in this action, regarding Plaintiffs' Motion

to Strike Defendants' Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) and Motion for New Trial Pursuant to Rule 59.

3. During this call, I pointed out that Plaintiffs' motion to strike was now moot, noting that (a) Plaintiffs had not filed their motion to strike until after Defendants began filing their memoranda in support of motions under Rules 50(b) and 59, (b) Plaintiffs' claims of waiver were unfounded because the Court's instructions stated that the briefing schedule would run "subsequent to the ten-day filing" of the actual motions, and (c) in any event, Defendants' post-trial motions would be timely up until 10 days after entry of judgment (and no judgment has been entered in this case). Plaintiffs refused to withdraw their motion to strike.

4. During the call, I offered to agree on a briefing schedule for Plaintiffs' motion to strike, which would be the only purpose of the presentment. Counsel for Plaintiffs refused to agree to any briefing schedule and reiterated that they wanted an in-person presentment.

5. During the call, I reiterated that Defendants would agree that Plaintiffs' oppositions to Defendants' post-trial motions were not due until August 19, 2009 (*i.e.*, 30 days after Defendants' supporting memoranda were filed, pursuant to the Court's instructions). Counsel for Plaintiffs incorrectly stated that their oppositions to Defendants' post-trial motions were due on August 5, 2009, and that a presentment on their motion was necessary to address this supposed "deadline."

6. During the call, I also offered to agree to an extension of Plaintiffs' deadline for responding to the post-trial motions, with Plaintiffs' time to run 30 days from the date of any denial of Plaintiffs' motion to strike. Counsel for Plaintiffs rejected this attempt to compromise, again insisting on an in-person presentment.

7. During the call, I proposed that the presentment take place on July 30, 2009, when Defendants had noticed presentment for motions *instanter* to file oversized briefs in support

of their post-trial motions. Plaintiffs rejected this suggestion as well, insisting on presentment on July 23, within three days of their filing.

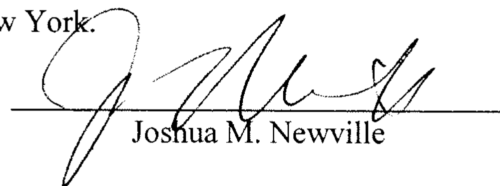
8. During the call, I reiterated that there was no point to an in-person presentment when Defendants had offered to agree to a briefing schedule and extension of Plaintiffs' scheduled time to respond to Defendants' motions, and thus Plaintiffs' insistence on a presentment within 3 days was simply a waste of time. I stated that counsel for Plaintiffs were acting unreasonably and that their conduct entitled Defendants to costs in responding to Plaintiffs' motion to strike.

9. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the May 7, 2009 trial transcript in the above-captioned action.

10. Attached hereto as Exhibit 2 are true and correct copies of unreported authorities cited in Defendants' Opposition.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Executed this 21st day of July, 2009, in New York, New York.



Joshua M. Newville

Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
2 EASTERN DIVISION
3 LAWRENCE E. JAFFE PENSION PLAN,)
on behalf of itself and all)
4 others similarly situated,)
)
5 Plaintiff,)
)
6 vs.) No. 02 C 5893
)
7 HOUSEHOLD INTERNATIONAL, INC.,)
et al.,) Chicago, Illinois
8) May 7, 2009
Defendants.) 10:30 a.m.
9
VOLUME 26
10 TRANSCRIPT OF PROCEEDINGS - TRIAL
BEFORE THE HONORABLE RONALD A. GUZMAN, and a jury
11
12 APPEARANCES:
13 For the Plaintiff: COUGHLIN STOIA GELLER RUDMAN &
ROBBINS LLP
14 BY: MR. LAWRENCE A. ABEL
MR. SPENCER A. BURKHOLZ
15 MR. MICHAEL J. DOWD
MR. DANIEL S. DROSMAN
16 MS. MAUREEN E. MUELLER
655 West Broadway
17 Suite 1900
San Diego, California 92101
18 (619) 231-1058
19 COUGHLIN STOIA GELLER RUDMAN &
ROBBINS LLP
20 BY: MR. DAVID CAMERON BAKER
MR. LUKE O. BROOKS
21 MR. JASON C. DAVIS
MS. AZRA Z. MEHDI
22 100 Pine Street
Suite 2600
23 San Francisco, California 94111
(415) 288-4545
24
25

1 APPEARANCES: (Continued)
2 For the Plaintiff: MILLER LAW LLC
BY: MR. MARVIN ALAN MILLER
3 115 South LaSalle Street
Suite 2910
4 Chicago, Illinois 60603
(312) 332-3400
5
For the Defendants: EIMER STAHL KLEVORN & SOLBERG LLP
6 BY: MR. ADAM B. DEUTSCH
224 South Michigan Avenue
7 Suite 1100
Chicago, Illinois 60604

22 THE COURT: Very well.
23 Any other motions before I release the jury?
24 MR. DOWD: None from the plaintiffs, your Honor.
03:01:22 25 MR. KAVALER: Yes, your Honor. We believe the

4807

1 verdict is fatally inconsistent in a number of ways, which
2 we're prepared to detail to the Court. I'm not sure if you
3 need the jury to be present. Obviously it's up to you.
4 Primarily it's the interspersal of the yeses and nos
03:01:36 5 when juxtaposed again Professor Fischel's leakage model,
6 whatever the -- whatever our position on the leakage model ab
7 initio might have been, it certainly doesn't work that way.
8 And certainly a verdict which contains both yeses and nos but
9 nevertheless adopts Professor Fischel's leakage damage model
03:01:55 10 is fatally flawed and internally inconsistent.
11 THE COURT: Okay.
12 MR. KAVALER: We have other things we'll say at the
13 appropriate time, but that is something which I thought should
14 be mentioned before the jury retires.
03:02:07 15 THE COURT: All right. Does the plaintiff have
16 anything to say?
17 MR. DOWD: No, your Honor. We think the verdicts are
18 consistent.
19 THE COURT: Very well.
03:02:12 20 Ladies and gentlemen, that constitutes your jury
21 service in this case. And I might add, quite a long, diligent
22 and some might even say heroic service it has been. I want to
23 personally thank you for your patience, your attentiveness and
24 your persistence as jurors in this case. I don't need to tell
03:02:44 25 you, it has been a difficult case. It has been a long case.

4808

1 It has been a complicated case. But it has been an important
2 case. And as such, I thank you for having taken the time out
3 of your lives at what I know is considerable cost both
4 personal and pecuniary to many of you to do this.
03:03:09 5 I also tell you that you should consider yourselves
6 to some -- in some respect fortunate to have had the
7 opportunity to take part in what is a fundamental aspect of
8 our democratic way of life. You have served your country
9 today without having to join the military, pay anything extra
03:03:39 10 in taxes or volunteer for community service. And we very much
11 appreciate it, and you should be proud of it.
12 We'll be back for any of you who wish to stick around
13 to talk to you if you want to -- have any questions for me, if
14 there's anything you want to ask, anything you want me to
03:03:57 15 explain. But you need not stick around.
16 Now, you are not required to and I would advise you
17 not to speak to anyone about your jury service after you leave
18 here today. It's done. You have done your duty. You have
19 finished. You have done it well. Put it behind you and move
03:04:15 20 on.
21 Retire to the jury room.
22 (Jury out.)
23 THE COURT: Date for motions?
24 (Brief pause.)
03:05:06 25 THE COURT: Does anybody need a date for motions?

4809

1 MR. KAVALER: Your Honor, I'm waiting to hear if
2 Mr. Dowd has anything to say.
3 MR. DOWD: Not at this time, your Honor. Did you ask
4 for a date for motions?
03:05:16 5 THE COURT: Motions, yes.
6 MR. KAVALER: Your Honor, we will be making formal
7 motions. But at this time, I want to renew the 50(a) motion.
8 And specifically I want to observe to the Court that --
9 there's a couple of points. Professor -- the jury has
03:05:35 10 selected Professor Fischel's more dubious by far, legally and
11 economically, damage model to the exclusion of anything else.
12 So we renew the motion on that ground since that model, in our
13 view, is not legally permissible and cannot sustain a
14 judgment.
03:05:48 15 Secondly --
16 THE COURT: Let me ask you to -- I mean, the record
17 will reflect that you have reserved -- I'm ruling that you're
18 reserving any issues you wish to raise in a written motion.
19 So how much time do you want to file a motion? That's really
03:06:04 20 what we need to --
21 MR. KAVALER: Your Honor, let me say this: I won't
22 repeat everything I've said previously. And I appreciate your
23 Honor's comment.
24 To the extent the jury has found against the
03:06:14 25 defendant Gilmer on restatement, I believe the record contains

4810

1 no indication whatsoever that he had any involvement in the
2 underlying accounting. They also found that he's not a
3 control person. So it's a little hard to understand what
4 evidentiary basis there is for a finding against him on a
03:06:29 5 restatement.
6 Also, the failure to include Andersen in question
7 number five for the allocation, I believe fatally infects the
8 allocation.
9 But I take your Honor's point. I want some guidance
03:06:44 10 from the Court as to what motions you want us to make when.
11 THE COURT: Well, you're right. What I'm asking you
12 for is a date for motions on the jury verdict. I mean, we
13 also have to, of course, address what we're going to do with
14 the rest of the case. But I think the first step is a date
03:06:56 15 for motions and resolution of any motions on the jury verdict.
16 MR. KAVALER: You're exactly right. My point simply,
17 your Honor, is there is a jurisdictional ten-day limit which
18 applies to motions directed to a judgment. Since there's no
19 judgment, I don't believe we're under the jurisdictional
03:07:10 20 ten-day limit. So I would be inclined to ask you for 30 days.
21 If your Honor has any doubt about that, however, we will
22 comply with the requirement that we file the notice of motion
23 and motion within ten days. And then we would ask you -- you
24 have the power to give us up to 60 days for a brief. We would
03:07:22 25 ask you for the maximum time available for the brief.

