

**APPELLATE COURT
STATE OF CONNECTICUT**

A.C. NO.: 42602	:	APPELLATE COURT
	:	
MERIBEAR PRODUCTIONS, INC. d/b/a	:	
MERIDETH BAER AND ASSOCIATES	:	STATE OF CONNECTICUT
	:	
V.	:	
	:	
JOAN FRANK, ET AL.	:	SEPTEMBER 11, 2019

MOTION FOR SANCTIONS

The Appellee, Meribear Productions, Inc. (hereinafter "Meribear"), hereby moves pursuant to, *inter alia*, Practice Book § 85-2, that sanctions be imposed on the Appellants and/or their counsel due to their collective failure to appear at the preargument conference on September 3, 2019.

I. BRIEF HISTORY OF THE CASE

Meribear is a California corporation in the business of, *inter alia*, providing interior design and staging services to facilitate their clients' sale of real estate. The Defendants/Appellants, Joan and George (a/k/a Andy) Frank, are individuals who at all times relevant hereto owned or had an interest in real estate known as 3 Cooper Lane, Westport, Connecticut (the "Premises"). The Franks hired Meribear to stage the Premises in order to give it a "showroom like quality" in conjunction with their placing the Premises on the residential real estate market in order to sell it.

On March 13, 2011, Meribear and the Franks entered into the "Staging Services and Lease Agreement", the Franks' breach of which formed the basis of the underlying dispute.

The sole purpose of the agreement was to have Meribear design, decorate, deliver and install rental furnishings, including high-end antiques and art, at the Premises in order to facilitate the sale of the Premises. In fact, it was the Defendants' Realtor, Jillian Klaff, who was working to sell 3 Cooper Lane, who contacted Mr. Baer directly and requested that he put together a proposal for staging the house.

The Contract also provided that in exchange for its work, Meribear was to receive payment according to the Contract terms. Notwithstanding, and despite the fact that Meribear fully performed its obligations, the Franks failed, refused or neglected to make payment and thereby breached the Contract. Moreover, the Franks interfered with and prevented Meribear from removing the furnishings after the Franks' breach, thereby causing Meribear to suffer additional damages. In fact, the Franks have wrongfully retained – and continue to this day to retain - possession of Meribear's goods.

On February 15, 2012, Meribear filed suit in the Superior Court of California, County of Los Angeles, claiming, *inter alia*, breach of contract and conversion ("California Action"). Meribear served process on both of the Franks in conformance with the Laws of the State of California. Ultimately, on August 7, 2012, after determining that Meribear had complied with the laws and requirements of the State of California, a Default Judgment ("Judgment") was entered in the California Superior Court, County of Los Angeles against Joan and George Frank and in favor of the Plaintiff in the amount of \$259,746.10.

The Judgment remaining entirely unpaid, Meribear commenced suit in the Superior Court for the Judicial District of Fairfield at Bridgeport in order to enforce the Judgment.

Meribear claimed enforcement of the Judgment in the First Count and, in the alternative, conversion damages for breach of the underlying Contract in the Second Count and damages in Quantum Meruit in the Third Count. The trial of this case was conducted on March 27, 2013 and April 24, 2013 before the Honorable Theodore Tyma.

On October 14, 2014, the Trial Court rendered an extremely thorough, well-reasoned Memorandum of Decision. In it the court found constructive service had been properly made on George Frank who was an owner of the company and routinely present at the office. Accordingly, the court found in Plaintiff's favor for common law enforcement of the Judgment against George Frank, but not against Joan Frank. With regard to the breach of contract claim, the court found in Plaintiff's favor as to both Joan and George Frank, specifically finding "the plaintiff's evidence relevant to the claimed breach to be credible, and the defendants' evidence not credible." In fact, the court expressly stated that it "*found George Frank's testimony on the procedural and substantive issues to be manufactured and lacking in truthfulness.*" (emphasis added). The Court rejected the Franks' Special Defenses, including that C.G.S. § 42-134a, the Home Solicitation Sales Act ("HSSA"), barred enforcement of the contract or that jurisdiction was lacking.

On or about December 18, 2014, the Defendants filed an appeal. By decision dated May 10, 2016, this Court affirmed the trial court's decision in favor of Meribear. Meribear Productions, Inc. v. Joan E. Frank et. al, 165 Conn.App. 305 (2016). Specifically, it found, *inter alia*, that Andy Frank had contractually consented to personal jurisdiction, that the contract at issue was not governed by the HSSA, and that the damages awarded were proper.

