

SECOND CIRCUIT REVIEW

Expert Analysis

Second Circuit Vacates Attorney Sanction That Impacts Clients

This month, we discuss *Mitchell v. Lyons Professional Services*,¹ in which the U.S. Court of Appeals for the Second Circuit vacated and remanded a denial of plaintiffs' motion to execute a monetary judgment, which had been entered as a sanction for attorney misconduct. In its decision, written by Judge Ralph K. Winter and joined by Judge Reena Raggi and Judge Denny Chin, the court concluded that the district court had not adequately developed the record regarding whether the plaintiffs contributed to their counsel's misconduct, nor sufficiently considered the adequacy of alternative sanctions, which would have directly impacted the offending attorney, rather than his clients.

Background

On April 16, 2009, plaintiffs filed a complaint against their former employer, Lyons Professional Services Inc. and two supervisory personnel, alleging various occurrences of sexual



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

harassment and sexual assault by the supervisory personnel and vicarious liability against Lyons. Plaintiffs were represented by Gary Rawlins.²

During the action's progression, Rawlins repeatedly engaged in conduct that appeared to be in willful disregard of court orders. For example, Rawlins sought and obtained three adjournments of the Initial Status Conference because he was "unable to proceed": once when he was on vacation and another time when he notified the court of the proposed adjournment only one day before the conference, in violation of the judge's rule requiring a minimum of 48 hours' notice.³

Similarly, Rawlins was ordered to provide notice of the Initial Status Conference to the defendants and to provide proof of service of such notice to the court on two separate occasions, but nonetheless failed to do so. In response to the court's entry of an Order to Show Cause for why

he should not be sanctioned, Rawlins claimed he had made a mistake. The court decided not to impose sanctions.

In spite of these failings by plaintiffs' counsel, after defendants did not appear, plaintiffs obtained default judgments against Lyons and one of the supervisory personnel. The case against the other individual was dismissed.

Subsequently, the court scheduled a damages inquest to determine the appropriate level of damages. In scheduling the requisite damages inquest, however, Rawlins again violated the court's 48-hour rule by requesting an adjournment of the inquest the day before it was scheduled.

The Second Circuit has sent a clear signal to the district courts about its unwillingness to allow lower courts to penalize clients for the actions of their attorneys.

On the day of the rescheduled inquest, only one of the plaintiffs was physically present in court, and Rawlins decided that none of the plaintiffs would testify even though their emotional injuries made up a large part of the

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in complex commercial litigation and white-collar criminal defense matters. KRISTEN-ELISE F. BROOKS, a litigation associate at the firm, assisted in the preparation of this column.

damages claims. Instead, Rawlins offered into evidence reports by an expert psychiatrist who had consulted with the plaintiffs, but the copies of the reports were neither pre-marked as exhibits nor assembled in the proper order for the court.⁴

In spite of this misbehavior, plaintiffs won an award of \$266,590 from the district court. This amount comprised back pay, damages for emotional harm, and punitive damages.

Then, on May 10, 2010, plaintiffs filed an execution motion against Lyons, the remaining supervisory personnel, Lyons' successor-in-interest, and Lyons' owner. Once again, throughout the execution proceedings, Rawlins consistently failed both to comply with court orders and to communicate effectively with the court in an effort to reduce the disruptive impact of his behavior.

During discovery proceedings, for example, Rawlins could not proceed with a scheduled hearing about the execution motion. In response, the district court issued a scheduling order containing several warnings, including one that noted Rawlins' failure to appear as "the latest in a series of failures by plaintiffs' counsel to effectively communicate with the Court and to demonstrate basic familiarity with the requirements of federal practice" and "[t]he Court believes it would be acting within its discretion to simply deny plaintiffs' [execution] motion based on counsel's failure to appear, particularly in light of the history of prior miscues."

