SILLY LAWYER TRICKS IX

By Tom Donlon – August 31, 2017

The latest column in our continuing series on real mistakes and misdeeds by real lawyers on appeal.

Boye v. Rubin & Bailin, 152 A.D.3d 1 (N.Y. App. Div. 2017)

Originally, this case began as a suit against a public relations firm in a dispute over missing pieces of art.

The law firm, which eventually became the appellee, initially represented the plaintiff in that action, bringing claims of conversion and breach of contract. Six months later, "after their relationship with plaintiff had deteriorated," the firm was granted permission to withdraw. *Id.* at 1.

Successor counsel appeared and amended the complaint to add negligence claims. In response to a later motion for summary judgment, successor counsel withdrew the claims of conversion and breach of contract. Many of the additional claims in the amended complaint were dismissed as time-barred. Thereafter, the first lawsuit settled.

Represented by a third attorney, plaintiff then sued its original lawyers for malpractice, claiming that the firm improperly, and without authorization, withdrew the conversion and breach of contract claims (which would not have been time-barred). Defendant moved to dismiss and asked for sanctions on the

grounds that the public record demonstrated defendant did not withdraw those claims—successor counsel did. In his opposition, plaintiff's counsel did not address this central fact. The trial court granted the motion in part, but denied sanctions.

Defendant subsequently moved for summary judgment on the remaining claims dealing with the timelines of its actions. The firm reiterated that it was not the one who withdrew the claims of conversion and breach of contract. Since plaintiff contended those claims were timely and would have prevailed at trial, the firm argued that it had committed no malpractice. Once again, the firm sought sanctions. In opposing summary judgment, plaintiff's counsel "did not address that it was well established by the record and the [trial court's] prior order that it had been successor counsel who had withdrawn the conversion and breach of contract claims in the [first] action. Nor did he make any efforts to correct the record or withdraw claims he most certainly knew were frivolous." *Id.* at 3. The trial court granted summary judgment dismissing the remaining claims. Although the trial court stated it was "not impressed" with plaintiff's attorney's performance, it again denied the request for sanctions. *Id.* at 4.

Then plaintiff's counsel made his big mistake—he filed an appeal, in which he "continue[d] to make the same materially false claim about the withdrawal" of the conversion and breach of contract claims. *Id.* The appellate court swiftly

rejected counsel's arguments on the merits (or lack thereof), and then turned to the question of sanctions. Unlike the trial court, the appellate court was in no mood to allow counsel to escape sanctions. The opinion refers four different times to plaintiff counsel's "materially false claim." *Id.* at 4, 6. It then states, "After a careful review of the appellate record and the parties' briefs, we draw the only conclusion such record permits—the bases for the legal malpractice claim have been without merit in law or in fact since their inception." *Id.* at 6. Despite being alerted by the trial court on multiple occasions, "counsel continued to repeat a knowingly false claim in what could only be described as a purposeful attempt to mislead this Court." *Id.* at 7. Given the strong language in the opinion, the remand to the trial court to determine the total attorney's fees and costs incurred by defendant, and to award it the full amount, is no surprise. Plaintiff's counsel had dodged sanctions before the trial court twice. He should not have pressed his luck before the appellate court.

Liu v. Janssen Research & Development, No. B266368, 2017 WL 1094354 (Cal. Ct. App. Mar. 23, 2017)

The opinion in this case does not contain the same strident criticism of appellate counsel, but the result for the client was no better. The parents of a child, who died during a drug trial, brought claims in their individual capacities and as representatives of the estate. The trial court granted summary judgment on both

types of claims. On a writ, the grant of summary judgment on the parents' individual claims was reversed, but not on their representative claims. In the meantime, judgment on the representative claims had been entered and the parents filed a timely appeal of that judgment. However, when the individual claims were returned for trial, plaintiffs' counsel requested and obtained a dismissal of that appeal.

At trial the parents eventually were awarded $5.6 million in damages but no punitives. They then appealed the dismissal of the representative claim on behalf of the estate, which had led to the denial of punitive damages. The appellate court ruled that the time to appeal from the grant of summary judgment on the claim as the estate's representative had run two years earlier. *Id.* at *5-6. The withdrawal of the earlier appeal, which had been timely filed, barred the later appeal of that claim after the trial. *Id.* at *6. While the procedural rules that resulted in a partial reversal on the writ may appear confusing, the basic mistake is clear—withdrawing an appeal that was timely filed without ensuring that it could be raised again after trial on the other count.

EEOC v. Diallo's Entertainment, Inc., No. 17-20062, *slip op* (5th Cir. June 7, 2017)

As Silly Lawyer Tricks has been published for over two years now, readers may notice some recurring themes—and attorney errors. This is an example of

cases discussed in prior columns, where behind a simple dismissal order lays a hidden litany of mistakes by the lawyers.

The Fifth Circuit's Order merely states that the appeal is dismissed because "appellant failed to timely file a brief and record excerpts." *Id.* at 1. That itself would be a serious enough error, but the court's docket—and that of the district court—reveal a trail of other mistakes along the way.

The EEOC brought the case in district court in September 2016, alleging an employee was wrongly terminated, because the club she worked at suspected she was HIV positive. Although properly served, the club never appeared—even though its attorney had participated in the EEOC administrative proceedings. In November 2016, a motion for default was granted. New counsel appeared and moved for relief from judgment in December. A status conference was scheduled for December 29, 2016 and, in her motion papers, new counsel stated she would attend. However, she never appeared.

Subsequently, in a January 2017 motion for new trial, counsel informed the court that, months before taking the case, she had booked a flight home to Los Angeles for the holidays. That is where she was on the day of the status conference. Counsel claimed she forgot to request to appear by telephone. Unimpressed, the district court denied the request for a new trial, and the appeal followed.

WWL DHotel Investors v. BB&V Venture, No. 16-0346, 2017 IL App. (1st) 160346 (Ill. App. Ct. May 9, 2017)

This is a case where both sides probably feel embarrassed even if the original plaintiff came out ahead. The suit involved lease payments on the historic Drake Hotel in Chicago. The owner attempted to retroactively increase the rent, based on a provision in the lease dealing with "deficiency lease year" (a decrease in gross receipts). The hotel operator sought declaratory judgment claiming that the provision was an unenforceable penalty. Both sides presented their arguments on the proper interpretation of the "deficiency lease year" provision and the trial court ruled in favor of the plaintiff hotel operator.

On appeal, both sides advanced the same competing interpretation of the provision addressed below. In its decision, however, the appellate court effectively said they were both wrong. The court pointed out that the provision on which the parties focused only applied if the building was no longer used as a first-class hotel. A separate provision, cited by the appellate court, required that any dispute over whether the Drake was being operated as a first-class hotel went to arbitration, with the remedy being termination of the lease, not increasing the rent. The appellate court held the later provision controlled, although neither party had raised it: "In the trial court and before this court the parties proceeded under the assumption that section 2.12 applied . . . . We conclude that section 2.12 does not

apply under these circumstances… ." *Id.* at *5. The appellate court reversed the trial court's grant of summary judgment and dismissed the case. *Id.* The hotel operator avoided millions of dollars in retroactive rent increases, so counsel might celebrate, although the client might question why counsel had been relying on the wrong lease provision throughout the case.

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