On May 31, 2016, the Franks filed their Petition for Certification to Appeal to which Meribear objected. The Supreme Court thereafter granted certification to appeal.

By Memorandum of Decision released on May 15, 2018, the Supreme Court determined that the Appellants' joint appeal of December 18, 2014 was improper and that the decision should be reversed and remanded with direction to the Appellate Court to dismiss the appeal because that Court lacked jurisdiction. Meribear Productions, Inc. v. Joan E. Frank et al., 328 Conn. 709, 726 (2018). Specifically, the Supreme Court concluded that although the judgment was final as to Joan Frank, id. at 724; id. at 726, FN 4; it was not final as to George Frank. id. at 725. The Court determined that because the trial court failed to dispose of either the contract count (Count 2) or the quantum meruit count (Count 3) as to George Frank, those counts were not legally inconsistent alternative theories of liability, there was no final judgment as to George Frank from which to appeal and therefore the joint appeal required dismissal. id. at 723-25. In its decision, the Supreme Court all but informed the Appellants that the appeals should have been taken separately. The appeal was thereafter dismissed.

On or about October 2, 2018, the Plaintiff filed a Motion for Attorney's Fees in the trial court as well as a Motion for Post Judgment Interest. On January 29, 2019, Meribear filed a withdrawal of Counts 2 and 3 of its Complaint as to George Frank. The Motions for Attorney's Fees and Post Judgment Interest were argued on January 30, 2019. The parties stipulated, and the trial court confirmed that an award of Attorney's Fees in the amount of \$66,410.00 would enter. On or about January 31, 2019, the trial court issued a written decision granting

Meribear an award of Post Judgment Interest in the amount of five percent (5%).¹ Neither action by the Court affects the finality of the judgment here at issue.

On or about February 15, 2019, Joan Frank and George Frank filed the instant joint appeal. Again, the appeal was taken jointly. Meribear thereafter filed a Motion to Dismiss the appeal on the ground that despite the Supreme Court's admonition that the judgments against the two Appellants were distinct and should have been pursued separately, the Appeal was nonetheless filed jointly. That Motion was denied. Appellants also filed their Motion for Permission to File Late Appeal to which Meribear objected. That Motion was granted and Meribear's Objection overruled.

As a result of the continuation of the appeal over Meribear's objection and Motion to Dismiss, a preargument conference was scheduled for September 13, 2019 by Order dated August 7, 2019, essentially one full month in advance of the conference. The conference was scheduled before the Hon. Lloyd Cutsumpas at the Waterbury J.D. Courthouse at 10am. On that same date, the undersigned requested in writing that his client and its corporate counsel be permitted to be available by telephone since they are located in California. That request was granted. All counsel of record were copied on the correspondence.

Notwithstanding the Court's Order scheduling the preargument conference as well as Meribear's Counsel's correspondence regarding the preargument conference, neither the

¹ [A] judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees [or interest] for the litigation remains to be determined. Hylton v. Gunter, 313 Conn. 472, 478-79 (2014).

Franks nor their counsel appeared on September 3, 2019. Meribear's counsel did appear, as ordered, and his client and corporate counsel were ready and waiting in California, some three hours earlier at 7am, for any call that might arise from the conference. After waiting for 30 minutes, the undersigned telephoned the Franks' counsel to ascertain their whereabouts. The undersigned was thereafter told the Franks' counsel would not be appearing because they had not entered the date on their calendars properly. No other reason, justifiable or not, was offered at that time or in subsequent communications. At that time, Hon. Lloyd Cutsumpas met with the undersigned, contacted the Appellate Court for direction, and informed Meribear that their only recourse was the filing of this Motion.

II. SPECIFIC FACTS ON WHICH MOVANT RELIES

In support of this Motion, Meribear relies on the fact that the failure to appear for a preargument conference is a serious offence. The Franks' counsel had an entire month's advance notice and additional correspondence regarding same from the undersigned. The undersigned took time to prepare for the conference and attended the conference. The undersigned's client and corporate counsel blocked out time to be available by telephone during the conference, some three hours earlier (7am) West Coast time and were available and waiting. Regardless, opposing counsel failed to appear, and offered neither a justifiable excuse nor an apology for wasting the Court, opposing counsel and the opposing parties' time and resources. The judgment against Joan Frank was entered on October 14, 2014. Meribear has been waiting to collect its judgment for five years and continues to incur considerable attorney's fees in the appellate process - all while the Franks continue in

possession of Meribear's personal property. For all of these reasons, sanctions for the Franks' counsel's failure to appear are both necessary and wholly appropriate.

