

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5058, 84-5201

HAROLD WEISBERG,
Plaintiff-Appellant,

JAMES H. LESAR,
Appellant,

v.

WILLIAM H. WEBSTER, Director,
Federal Bureau of Investigation, et al.,
Defendants-Appellees.

Nos. 84-5059, 84-5202

HAROLD WEISBERG,
Plaintiff-Appellant,

JAMES H. LESAR,
Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the District of Columbia

REPLY BRIEF FOR APPELLANT JAMES H. LESAR

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 v.) No. 84-5058
) No. 85-5201
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 Bureau of Investigation, et al.,)
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 Defendants-Appellees.)

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REPLY BRIEF FOR APPELLANT JAMES H. LESAR

1. The government's brief states (at p. 20) that "plaintiff's conduct during this litigation manifests an obdurate refusal to comply with the court's direction of the case and a determination to control the course of the litigation as plaintiff thought best" (emphasis added). With these assertions

as the predicate, and with no factual findings to support it, the government then leaps to the conclusion that plaintiff's counsel should be jointly liable for expenses because he "failed to exercise . . . control over his client" and "appeared to view himself solely as plaintiff's mouthpiece with no responsibilities to the court." Appellees' Brief at 46.

Beyond the factual void to support that claim, the legal support for this argument rests on little more than the general proposition that a district court has considerable discretion in meting out sanctions under Rule 37. To this the government adds its claim that there was no abuse of discretion in making Lesar pay expenses based on the facts here. By casting the argument in such broad terms, the government manages to ignore the difficult ethical problems that arise for a lawyer when his or her client does not want to be "controlled," yet the lawyer is threatened with having to pay the other party's expenses unless the client's conduct is brought into line. The issue is a serious one, and it cannot be sidestepped with vague generalities about a "lawyer's responsibilities to the court." Appellees' Brief at 46.

In Lesar's opening brief, we demonstrated why the tensions inherent in such a situation require that great care be exercised before sanctions are imposed on the lawyer. We also demonstrated why the case law requires a district court to sort out the relative culpabilities (if any) of lawyer and client and to make specific factual findings with respect to each, something the district court failed to do here. Finally, we pointed

out that the Code of Professional Responsibility requires that the client be advised as to the law and that the lawyer may not take any action for an improper purpose or which is not based on a good faith belief that it is proper. Contrary to the government's assertions (at pp. 45-46), Lesar represented to the Court that he did satisfy these requirements under the Code (see Lesar's opening brief at p. 12), and thus the district court had no basis for imposing costs on him.

2. In its zeal to hold Lesar liable for the decisions of his client, the government's brief misstates the factual record about what Lesar did. Faced with the fact that it was Weisberg who refused to answer the disputed discovery requests, the government finds itself in the awkward position of having to rummage through the record in a quest for evidence to make Lesar seem somehow culpable for not responding to the discovery request. Unfortunately, the brief misstates the record in several respects.

For example, the government's brief suggests (at p. 44) that the district court acted properly because it had "closely observed plaintiff's counsel's relations with plaintiff in this litigation for more than five years." The implication, of course, is that Weisberg's refusal to comply with the discovery order was directly aided and abetted by Lesar, and that it was simply the last straw after five years of similar recalcitrance. That is factually incorrect. The case was dormant for almost four years while the government completed

its administrative processing of Weisberg's requests and then moved for partial summary judgment on 3 May 1982. In fact, the events of the first four years fill only one out of ten pages of docket entries in this case, and little activity took place in court other than occasional status calls. It is thus inaccurate to say that the district judge "closely observed" Lesar's "relations with plaintiff...for more than five years."^{1/} In fact, the only time that the court had an opportunity to note any relationship between Lesar and his client, the case was four years old, and there was an obvious tension between them about responding to the government's discovery request. See 8 April 1983 transcript ("tr.") at 40-41, Docket Entry 96A.

Moreover, the record of those status hearings shows that Lesar and the government were trying to work cooperatively to expedite the processing of the records and resolve any disputed issues.^{2/} As for the notion that Lesar somehow encouraged unconscionable delays (Appellees' Brief at p. 47), the record of these status hearings also shows that Lesar acceded to four years of delay at the request of the government, which wanted time to complete its processing of Weisberg's FOIA requests, administrative review, and the reprocessing of several thousand

^{1/} Counsel understands that after Weisberg attended the first status call on 22 March 1979, his health did not permit him to attend any other hearings in court.

