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SS & J Morris, Inc. v. I. Appel Comp.
S.D.N.Y.,2000.

United States District Court, S.D. New York.
SS & J MORRIS, INC. (formerly named Val Mode
Lingerie, Inc.), Stuart Morris and Seth Morris,
Plaintiffs,

v.

I. APPEL CORPORATION, VMAC, INC., and
Herbert Feinberg, Defendants.
**No. 97 CIV. 6938(LMM)(DFE), 97 CIV.
8230(LMM)(DFE).**

July 26, 2000.

William S. Gyves, Esq., Entwistle & Cappucci
LLP, New York.

George R. Osborne, Esq., Law Office of George R.
Osborne, New York.

OPINION AND ORDER

EATON, Magistrate J.

*1 Magistrate Judge Grubin conducted the general pretrial supervision of these two cases from March 1999 through February 2000. The cases were reassigned to me after she left the judiciary in February 2000.

On January 26, 2000, the plaintiffs moved for an order imposing sanctions upon defendant Herbert Feinberg and his attorney George R. Osborne. In opposing papers dated March 10, the defendants cross-moved for sanctions against the plaintiffs' attorneys (William S. Gyves and his law firm). On March 22, the plaintiffs served their reply papers. On March 29, the defendants served a reply affidavit from Osborne. Oral argument was requested, but I find it to be unnecessary.

In their voluminous papers, both sides list what they consider to be examples of sanctionable conduct, primarily during the deposition of defendant Feinberg over the course of five days from Septem-

ber 1999 to January 2000. Attached to the affidavits are numerous pages of the transcript of that deposition.

As a general matter, I do not encourage sanctions motions and I am hesitant to impose sanctions. In the case at bar, I have decided to impose sanctions on Feinberg and Osborne, and to deny their cross-motion.

With respect to the applicable law, there is no dispute. Indeed, the "argument" section of Osborne's brief is copied verbatim from the argument section of plaintiffs' brief. Both sides recite with approval the following passage from Judge Mukasey's opinion in *Learning International, Inc. v. Competence Assurance Systems Inc.*, 1990 WL 204163 at * 3 (S.D.N.Y.1990):

If [defense counsel] objected to what he regarded as forays into matters that were not to be the subject of the deposition, he could have sought a ruling from the court. He was not free simply to pepper the proceeding with interruptions and directions not to answer.

In all proceedings, including those governed by the Federal Rules of Civil Procedure governing discovery, there is a "duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and that actions may be litigated in an orderly manner." [Citation omitted]

The parties also agree that the Court, when it finds bad-faith litigation conduct, has the authority to impose sanctions (a) on parties and attorneys under its inherent power to "supervise and control its own proceedings," and (b) on attorneys under 28 U.S.C. § 1927. See *Oliveri v. Thompson*, 803 F.2d 1265, 1271-73 (2d Cir.1986), cert. denied, sub nom. *County of Suffolk v. Graseck*, 480 U.S. 918, 107 S.Ct. 1373 (1987); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D.N.Y.1987)

(Pollack, J.).

I also note a more recent Second Circuit decision, *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir.1999), which states:

In order to impose sanctions pursuant to its inherent power, a district court must find that: (1) the challenged claim was without a colorable basis and (2) the claim was brought in bad faith, *i.e.*, motivated by improper purposes such as harassment or delay.

*2 Rule 30(d), F.R.Civ.P., states in pertinent part (with my emphasis):

(1) A party may instruct a witness not to answer *only when necessary* to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(3) ... upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent

Rule 30(d)(3) is susceptible to insincere, bad-faith invocation. After reviewing the submitted pages of transcript, I make the following findings. 1. Gyves did not unreasonably annoy, embarrass or oppress the deponent Feinberg. 2. Feinberg's and Osborne's claims to the contrary were utterly devoid of a legal or factual basis, and they knew it. 3. Feinberg exhibited an assertive personality, and did not seem to be vulnerable to embarrassment or oppression. 4. He frequently asserted that he was annoyed, but those assertions were a deliberate attempt to confuse the record and to avoid giving responsive answers. 5. Feinberg and Osborne invoked Rule 30(d)(3) in bad faith, in an attempt to excuse Feinberg's willfully non-responsive answers and Osborne's instructions not to answer. 6. This conduct, and their many speeches and interruptions, were motivated by their desire to delay the litigation and to harass the plaintiffs.