4811

1 Separate independent question --
2 THE COURT: Well, I think that's what we should do.
3 I think that's what we should do.
4 MR. KAVALER: Okay.
03:07:32 5 THE COURT: I'm not going to make a ruling on whether
6 the ten-day period applies in this situation. I have seen
7 arguments both ways on that question. So you can do as you

8 like. But if you're asking for time subsequent to the ten-day
9 filing --
03:07:57 10 MR. KAVALER: We are, your Honor.
11 THE COURT: I will give you the time. You're asking
12 for 60 days?
13 MR. KAVALER: I am, your Honor.
14 THE COURT: Okay. 60 days. And in response, how
03:08:09 15 much time do you want?
16 MR. DOWD: I guess -- 60 days seems like an awful
17 long time --
18 THE COURT: It is.
19 MR. DOWD: -- to get to the second stage. I would
03:08:19 20 hope that counsel could do it in ten or 20 or 30.
21 THE COURT: Let me just suggest to you that we don't
22 have to forgo moving forward on the second stage while you are
23 briefing and the Court is ruling on the issues raised with
24 respect to the verdict. We have a verdict, and that's more
03:08:36 25 than sufficient for me to justify moving forward with the

4812

1 other aspects of the case.
2 MR. DOWD: Fair enough, your Honor. Then I would ask
3 for 30 days to respond if he gets 60.
4 THE COURT: 60 plus 30 and a reply in 15.
03:08:48 5 MR. KAVALER: Thank you, your Honor.
6 With regard to phase two --
7 THE COURT: I would be happy to have, within 21 days,
8 briefs from the parties as to how they feel we should proceed
9 on phase two.
03:09:12 10 MR. KAVALER: Simultaneous briefing, your Honor?
11 THE COURT: Yes, simultaneous briefing.
12 Anything else?
13 MR. KAVALER: May I have one second, your Honor.
14 THE COURT: Sure.
03:09:25 15 (Brief pause.)
16 MR. KAVALER: That's all for us today, your Honor.
17 MR. DOWD: Your Honor, just one question. I know
18 sometimes jurors come up to the lawyers. I don't know what
19 the rules here are in the Northern District of Illinois. I
03:09:34 20 know in some jurisdictions --
21 THE COURT: In view of the fact that this case is
22 still pending, I'm going to instruct both sides not to have
23 any intercourse with the jurors regarding their jury verdict,
24 regarding their deliberations or any aspect of this trial.
03:09:51 25 MR. DOWD: Thank you, your Honor.

Exhibit 2

HOnly the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
John CHWARZYNSKI, Plaintiff,
v.
LT. Robert TEBBENS, Lt. Thomas Cody, Daniel Fortuna, Thomas Ryan, David Quintavalle, Lt. Joel Burns, Peter O'Sullivan, Lt. Paul Stamper, Peter Houlihan, and Marc J. McDermott, Individually and in Their Capacities as Officers and Members of Chicago Fire Department Union Local 2, and International Association of Fire Fighters, Harold A. Schaitberger, Louie Wright, Joseph Conway and Danny Todd, Individually and in Their Capacities as Officers and Members of the International Association of Fire Fighters, Defendants.
No. 07 C 2102.

Sept. 10, 2008.

James Maher, III, Chicago, IL, for Plaintiff.

Stephen Bernard Horwitz, Sugarman & Horwitz, Librado Arreola, Marvin Gittler, Asher, Gittler, Greenfield, Cohen & D'Alba, Chicago, IL, Thomas A. Woodley, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

RONALD A. GUZMAN, District Judge.

***1** On May 12, 2008, the Court granted defendants' motions for sanctions against plaintiff Chwarzynski and his counsel, James Maher III, pursuant to Federal Rule of Civil Procedure ("Rule") 11 and 28 U.S.C. § 1927 because Maher had asserted a variety of baseless claims and legal contentions and he and Chwarzynski both unreasonably multiplied and increased the cost of these proceedings. (*See* Minute Order of 5/12/08); Fed.R.Civ.P. 11(b)(1), (2), (c)(1); 28 U.S.C. § 1927. The question that remains is exactly what sanction should be imposed.

"The purpose of both Rule 11 and section 1927 is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs also bear them." *Kapco Mfg. Co., Inc. v. C & O Enter., Inc.,* 886 F.2d 1485, 1491 (7th Cir.1989) (per curiam) (citations omitted). An award of attorney's fees is a customary, but not mandatory, sanction. *See Johnson v. A.W. Chesterton Co.,* 18 F.3d 1362, 1366 (7th Cir.1994) ("[T]he deterrent purpose of the [Rule 11] should be served by imposing a sanction that fits the inappropriate conduct."(quotation omitted)); *Kotsilieris v. Chalmers,* 966 F.2d 1181, 1187-88 (7th Cir.1992) (stating that "a court may impose a penalty as light as a censure and as heavy as is justified" under section 1927 and Rule 11 (quotation omitted)).

Chwarzynski and Maher urge the Court to impose only a non-monetary sanction. Defendants urge the Court to award them all of the fees and costs they expended in defending this suit.

The Court declines to do either. Given the nature of their conduct, *i.e.,*"vigorously pursu[ing] this case for ... nine months" after being told "both by defense counsel and the Court, that [it] could not be maintained in the Union's name and most of the claims asserted in it were legally unfounded" (Minute Order of 5/12/08 at 3), a non-monetary sanction would be insufficient to redress the harm Chwarzynski and Maher caused or deter them and others from engaging in such conduct in the future. On the other hand, requiring Chwarzynski and Maher to pay all of defendants' fees and expenses would be excessive. Though most of the claims were clearly unfounded, the Court denied defendants' motion to dismiss the breach of fiduciary duty and fraud claims asserted against them in Counts VI and VII and gave plaintiffs leave to try to "salvage the RICO claims in Counts I-III."(Mem. Op. & Order of 9/28/07 at 8-10.) Chwarzynski voluntarily dismissed the suit before those claims were decided on their merits. Because it is possible that those claims had merit and requiring Chwarzynski and Maher to pay all of defense counsels' fees and costs might chill their and others' pursuit of David-versus-Goliath claims, the Court will

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not require them to do so.

On balance, given: (1) the purpose of Rule 11 and section 1927 sanctions; (2) Chwarzynski and Maher's conduct; (3) Maher's status as a sole practitioner and his apparent inexperience in federal litigation; (4) the fact that the suit arose from disputes between the president and the board of a local union whose members have, in the last twenty years, engaged in an almost continual effort to remove whomever they elect as their president (*see* Fran Spielman, *Chicago Firefighters, Union Leader Clash,* FIREHOUSE.COM, Dec. 12, 2006, http://cms.firehouse.com/web /online/News/Chicago-Firefighters-Union-Leader-Clash/46$52389); (5) the duplication of effort that defense counsel could have avoided had they made joint submissions; and (6) the amount of resources defendants devoted to this suit, which they knew was largely unfounded, this Court finds an award of one quarter of the fees defense counsel reasonably expended on the suit and none of the costs is an appropriate sanction. *Brown v. Fed'n of State Med. Bds. of the U.S.,* 830 F.2d 1429, 1439 (7th Cir.1987) (noting that courts "should reflect upon equitable considerations in determining the amount of the sanction," including the sanctioned person's ability to pay and his legal experience and the extent to which the party requesting sanctions could have mitigated its costs), *abrogated in part on other grounds, Mars Steel Corp. v. Cont'l Bank N.A.,* 880 F.2d 928, 930 (7th Cir.1989); *see Leffler v. Meer,* 936 F.2d 981, 987 (7th Cir.1991) (noting, in the context of a section 1988 fee award, that "there should be some proportionality between the merits of the plaintiff's claim and the hours expended by defense").

