

USDC SCAN INDEX SHEET



RYC 4/12/05 15:02
3:04-CV-02254 BARRAGAN V. JMJ ENTERTAINMENT
22
O.

FILED

05 APR 11 PM 2:34

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Signature]
BY: DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEMETRIO BARRAGAN,
Plaintiff,

v.

JMJ ENTERTAINMENT, INC., *et al.*,
Defendants.

Civil No. 04-CV-2254-L(LSP)

**ORDER GRANTING REQUEST
FOR ATTORNEYS' FEES AND
COST FOLLOWING OSC**

The underlying action, alleging violations of the Americans with Disabilities Act ("ADA"), was filed on November 10, 2004. The owner of defendant JMJ Entertainment was served with the Complaint on November 29, 2004 and defendants filed their Answer on December 23, 2004. But also on December 23, 2004, plaintiff filed a request to enter default. Because the Answer already had been docketed, the Clerk of the Court did not enter default.

On December 30, 2004, counsel for defendant, Mr. Adams, filed his declaration in opposition to plaintiff's request for entry of default, a request for notice of default if default had been entered and a request for an order to show cause. Attorney Adams' declaration raised several serious issues concerning plaintiff's application for entry of default and plaintiff's counsel's behavior. Because Mr. Adams' allegations were made under penalty of perjury, the Court entered an OSC why sanctions should not be imposed upon plaintiff's counsel, Roy Landers. Mr. Landers was required to serve a statement concerning the accuracy of the contents

22

1 of his declaration in support of request for entry of default and whether he had actually signed
2 his declaration.

3 On January 18, 2005, Mr. Landers filed his OSC declaration along with the declaration of
4 William Carter, an ADA consultant with regard to the inspection and verification of whether or
5 not business facilities are in compliance with the ADA.

6 The Court held the order to show cause hearing on January 31, 2005, at which time Mr.
7 Landers admitted that he had directed his daughter to sign his name to the declaration associated
8 with the request for entry of default: "With respect to the aspects of the signing of the signature,
9 I'm not going to lie to the court. I did it. It was clearly a lapse in judgment. Frankly, I was just,
10 frankly, wanted to be away." (R. Tr. at 10). Mr. Landers' comments suggest a violation of Rule
11 3-110, California Rules of Professional Conduct:

12 (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal
13 services with competence.

14 (B) For purposes of this rule, "competence" in any legal service shall mean to
15 apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical
16 ability reasonably necessary for the performance of such service.

17 Rule 3-110, California Rules of Professional Conduct.

18 The Court also noted that Mr. Lander's had not addressed in his OSC declaration the
19 issue of why defendant was served with the request for entry of default when plaintiff knew
20 defendant was represented by counsel based on an informal request defendant's counsel made
21 for an extension of time that occurred over several phone calls and/or messages to Mr. Landers'
22 office. Mr. Landers indicated the issue was simply an error: "The other thing is simply a mistake
23 that the matter was sent to the defendant instead of the counsel. And I think it's probably [a]
24 reflection of what I've been going through." (R. Tr. at 14-15). Although Mr. Landers' appears
25 to believe the mistake is unremarkable, Rule 2-100, California Rules of Professional Conduct
26 provides that: "(A) While representing a client, a member shall not communicate directly or
27 indirectly about the subject of the representation with a party the member knows to be
28 represented by another lawyer in the matter, unless the member has the consent of the other
29 lawyer."

30 Additionally, the Court pointed out that Mr. Lander's did not address that his paralegal

1 daughter was the one to indicate that she was unwilling to grant an extension of time to
2 defendant. In a letter to Mr. Adams in response to a request for an extension of time in which to
3 file an answer, Natasha Landers indicated that *she* could not accommodate Mr. Adams' request.
4 A request for an extension of time is counsel's duty to consider, and not for a paralegal to
5 determine. In *Vaughn v. State Bar of California*, 6 Cal. 3d 847, 856 (1972), the court found that
6 a petitioner who had permitted his signature to be made by his office staff was engaged "in a
7 course of conduct involving gross negligence and carelessness, tantamount to moral turpitude"
8 and his negligence "rested ultimately upon [counsel's] responsibility to supervise the work of
9 his associate attorney and his clerical staff." In responding to the Court, Mr. Landers explained
10 that: "My daughter, that letter was written after she spoke to me, so when she says 'I cannot,'
11 that really was me, for clarification purposes. I understand the way it looks." (R. Tr. at 14).