Herbert Feinberg. Feinberg is 73 years old and has

twice had serious heart surgery. *See* 3/10 Feinberg aff. ¶ 5. He is the chairman and 50% stockholder of the corporate defendant I. Appel Corporation, a garment manufacturer. He is very intelligent and is certainly no stranger to litigation. He recently went through a long and expensive arbitration with his former partner in I. Appel, and the arbitrators' decision described him as follows:

Feinberg is a knowledgeable and sophisticated businessman with a long career in business investments, management and finance and with experience in all aspects of apparel manufacturing including sales, shipping, warehousing, operations and contract negotiations. At the time he acquired his interest in I. Appel, Feinberg was involved in 14 or 15 different businesses. Those businesses included: interests in the wine business; a commodities trading firm; real estate, oil and banking investments; an aircraft supply company; and a company that manufactured video cassettes.

See 1/26 Gyves aff., Exh. B, p. 17. Feinberg also says that he is "a major shareholder of PepsiCo." *See id.*, Exh. A, Tr. 843.

George R. Osborne. Osborne was born in 1933 and was admitted to the New York bar in 1960. He first began to represent I. Appel in 1979. From 1993 to 1998, there were 27 cases where he represented I. Appel, or Feinberg, or entities controlled by Feinberg. *See id.*, Exh. Q, Tr. 54-59. In February 1998, in Supreme Court, New York County, Justice Lorraine Miller imposed a \$5,000 sanction on Feinberg and Osborne, and struck Feinberg's counterclaims. Justice Miller wrote:

*3 ... Feinberg ... and/or his counsel have engaged for several years in behavior clearly designed to harass and stonewall this litigation from reaching its conclusion....

.... Mr. Osborne and his client have, for many years, engaged in a deliberate campaign of obfuscation and utter disrespect for court orders, professional responsibility, and civilized behavior.

See id., Exh. T, pp. 5-6. In May 1999, the First Department unanimously affirmed. *Colton, Hartnick, Yamin & Sheresky v. Feinberg*, 261 A.D.2d 238, 689 N.Y.S.2d 395 (1st Dept.1999).

William S. Gyves. Gyves was born in 1960 and was admitted to the New York bar in 1992.

A reading of Feinberg's deposition makes it quite apparent that Feinberg and Osborne deliberately acted to prevent Gyves from getting answers to many legitimate questions. To this end, they used several techniques. For example, they repeatedly caused long interruptions and colloquies. Feinberg kept saying that Gyves was "badgering" him by asking him follow-up questions.

In the first day of deposition, in September 1999, Feinberg threatened that he would walk out rather than answer certain questions. *See id.*, Exh. A at Tr. 130-32, 135:

Q. What is your understanding of the term "silent partner"?

A. I don't know. What is *your* understanding of the term "silent partner"? [my emphasis]

You are going to excite me so I will walk out and you can go to the court and we will have that decided.

I will walk out if you ask me that question one more time.

Q. Have you ever described yourself to anyone as being a silent partner?

A. Sir, you are trying to aggravate me. I want to let you know something. I have had two heart operations and I don't appreciate this.

I am just telling you now that if you keep doing this I will walk out and we will all go to the judge. I

don't care.

And *see id.* at Tr. 183-84:

Q. Do you have a recollection, as you sit here today?

A. You know, sir, you are showing me little letters all from my career that you have sat and studied for weeks. I don't remember these things and if you keep badgering me I am going to really walk out on you.

Q. Sir, you have no recollection -

A. I did not say that.

Q. Do you have a recollection, as you sit here, sir -

A. Sir, I don't want to have to take your crap anymore.

On the second day of deposition, Feinberg and Osborne ate up time with long speeches. *See id.* at Tr. 375-81, 479-81. At Tr. 490-91, Feinberg refused to answer a question because of the posture in which the questioner was sitting. At Tr. 609-10, Gyves alleged that Feinberg had approached him and made a physical threat during the recess, in Osborne's presence. Far from denying this, Osborne said: "if this witness gets a little bit excited at the end of the second day, my attitude is God bless him because anything that has happened here is your fault."

*4 Before resuming the deposition of Feinberg, Gyves took the deposition of another officer of I. Appel, Milton Schneider. Both sides agree that this deposition went relatively smoothly. The reason, says Gyves, is that Schneider honored his obligation to answer the questions. But Osborne's brief, at page 21, argues that Schneider was a "healthier, younger man, whom Gyves recognized he could not badger and upset and excite." In reality, Feinberg, far from being intimidated by Gyves, insisted on attending part of Schneider's deposition, where he freely interrupted the proceedings. At one point, Feinberg instructed the witness: "Do me a favor.

Don't answer until he gives us a copy."See 1/26 Gyves aff., Exh. P at Tr. 155.

After that, Feinberg appeared for his third day of deposition. See *id.*, Exh. A at Tr. 658-945 (passim). At Tr. 733, Gyves asked a perfectly proper question:

Q. If Mr. Cohen were to testify that you had in fact expressed a lack of confidence in the 1995 financials, would he be testifying inaccurately?