***2** The next question is how much did the defendants reasonably spend on this case? Reasonable attorneys fees are generally calculated by the lodestar method, which requires the Court to "multiply[ ] the hours reasonably expended on the litigation by a reasonable hourly rate."*See Leffler,* 936 F.2d at 985 (section 1988); *S.A. Auto Lube, Inc. v. Jiffy Lube Int'l, Inc.,* 131 F.R.D. 547, 550 (N.D.Ill.1990) (using lodestar method to determine sanctions).[FN1] The number of hours reasonably expended on the litigation does not include those "that are excessive, redundant, or otherwise unnecessary." *Heriaud v. Ryder Transp. Servs.,* No. 03 C 289, 2006 WL 681041, at *3 (N.D.Ill. Mar.14, 2006) (quotation and citations omitted). Moreover, if any time entry is too vague or otherwise inadequate to allow an assessment of reasonableness, the Court may disregard it. *Harper v. City of Chi. Heights,* 223 F.3d 593, 605 (7th Cir.2000).

> FN1. The Court may then adjust the lodestar amount, if appropriate, in light of the ten factors set forth in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974). *Hensley v. Eckerhart,* 461 U.S. 424, 434 n. 9, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). But, as the Supreme Court has noted, most of those factors are "subsumed within the ... calculation of hours reasonably expended at a reasonable hourly rate."*Id.*

Defendants International Association of Fire Fighters, and its officers Harold A. Schaitberger, Joseph Conway, Danny Todd and Louie Wright (collectively, "International") say that Thomas Woodley, Kurt Rumsfeld, Baldwin Robertson and Eric Hallstrom, who are based in Washington D.C., and Librado Arreola and Marvin Gittler, who are Chicago lawyers, reasonably spent 510.2 hours, or $112,292.50, defending them in this suit. (Int'l Resp. Court's May 12, 2008 Order, Ex. 1, Woodley Decl. ¶ 16; *id.,* Exs. A-E, Woodley, Rumsfeld, Robertson & Hallstrom Time Records; *id.,* Ex. 2, Arreola Decl., Exs. A & B, Arreola & Gittler Time Records.)

The Court disagrees. First, all of the work done by attorney Hallstrom is duplicative of that done by other International lawyers. (*Compare id.,* Ex. 1, Woodley Decl., Ex. D, Hallstrom Time Records *with, id.,* Exs. A-C, Woodley, Rumsfeld & Robertson Time Records *and, id.,* Ex. 2, Arreola Decl., Ex. A, Arreola Time Records.) Thus, the 21.6 hours Hallstrom billed were not reasonably expended on this case.

Moreover, virtually all of the time billed by Arreola and Gittler is: (1) duplicative of other lawyers' work; (2) for administrative work that should have been done by a non-lawyer; or (3) described so vaguely that the Court cannot assess its reasonableness. The Court, therefore, deems reasonable only 14.25 of the hours billed by Arreola and none of the time billed by Gittler. (*See id.,* Ex. 2, Arreola Decl., Ex. A, Arreola Time Records (entries for 4/27/07, 5/17/07, 6/25/07,

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7/26/07, 10/12/07, 10/15/07, 10/16/07, 12/11/07, 12/13/07, 1/3/08, 1/16/08, 2/26/08); *id.*, Ex. B, Gittler Time Records.)

Woodley, Rumsfeld and Robertson's billings have similar problems. They contain entries: (1) for work done before the lawsuit was filed (*id.*, Ex. 1, Woodley Decl., Ex. A, Woodley Time Records (entry for 4/10/07); *id.*, Ex. B, Rumsfeld Time Records (entries of 4/12/07, 4/13/07, 4/15/07)); (2) that are too vague to assess whether they are reasonable (*id.*, Ex. A, Woodley Time Records (entries of 4/17/07, 4/20/07, 4/24/07, 4/25/07, 5/3/07, 5/8/07, 5/18/07, 6/29/07, 7/26/07, 10/3/07, 10/16/07, 10/22/07, 11/21/07, 11/26/07, 12/31/07, 1/14/08, 1/15/08, 2/28/08, 5/14/08); *id.*, Ex. C, Robertson Time Records (entries of 5/15/07, 6/22/07, 6/29/07, 7/2/07, 10/1/07, 10/12/07, 10/15/07, 12/4/07, 12/10/07, 12/31/07, 1/17/08, 1/18/08, 2/8/08)); or (3) duplicative of time billed by other attorneys for the same task or billed by the same attorney for the same task on previous days (*id.*, Ex. A, Woodley Time Records (entries of 5/4/07, 5/11/07, 6/20/07, 6/25/07, 6/26/07, 7/18/07, 7/19/07, 10/30/07, 1/7/08, 2/20/08, 3/3/08); *id.*, Ex. B, Rumsfeld Time Records (entry of 4/16/07); *id.*, Ex. C, Robertson Time Records (entry of 9/27/07)). Consequently, these 71.1 attorney hours are not reasonable.

***3** Even after the vague and redundant entries are deleted, however, the total number of hours International's lawyers devoted to certain tasks is still excessive. For example, preparation for and participation in the TRO hearing consumed a total of 68.95 attorney hours. (*See id.*, Ex. 1, Woodley Decl., Ex. A, Woodley Time Records (entries of 4/16/07, 4/18/07, 4/26/07, 4/27/07, 4/30/07); *id.*, Ex. B, Rumsfeld Time Records (entries of 4/17-20/07, 4/23-25/07, 4/27/07); *id.*, Ex. 2, Arreola Decl., Ex. A, Arreola Time Records (entry of 4/27/07).) Work related to International's first motion to dismiss consumed 115.2 attorney hours. (*See id.*, Ex. 1, Woodley Decl., Ex. A, Woodley Time Records (entries of 4/23/07, 5/7/07, 5/17/07, 7/5/07, 9/28/07, 10/1/07); *id.*, Ex. B, Rumsfeld Time Records (entries of 5/7/07, 5/10-12/07, 5/14/07, 5/16/07, 5/17/07, 6/29/07, 6/30/07, 7/1/07, 7/3/07, 7/4/07); *id.*, Ex. C, Robertson Time Records (entries of 5/1/07, 5/3/07, 5/4/07, 5/8-11/07, 5/14/07, 5/16-18/07, 6/26/07, 7/3-5/07).) Work related to its second motion to dismiss took 80.3 hours. (*See id.*, Ex. A, Woodley Time Records (entries of 10/29/07, 11/16/07, 11/19/07, 11/2/07, 12/17/07); *id.*, Ex. C, Robertson Time Records (entries of 10/22/07, 10/26/07, 10/30/07, 10/31/07, 11 / 1 /07, 11/2/07, 11/5/07, 11/6/07, 11 /7/07, 11/8/07, 11/9/07, 11/12/07, 11/13/07, 11/14/07, 11/15/07, 11/19/07, 11/20/07, 12/3/07, 12/18/07, 12/21/07).) Likewise, preparing the motion for sanctions and supporting materials took 125.9 attorney hours. (*See id.*, Ex. A, Woodley Time Records (entries of 6/7/07, 6/27/07, 6/28/07, 7/6/07, 12/26/07, 12/27/07, 1/3/08, 1/10/08, 1/23/08, 1/25/08, 2/25/08, 2/26/08, 3/1/08, 4/1/08, 5/13/08, 5/15/08, 5/19/08, 5/20/08); *id.*, Ex. C, Robertson Time Records (entries of 6/8/07, 6/11/07, 6/12/07, 6/25/07, 6/27/07, 6/28/07, 7/9-11/07, 7/16/07, 7/17/07, 7/19/07, 7/20/07, 7/23/07, 7/24/07, 8/7/07, 12/28/07, 1/1/08, 1/4/08, 1/6/08, 1/7/08, 1/9-11/08, 1/28/08, 2/7/08, 2/15/08, 2/19-26/08, 2/29/08, 3/3/08); *id.*, Ex. 2, Arreola Decl., Ex. 2, Arreola Time Records (entries of 6/25/07, 7/26/07, 1/16/08, 2/26/08).)

The work related to the TRO hearing-which lasted only a few hours and did not involve the presentation of any witnesses or evidence-could reasonably have been completed in half the time. Likewise, the work related to International's first motion to dismiss-the end result of which was two, fifteen-page briefs that fleshed out the likelihood of success arguments made in opposition to the TRO-should reasonably have taken about 40 hours. Further, because their time records suggest that there was a significant overlap in the work on these briefs, the Court discounts all of the time Rumsfeld billed to the motion, reduces to 35 the hours Robertson billed to it and reduces to 5 the hours Woodley billed to it. Similarly, the work devoted to the motion to dismiss the amended complaint, which largely reiterated the original complaint, should reasonably have taken one-third, or about 27, of the 80.3 hours billed to it. Finally, the 124 hours the lawyers devoted to sanctions-the largest amount of time they spent on any portion of this suit-was well in excess of what should reasonably have been spent. Consequently, the Court reduces by two-thirds to 41.4 hours the time billed to the sanctions motion.

***4** After all of these reductions, the Court finds that

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International's lawyers reasonably spent a total of 165.3 hours-51.1 hours by Woodley, 29.1 hours by Rumsfeld, 74.7 hours by Robertson and10.4 hours by Arreola-defending this suit.