12 Finally, and most importantly, the Court noted that Mr. Landers attempted to make the
13 settlement and dismissal of the underlying action conditional upon withdrawal of order to show
14 cause and with no sanctions being imposed. In his OSC declaration, Mr. Landers stated that
15 dismissal of the underlying case was based upon information he received about defendant's
16 financial situation and dismissal of the case had absolutely nothing to do with the OSC. In
17 addressing the Court on this issue, Mr. Landers stated that "[a]t no time was there any intent to
18 compromise anything with respect to the client. The client is well aware of the circumstances,
19 and I did not dismiss the case where it wasn't the intent to dismiss the case on the sole premises
20 of dismissing the OSC." (R. Tr. at 7). When confronted, however, with his declaration that
21 specifically conditioned dismissal of the underlying case upon withdrawal of the OSC, Mr.
22 Landers stated: "That's true. I'm stuck with what I said." (R. Tr. at 8). See Landers' OSC
23 Declaration, Exh. 3, Letter to William Adams.

24 Accordingly, I have advised my client and have authority to dismiss the claims
25 against the defendants provided that the following conditions are agreed to and
met.

26 ...
27 2.. The OSC set for January 31, 2005 will be taken off calendar and any request
28 for sanctions, including attorney's fees is withdrawn immediately. A filing with
the court to that effect is required on or before January 18, 2005 in order to prevent
my office from having to prepare declarations and supporting documents in the
matter. Should a response be required this offer to compromise the case is

1 automatically withdrawn.

2 Mr. Landers then noted that there had been a “history” between him and defendant’s
3 counsel. *Id.* He further explained that when he talked with his client he told his client:

4 [T]his is the kind of case that if we want to try and get someone in compliance,
5 which should be the motivation in the first place, let’s get them in compliance, but
6 let’s go ahead and dismiss the case with respect to statutory fees or attorney’s fees.
7 . . . My thinking was that if we’re going to do that, then go ahead and take the OSC
8 off. I would admit that it’s probably a mistake, and in my zeal to try to be as stiff
9 as I could with Mr. Adams, because he’s been the same with me, I made the
10 mistake. It’s a clear mistake.

11 (R. Tr. at 8-9). Mr. Landers also discussed that he has “not been in the best of condition” and
12 has been “diagnosed as depressed. I am under doctor’s care now with medication, etc. My
13 thinking has not been the best.” (R. Tr. at 9).

14 From the bench, the Court discussed that by making dismissal absolutely conditional upon
15 withdrawal of OSC, *i.e.*, an essential part of the agreement, Mr. Landers had violated the Ethical
16 Canons which require the absolute and complete fidelity by the attorney to his client. *See Flatt*
17 *v. Sup. Ct. (Daniel)*, 9 Cal. 4th 275, 289 (1994); ABA Model Rule 1.7. “It is an attorney’s duty to
18 protect his client in every possible way, and it is a violation of that duty for him to assume a
19 position adverse or antagonistic to his client without the latter’s free and intelligent consent.”
20 *Santa Clara County Counsel Attys. Ass’n v. Woodside*, 7 Cal. 4th 525, 548 (1994). The duty of
21 loyalty is the primary value at stake in conflict of interest situations. A lawyer must represent the
22 client’s interest without being influenced by the lawyer’s personal interest.

23 After reviewing the circumstances presented, the Court finds that by conditioning
24 dismissal of the underlying action on withdrawal of the OSC against Mr. Landers’ personally,
25 Mr; Landers was attempting to bypass the Court’s order to the detriment of his client who would
26 likely incur additional attorneys’ fees because the case would not settle under the terms agreed to
27 previously. Further, Mr. Landers’ actions are detrimental to the defendant who did not want to
28 expend and any additional time or money on this case and are detrimental to the Court’s
administration of justice.

