LAW AND THE FAMILY

Sanctions and Discipline for Frivolous Conduct in Matrimonial Actions

By Joel R. Brandes

New York Court Rules authorize the imposition of costs and sanctions upon attorneys and parties who engage in frivolous litigation and appeals and engage in abusive litigation tactics. (22 NYCRR Part 130) The rules provide, among other things, that the court, in its discretion, may award to any party or attorney in any civil action, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. In addition to or instead of awarding costs, the court may impose financial sanctions, payable to the clients' security fund, for frivolous conduct. This sanctions rule does not apply to proceedings in town or village courts, small claims parts, and proceedings in the Family Court under Articles 3, 7, 8, or 10 of the Family Court Act. (22 NYCRR **§**130-1.1(a))

Frivolous conduct is defined as, among other things, conduct completely without merit in law or fact and which cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law. (22 NYCRR **§**130-1.1(c) (1).)

Attorneys should be are aware of the fact that Rule 3.1 of the Rules of Professional Conduct ("RPC") covers the same ground as 22 NYCRR **§**130-1.1(c) and is applicable to proceedings in all court. It provides, in part: (a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. …(b) A lawyer's conduct is "frivolous" for purposes of this Rule if: (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or (3) the lawyer knowingly asserts material factual statements that are false.

Attorneys have been disciplined for engaging in frivolous conduct. In Matter of Gurvey, (102 AD3d 197 (1st Dept 2012)) a lawyer was suspended for six months for, among other things, frivolous litigation. In Matter of Rosenberg, (97 AD3d 189 (1st Dept 2012)) a lawyer was suspended for one year for the pursuit of fraudulent and meritless litigation.

An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR **§§**2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing depends upon the nature of the conduct and the circumstances of the case. (22 NYCRR **§**130-1.1(d).) In determining whether the conduct was frivolous, the court must consider, among other

issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent to counsel. (22 NYCRR §130-1.1(c).)

For example, it has been held that a judgment which granted the husband's motion for costs and sanctions was proper where the husband's express request for attorney's fees and sanctions in a notice of cross-motion furnished the wife with adequate notice that this would be considered. (Dellafiora v. Dellafiora, 172 A.D.2d 715, 569 N.Y.S.2d 103 (2d Dep't 1991) However, it is improper for the Court, on its own initiative, to impose a sanction, where counsel is not put on notice by the other party or by the court that a sanction is being sought or contemplated, and is not given a reasonable opportunity to be heard. (Kramer v. Berardicurti, 79 A.D.3d 1794, 913 N.Y.S.2d 856 (4th Dep't 2010) In Breslaw v. Breslaw, (209 A.D.2d 662, 619 N.Y.S.2d 323 (2d Dep't 1994)) the Appellate Division held that by denying an attorney the right to cross-examine witnesses and the right to present a defense the court failed to give the attorney the mandated reasonable opportunity to be heard.

In Tamburello v. Tamburello, (165 A.D.3d 1006, 85 N.Y.S.3d 199 (2d Dep't 2018) the defendant, through her attorney, moved to set aside the parties prenuptial agreement contending, in effect, that there had been a novation such that the agreement had been replaced by an affidavit of support submitted to the Department of Homeland Security. The defendant's attorney provided no legal authority supporting this contention. Although the court precluded the defendant from seeking to set aside the prenuptial agreement, the defendant's attorney later attempted, at the trial, to question the plaintiff about the affidavit of support, arguing, in effect, that the affidavit of support replaced the prenuptial agreement. The defense then rested without presenting evidence. The Appellate Division found that the conduct of the defendant's attorney was frivolous. He continued to advance his contention relating to the affidavit of support, which was completely without merit in law, in contravention of the Supreme Court's prior ruling, and his conduct appeared to have been undertaken primarily to delay or prolong the resolution of the litigation.

It has been held that it is improper to file a notice of pendency against the marital residence in a matrimonial action**.** An attorney who files a notice of pendency against the defendant's property, in a matrimonial action, based upon the request for equitable distribution was sanctioned for conduct which was e frivolous and completely without merit, since title, possession, use, or enjoyment of the property would not necessarily be affected in that action, to authorize its filing. An attorney who obtained a **"**so-ordered**"** subpoena duces tecum and served it upon a hospital to obtain the defendant's medical records, before filing a note of issue and before a trial date was set, was sanctioned for frivolous conduct, as it was completely without merit.(22 NYCRR 130-1.1[c] [2].)