The next task is to determine a reasonable hourly rate for International's counsel. Harman v. Lyphomed, Inc., 945 F.2d 969, 974 (7th Cir.1991). An attorney's "actual billing rate for comparable work is presumptively appropriate to use as the market rate." *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 909 (7th Cir.2007) (quotation omitted)."Only if the court is unable to determine the attorney's true billing rate (because he maintains a contingent fee or public interest practice, for example) should the court look to the next best evidence-the rate charged by lawyers in the community of reasonably comparable skill, experience, and reputation." *Id.* at 909-10 (quotation omitted).

International says the reasonable hourly rates for its counsel are $225.00 for Woodley, $210.00 for Rumsfeld, $190.00 for Robertson and $215.00 for Arreola, and has offered evidence from local practitioners to support that request. (*See* Int'l Resp. Court's May 12, 2008 Order, Ex. 3, Hayes Decl. ¶¶ 1-6; *id.*, Ex. 4, Cotiguala Decl. ¶¶ 2-8, 15-20.) International does not, however, say that those are the rates its lawyers actually charged. In fact, the declarations supporting its sanction request are quite vague on this point. Woodley says, for example, that "[h]ourly rates of up to $400 have been paid to ... partners of [ ]his firm over the last several years," and thus, the $225.00 per hour he seeks for his own services is "substantially below applicable market rates." (*Id.*, Ex. 1, Woodley Decl. ¶ 6.) That may be true, but Woodley provides no substantiation-bills from other cases, fee awards by other courts, or even details about who was paid what rate, by whom, for what kind of work, in which city and precisely when-to substantiate his claim.

His statements about his colleagues' hourly rates are even more ambiguous. Woodley does not say that his firm actually billed International $210.00 per hour for Rumsfeld's work. Moreover, though he identifies Rumsfeld as a firm partner, Woodley does not, as he did for himself, use rates recently garnered by other firm partners to justify Rumsfeld's hourly rate. Rather, Woodley says simply that Rumsfeld's "hourly rate in this action ... is $210.00."(*Id.* ¶ 8.) He also says that Robertson's "hourly rate in this action is $190.00."(*Id.* ¶ 10.)Woodley does not, however, say that his firm actually billed International at that rate for Robertson's work, set forth the billing rates charged by his firm for comparable work done by comparable lawyers or provide evidence of the hourly rate charged by comparable lawyers for comparable work in Chicago.

The declaration of International's local counsel is no more forthcoming. Arreola says that he is an associate with Asher, Gittler, Greenfield & D'Alba, Ltd. and his "hourly rate in this action ... is $215.00," which is "substantially below the applicable market rate."(*Id.*, Ex. 2, Arreola Decl. ¶¶ 2, 7; *see id.* ¶ 11.)But Arreola does not say that his firm actually billed International $215.00 per hour for his services or provide any support for his statements about the Chicago market rate.

***5** In short, International has not established that it was actually charged the rates it seeks or explained why the actual rates it was charged are not a proper measure of reasonableness in this case. Absent that information, the Court cannot assess the propriety of awarding fees as a sanction. Thus, in lieu of fees, and in light of the equitable factors noted above, the Court orders Maher and Chwarzynski, jointly and severally, to pay International the lump sum of $5,000.00 for their violations of Rule 11 and section 1927.[FN2]

FN2. Had International established that the rates it seeks are reasonable, the sanctions imposed would have been $8,509.37 (one-fourth of $34,037.50 [$11,497.50 [51.1 hours by Woodley x $225.00] + $6111.00 [29.1 hours by Rumsfeld x $210.00] + $14,193.00 [74.7 hours by Robertson x $190.00] + $2236.00 [10.4 hours by Arreola x $215.00].)

The other defendants, Robert Tebbens, Thomas Cody, Daniel Fortuna, Thomas Ryan, David Quintavalle, Joel Burns, Peter O'Sullivan, Paul Stamper, Peter Houlihan and Mark J. McDermott, officers of Chicago Fire Department Union Local 2 (collectively "the Local"), say their counsel, Robert Sugarman and

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Stephen Horwitz, reasonably expended 409.5 hours defending them in this suit. (*See* Local's Mem. Supp. Sanction Order, Horwitz Aff. ¶ 6.) Though that is substantially less than International requested, the time records of Local's counsel still demonstrate redundancies and inefficiencies. Most of the time billed by Sugarman, for example, is either duplicative of that billed by Horwitz or too vaguely described to permit a reasonableness determination. The Court, therefore, deems reasonable only 11.8 hours billed by Sugarman. (*See id.,* Ex. A, Sugarman & Horwitz Time Records, RSS time entries of 4/23/07, 5/17/07, 7/3/07, 7/5/07 (entry for .5 hours), 9/27/07, 11/26/07, 11/28/07, 12/4/07, 1/23/07, 1/24/07.)

There are also problems with Horwitz's time entries. For example, 8.3 of the hours he billed are too vaguely described to assess their reasonableness, were devoted to administrative tasks that should have been handled by a non-lawyer or were duplicative of work for which he had previously billed. (*Id.,* SBH entries for 4/23/07, 5/1/07, 5/4/07, 5/24/07, 7/10/07 [entry for .5 hours], 10/08/07, 10/24/07, 1/25/08, 2/7/08, 2/14/08, 3/21/08, 3/24/08.) Moreover, he spent 17 hours defending his partner and himself against ARDC charges Maher filed against them or performing other work for the Local. (*Id.,* SBH entries for 5/8/07, 5/10/07, 6/20/07, 6/25/07, 6/27/07, 6/29/07, 7/10/07 [entry for 1.7 hours].) These hours are not, therefore, reasonable.

Even after the vague and unrelated entries are deleted, however, the total number of hours the Local's lawyers devoted to certain tasks is excessive. For example, they devoted 55.9 hours to its motion to dismiss the original complaint (*id.,* SBH entries for 4/18-21/07, 4/24/07, 4/25/07, 4/28/07, 5/18/07, 5/23/07, 7/6/07, 10/1/07, 10/3/07; RSS entry for 4/23/07, 7/5/07), 134 hours to discovery (*id.,* SBH entries of 10/25/07, 10/26/07, 10/30-11/2/07, 11/7/07, 11/8/07, 11/10/07, 11/12-15/07, 11/23/07, 11/24/07, 11/28/07, 11/30/07, 12/2/07, 12/3/07, 12/5-7/07, 12/11/07, 12/13/07, 12/18-21/07, 12/27/07, 1/3/08; RSS entries of 11/26/07, 11/28/07, 12/4/07), 38.8 hours to the Local's motion to dismiss the amended complaint (*id.,* SBH entries for 10/9/07, 11/9/07, 11/12/07, 11/13/07, 11/16/07, 11/19/07, 11/20/07) and 87 hours to its request for sanctions (*id.,* SBH entries for 7/10/07, 7/11/07, 8/7/07, 8/8/07, 12/24/07, 12/26/07, 1/15/08, 1/18/08, 1/21/08, 1/22-24/08, 2/15/08, 2/21/08, 2/26/08, 2/28/08, 2/29/08, 5/13/08, 5/19-21/08; RSS entries for 7/3/07, 1/23/08, 1/24/08).

***6** The work related to the Local's first motion to dismiss-the end result of which was a ten-page supporting brief and an eight-page reply brief-should reasonably have taken about 40 hours. Thus, the Court eliminates 16 hours billed for that work. (*Id.,* SBH entries for 4/24/07, 4/25/07, 4/28/07; RSS entry of 4/23/07). Similarly, the work related to the second motion to dismiss should reasonably have taken two-thirds, or about 26 hours, of the 38.8 hours billed for it. The discovery work involved drafting one set of interrogatories, document production requests and requests for admission, preparing certain defendant's responses to plaintiff's written discovery, and taking the deposition of one, Local-affiliated, witness. Though not a trivial of work, it could reasonably have been completed in about one-third of the time billed to it. Finally, like International, the Local devoted too much time to pursuing sanctions. Consequently, the Court reduces by half to 43.5 the time billed to sanctions.

After these reductions, the Court finds that the Local reasonably spent a total of 169.6 hours (40 hours on the first motion to dismiss, 25.9 hours on the second motion to dismiss, 40.7 hours on discovery, 43.5 hours on sanctions and 19.6 hours on other tasks) defending this suit.

Next, the Court must determine a reasonable hourly rate for Local's lawyers. *Harman,* 945 F.2d at 974. In an affidavit submitted to support the sanction request, Horwitz says that his firm's actual hourly billing rates to Local 2 were $235.00 from April 16-August 31, 2007, $245.00 from September 1-December 31, 2007, and $255.00 from January 1-May 22, 2008. (Local's Mem. Supp. Sanction Order, Horwitz Aff. ¶ 7.) Because those rates are presumptively the market rate, *Muzikowski,* 477 F.3d at 909, a presumption Chwarzynski and Maher have not rebutted, the Court finds that those rates are reasonable. Therefore, the Court orders Maher and Chwarzynski, jointly and severally, to pay the Local $10,324.25 (one-fourth of $41,297.00 [$13,512.50 (57.5 hours-37.5 motion to dismiss, 6.9 sanctions and 13.1 other-x $235.00) + $19,624.50 (80.1 hours-2.5 motion to dismiss, 25.9

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motion to dismiss amended complaint, 40.2 discovery, 5 sanctions and 6.5 other-x $245.00) + $8160.00 (32 hours-.5 discovery and 31.5 sanctions-x $255.00)] for their violations of Rule 11 and section 1927.

