

A.C. 42602 : STATE OF CONNECTICUT
MERIBEAR PRODUCTIONS, INC. : APPELLATE COURT
v.
JOAN FRANK ET AL. : SEPTEMBER 20, 2019

OPPOSITION TO MOTION FOR SANCTIONS

The Defendants hereby respectfully oppose the Motion for Sanctions filed by the Plaintiff, dated September 11, 2019, and urge this Court to deny that motion. Under the circumstances of this case, the imposition of a sanction is unwarranted because the conduct in question resulted from an honest mistake, not a willful or repeated refusal to adhere to court orders. In addition, *immediately* upon being informed of his error, Defense counsel provided a good faith explanation and an apology. Finally, because the purpose of sanctions is to deter and correct misconduct, this is not a case where the imposition of sanctions is appropriate.

I. Factual Grounds for Opposition

Following proceedings in this Court and the Supreme Court, the Supreme Court issued a decision on May 15, 2018, finding that the appeal should be dismissed for lack of a final judgment and remanding the appeal to this Court for that purpose. *Meribear Productions, Inc. v. Frank*, 328 Conn. 709 (2018). The matter then was remanded to the trial court for further proceedings. On January 29, 2019, Plaintiff withdrew counts two and three as to George Frank, rendering the judgment final as to both defendants. The current appeal was filed on February 15, 2019. Plaintiff filed a timely motion to dismiss, which subsequently was denied by this Court.

A PAC was scheduled for September 3, 2019 before Judge Cutsumpas in Waterbury. Undersigned counsel did not properly calendar the date of the PAC and, as

a result, did not appear at the scheduled time. On September 3 at approximately 10:30 a.m., one half hour after the scheduled start time for the PAC, the Plaintiff's lawyer contacted the undersigned to ascertain whether he would be attending. The undersigned informed Plaintiff's counsel that he had mis-calendared the date for a date in the future and *immediately* apologized for any inconvenience. Plaintiff's counsel indicated that he had no interest in returning to Waterbury for another PAC on any future date, said that he would advise the PAC judge of the conversation, and hung up. On September 11, 2019, Plaintiff's counsel filed a motion for sanctions.

II. Legal Grounds for Opposition

The Plaintiff claims that the imposition of sanctions is appropriate based on the failure to attend the PAC and because of an alleged lack of either an explanation or apology. He claims the latter constitutes a "blatant disregard" for the Court and opposing counsel. First, he is factually incorrect. Contrary to his claim, Defendant's counsel offered both an explanation and an immediate apology. When Plaintiff's counsel informed him of the PAC, Defendants' counsel explained that he had mis-calendared the date; that is a mistake, not evidence of any sort of disregard for counsel or the Court. (It is also something directly reflected in Plaintiff's motion, despite the claim of no explanation). Counsel also apologized immediately for making that mistake.

Practice Book § 63-10 provides that the failure to attend a PAC "may result in the imposition of sanctions." The word may means that the imposition of sanctions is not mandatory but rests within the sound discretion of the Court. Obviously, any sanction must be based on the particular facts of the case.

Of course, the Court has the power to order sanctions, in its discretion, "to compel the observance of its rules." *Thalheim v. Town of Greenwich*, 256 Conn. 628, 655 (2001),

(quoting *Gionfrido v. Wharf Realty, Inc.*, 193 Conn. 28, 33 (1984)). “A court is free to determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what the sanction should be.” *Id.* at 656 (citing to *Statewide Grievance Committee v. Fountain*, 56 Conn. App. 375, 378 (2000)).) Discussing the basis for sanctions in a civil proceeding, the Supreme Court has referenced the framework used in attorney grievance proceedings. “A court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession. *In re Durant*, [80 Conn. 140, 147 (1907)].” *Id.* at 655 (quoting *Statewide Grievance Committee v. Fountain*, 56 Conn. App. 375, 378 (2000)). While sanctions are within the Court’s discretion, they should be appropriate to the circumstances of a particular case. See Practice Book §1-25(b)(2) (specifying sanctions for “willful” or “repeated” failure to comply with court orders).

Contrasting the facts of this case to the facts of the two cases where this Court imposed sanctions for the failure to attend a PAC should guide this Court to conclude that the imposition of a sanction is unwarranted here. First, in *Feuerman v. Feuerman*, 39 Conn. App. 775 (1995), the attorney for the appellant failed to appear for the PAC. The judge and opposing counsel waited for over an hour while the judge attempted to contact the missing attorney. During that hour, the judge asked the appellee’s attorney to look for the appellant’s absent attorney. She called the appellant’s attorney’s office and was told that “he was somewhere in the building.” The PAC judge made additional attempts to contact the appellant to reschedule the conference. The attorney failed to return any of the judge’s calls. The appellee filed a motion to dismiss the appeal and for sanctions

in the form of attorney's fees.