Conduct is also frivolous if it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.[12] In Borstein v. Henneberry, (132 A.D.3d 447, 17 N.Y.S.3d 414 (1st Dep't 2015) the Plaintiff husband, an experienced matrimonial lawyer, who represented himself in the divorce proceeding was sanctioned twice during that action. In his post-trial memoranda, he claimed that he loaned the wife **"**$27,000 during the years after the filing for divorce**"** to allow her to finance a business venture. The decision did not specifically address the $27,000 loan, but stated that **"**[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected.**"** The husband then commenced an action against the wife seeking the same $27,000. The wife's counsel sent the husband a letter asking him to discontinue the action voluntarily because the divorce action had determined the issue of the loan. Supreme Court dismissed the complaint, concluding that the loan was **"**fully and actively litigated by [the husband]**"** in the divorce action. The wife's subsequent motion for sanctions based was denied. The Appellate Division reversed and imposed sanctions. It found that res judicata barred the subsequent plenary action for repayment of the loan. The Appellate Division observed that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighed heavily in favor of a finding that his conduct was intended solely to harass the wife. Aside from the blatant lack of merit to the complaint, other factors justifying sanctions and attorneys' fees were present. First, the wife expressly informed the husband that she considered the action barred by res judicata and urged him to discontinue it, but he pressed on, forcing her to expend unnecessary resources. And, this was not the first instance in which the husband had taken a position that was not legally tenable. Coupled with the earlier incidents, the commencement of this action exhibited a **"**broad pattern ... of delay, harassment and obfuscation**"** that warranted the imposition of sanctions.

Conduct is frivolous if it asserts material factual statements that are false. (22 NYCRR 130-1.1[c] [3]). Sanctions have granted for frivolous conduct based on a party's' false testimony at trial as to a material issue. (Sanders v. Copley, 194 A.D.2d 85, 605 N.Y.S.2d 281 (1st Dep't 1993).

In Capetola v. Capetola, (96 A.D.3d 612, 947 N.Y.S.2d 94 (1st Dep't 2012)) the Appellate Division affirmed an order which, imposed sanctions upon the defendant and his lawyer in the amount of $10,000 each. Defendant, a lawyer involved in his divorce proceedings, submitted an affidavit to the court that was intentionally misleading in that he stated that he opposed renting out an apartment that was a disputed marital asset because he needed to use it at times for work purposes. He failed to disclose that, at that time, he was renting the apartment to the daughter of his lawyer for an amount that was substantially below market rate. This deliberately misleading representation concerning marital assets was properly found to be sanctionable, as it related to material facts on a pending motion.

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Frivolous conduct includes the making of a frivolous motion for costs or sanctions. (22 NYCRR §130-1.1(c)). In Tercjak v. Tercjak, (49 A.D.3d 773, 854 N.Y.S.2d 454 (2d Dep't 2008) the Appellate Division held that it was proper to impose costs upon counsel for the mother, for making frivolous motions to impose sanctions and costs upon the Law Guardian and the father's counsel. In support of the motions, the attorney submitted, inter alia, affidavits from a doctor that were rife with unfounded, gratuitously offensive, and utterly unacceptable attacks upon counsel for the father, the Law Guardian, and the Family Court. The record supported the determination that the motions were completely without merit in law or fact, and were made primarily to harass or maliciously injure another

The Appellate Divisions have imposed sanctions upon attorneys and their clients for pursuing frivolous appeals. 22 NYCRR 130-1.1[c]). Like the Supreme Court rules, 22 NYCRR §1250.1(h) of the practice rules of the appellate division provide, inter alia, for the imposition of sanctions and costs upon motion or upon the court's own initiative, after a reasonable opportunity to be heard. (22 NYCRR §1250.1(h) effective September 17, 2018.)

In McMurray v. McMurray, (163 A.D.2d 280, 557 N.Y.S.2d 149 (2d Dep't 1990)) counsel was sanctioned by the Appellate Division for pursuing "patently frivolous" appeals in an action by a wife to obtain equitable ownership of the marital residence, which had been awarded to her former husband in their prior divorce action. In imposing sanctions, the court characterized counsel's conduct as "inexcusable" since, as evidenced by his appellate brief, the plaintiff's position ran counter to all established precedent.

Sanctions have also been imposed by the Appellate Division for failure to promptly notify it that the primary issues raised on the appeal had been settled (Trank v. Trank, 212 A.D.2d 777, 622 N.Y.S.2d 971 (2d Dep't 1995) or rendered academic. (Leggio v. Leggio 183 A.D.2d 815, 584 N.Y.S.2d 68 (2d Dep't 1992) In Belsky v. Belsky, (172 A.D.2d 576, 568 N.Y.S.2d 627 (2d Dep't 1991)) an attorney was sanctioned for perfecting a custody appeal which was moot at the time it was filed because the child had attained the age of 18 years.

Conclusion

Lawyers who engage in frivolous conduct place their licenses in jeopardy. The same frivolous conduct prohibited by the Court Rules can subject a lawyer to professional discipline and suspension for a violation of the Rules of Professional Conduct.

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