III. LEGAL GROUNDS FOR MOTION

"There are three possible sources for the authority of courts to sanction counsel and pro se parties. These are inherent power, statutory power, and the power conferred by published rules of the court." In the Matter of Presnick, 19 Conn.App. 340, 347, *cert. denied*, 213 Conn. 801 (1989). That power may be expressly recognized by rule or statute but it exists independently of either and arises because of the control that must necessarily be vested in courts in order for them to be able to manage their own affairs as to achieve an orderly and expeditious disposition of cases." Id. "The failure to appear at a preargument settlement conference is a serious violation of our rule of practice." Feuerman v. Feuerman, 39 Conn.App. 775 (1995)(counsel ordered to pay attorney's fees in the amount of \$750.00 for opposing counsel).

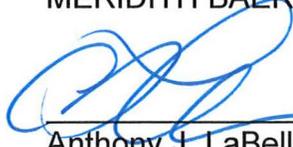
Rule of Appellate Procedure § 63-10 regarding preargument conferences specifically provides that "failure of counsel to attend a preargument conference may result in the imposition of sanctions under Section 85-2." P.B. § 63-10. Rule 85-2 provides that sanctions may include, *inter alia*, "costs and payment of expenses, together with attorney's fees to the opposing party." In this case, the imposition of sanctions against the Franks' counsel is appropriate and warranted. Not only was there a failure to appear, but a blatant disregard and disrespect for the Court and opposing counsel and opposing parties was exhibited in their failure to offer an explanation or apology.

III. CONCLUSION

For the reasons asserted herein, the Court should grant this Motion for Sanctions and order that the Appellants pay Meribear's attorney's fees and expenses incurred for the appearance at the preargument conference and preparation of this Motion in the total amount of \$2,000.00.

THE PLAINTIFF/APPELLEE,

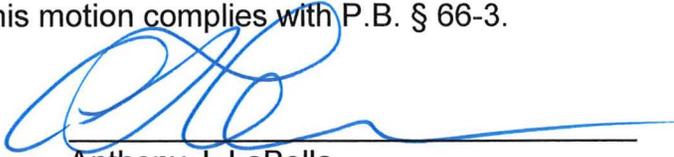
MERIBEAR PRODUCTIONS, INC. d/b/a
MERIDITH BAER and ASSOCIATES,

By: 

Anthony J. LaBella, Esquire
Ury & Moskow, L.L.C.
883 Black Rock Turnpike
Fairfield, CT 06825
(203) 610-6393 (p) / (203) 610-6399 (f)
Anthony@urymoskow.com

CERTIFICATION

This is to certify that this motion complies with P.B. § 66-3.



Anthony J. LaBella
Commissioner of the Superior Court

CERTIFICATION

The undersigned attorney hereby certifies that on September 11, 2019, pursuant to Connecticut Rule of Appellate procedure § 62-7, that:

- (1) The electronically submitted Objection to Motion for Permission to File Late Appeal (hereinafter "Objection") was delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided; and
- (2) The electronically submitted Objection and the filed paper have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and
- (3) A copy of the Objection was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal as indicated below, in compliance with § 62-7; and
- (4) The Objection filed with the appellate clerk is a true copy of the Objection that was submitted electronically; and
- (5) The Objection complies with all provisions of this rule.

Courtesy Copy:
Chambers of the Honorable
Theodore R. Tyma
1061 Main Street
Bridgeport, CT 06604

Michael S. Taylor, Esq.
Horton, Dowd, Bartschi & Levesque, P.C.
90 Gillett Street
Hartford, CT 06106
(860) 522-8838 (p) / (860) 728-0401 (f)
mtaylor@hdblfirm.com

Christopher C. Vaugh, Esq.
160 Fairfield Woods Road
Suite 14
Fairfield, CT 06825
203-581-4298 (p)
ccvaugh@gmail.com



Anthony J. LaBella, Esq.
Commissioner of the Superior Court