Conclusion

For the reasons set forth above and in the Court's May 12, 2008 Order, the Court orders Chwarzynski and Maher, jointly and severally, to pay $5,000.00 to International and $10,324.25 to the Local as a sanction for their violations of Rule 11 and section 1927.

SO ORDERED.

N.D.Ill.,2008.
Chwarzynski v. Tebbens
Not Reported in F.Supp.2d, 2008 WL 4210661 (N.D.Ill.)

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H Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.
Christopher IOSELLO, Plaintiff,
v.
Victor LAWRENCE, doing business as Lexington Law Firm, Defendant.
No. 03 C 987.

Sept. 16, 2005.

Cathleen M. Combs, Daniel A. Edelman, James O. Latturner, Anne Michelle Burton, Alexander Holmes Burke, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL, for Plaintiff.

Angela Dawn Cook, Fisher Kanaris, P.C., David P. Germaine, Daar & Vanek, P.C., Chicago, IL, Blake S. Atkin, Lonn Litchfield Atkin & Hawkins P.C., Joann Shields, Atkins & Howard, Salt Lake City, UT, for Defendant.

MEMORANDUM OPINION AND ORDER

GUZMÁN, J.

***1** Magistrate Judge Michael T. Mason has recommended that Victor Lawrence's (doing business as Lexington Law Firm) motion for attorneys' fees and costs pursuant to 28 U.S.C. § 1927 be granted in part and denied in part. Before the Court is plaintiff Christopher Iosello's objection to the Magistrate Judge's Report and Recommendation. For the reasons provided in this Memorandum Opinion and Order, the Court adopts the Report and Recommendation in full.

FACTS

On May 27, 2004, while the instant case was pending before this Court, another plaintiff, who was represented by the same law firm as the plaintiff in the instant case, Edelman, Combs, Latturner & Goodwin, LLC ("Edelman Combs"), brought another suit against the instant defendant, see *D'Agostino v. Lexington Law Firm,* No. 04 C 3660 (N.D.Ill.2004). On August 27, 2004, Lexington moved to dismiss or stay the *D'Agostino* case pending resolution of class certification status in *Iosello,* the instant suit. On August 30, 2004, Edelman Combs on Iosello's behalf moved this Court to find that the *D'Agostino* case was related to the instant case and to have it transferred to this Court's docket, and the motion was set for presentment on September 7, 2004. *Id.*

On August 31, 2004, after the relatedness motion was filed, but before it was presented to the Court, Judge Ruben Castillo dismissed the *D'Agostino* class claims with prejudice and individual claims without prejudice. (Pl.'s Objection Magistrate's Report & Recommendation ("Pl.'s Objection") at 1; Def.'s Resp. Mem. Opp'n Pl.'s Objection at 1-2.) Despite that fact, on September 7, 2004, before this Court, Edelman Combs argued Iosello's motion to reassign the class claims in the *D'Agostino* case and designate them as related to *Iosello.* (Def.'s Resp. Mem. Opp'n Pl.'s Objection at 2.) Edelman Combs refused to withdraw the motion although Lexington Law Firm made numerous requests for it to do so, and Edelman Combs argued that Judge Castillo wanted this Court to have the opportunity to rule on the motion for relatedness and on Lexington's motion for sanctions in the *D'Agostino* case. (Pl.'s Objection at 3.)

The Court denied Iosello's motion for a finding of relatedness, stating that it had no basis in law because the *D'Agostino* case had been dismissed and thus there was no case to reassign as related and that the *D'Agostino* sanctions motion was not related to the *Iosello* matter. Lexington then moved for attorneys' fees and costs under 28 U.S.C. § 1927 based on the argument that it was forced to defend against a motion that had no basis in law. The Court referred the motion to Magistrate Judge Mason for a Report and Recommendation.

Magistrate Judge Mason recommended granting in part and denying in part the motion. Magistrate Judge Mason stated that because the *D'Agostino* case had been dismissed, no basis existed for granting the mo-

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tion to reassign or to declare *D'Agostino* as a related case. He also stated that Edelman Combs acted unreasonably and vexatiously in continuing to pursue the motion to reassign after the *D'Agostino* case was dismissed, and recommended that the law firm be sanctioned $2,010.00 in attorneys' fees and costs for the preparation of a written opposition to plaintiff's motion to reassign *D'Agostino*.Plaintiff objects to Magistrate Judge Mason's Report and Recommendation and argues that Edelman Combs did not act in bad faith or multiply the proceedings by failing to withdraw the relatedness motion.

DISCUSSION

***2** Under Federal Rule of Civil Procedure 72, the standard of review employed by the Court to review matters determined by a magistrate judge depends on whether the matter is dispositive or nondispositive. FED. R. CIV. P. 72. "[R]esolution of a sanctions request is a dispositive matter capable of being referred to a magistrate judge only under [28 U.S.C.] § 636(b)(1)(B) or § 636(b)(3), where the district judge must review the magistrate judge's report and recommendations *de novo.*" Retired Chi. Police Ass'n v. Firemen's Annuity & Benefit Fund of Chi., 145 F.3d 929, 933 (7th Cir.1998) (internal quotations omitted).

A motion for the award of attorneys' fees is governed by 28 U.S.C. § 1927, which provides that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."28 U.S.C. § 1927. The purpose of sanctions awarded pursuant to section 1927 is to "deter frivolous litigation." *Moline v. Trans Union, L.L.C.,* 222 F.R.D. 346, 349 (N.D.Ill.2004); *see Kapco Mfg. Co., Inc. v. C & O Enters.,* 886 F.2d 1485, 1491 (7th Cir.1989).

Repetitious assertion of a legal argument may be grounds for sanctions to be awarded if "a competent attorney would find no basis for a legal argument." *In re TCI Ltd.,* 769 F.2d 441, 447 (7th Cir.1985). Motions must be justified by existing law or a good faith argument for the modification, reversal or extension of existing law. *Id.* Whether sanctions under 28 U.S.C. § 1927 are appropriate is based on an objective test and focuses on whether an attorney "has acted in an objectively unreasonable manner by engaging in a serious and studied disregard for the orderly process of justice" or pursued a "claim without a plausible legal or factual basis and lacking in justification." *Walter v. Fiorenzo,* 840 F.2d 427, 433 (7th Cir.1988) (internal quotations omitted)."If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." *Id.* at 434.

Lexington contends that Edelman Comb's moving for reassignment of an already dismissed case was unreasonable and vexatious, and the Court agrees. In the Northern District of Illinois, Local Rule 40.4 governs motions for reassignment of cases as related and requires that each of the following conditions be satisfied:

(1) *both cases are pending in this Court;*

(2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort;

(3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and

(4) the cases are susceptible of disposition in a single proceeding.

***3** N.D. ILL.LR 40.4(b) (emphasis added). Thus, Local Rule 40.4(b) requires that both cases must be pending to allow for reassignment. *Donahue v. Elgin Riverboat Resort,* No. 04 C 816, 2004 WL 2495642, at *2 (N.D.Ill. Sept.28, 2004); *Hollinger Int'l, Inc. v. Hollinger, Inc.,* No. 04 C 0698, 2004 WL 1102327, at *2 (N.D.Ill. May 05, 2004). The primary purpose of reassignment of a case based on relatedness is to save judicial time and effort. *See* N.D. ILL.LR 40.4(b)(2).

By the time Edelman Combs presented its motion to reassign the *D'Agostino* case as related to the *Iosello* case, the *D'Agostino* case had been dismissed and was no longer pending.[FN1]Further, Lexington's coun-

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sel repeatedly asked Edelman Combs to withdraw the motion to reassign after *D'Agostino* was dismissed, but Edelman Combs refused. Therefore, a reasonable attorney aware of the requirements of the local rule would have withdrawn the motion for reassignment prior to the September 7, 2004 presentment date. Edelman Combs' continuing to pursue this motion once it knew of the dismissal of the case was a choice that a reasonably careful attorney would have known was unsound. The Court therefore finds that Edelman Combs acted unreasonably and vexatiously in presenting the motion for reassignment. Edelman Combs' baseless motion wasted the Court's time and resulted in Lexington's research and defense costs in preparing a response to the motion, as well as time and money on the part of defense counsel in attempting to persuade Edelman Combs to withdraw the motion.

> FN1. Edelman Combs' reliance on Judge Castillo's comments that this Court should be afforded the opportunity to address the relatedness motion is misplaced. Although Judge Castillo stated that this Court could reassign any *D'Agostino* individual claims, he clearly and unequivocally dismissed the *D'Agostino* case in total.