The same order set a hearing for Nov. 8, 2010, requiring Rawlins to prepare for the hearing and specifically warning that "failure to comply with these procedures will result in denial of [the] motion without further accommodations."⁵ Yet, Rawlins ultimately appeared before the court in disregard of the order without having delivered in advance excerpted deposition tran-

scripts and exhibits he planned to use.⁶ Rather than denying the motion as it had threatened to do, the court only sanctioned Rawlins \$500 and rescheduled the hearing.

Rawlins failed to appear timely for even the rescheduled hearing. Without any indication that Rawlins would attend, the district court dismissed the execution motion after waiting 30 minutes.⁷

The court noted that, in general, though clients are bound by the acts of their attorneys, where delay is caused by a lawyer's disregard of the obligations he owes to his clients, it is more appropriate to impose a sanction—even if it is less drastic than dismissal—directly on the attorney.

Both plaintiffs and Rawlins moved for reconsideration of the sanction. The court offered Rawlins an opportunity to explain why such sanction should not be imposed. The only explanation Rawlins had was that he "misread his calendar entry for the hearing."⁸ The district court "did not find compelling" Rawlins' excuse, given Rawlins' "chronic lateness and repeated failures to comply with court orders over the course of the case."⁹ Instead, it found Rawlins' non-appearance at the hearing to be "the culmination of a long series of acts of unprofessional conduct, disregard of court orders, and the unsuccessful application of lesser sanctions for this misconduct" and denied the motion for reconsideration.¹⁰ Plaintiffs subsequently appealed.

Second Circuit's Decision

The Second Circuit vacated and remanded the decision of the lower court, noting that it was inappropri-

ate for the district court to have imposed such a sanction where it was unclear from the record whether the misconduct was solely that of the attorney, rather than the clients, and whether the lower court had adequately considered the sufficiency of alternative sanctions.

In beginning its assessment, the court recognized that "[e]very district court has the inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for...disobeying the court's orders."¹¹ Such decisions to impose these sanctions must be reviewed for an abuse of discretion.

The court noted that dismissing an action is the most severe sanction and "must be [preceded] by particular procedural prerequisites," outlined in *Mickle v. Morin*.¹² These include: (1) notice of which conduct is sanctionable, (2) the standard to be used to judge such conduct, and (3) an opportunity to be heard. The court also emphasized that the sanction of dismissal with prejudice, as imposed by the lower court, must be supported by "clear evidence of misconduct" and "a high degree of specificity in the factual findings," and should only be used in "extreme situations" where there was a "finding of willfulness, bad faith, or reasonably serious fault."¹³

The court found adequate the procedural safeguards afforded by the district court and held that those safeguards met the *Mickle* requirements. Specifically, the court noted that the lower court's scheduling order provided Rawlins and the plaintiffs with both notice of the sanctionable conduct and the standard by which such future conduct would be judged—the order clearly indicated that Rawlins' future noncompliance and tardiness would result in dismissal of the execution motion.

The court also ruled that the district court had allowed ample opportunity

to be heard. Both plaintiffs and Rawlins had an opportunity to respond to the sanction, and plaintiffs were offered yet another opportunity to be heard through their motion for reconsideration. The court reasoned that “[a]n opportunity to be heard before a dismissal takes effect is not required when the notice of impending dismissal is clearly communicated, in the context of a scheduling order or by other means.” The court further held that plaintiffs had an opportunity to respond in “an informed manner” in compliance with *Mickle*, since the reasons for dismissal were “self-evident” given the court’s prior scheduling order and its oral references to Rawlins’ repeated failures to comply with court orders.

Next, to determine whether there was a finding of “willfulness, bad faith, or reasonably serious fault” by plaintiffs to warrant dismissal of the action, the court weighed factors enumerated in *Lucas v. Miles*: (1) the duration of noncompliance; (2) whether the party received notice that failure to comply would cause dismissal; (3) the likely prejudice to the opposing party from delay due to noncompliance; (4) a balancing of the court’s interest in managing its docket with the party’s interest in being heard; and (5) whether the lower court sufficiently considered the “adequacy of lesser sanctions.”¹⁴

In doing so, the court found that the first four factors weighed heavily in favor of dismissal. First, Rawlins’ non-compliance had occurred throughout the duration of the proceedings in the district court. Second, the district court had given notice two months before dismissal that future misconduct would have such an effect. Third, additional delays would continue to waste time and other resources of defendants. Fourth, the court had a “clear need to manage its docket” and

Rawlins’ behavior was disrupting its ability to do so. The court thus agreed with the district court’s assessment of these four factors.

