UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-cv-03110-KPF

ALEJANDRO DOMINGO MALVAR EGERIQUE,

Plaintiff,

v.

EZRA CHOWAIKI, DAVID BENRIMON FINE ART LLC, DAVID BENRIMON, LINDA BENRIMON also known as LINDA ROSEN, PIEDMONT CAPITAL LLC, AVICHAI ROSEN, and JOHN DOES 1-10,

Defendants.

ORAL ARGUMENT REQUESTED

PLAINTIFF ALEJANDRO DOMINGO MALVAR EGERIQUE'S MEMORANDUM IN OPPOSITION TO THE BENRIMON DEFENDNATS' MOTION FOR RULE 11 SANCTIONS

INTRODUCTION

Plaintiff, Alejandro Domingo Malvar Egerique (Mr. Malvar), opposes the motions of the Benrimon Defendants for sanctions under F. R. Civ. P. 11. The motion is without merit and frivolous. It does not meet any of the requirements of Rule 11. It misconstrues or ignores the facts and the law. It does not apply the law to the facts of this case. And, its sole purpose is to intimidate plaintiff into abandoning this case, and to fulfill the threats made to plaintiff and his counsel (beginning ten months before any of the Benrimon defendants or their counsel ever saw a word of the complaint), that the Benrimon defendants would move to dismiss the complaint, move for Rule 11 sanctions, and sue both plaintiff and his counsel, personally. The threats, and fulfilling those threats, are intended to have, and do have, a chilling effect on litigation.

"Rule 11 sanctions should be imposed with caution…" *Knipe v. Skinner*, 19 F. 3d. 72, 78 (2d. Cir. 1994). The well-pleaded First Amended Complaint does not violate any provision of Rule 11, and we respectfully request that the motion be denied.

ARGUMENT

I.

The Motion Does Not Comply With The Safe Harbor Provisions of Rule 11 (c)(2).

Rule 11 (c)(2) requires that before filing a Rule 11 motion, a party must give the responding party 21 days' notice so that the "challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected." Defendants' opposition to plaintiff's First Amended Complaint was due on October 18, 2019. At 10:39 p.m. on October 16, 2019, counsel for the Benrimon defendants emailed plaintiff's counsel its Rule 11 motion, which relies entirely, or almost entirely, on its brief on the merits, as supporting its Rule 11 motion. See Ex. 1 to Weiss Decl. But, the brief on the merits, containing those arguments did not accompany the October 16, 2019 email and draft of the Rule 11 motion, and was never submitted to plaintiff before the Benrimon defendants filed their Rule 11 motion.

Inasmuch as the motion does not comply with the requirements of Rule 11(c)(2), it should be denied.

II.

The First Amended Complaint Is Not Presented for any Improper Purpose, Its Claims and Legal Contentions Are Warranted By Existing Law, and Its Factual Contentions Have Evidentiary Support.

A Court may sanction a party and/or its attorney under Rule 11 for the filing of a complaint if any portion of Rule 11 (b) (1)-(3) is violated. Those provisions provide:

> (b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or

unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;

In this case, as both the First amended Complaint and plaintiff's opposition to defendants' motion to dismiss demonstrate, every element of Rule 11 (b) has been complied with. First, plaintiff has not brought the case for any improper purpose. Plaintiff has not brought the case to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Mr. Malvar brought this case to seek justice for the injuries caused to him by defendants' tortious, fraudulent, and unlawful actions.

Second, all plaintiff's claims and legal contentions are warranted by existing law or by nonfrivolous arguments for extending, modifying, or establishing new law. In fact, as plaintiff's brief in opposition to the motions to dismiss (which plaintiff incorporates in this opposition) demonstrates, plaintiff is correct in every one of its claims and contentions, and should prevail on each of them; while defendants' arguments repeatedly ignore the facts, misconstrue and misrepresent the law, do not apply the law to the facts, and arguably do not comply with Rule 11 requirements themselves.

Third, each factual allegation in the First Amended Complaint is supported by citations to publicly available documents (or by examination of such documents), examination and investigation of the facts, and allegations, based on a good faith belief, that the facts will likely

have evidentiary support after a reasonable opportunity for further investigation or discovery. See also, Weiss Decl.

III.