Moreover, the Court finds Mr. Landers’ use of his paralegal to sign his signature on
declarations and his error in sending court documents to the defendant notwithstanding his

1 knowledge that defendant was represented by counsel falls below a basic standard of
2 professional expected by the Court and likely violate ethical canons.

3 Because Mr. Landers indicated that he was depressed and receiving treatment, the Court
4 ordered Mr. Landers to provide the Court with his doctor's report, which he did *in camera*. The
5 Court has reviewed the letter of Alan T. Chang, M.D., Mr. Landers' medical doctor. Dr. Chang
6 states that Mr. Landers is depressed and recognizes that he needs help. Dr. Chang further states
7 that he has placed Mr. Landers under his medical care and supervision for his depression, and
8 has prescribed medication for the depressive condition. Dr. Chang notes that he will assist Mr.
9 Landers if psychological or psychiatric referral becomes necessary.

10 Based on the letter of Mr. Landers' medical doctor, it does not appear that Mr. Landers is
11 suffering from severe and/or pervasive depression sufficient to explain the lapses in judgment
12 and behavior exhibited in this case. Accordingly, the Court will grant defendants' motion for
13 attorneys' fees incurred after the case was settled but not dismissed because of Mr. Landers'
14 refusal to allow the stipulated dismissal to be filed absent withdrawal of the order to show cause.

15 **Reasonableness of Attorneys' Fee Request**

16 Defendant's counsel seeks total fees in the amount of \$2,553.75 for the time spent after
17 the parties had reached a stipulation for dismissal but plaintiff's counsel conditioned the
18 settlement dismissal on dismissal of the OSC. Plaintiff's counsel opposes the request for
19 attorneys' fees on the basis that the parties had, as part of the underlying settlement, agreed that
20 attorneys' fees would be waived. Here, defendant's counsel notes that he is not requesting
21 attorneys' fees for time expended in the underlying case but only those fees incurred due to
22 plaintiff's delay of dismissal. As a result of plaintiff's counsel's demand that the request for an
23 order to show cause be withdrawn, something defendant could not do once the Court ordered an
24 order to show cause hearing, defendant incurred fees that were not anticipated when the parties
25 originally agreed to the dismissal. The Court finds that defendant should not be made to bear
26 the burden of additional expenses incurred because of plaintiff's counsel's concern about the
27 ramifications of an OSC hearing as to his behavior.

28 Defendant's counsel states that his hourly rate is \$225.00. He has supplied time slips

1 which the Court has reviewed. The Court finds that defendant's request for attorneys' fees in the
2 amount of \$2,553.75 is reasonable and appropriate in this situation.

3 **Conclusion**

4 The Court finds the imposition of attorneys' fees against Roy Landers to be warranted for
5 his conduct during the course of this litigation. Although the Court is sympathetic to Mr.
6 Landers' emotional difficulties and commends his efforts to obtain medical treatment for his
7 depression, the Court finds that his conduct falls seriously below the level of professionalism
8 expected and required by the district court. The Court further finds that this matter should be
9 referred to the California State Bar Association for any actions it may deem appropriate.

10 Based on the foregoing, **IT IS ORDERED** granting request for attorneys' fees following
11 the order to show cause in the amount of \$2,553.75. **IT IS FURTHER ORDERED** that the
12 attorneys' fees shall be paid by counsel for plaintiff, Roy L. Landers, and not plaintiff, to counsel
13 for defendant, William A. Adams, on defendant's account, within 30 days of the filing of this
14 Order. **IT IS FURTHER ORDERED** that the Clerk of the Court send a copy of this letter to
15 Intake Unit, The State Bar of California, 1149 South Hill Street, Los Angeles, California 90015.

16 **IT IS SO ORDERED.**

17
18 Dated: 4/8/05

19 
M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE

20 COPY TO:
21 HON. LEO S. PAPAS
UNITED STATES MAGISTRATE JUDGE

22
23 ALL PARTIES/COUNSEL
24
25
26
27
28