Once the Court has found violations under section 1927, the Court has discretion to award attorneys' fees. *Moline*, 222 F.R.D. at 349. However, whether or not the party moving for sanctions has mitigated its own legal costs will influence the amount of the award. *Id.* Also, the Court must impose the least severe sanction that will serve the goals of section 1927. *Id.* Here, defense counsel sought $15,950.81 for defending plaintiff's motion to reassign and for preparing the section 1927 motion and reply brief. This amount includes attorneys' fees in the amount of $12,813.75 for the 38.25 hours of time spent preparing a defense to the motion to reassign, as well as $1,351.31 in costs, including travel expenses for defense counsel to travel from Utah to Chicago to appear for the presentment hearing. In counsel's log of time sheet entries, however, only six hours of the lead attorney's time were spent preparing defendant's opposition to the motion to reassign and appearing for that motion, at a rate of $335.00 per hour. Magistrate Judge Mason recommended an award of six hours of attorneys' fees at $335.00 per hour, stating that local counsel alone could have appeared for Lexington and reduced Lexington's defense costs. Because the Court holds that defense counsel failed to mitigate adequately a large amount of the legal costs sought, the Court also independently finds that the award of $2,010.00 in attorneys' fees and costs is appropriate and will serve the purpose of deterring Edelman Combs from engaging in similar conduct in the future.

***4** Lastly, Lexington argues that the Court should not only affirm the Magistrate Judge's Report and Recommendation but also should also award attorneys' fees and costs related to its response to plaintiff's objection to the Report and Recommendation. The Court declines to award additional attorneys' fees and costs because the sanction of $2,010.00 serves as a sufficient deterrent for frivolous motions, the main purpose of 28 U.S.C. § 1927.

CONCLUSION

For the reasons set forth above, the Court adopts in full Magistrate Judge Michael T. Mason's Report and Recommendation regarding defendant's motion for attorneys' fees and costs pursuant to 28 U.S.C. § 1927 [doc. no. 183-1].

SO ORDERED.

N.D.Ill.,2005.
Iosello v. Lawrence
Not Reported in F.Supp.2d, 2005 WL 2293680 (N.D.Ill.)

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H Only the Westlaw citation is currently available.

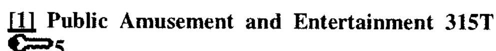
United States District Court,
S.D. New York.
WANTANABE REALTY CORP., et al., Plaintiffs,
v.
THE CITY OF NEW YORK, et al., Defendants.
No. 01 Civ. 10137(LAK).

Dec. 3, 2003.

Roller coaster owner brought action claiming that city wrongfully demolished roller coaster. After jury verdict in favor of owners on issue of liability, city moved for judgment as matter of law or for new trial. The District Court, Kaplan, J., held that: (1) borough commissioner did not violate owner's substantive due process rights; (2) assistant commissioner of city's department of buildings did not trespass onto owner's property; and (3) city could not be subjected to punitive damages for its trespass.

Motion granted in part, and denied in part.

West Headnotes



[1] Public Amusement and Entertainment 315T 5

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk5 k. In General. Most Cited Cases
(Formerly 376k2 Theaters and Shows)

Borough commissioner of city's department of buildings did not violate roller coaster owner's substantive due process rights by issuing emergency declaration that led to roller coaster's demolition, even if declaration was based on report of building inspector whom commissioner knew was not qualified to judge structural soundness of roller coaster, where department had regular practice of notifying owner of issuance of emergency declaration in advance of demolition. U.S.C.A.Const. Amend. 14.

[2] Municipal Corporations 268 739(1)

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k739 Destruction of Property
268k739(1) k. In General. Most Cited Cases

Under New York law, assistant commissioner of city's department of buildings for operations did not trespass onto roller coaster owner's property, under aiding and abetting theory, as result of his approval of emergency declaration for demolition of roller coaster, even if he subsequently learned that papers had included incorrect block and lot number, where he was not present when roller coaster was demolished, and was unaware that any unjustified demolition would occur. Restatement (Second) of Torts § 876(b), cmt. d.

[3] Federal Civil Procedure 170A 2366.1

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(C) Proceedings
170Ak2366 Time for Motion
170Ak2366.1 k. In General. Most Cited Cases

Defendants' motion for new trial following jury's finding of liability was **timely**, even if it was filed more than ten days after jury rendered verdict, where trial had been **bifurcated**, and no judgment on damages had yet been entered. Fed.Rules Civ.Proc.Rules 50(b), 59, 28 U.S.C.A.

[4] Municipal Corporations 268 743

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 k. Damages. Most Cited Cases

Under New York law, city could not be subjected to

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punitive damages for its trespass onto roller coaster owner's property.
Barry S. Gedan, for Plaintiffs.

Dana Biberman, Kerri A. Devine, Assistant Corporation Counsel, Michael A. Cardozo, Corporation Counsel of the City of New York, for Municipal Defendants.

MEMORANDUM OPINION

KAPLAN, J.

***1** Plaintiffs, one of which owned the Thunderbolt roller coaster on Coney Island, brought this action against the City of New York and various officials of its Departments of Buildings ("DOB") and of Housing, Preservation and Development ("HPD") claiming that the City wrongfully demolished the roller coaster. Many of the claims were disposed of on pretrial motions, one of which resulted in an extensive opinion, familiarity with which is assumed.[FN1] The issues of liability and damages were severed, and the liability phase was tried to a jury on claims of common law trespass and violations of the rights of plaintiff Wantanabe Realty Corp. ("Wantanabe") to substantive due process of law under the federal and state constitutions. The jury returned a special verdict which, in relevant part and broadly described, found that (1) Tarik Zeid, Brooklyn borough commissioner of the DOB, violated Wantanabe's substantive due process rights by issuing an emergency declaration that led to the demolition with deliberate indifference to whether his action in so doing created a substantial risk that the roller coaster would be demolished without regard to whether demolition was necessary to protect the public, and (2) Frank G. Marchiano, DOB assistant commissioner for operations, Vito Mustaciuolo, associate commissioner of HPD for enforcement services, and, by necessary extension, the City were liable on the theory that the demolition was an unjustified trespass and that the individuals in essence were aiders and abettors. The City, Zeid, Marchiano and Mustaciuolo now move for judgment as a matter of law or, in the alternative, for a new trial. They seek also a determination that plaintiff may not recover punitive damages as a matter of law.

FN1. *Wantanabe Realty Corp. v. City of New York*, --F.Supp.2d ----, No. 01 Civ. 10137(LAK), 2003 WL 21543841 (S.D.N.Y. July 10, 2003, as corrected July 14, 2003).

I The Motion for Judgment as a Matter of Law

A. Substantive Due Process

The essence of plaintiff's substantive due process claim was that Zeid issued the emergency declaration on the basis of the report of a building inspector whom he knew was not qualified to judge the structural soundness of the roller coaster.[FN2] As noted, the jury accepted that argument and found, in its response to Question 1 on the verdict form, that he issued the emergency declaration with deliberate indifference to whether its issuance created a substantial risk that the roller coaster would be demolished unjustifiably. Defendants, however, seek judgment as a matter of law dismissing the substantive due process claim against Zeid on the merits and on the ground of qualified immunity. They argue that (a) Zeid had a rational basis for issuing the emergency declaration in that he reasonably relied on Padmore and, in any event, that the issuance of the emergency declaration did not create a substantial risk of unjustified demolition in light of the regular practice of notifying the owner of property subject to such a declaration and affording the owner an opportunity to demonstrate the absence of any condition warranting demolition, (b) Zeid's conduct was not outrageously arbitrary or conscience-shocking even if the jury was justified in answering Question 1 as it did, and (c) Zeid is entitled to qualified immunity.

FN2. Joint Pretrial Order ("PTO") (DI 75) § IV.A (Plaintiffs' Contentions), ¶¶ 27-33; *id.* § V (Plaintiffs' Statement of Issues to be Tried) ¶¶ 1-3, 7; Tr. 63-67 (opening statement); *id.* 780-82, 792-93, 796-99 (closing argument) ("outrageous and shocking conduct of Mr. Zeid in issuing a declaration without cause and circling demolition and crossing out repair and knowing the risk that would cause demolition down the line ...").

***2** Zeid did not seek judgment as a matter of law at the close of the proof on grounds (b) and (c).[FN3] He

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therefore may not be heard to advance those contentions as a basis for dispositive relief.[FN4] He did, however, preserve the contentions set forth in (a).

FN3. Tr. 704 line 23/713 line 3.

FN4. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 362 (2d Cir.1992), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993); 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2537, at 344-45(1995) ("WRIGHT & MILLER").

Insofar as Zeid argues that the jury was not justified in regarding his reliance on Padmore's report as not merely ill-advised but outrageously arbitrary, his position is indefensible. The jury was entitled to credit Zeid's quite damning deposition testimony, in which he admitted his awareness that Padmore was unqualified to judge the structural soundness of the roller coaster,[FN5] and to reject his effort at trial to justify his reliance on Padmore's report. His fallback position, however, is more substantial.

FN5. The testimony is summarized at 2003 WL 21543841, at *5-*6.

As the opinion on the summary judgment motions made clear, it has been undisputed that DOB Operations Policy and Procedure Notice # 16/93 (the "OPPN"), which the DOB follows with respect to dangerous structures, provides for the issuance of emergency and immediate emergency declarations and requires the sending of a notice to the owner of an affected property.[FN6] The Court determined also that such notices "automatically" are sent to owners of property subject to an emergency declaration.[FN7]

FN6. *Id.* at *2-*3.