A. I think that is a hypothetical question and I refuse to answer that question.

MR. OSBORNE: Mr. Gyves, I am going to now take a much broader position on these hypothetical questions and I am not going to permit the witness to answer

This was a clear violation of [Rule 30\(d\)\(1\)](#). There was no claim, nor could there be, that the question was unreasonably annoying, embarrassing or oppressive. The next question was also proper:

Q. Do you have an opinion, sir, of the credibility of David Feinberg, who was your attorney in connection with the Val Mode transaction?

A. He is my nephew and I am not going to answer that.

MR. OSBORNE: No, I am going to instruct the witness not to answer.

See *id.* at Tr. 735.

On November 22, 1999, the arbitrators issued a unanimous 39-page decision and ordered Feinberg to pay \$1,076,972 to his former partner in I. Appel, by December 5, 1999. See *id.*, Exh. B at p. 37. That arbitration involved some of the same issues as the case at bar.

On December 2, 1999, the fourth day of deposition began, but it lasted only a few pages. See 1/26

Gyves aff., Exh. A at Tr. 951-69. At Tr. 958-59, Feinberg refused to testify about any discussion that he had with his brother, and Osborne said "I am concurring completely" in that refusal. At Tr. 964, Feinberg was asked about his relationship with the arbitrator chosen by him; Osborne said "This is privileged," and when asked to state the nature of the privilege, Osborne said, "I am not at liberty to discuss anything further with you." At Tr. 965, Osborne confirmed that the witness would not answer any questions about the arbitrators' decision. At Tr. 966 Osborne refused to participate in a call to Judge Grubin, and walked out with the witness. Osborne claimed that this had been necessary to make a motion under [Rule 30\(d\)\(3\)](#). But Judge Grubin exposed the fact that there was no basis for such a motion. Five weeks later, Judge Grubin held a telephone conference, and the transcript (*id.* at Exh. L) states at pages 5-8 (with my emphasis):

*5 THE COURT: All right, I understand that. But the point I want to make, and this is for you, Mr. Osborne, is you know that you can object, but you can't simply instruct a witness not to answer and then walk out.

MR. OSBORNE: Well, part of the problem-it works slightly differently. *The questions frequently are so personally embarrassing* that Mr. Feinberg refuses to answer them.

THE COURT: *Give me some examples of these personally embarrassing questions* so I can get an idea [of] what you [are] talking about.

MR. OSBORNE: I don't have a transcript in front of me, so there would be no way to start reading them verbatim. This, of course, is one of the reasons why I wanted to make a written motion.

THE COURT: Well, just tell me them.

MR. OSBORNE: Well, for example, ["] ["] what is your opinion of the decision. ["] ["] *What did you discuss with your brother regarding this decision.* ["] Those questions have nothing to do with this

case.

THE COURT: Well, they could, if he's made certain admissions.

MR. GYVES: Exactly right, Judge. That's where I was going.

THE COURT: But *why is that embarrassing?* If it weren't his brother, and it were somebody else, he's entitled - *that's what discovery is all about*, to hear what -

MR. GYVES: And I purposely -

THE COURT: -was said.

MR. GYVES: And I purposely didn't delve -

MR. OSBORNE: You may say so, Judge.

MR. OSBORNE: Well, I have a client who, well in his seventies, sometimes is not about to put up with certain things. And if he refuses to answer -

THE COURT: Well, if he doesn't want to answer he can tell Mr. Gyves that, but as to the attorney -

MR. OSBORNE: The record -

THE COURT: -as an attorney, if the question is objectionable, in your view, *you can state that you object to it, but you have to tell him that under the law it's his obligation to answer it*.

MR. OSBORNE: And the witness has frequently refused to answer.

THE COURT: That's up to him.

MR. OSBORNE: That's exactly what I'm saying, -

THE COURT: But you are not -

MR. OSBORNE: -it's up to him. Mr. Gyves -

THE COURT: But you can not instruct him.

MR. OSBORNE: -then wants me to direct him to

answer in any event. And he refused to do so.

THE COURT: Then that's a different issue, Mr. Osborne.

MR. OSBORNE: Well, that's frequently been the case.

THE COURT: You cannot instruct him not to answer.

MR. OSBORNE: I understand.

Judge Grubin ordered Feinberg to appear for another day of deposition, which took place on January 25, 2000. Portions of that transcript appear at the 3/21 Gyves reply aff., Exh. A at Tr. 972-1251 (passim). In reply to a number of questions, Feinberg now asserted, "I don't recall." I have decided to order Feinberg to answer only one line of questioning, one which Judge Grubin had specifically ruled was appropriate:

Q. When we last met, at the fourth day of your deposition, sir, you indicated that you had discussed the decision with your brother Frank, I believe.