This Court scheduled a hearing on the request for sanctions. The appellant's attorney failed to appear. He sent one of his partners in his stead. The partner indicated that he had an *unsigned* affidavit from appellant's counsel stating that appellant's counsel was out of the country at the time of the PAC. This Court also received an affidavit stating that the appellant's attorney was on vacation the week of September 7, 1995. In imposing a sanction of \$750, this Court stated that the affidavits "fail to explain adequately why [the appellant's attorney] could not be present at a preargument settlement conference on August 29, 1995." *Id.* at 777. As to the unsigned affidavit, it "is of no evidentiary value." *Viola v. O'Dell*, 108 Conn. App. 760, 768 (2008). The Court also noted that the second affidavit did not address the actual date of the PAC. The imposition of a sanction was warranted because of the Attorney's behavior, not simply because he missed the PAC.

Second, in *Esposito v. Presnick*, 15 Conn. App. 654, *cert. denied*, 209 Conn. 819 (1988), the defendant failed to appear at a PAC and failed to explain his reason for not appearing. This Court ordered him to appear to "give reasons, if any, why sanctions should not be imposed" *Id.* at 665. He failed to appear at that hearing as well. Instead of appearing, he sent a letter to the court. The letter stated:

Please be advised that this office will not attend your hearing on June 4, 1987. This office will not offer any (sic) to settle this case. We could have settled this case by paying \$700. This matter has been appealed before and a pre-trial conference was held concerning that appeal. The plaintiffs have no case whatsoever and there are no grounds for an appeal. The court should just take this case on the papers.

Id. at 666. This Court imposed a sanction of \$500. Again, the sanction was warranted not just because of the missed PAC, but because of the attorney's behavior and blatant disregard for the court.

The behavior exhibited in both of these cases was egregious. *Intentionally* failing

to appear for a hearing—which seems to have been the circumstance in both cases—does reflect a blatant disregard for the authority of the Court. In addition, neither of the attorneys proffered a good faith basis for missing the conference. One lawyer could not explain why he failed to attend and the other affirmatively refused, concluding that he would decide whether his attendance was required.

That is not what happened in this case. Here, although Defendant's counsel missed the PAC, he immediately provided a good faith, honest explanation for why he was not there, and he apologized. Counsel did not offer any pretext, as was the circumstance in the cited cases, and counsel was available for a rescheduled hearing, though Plaintiff's counsel indicated he was not interested. There was no willful or repeated violation of a court order, nor any intentional violation at all. While counsel clearly understands the significance of adhering to the Court's schedule and orders, no disrespect or sleight was intended. The failure to attend was the result of a mistake, which should not be the basis for an order of sanctions.

Finally, Plaintiff seeks an award of \$2,000 for attending the PAC and preparing his motion for sanctions. If this Court were to award sanctions, and Defendant believes it should not, \$2,000 is not a reasonable amount. First, counsel has not demonstrated that he spent significant time preparing for or attending the conference. And second, almost six of eight pages of Plaintiff's motion for sanctions are comprised of an argumentative, largely irrelevant recitation of the history of this case that could have been cut and pasted from any number of Plaintiff's prior filings.

The Motion for Sanctions should be denied.

RESPECTFULLY SUBMITTED BY,
THE DEFENDANTS, JOAN FRANK, ET AL.,



Michael S. Taylor
Horton, Dowd, Bartschi & Levesque, PC
90 Gillett Street
Hartford, CT 06105
T: 860-522-8338
F: 860-728-0404
E: mtaylor@hdblfirm.com
Juris No. 410210

CERTIFICATION

I hereby certify: (1) on September 20, 2019, the foregoing document was emailed to the counsel of record listed below; (2) the document contains no personally identifiable information or such information has been redacted; and (3) the document complies with all applicable rules of appellate procedure.

Anthony J. Labella, Esq.
Ury & Moskrow, LLC
883 Black Rock Turnpike
Fairfield, CT 06825
T: (203) 610-6393
F: (203) 610-6399
E: Anthony@urymoskow.com

Christopher C. Vaugh, Esq.
160 Fairfield Woods Road, Suite 14
Fairfield, CT 06825
T: 203-581-4298
E: ccvaugh@gmail.com



Michael S. Taylor