FN7. *Id.* at *6 & n. 65.

Plaintiff offered the OPPN in support of its unsuccessful summary judgment motion. Exhibits to plaintiffs' motion for summary judgment, Ex. 25; *see also* Pl. 56.1 St. (DI 43) ¶ 35 (authenticating exhibit). Indeed, one of its principal arguments was that the DOB's use of the OPPN rather than the unsafe buildings procedure set out in the New York City Administrative Code was unlawful. Moreover, in plaintiff's Rule 56.1 Statement in opposition to defendants' motion for summary judgment, plaintiff admitted that a notification letter was sent to the entity believed to be the owner of the property, Pl. Opp. 56.1 St. (DI 55) ¶ 36, and then elaborated on this in the pretrial order, where it stipulated that a form letter notifying the owner was sent, albeit to an incorrect addressee, on September 1, 2000, following the issuance of the emergency declaration (PTO § III (Stipulated Facts) ¶¶ 115, 118). It further contended that, upon discovery of the error in the owner's identity, a corrected letter was prepared and addressed to the plaintiff but that the street address was incorrect in that one numeral was dropped. *Id.* ¶¶ 130-33.While plaintiff's Rule 56.1 Statement on defendants' summary judgment motion declined to admit that the corrected letter, which was DX V in evidence at trial, was sent, it did not dispute the existence of the general practice.

The evidence at trial was to the same effect, viz. that the issuance of an emergency declaration was only the first step in a process that ultimately could lead to demolition. Zeid testified, without contradiction or impeachment on this point, that a copy of the emergency declaration ordinarily was sent to the owner with a letter demanding that the owner repair or demolish the structure in question, which in turn gave the owner an opportunity to approach the DOB and to demonstrate that the structure was safe.[FN8] This was supported in part by DX V, a copy of the letter sent to the owner of the structure here at issue, which according to Zeid was "a standard letter that goes out from the construction division."[FN9] It was supported also by the testimony of Messrs. Mineo, Marchiano and Mustaciuolo, all current or former employees of the DOB or HPD. Mustaciuolo testified that, after receiving an emergency declaration from DOB, HPD would "attempt to contact the owner of the property

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with the intent to try to get compliance."[FN10] McCardle referred to staff members at HPD gathering information on owners of the property so that the department could send them letters.[FN11] He testified also that the general procedure of notifying the owner of the property was followed in this specific situation and that the letter was re-sent once the department found out that it initially had identified the owner incorrectly.[FN12] Mineo, a former acting chief inspector of the DOB, testified that some boroughs, including Brooklyn, included copies of these form letters in the packets of information sent to DOB headquarters along with copies of emergency declarations.[FN13]

FN8. Tr. 517 line 18/521 line 23.

FN9. *Id.* at 521 lines 20-21.

FN10. *Id.* at 626.

FN11. *Id.* at 587.

FN12. *Id.* at 590.

FN13. *Id.* at 437-38, 445-46.

The evidence that the standard DOB practice following the issuance of an emergency declaration was to notify the owner and thus to afford the owner an opportunity to dispute the existence of any condition requiring demolition or repair, if appropriately considered on this motion, would put Zeid's actions in an entirely different light. Assuming, as the Court must, that he issued the emergency declaration on the basis of an inspection report by an individual whom he thought unqualified, the risk that this would lead to an unjustified demolition nevertheless was quite limited in light of the regular practice of notifying the owner of the issuance of the declaration well in advance of demolition. Any reasonable property owner who received such a notice and who disagreed with the DOB's declaration would be expected to dispute the declaration rather than have its property demolished. The only material risk of an unjustified demolition would arise from a failure by the property owner to receive or read the notice. While such a failure in fact occurred here as a result of two errors-the initial the misidentification of the property owner and, when that error was discovered, the typographical error in plaintiff's address-there was no evidence from which the jury reasonably might have concluded that Zeid did not expect that the owner would be notified in accordance with regular practice.

***3** The Court determined that the plaintiff, in order to prevail on the substantive due process claim, would have to prove, in the words of Question 1, that "Zeid issued the Emergency Declaration with deliberate indifference to whether the issuance of the Declaration created a substantial risk that the roller coaster would be demolished without regard to whether demolition was necessary to protect the public."Plaintiff's counsel stated that he had no objection to that formulation.[FN14] He raised no relevant objection to the jury instruction on this point.[FN15] In consequence, the evidence that there was a regular DOB practice of notifying owners of property subject to emergency declarations well in advance of any demolition by the City, if properly considered, would undermine completely the jury's finding with respect to Question 1: even if Zeid knew that there was little or no basis for concluding that there actually was an unsafe condition, the process of owner notification and response meant that the roller coaster would be torn down without regard to whether it really was a safety hazard only in the unlikely event that the notice was not actually sent, received and read. So the question whether this evidence is properly considered is determinative of the outcome of Zeid's motion.

FN14. Tr. 714 lines 20-25.

The Court notes that the remarks attributed to plaintiff's counsel at Tr. 713, lines 17-22, as the context reflects, in fact were made by defendants' counsel.

FN15. *Id.* 735 line 18/737 line 7.

Plaintiff's only objection to this portion of the charge related to his contention that the knowledge essential to a finding of deliberate indifference could be constructive as well as actual. That objection was overruled but has no bearing on the present issue.

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In passing on a motion for judgment as a matter of law, whether at the close of the evidence or after verdict,[FN16] "the court should review the record as a whole ... and disregard all evidence favorable to the moving party that the jury is not required to believe."[FN17] In other words, it must credit the evidence favoring the non-moving party and "that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." ' [FN18] The ultimate question is "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." [FN19] "[T]here must be evidence on which the jury could reasonably find for the plaintiff." [FN20]

FN16. 9A WRIGHT & MILLER § 2537, at 347.

FN17. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

FN18. *Id.* (quoting 9A WRIGHT & MILLER at 300).

FN19. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FN20. *Id.*

[1] In this case, Zeid was an interested witness, but the plaintiff never challenged his testimony concerning the existence of the notification process that he described. While Mineo, Mustaciuolo and McCardle were parties, they were not defendants on the substantive due process claim to which this issue relates. Their interests were unaffected by whether or not the notification process existed. In all of the circumstances, the jury could not reasonably have declined to find that the regular practice of the DOB was to notify the owner of the issuance of an emergency declaration and that Zeid knew that. In fact, the form notification letter is stamped with his signature.[FN21] Moreover, during the argument of the post-verdict motion, plaintiff's counsel admitted that the evidence concerning the regular practice of sending these letters was uncontroverted.[FN22] In consequence, although the jury was amply justified in finding that his issuance of the emergency declaration was unjustified, it could not reasonably have concluded that this action, however improper, reflected deliberate indifference to the creation of a substantial risk that it would result in demolition of the roller coaster without regard to whether demolition was necessary to protect the public.

FN21. DX V; Tr. 521-22.

FN22. "THE COURT: * * * Did the plaintiffs in any way contravene the otherwise undisputed evidence that the regular practice in the Brooklyn borough office was to send a form letter comparable to Defendant's [*sic*] Exhibit V to owners whose property was the subject of emergency declarations? Yes or no.

"MR. GEDAN [plaintiff's counsel]: Not recalling what V was, but assuming--

"THE COURT: V was the letter to your client that was sent to 333 Henry Hudson Parkway, that you stipulated was sent and that everyone stipulated was not received.

"MR. GEDAN: We never contravened that, your Honor."(Tr., Dec. 2, 2000, at 18)

***4** Accordingly, Zeid is entitled to judgment as a matter of law on the substantive due process violation.

B. The Trespass Claim

Defendants next seek judgment as a matter of law on the theory that the evidence does not support a liability finding as against any of the City of New York and defendants Marchiano and Mustaciuolo. They contend that (a) all three of these defendants are protected by state law official immunity, (b) Marchiano's actions in relation to demolition of the Thunderbolt were insufficiently substantial, (c) Marchiano and Mustaciuolo were justified in acting as they did be-

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cause they reasonably believed that their actions were necessary to avert an imminent public disaster, (d) Mustachiuolo acted pursuant to a facially valid order, and (e) the demolition of the building referred to as the Kensington Hotel was reasonably necessary to the demolition of the Thunderbolt.

Defendants did not seek judgment as a matter of law on any of these grounds save that they sought dismissal as to Marchiano on that ground that he did "[n]othing of substance." FN23 In consequence, all of their present contentions save that are foreclosed as a basis for relief under Rule 50(a).

FN23. Tr. 710-13.