The Benrimon Defendants' Rule 11 Arguments Have No Merit.

The Benrimon defendants' arguments, pp. 4-11, to the effect that plaintiff has violated Rule 11, rely entirely on the arguments they made in their motion to dismiss. In plaintiff's opposition to that motion, plaintiff has demonstrated, in each case challenged by the Benrimon defendants, that plaintiff has met all pleading requirements.

In their Rule 11 motion the Benrimon defendants claim that plaintiff has violated Rule 11 for several reasons.

First, they claim, p. 5, that the complaint lacks allegations of predicate acts satisfying the relatedness, continuity, and nexus requirements. As demonstrated in Argument I.B.1., at pp. 15-20 (See also Argument I.B.2., at pp. 20-21) of plaintiff's brief in opposition, all those elements were pleaded in great detail in the First Amended Complaint. Since, plaintiff has adequately pleaded these points, the Benrimons defendants' motion to dismiss and for rule 11 sanctions should both be denied.

Second, the Benrimon defendants claim, at pp. 5, and 5-6, that plaintiff must allege that each of the Benrimon defendants was engaged in the business of making usurious loans. As explained in the opposition to the motion to dismiss, the 18 U.S.C. § 1962 (c) RICO violation occurs when a defendant engages in the *collection of unlawful debt*, not in making or incurring it. *Gregoria v. Total Asset Recovery, Inc.*, 2015 WL 115501 at *5 (E.D.Pa. 2015) ("While an unlawful debt must be "incurred in connection with ... the business of lending money," 18 U.S.C. § 1961 (6), the statute does not require the collector to also be the lender. *See* 18 U.S.C.

§1962(c).") Since plaintiff pleaded, ¶¶ 84-89, the facts demonstrating the existence of unlawful debt at length, and those facts even allege multiple and renegotiated loans, and collection as well, plaintiff has met the pleading requirements, and should prevail on these issues on the motion to dismiss and at trial. See also Argument I.C. of the brief in opposition, at pp. 25-31.

Third, the Benrimon defendants assert, p. 5, that the conspiracy allegations have no merit. In their brief to dismiss, they rely primarily on the fact that plaintiff did not assert that the Benrimon defendants did not have knowledge of Mr. Chowaiki's criminal activity. In the complaint, plaintiff on repeated occasions that the Benrimon defendants *did know* (not merely "knew or should have known") that Mr. Chowaiki was selling consigned art work that he had no right to sell. Plaintiff alleged that *they knew* because one of the owners of such a work told the Benrimons that Mr. Chowaiki was doing that. Plaintiff also alleges that *they knew* because the Benrimon defendants *relied upon* the written provenance of *le Gueridon* which showed that Mr. Malvar owned it, when they made the $300,000.00 loan. Indeed, the whole point of making the $300,000.00 usurious loan through Piedmont, was to conceal the role of the Benrimons in a transaction that they knew involved taking other peoples' property at deeply discounted prices. And knowing this, and joining in Mr. Chowaiki's efforts to defraud and steal from art owners, they are Mr. Chowaiki's co-conspirators. See complaint at ¶¶ 12, 33, 40, 41, 44, 46, 47, 49, 52, 54, 57, and 60 for some examples of allegations of the Benrimons' knowledge.

Fourth, based on their brief in support of their motion to dismiss, the Benrimon defendants allege, pp. 6-8, that plaintiff did not adequately plead state claims. But, as set out at pp. 34-25, of the brief in opposition, plaintiff did.

Fifth, the Benrimon defendants argue, at pp. 8-9, that instead of being sanctioned, disciplined, or reprimanded themselves for omitting the Shtar Isko from the proceedings before

Judge Rakoff, plaintiff should be sanctioned. This claim should enter all dictionaries as the prime example of "high irony." This issue is addressed extensively in the brief in opposition to the motion to dismiss, pp. 25-31.