*6 Do you recall that testimony?

A. Yes.

Q. Can you tell me what the nature of that discussion was with your brother Frank?

A. I don't recall.

Q. You have no recollection?

A. I don't recall.

Q. Do you recall when that discussion took place?

A. I don't recall.

Q. Was it shortly after you received a copy of the [11/22/99] arbitration decision?

A. Yes.

Q. Within a week?

A. I don't recall.

Q. Have you had one discussion with your brother Frank or more than one discussion regarding the arbitration decision?

A. I don't recall.

See id. at Tr. 985-86. These questions were asked (first on 12/2/99 and now on 1/25/00) about the very recent and significant arbitration decision, which ordered Feinberg to pay more than \$1 million. I find that Feinberg's five "I don't recall" answers were insincere and deliberately "evasive or incomplete" within the meaning of Rule 37(a)(3). I will give Feinberg the benefit of the doubt concerning his many other assertions of "I don't recall," although they may cause problems for him if there is a trial. I direct Feinberg to refresh his recollection and to serve, no later than August 10, sworn written answers (in complete and specific detail) to each of the questions quoted by me from Tr. 985-86.

At this fifth day of deposition, Osborne made fewer interruptions, but there were still too many, for example, at Tr. 1111:

Q. But you had no idea that that was the case two minutes ago, did you?

MR. OSBORNE: You have refreshed his recollection successfully, Mr. Gyves.

MR. GYVES: Is that right? I don't think that it required refreshing whatsoever.

MR. OSBORNE: Bend over. I will pin a me[d]al on you.

MR. GYVES: Excuse me?

MR. OSBORNE: Bend over. I will pin a me[d]al on you for your noble efforts.

Feinberg and Osborne have submitted a cross-motion claiming that Gyves ought to be sanctioned.

The cross-motion is utterly without merit. With hindsight, there are some passages where Gyves might have been better advised to forego a rejoinder, but he did not cross the line which Feinberg and Osborne crossed repeatedly and deliberately. Osborne underscores the transcript where Gyves said, "I will do anything that I want at a deposition." This was an unfortunate choice of words, but it was not improper when read in context, since it replied to Osborne's preposterous claim that "conducting cross-examination" was somehow improper in a deposition. *See* Tr. 382 at Exh. A to Osborne's 3/10 Mem. A bit earlier, Osborne had similarly asserted that it was improper to "trap the witness in inconsistent answers." *See* 1/26 Gyves Aff., Exh. A at Tr. 377.

I find that Feinberg and Osborne are quite intelligent and knew exactly what they were doing. Through their speeches, interruptions, refusals to answer and instructions not to answer, they caused a delay of almost two months (from 12/2/99 to 1/25/00) and caused the entire deposition to consume five days, about twice as much time as it should have. They also caused the litigation to be much nastier than it should have been. Gyves warned that he was going to move for sanctions; Feinberg was undeterred and said, "Don't give me this sanction business all of the time." *See id.* at Tr. 490.

*7 I have decided to impose the following sanctions upon Feinberg and Osborne, jointly and severally:

(a) 50 per cent of the court reporter's fees for producing the transcript of the entire five days of Feinberg's deposition,

(b) 50 per cent of Gyves's normal hourly rate during the time that he was questioning Feinberg, and

(c) all of the reasonable expenses and attorneys' fees for bringing plaintiffs' sanctions motion and for opposing the cross-motion.

At their convenience, the plaintiffs shall serve and

file an affidavit describing such fees and expenses in detail, and Feinberg and Osborne shall have 14 days to serve and file any response.

The plaintiffs note that Feinberg and Osborne were not deterred by Justice Miller's 1998 sanctions (\$5,000 and striking the counterclaims). They also note that Feinberg is very wealthy and may view a mere compensatory sanction as just another cost of litigation. They request me to impose punitive sanctions, and to refer Osborne's conduct to the Chief Judge pursuant to [Local Civil Rule 1.5](#). After reflection, I have decided to decline to take those two steps. Gyves is free to write to the Chief Judge for referral to the Committee on Grievances; I happen to be a member of that committee, and I would refuse myself if there were such a referral.

In view of Osborne's tendency to delay matters, I slightly modify Paragraph 11 of my July 10 order. Plaintiffs' sections of the joint pre-trial order must still be served by September 1, 2000. Defendants' sections must be served by September 15, 2000. The final joint pre-trial order must still be filed by October 2, 2000.

S.D.N.Y.,2000.

SS&J Morris, Inc. v. I. Appel Corp.

Not Reported in F.Supp.2d, 2000 WL 1028680 (S.D.N.Y.), 47 Fed.R.Serv.3d 552

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