Viewing the evidence concerning Marchiano's role in the light most favorable to the plaintiff, the jury would have been entitled to find only the following: Marchiano was assistant commissioner of the DOB for operations at the time relevant here. His job entailed overseeing the day to day operations of the borough offices, including inspectorial services. FN24 Emergency declarations issued by the borough offices were forwarded to his office. Marchiano reviewed them "for accuracy for the appropriate paperwork ... and also check[ed] the inspector's report to make sure it [was] clear as to what they're requesting ... HPD [the Department of Housing Preservation and Development, which actually carried out demolitions for the City] to do." FN25 Once he reviewed a declaration for accuracy and completeness, he typically did not see it again. FN26

FN24. *Id.* at 466-68.

FN25. *Id.* at 468-70.

FN26. *Id.* at 470.

In this case, Marchiano received a call from his superior, Barry Cox, who asked that he have the Thunderbolt inspected. FN27 He told a subordinate to have the Brooklyn office do so and, a few days later, received the emergency declaration, an inspection report and a form of letter to the owner. He determined they were accurate and complete, signed off on them, and told a subordinate to send them to HPD. FN28 Subsequently, he learned that the papers had included an incorrect block and lot number and saw the amended emergency declaration. FN29 He never heard anything further. FN30

FN27. *Id.* at 471.

FN28. *Id.* at 471-74.

FN29. *Id.* at 474.

FN30. *Id.* at 475.

As Marchiano did not trespass on plaintiff's property, he can be found liable only on what amounts to an aiding and abetting theory. In other words, plaintiff was obliged to prove that he gave substantial assistance or encouragement to the primary tortfeasor, knowing that the other's conduct constituted a breach of duty. FN31 Further, constructive knowledge of a breach of duty is insufficient to impose aiding and abetting liability; actual knowledge is required. FN32

FN31. *E.g., Pittman by Pittman v. Grayson,* 149 F.3d 111, 122-23 (2d Cir.1998); *Nat'l Westminster Bank USA v. Weskel,* 124 A.D.2d 144, 147, 511 N.Y.S.2d 626, 629 (1st Dept.1987); RESTATEMENT (SECOND) OF TORTS § 876(b) (relied upon in *Lindsay v. Lockwood,* 163 Misc.2d 228, 233, 625 N.Y.S.2d 393, 397 (Sup.Ct. Monroe Co.1994); *Fletcher v. Atex, Inc.,* 68 F.3d 1451, 1455-56 (2d Cir.1995)).

FN32. *Kolbeck v. LIT America, Inc.,* 939 F.Supp. 240, 246 (S.D.N.Y.1996).

***5** Substantial assistance is a meaningful element. As comment d to Section 876(b) of the Restatement makes clear:

"The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." FN33

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FN33. RESTATEMENT (SECOND) OF TORTS § 876(b), cmt. d.

[2] Measured by this standard, Marchiano's actions, even viewed most generously in favor of the plaintiff, were insufficient to justify the jury's finding. While the act in which he assisted-the demolition of the Thunderbolt-was consequential, his role at most was simply to check the paperwork.[FN34] He was not present when the roller coaster was demolished. He certainly was unaware of any breach of duty, as he had no basis for believing that any unjustified demolition would occur. This branch of the motion therefore will be granted.

FN34. To be sure, the jury was not obliged to believe Marchiano's testimony as to his role. But there was no other evidence. Hence, if his testimony were disregarded, the evidence manifestly would be insufficient to show that he lent substantial assistance to the demolition.

II New Trial

A. Timeliness

Neither defendants' notice of motion nor their memorandum of law seeks a new trial, this despite the fact that the memorandum contains two sentences arguing in conclusory terms that the verdict was against the weight of the evidence and a slightly more elaborate contention that plaintiff's summation was improper. The only relief they seek is judgment as a matter of law. But a federal district court may not grant judgment as a matter of law on such grounds. When the lack of any application for a new trial was pointed out at oral argument, defendants' counsel stated that they do seek a new trial. Plaintiff resists on the ground that the application is untimely.

[3] A party seeking a new trial under either Rule 50(b) or 59 must move for that relief within ten days after entry of judgment.[FN35] Unlike most time periods prescribed by the Federal Rules, that ten day period may not be extended under Rule 6.[FN36] Had judgment been entered, the motion would have been untimely. As the trial was **bifurcated**, however, no judgment yet has been entered. Indeed, the application for a new trial relates only to the liability phase of the case. In consequence, the motion is **timely**.[FN37]

FN35. FED. R. CIV. P. 50(b), 59(b).

FN36. *Id.* 6(b). *See also, e.g., Rodick v. City of Schnectady,* 1 F.3d 1341, 1347 (2d Cir.1993).

FN37. *See, e.g., Dunn v. Truck World, Inc.,* 929 F.2d 311, 313 (7th Cir.1991) (prejudgment motion for new trial timely); *Riggs v. Scrivner, Inc.,* 927 F.2d 1146, 1148 (10th Cir.1991) (time limit for new trial motion does not begin to run until after relief determined).

B. The Weight of the Evidence

Defendants' contention that the verdict is against the weight of the evidence, in light of the entry of judgment as a matter of law dismissing the claims against Zeid and Marchiano, retains vitality only insofar as the application is made on behalf of the City and Mustachiuolo.

It has no merit with respect to the City. The finding that the demolition was unjustified [FN38] was amply supported by the evidence.

FN38. Verdict form, Questions 3, 8.

The jury made two findings with respect to Mustachiuolo: defendants failed to prove that (1) he acted out of a reasonable belief that demolition of the roller coaster was necessary to avert an imminent public disaster, and (2) his action involved the exercise of discretion as distinguished from it being the performance of a routine or ministerial function. The first question of course went to the issue of justification while the second was pertinent to the state law defense of official immunity.

***6** There is substantial reason to doubt that any real purpose would be served by ruling on this motion. To the extent that the destruction of the roller coaster

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was tortious, the City of New York plainly is liable. Plaintiff nevertheless has pursued not only the City, but an array of mid-level City employees, thus causing considerable expense and occupying a great deal of otherwise unnecessary Court time. The purpose of doing so, apart from possible vindictiveness, is not apparent. There is no suggestion that any City employee caused plaintiff any damage different from whatever damage may have been inflicted by the City. The City is entirely able to respond in damages and, in any case, would be obliged to indemnify its employees for any compensatory damages assessed against them for actions within the scope of their employment. So plaintiff has nothing to gain from suing the individuals for trespass save the possibility of punitive damages,[FN39] and there is no reason to suppose that Mustachiuolo is sufficiently well off to justify the expense of seeking such a recovery from him.

FN39. As indicated below, punitive damages are not available against the City on the trespass claim.

In these circumstances, it appears to the Court that no valid purpose would be served by ruling at this time on Mustachiuolo's motion for a new trial on liability. The motion will be denied without prejudice to renewal within ten days after the entry of judgment.

C. Improper Summation

Defendants contend that the verdict was tainted by plaintiff's allegedly improper summation. The short answer to the argument is that they did not object to the summation. Even a criminal conviction is not undermined by an improper summation, absent a contemporaneous objection, unless there was "flagrant abuse." [FN40]The Court finds no flagrant abuse here.

FN40.*E.g.*, *United States v. Zichettello*, 208 F.3d 72, 103 (2d Cir.2000), *cert. denied*, 531 U.S. 1143, 121 S.Ct. 1077, 148 L.Ed.2d 954 (2001).

III Punitive Damages

Although the damages trial has yet to take place, defendants' motion for judgment as a matter of law sought also dismissal as a matter of law of all of plaintiff's punitive damage claims. The Court afforded plaintiff an opportunity to brief the issue and held oral argument. Accordingly, at least part of that issue now is ripe for disposition.

[4] With the dismissal of the substantive due process claim, the only remaining basis for liability is common law trespass, a tort for which punitive damages generally are available in an appropriate case. Under New York law, however, neither the state or any political subdivision thereof may be held liable for punitive damages absent a statute so providing.[FN41]Plaintiff has pointed to no such statute here.[FN42]Accordingly, the punitive damage claim against the City is dismissed.

FN41.*E.g.*, *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987); *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104 (1982).

FN42. The Court does not here rule on plaintiff's contention that it is entitled to treble damages pursuant to N.Y. REAL PROP. ACT. & PROC.. L. § 853, an issue that is premature in the absence of a compensatory damage award in plaintiff's favor.

The defendants' application is premature insofar as it is addressed to the punitive damage claim against Mustachiuolo. The motion to that extent is premised on the proposition that plaintiff has adduced all evidence pertinent to Mustachiuolo's liability for punitive damages already. Plaintiff claims otherwise. Accordingly, the Court will not decide this question at this point.

IV Conclusion

*7 For the foregoing reasons, defendants' motion for judgment as a matter of law is granted to the extent that the action is dismissed as to defendants Marchiano and Zeid. It is denied in all other respects. The alternative motion for a new trial as to liability is

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denied, the denial being without prejudice insofar as defendant Mustachiuolo. The defendants' application to dismiss plaintiff's punitive damage claims is granted to the extent that the punitive damage claim against the City is dismissed and denied without prejudice to renewal insofar as it concerns Mustachiuolo.

SO ORDERED.

S.D.N.Y.,2003.
Wantanabe Realty Corp. v. City of New York
Not Reported in F.Supp.2d, 2003 WL 22862646 (S.D.N.Y.)

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