Sixth, the Benrimon defendants allege that allegations with respect to the Leger are violations of Rule 11, pp. 9-11. They are not. We have alleged that Mr. Chowaiki, with others, ¶ 99, sold and converted the Leger to his benefit as part of his pattern of racketeering activities. ¶¶ 104-108. The purpose of those Racketeering Activities was, conducted with others, to defraud art owners of their art, including selling art he had no right to sell. The Benrimon defendants knew of those activities when they acquired *le Gueridon*. (One of Mr. Chowaiki's victims explicitly told the Benrimons that Mr. Chowaiki was selling other people's art without authorization; when the Benrimon acquired *le Gueridon*, they relied upon the provenance of *le Gueridon* which showed that Mr. Malvar, not Mr. Chowaiki owned it; and they knew that they were acquiring art at less than 1/3 of its value.) With this knowledge of unlawful activity, the Benrimon defendants decided to join Mr. Chowaiki's efforts and acquired three works of art belonging to three different victims. By joining Mr. Chowaiki's scheme, they became his co-conspirators, and liable for the damages sustained by the victims during the entire duration of the conspiracy. See, generally, Brief in Opposition, 31-34. This includes liability for the Leger.

IV.

The Rule 11 Motion is an Attempt to Threaten, Terrorize, and Intimidate Plaintiff.

In June 2018, ten months before he saw any complaint, Luke Nikas, the Benrimon defendants' counsel, told plaintiff's counsel that if plaintiff filed a case against his clients, his clients would move to dismiss the complaint, move for Rule 11 sanctions, and sue both Mr. Malvar and his counsel. The threats continued through the end of August 2018, when

communications ceased. (See Weiss Decl. ¶ 3). On July 29, 2019, in open court, Mr. Nikas repeated the threat regarding the motion to dismiss and Rule 11 sanctions regarding a complaint he had never seen.

As set out in the opposition to the motion to dismiss, the defendants' motions should be denied in their entireties. This moots the Rule 11 motion. But even if any portion of any motion to dismiss survives, the brief in opposition to those motions, demonstrate that no argument or claim made by plaintiff in any way violates Rule 11. Nor do the Benrimon defendants state which provision of Rule 11 (b) has been violated and how. The filing of the motion has no goal other than to intimidate plaintiff, make plaintiff think twice about seeking justice in this court, and to permit the defendants to escape liability for their actions.

On November 3, 2017, the Benrimon defendants' counsel, took out two full page advertisements in the Sunday New York Times Business section, pp. 3 and 5, See Weiss. Decl. Ex. 2. Each advertised, that *the reason* for hiring the Benrimon defendants' counsel is because they terrorize and intimidate their opponents (no other factor, including legal knowledge, and skill was mentioned). In bold and large type, the advertisements stated, "**So call us – and strike fear in the hearts of *your* opponents.**" And, "**In litigation, you get to choose who your opponents have to face in the courtroom. Why not chose the firm they fear most?**"

Both Mr. Nikas and his firm need to live up to expectations of intimidation. But the court should not let them do it when they are attempting to prevent parties from obtaining justice and redress for their injuries, and where the allegations of Rule 11 violations have no basis in law or fact. The utilization of Rule 11 is inappropriate in this case. In *Bartronics v. Power-One, Inc.*, 245 F.R.D. 532, 538 (S.D. Ala. 2007), the Court put it nicely:

> Rule 11 is not a weapon for intimidating or browbeating opposing counsel to refrain from filing a pleading that a lawyer disagrees with. It is not a bargaining chip to be flashed

cavalierly in hopes of securing a strategic advantage. Rather, Rule 11 is a narrowly cabined provision whose sanctions "are to be imposed sparingly, as they can have significant impact beyond the merits of the individual case and can affect the reputation and creativity of counsel." *Hartmarx corp. v. Abboud*, 326 F.3d 862, 867 (7th Cir.2003).

Accordingly, we respectfully request that the motion for sanctions be denied.

CONCLUSION

In *Rodick v. City of Schenectady*, 1 F. 3d 1341, (2d. Cir. 1993), the Second Circuit stated,

Rule 11is targeted at situations where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands. When divining the point at which an argument turns from merely losing to losing and sanctionable, ... we have instructed district courts to resolve all doubts in favor of the signer." [citations and internal quotations omitted, emphasis in original.]

In this case, the First Amended Complaint is well-pleaded, and the arguments in plaintiff's opposition to the motion to dismiss are winning ones. But if there are any doubts, this Court should decide in favor of plaintiff and against the Benrimons.

Wherefore, we respectfully request that the motion for sanctions be denied.

RESPECTFULLY SUBMITTED,

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