MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

CHARLES DUN-ZHENG YAN, x

Plaintiff,

-against-

NANCY KLEIN and JEANETTE DIAMOND,

Defendants. x

INDEX NO. 8004/03

BY: GRAYS, J.

DATED:

In October, 1997, the plaintiff Charles Dun-Zheng Yan ("Yan") was terminated for insubordination by his employer Luxottica Group ("Luxottica"). Thereafter, he commenced actions against his direct supervisor Nancy Klein ("Klein") and the General Manager of his department, Ronnie Potter ("Potter") (see, Yan v Klein, Index No. 2927/98 [Kitzes, J.]; Yan v Potter, Index No. 22392/98 [Price, J.]; see also, Yan v Klein, 266 AD2d 209). Following the dismissal of those actions, Yan commenced the instant action against Klein, Potter and Jeanette Diamond ("Diamond"), interposing allegations and causes of action similar to those interposed in the prior actions.

By order dated October 15, 2003, this court (Grays, J.) granted those branches of a motion by Klein, Diamond and Potter to dismiss the complaint and to permanently enjoin Yan from filing further legal proceedings against Klein, Diamond, Potter, or any other current or former employees of Luxottica or against Luxottica

itself, insofar as such legal proceedings related to Yan's past employment with Luxottica. Essentially, Yan's action was dismissed based upon principles of res judicata and collateral estoppel (see, Order dated October 15, 2003). That branch of the defendants' motion seeking to impose sanctions on Yan was granted only to the extent of setting the matter down for a hearing to be held on Tuesday, December 9, 2003.

On the hearing date, Yan appeared pro se. He indicated that he commenced the actions against his former supervisors because he wanted to obtain discovery from them and/or Luxottica. Yan commenced the instant action despite being warned by the defendants' counsel that this action would be frivolous and, if he commenced it, the defendants would seek sanctions.

Following the issuance of this court's order dated October 15, 2003, Yan sent the defendants' attorney, on 16 separate dates, drafts of a motion for reconsideration and requests for what amounted to an 89-day adjournment of time to make that motion. Yan repeatedly requested meetings from and with Luxottica's owner and supervisors and, on or about December 8, 2003, he faxed a one-page note to Klein, apparently indicating his intent to commence an Article 78 proceeding against her.

The defendants submitted into evidence statements of legal fees and expenses incurred for legal services performed in connection with this action. From April 1, 2003 through

October 28, 2003, the total amount of legal fees billed was $23,566.25, and the total amount of disbursements and expenses billed was $1,066.51. The nature of the legal worked performed, the hourly rate charged, the time spent on the legal work performed and each disbursement or expense, are detailed in those statements.

At the conclusion of the hearing, the defendants urged the court to impose a maximum $10,000.00 sanction pursuant to 22 NYCRR 130-1.1. In response, Yan asserted that sanctions were unwarranted as he only sought discovery from Luxottica's owner and employees/supervisors.

Pursuant to 22 NYCRR 130-1.1[a] a court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct.

Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (see, 22 NYCRR 130-1.1[c][1]-[3]).

In determining whether the conduct was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party (see, 22 NYCRR 130-1.1[c]).

The commencement of this action against Klein, Potter and Diamond constituted frivolous conduct warranting the imposition of a sanction in that the action was completely without merit in law and was undertaken primarily to harass Luxottica, its owner and its employees/supervisors (see, Charles & Boudin v Hilda Meyer, 307 AD2d 272 [third-party action barred by collateral estoppel was properly dismissed and commencement of that third-party action constituted frivolous conduct warranting the imposition of a sanction]; 22 NYCRR 130-1.1[c][1], [2]). In addition, Yan was repeatedly warned that this action was frivolous and that sanctions would be sought (see, 22 NYCRR 130-1.1[c]).

The record further demonstrates that Yan persists in repeatedly requesting meetings with Luxottica's owner or employees/supervisors in order to obtain discovery, and has threatened further legal actions or proceedings. Such conduct is also frivolous as is designed merely to harass Luxottica and its

owner, employees/supervisors, and attorney (see, Ferraro v Gordon, __ AD2d __, 768 NYS2d 483; 22 NYCRR 130-1.1[c]).

Accordingly, based upon the evidence presented at the hearing, that branch of the defendants' motion seeking to impose sanctions against Yan based upon frivolous conduct is granted. The defendants are awarded reimbursement by Yan of actual expenses reasonably incurred in the amount of $1,066.51. In addition, the defendants are awarded reasonable attorney's fees in the amount of $8,500.00.

Settle Judgment.

_____
J.S.C.