On the fifth factor, however, the court held that the district court did not sufficiently consider alternative sanctions. It found that, on the present record, it was impossible to determine both whether the delays leading to dismissal were solely a result of Rawlins’ actions, rather than those of his clients, and whether the district court even considered imposing alternate sanctions that would have impacted only Rawlins, rather than both Rawlins and his clients. The court noted that, in general, though clients are bound by the acts of their attorneys, where delay is caused by a lawyer’s disregard of the obligations he owes to his clients, it is more appropriate to impose a sanction—even if it is less drastic than dismissal—directly on the attorney.

The court went on to describe the “wide panoply of sanctions” that were available to the district court, including imposing monetary sanctions on Rawlins, suspending Rawlins if he refused to pay, and forcing Rawlins to disclose his conduct to the bar, future clients, and other courts. The court stated that the requirement is not for a district court to impose such sanctions, but rather to consider the adequacy of such alternatives. In failing to do so, the district court abused its discretion in imposing the sanction of dismissal.

In so holding, the court noted that the plaintiffs in this case were “unsophisticated” and that Rawlins’ sanctionable conduct could have been “due entirely to counsel’s personal irresponsibility and afforded no strategic advantage to appellants.” The court also emphasized that the plaintiffs had already obtained a judgment and the only outstanding step for them was to execute the judgment.

The court vacated and remanded for the district court to explicitly consider the full range of alternative sanctions after holding a hearing prior to final dismissal of the action.¹⁵

Conclusion

In its decision, the Second Circuit has sent a clear signal to the district courts about its unwillingness to allow lower courts to penalize clients for the actions of their attorneys. The court has made clear that the record must clearly support a finding of wrongdoing by the party itself (rather than just the actions of counsel) or, at minimum, illustrate the district court’s consideration (and rejection) of other available alternatives. This case, which has helped to shape Second Circuit sanctions jurisprudence, raises the question of what circumstances could actually justify dismissal of an unsophisticated party’s claims as sanctions for attorney misconduct, and suggests that dismissal with prejudice as a potential sanction in such circumstances—at least against relatively unsophisticated parties—may not be a valid option.

.....●.....

1. *Mitchell v. Lyons Prof'l Servs.*, No. 10-5100-cv, 2013 WL 709645 (2d Cir. Feb. 28, 2013).

2. Complaint, *Mitchell v. Lyons Prof'l Servs.*, No. 09-cv-01587-BMC (E.D.N.Y. April 16, 2009).

3. *Lyons*, 2013 WL 709645 at *1.

4. Memorandum Decision and Order at 4-5, *Mitchell v. Lyons Prof'l Servs.*, No. 09-cv-01587-BMC (E.D.N.Y. Jan. 11, 2011) [hereinafter Order].

5. *Lyons*, 2013 WL 709645 at *1-2.

6. Order at 6.

7. Id. at 7.

8. Brief of Plaintiffs-Appellants at *7-9, *Mitchell v. Lyons Prof'l Servs.*, No. 10-5100-cv, 2011 WL 2612823 (2d Cir. June 24, 2011).

9. Order at 10.

10. Id. at 1.

11. *Lyons*, 2013 WL 709645 at *2 (citations and internal quotation marks omitted).

12. Id. See also 297 F.3d 114, 125 (2d Cir. 2002).

13. *Lyons*, 2013 WL 709645 at *2-3 (citations and internal quotation marks omitted).

14. Id. at *3-4. See also 84 F.3d 532, 534-35 (2d Cir. 1996).

15. *Lyons*, 2013 WL 709645 at *4.