^{2/} Although the district court repeatedly expressed its impatience with the delays during the first four years of the case, he also praised counsel for both sides for their positive attitude towards resolving their differences. See 7 January 1981 tr. at 7; 17 February 1981 tr. at 6, and 27 May 1981 tr. at 4, all of which appear in the record following Docket Entry 92.

pages of documents.^{3/}

Finally, the appellees charge (at p. 46) that if Weisberg was really determined not to comply with the court's discovery order, then Lesar "must have known that" fact when he sought an extension of time in February 1983 in order to consult with his client, yet he "represented to the court that a response would be forthcoming" The implication is that Lesar deceived the court at a time when he knew full well that Weisberg would never comply with the discovery order, yet he sought the extension in order to drag out the case further.

There are several answers to this charge. First, there is no evidence in the record that Weisberg had firmly decided not to reply when Lesar sought the extension, and in fact, there is evidence that Lesar had worked on drafting a response to the discovery request. See 8 April 1983 transcript, supra. Second, even if Weisberg had said to Lesar that he would not reply, it is difficult to fault Lesar for seeking an extension in an effort to confer with his client and see if it were possible to work things out. Certainly, it is not unusual for clients to vow that they will never do something under any circumstances, only to change their minds when confronted with a court order telling them to do it. What the government seems to suggest is that lawyers should always take what their clients say at face value in these situations, because if they seek an

^{3/} See 22 March 1979 tr. at 5-6; 25 March 1980 tr. at 2-3, 5; 14 October 1980 tr. at 3-4, 7; 7 January 1981 tr. at 3-5; 17 February 1981 tr. at 3-4; 27 May 1981 tr. at 3-4, all of which appear in the record after Docket Entry 92.

extension in order to try and resolve the matter, and if the client thereafter remains adamant, then the lawyer may be personally liable for sanctions under Rule 37. Such a result would only make it more difficult for a lawyer to represent a client effectively in ticklish situations, a problem the government prefers to ignore.

3. The fundamental error made by defendants is their enormous overemphasis on the duty of the lawyer as an "officer of the court" to the exclusion of his or her duty to the client. This Court has recently had occasion to review the issue in the context of a disqualification order and came down firmly on the side of the lawyer, except when there is a specific obligation imposed by the Code of Professional Responsibility or other relevant authority. Koller v. Richardson-Merrell, Inc., ___ F.2d ___, No. 84-5039 (D.C. Cir. 29 May 1984). This Court emphasized that "[t]he fundamental obligation of an attorney to his client -- the bedrock principle of the adversary system -- does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud." Slip op. at 36. The Court went on to note that the Disciplinary Rules of the Code set forth standards "to guide attorneys through the numerous and difficult ethical dilemmas that an advocate confronts." Id. at 37. In the circumstances presented in Koller:

An attorney faced with a potential conflict between the duty to the client and the duty not to perpetuate a fraud on the tribunal is entitled to rely on the stan-

dards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zealously the interests of the client.

Id. at 37-38. Analyzing the actions of plaintiffs' counsel there under those standards, the Court found insufficient evidence of conduct in violation of the Code, such that the sanction of disqualification was warranted. Id. at 43-44.

That analysis is equally compelling here. There is no showing that Lesar's conduct improperly hindered discovery or that the Code of Professional Responsibility obliged him to coax his unwilling client. Under the circumstances, he cannot be liable for costs under Rule 37 on the vague notion he appears to have "forgotten entirely his duties as an officer of the court." Appellees' Brief at 45. A similar argument was rejected in Koller, and it should be rejected here too. Something more is required before Rule 37 can be invoked against an attorney.

CONCLUSION

For these reasons, as well as the reasons set forth in the other briefs filed by appellants, the judgment against appellants should be reversed. Alternatively, if any award of Rule 37 sanctions is upheld in this case, then appellant Lesar should not be held liable. Finally, if this Court should decline to vacate the award of expenses as to Lesar, it should

remand the case to the district court for preparation of findings regarding the respective liability, if any, of Weisberg, Lesar, or both for expenses.

Respectfully submitted,

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