

<b>Saul v Cahan</b>
2015 NY Slip Op 30710(U)
May 1, 2015
Supreme Court, Kings County
Docket Number: 500494/2014
Judge: Carolyn E. Demarest
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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of May, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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LEWIS SAUL,

Plaintiff,

- against -

ERIC CAHAN and E-UNIT, LLC,

Defendants/Counter-Claimants.

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The following papers numbered on this motion:

**DECISION  
AND  
ORDER**

Index No. 500494/14

NYSCEF Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	140,142
Opposing Affidavits (Affirmations)	161-172
Reply Affidavits(Affirmations)	175-189
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	141,160,174

Defendant Eric Cahan (“defendant”) moves for sanctions pursuant to 22 NYCRR 130-1.1(c) and attorney’s fees pursuant to CPLR 3220.

**BACKGROUND**

In this action, the defendant advised the plaintiff regarding the purchase of contemporary art in exchange for a commission. A dispute arose between the parties regarding certain art transactions, plaintiff filed a complaint, and the defendant filed an answer with affirmative defenses and counterclaims. A more detailed analysis of the relationship between the parties is found in this court’s decision and order in this action, *Saul v Cahan*, 2014 NY Slip Op 51592(U) [Sup Ct, Kings County 2014] (“Dismissal Decision”).

After the plaintiff amended the complaint, there was some motion practice regarding an order of protection and the defendant moved to dismiss the complaint. The motion was granted in

the Dismissal Decision.<sup>1</sup> Defendant now seeks the recovery of his attorney's fees since the inception of this action as a sanction, pursuant to 22 NYCRR 130-1.1(c), claiming that this action was frivolous. Defendant argues that plaintiff, an experienced attorney with more than 30 years of experience, brought a meritless complaint that, "was filed as a weapon to harass, intimidate, and carry out [the plaintiff's previous] written threat to bring 'financially devastating' litigation against the defendant" and has a history of using his law firm to litigate frivolous personal lawsuits as a form of harassment. Further, defendant argues that his counsel submitted a CPLR 3220 offer to the plaintiff on June 20, 2014 ("3220 Offer") and that plaintiff did not accept the 3220 Offer. Accordingly, defendant argues that he is entitled to recover the attorney's fees he incurred after June 20, 2014, pursuant to CPLR 3220, as the defendant succeeded in obtaining a more favorable judgment than offered in the 3220 Offer.

Plaintiff argues that although the defendant succeeded in having the action dismissed, the litigation was not frivolous and the defendant continues to harass the plaintiff in an attempt to improperly recover sales tax on art work purchased by plaintiff through the defendant. Further, plaintiff argues that CPLR 3220 is inapplicable in this action as the statute requires a party "trying the issue of damages" and a trial was not held.

### DISCUSSION

Civil Practice Law and Rule 3220 states;

At any time not later than ten days before trial, any party against whom a cause of action based upon contract, express or implied, is asserted may serve upon the claimant a written offer to allow judgment to be taken against him for a sum therein specified, with costs then accrued, if the party against whom the claim is asserted fails in his defense. If within ten days thereafter the claimant serves a written notice that he accepts the offer, and damages are awarded to him on the trial, they shall be assessed in the sum specified in the offer. *If the offer is not so accepted and the claimant fails to obtain a more favorable judgment, he shall pay the expenses necessarily incurred by the party against whom the claim is asserted, for trying the issue of damages from the time of the offer.* The expenses shall be ascertained by the judge or referee before whom the case is tried. An offer under this rule shall not be made known to the jury. (emphasis added)

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<sup>1</sup> The Dismissal Decision specifically noted that, "[a]lthough E-Unit is named as a defendant in this action, plaintiff's amended complaint does not actually allege any claim as against it."

Although the plain language of the statute appears to contemplate at least the commencement of a trial before a party could recover attorney's fees pursuant to CPLR 3220 (*see, e.g., Abreu v Barkin & Assoc. Realty, Inc.*, 115 AD3d 624 [1st Dept 2014] (holding that a party is entitled to attorney's fees pursuant to CPLR 3220 where plaintiff withdrew claims, pursuant to a stipulation, *at trial*)), the Third Department granted attorney's fees pursuant to CPLR 3220 where a defendant obtained summary judgment dismissing a case after the joinder of issue (*see Morgan v Kunker*, 268 AD2d 749, 751 [3d Dept 2000]). Accordingly, the doctrine of *stare decisis* requires this court to follow the precedent of the Third Department Appellate Division until the Court of Appeals or the Second Department Appellate Division pronounces a contrary rule (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

However, the defendant's motion for attorney's fees, pursuant to CPLR 3220, must be denied, without prejudice, as the defendant's motion did not include a copy of the 3220 Offer or proof of the attorney's fees. Although the defendant attempted to correct the omission of proof of attorney's fees in his reply, the omission in the motion deprived the plaintiff of the opportunity to challenge those fees in his opposition. Further, while the defendant submitted affidavits claiming that he incurred \$29,579.03 in attorney's fees in this action after June 20, 2014, a review of the invoices shows only \$17,371.04 in attorney's fees. Accordingly, a *de novo* motion, including the 3220 Offer and proof of attorney's fees, is required should defendant seek to recover fees pursuant to CPLR 3220.

Although the court's Dismissal Decision clearly suggests that the plaintiff's action was frivolous, the court declines to grant the plaintiff's motion for sanctions at this time as it is premature. The Court takes judicial notice that on December 15, 2014, a month after the Dismissal Decision, the defendants commenced a new action, *E-Unit LLC v Saul* (Index No. 511863/14)<sup>2</sup> ("E-Unit Action"), against plaintiff. The E-Unit Action, which is also before this court, includes four of the identical causes of action<sup>3</sup> that were initially interposed by the

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<sup>2</sup> The complete caption of the E-Unit Action is *E-Unit LLC, a Delaware limited liability company, and Eric Cahan, individually, v Lewis Saul, individually, Lewis Saul & Associates, P.C., a Washington D.C. and Maine professional corporation, The Commissioner of Taxation and Finance, and New York State Department of Taxation and Finance*. Defendant Lewis Saul & Associates, P.C. is Saul's law firm that represents the plaintiff in the present action.

<sup>3</sup> The E-Unit Action includes causes of action for unjust enrichment, tortious interference with business relations, tortious interference with contract, and abuse of process in addition to a new cause of action for a declaratory judgment "with respect to Saul's failure and refusal to pay sales tax".

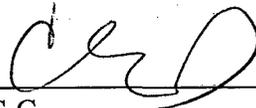
defendants as counterclaims in the present action prior to plaintiff's filing of an Amended Complaint which was never answered. Saul currently has a motion pending in the E-Unit Action to dismiss that action and for sanctions against Cahán. As the dispute between the parties is ongoing, and defendants are actively pursuing claims against the plaintiff that originated in this action, based upon the same relationship that was the basis of the plaintiff's dismissed complaint, it is premature to rule on whether the plaintiff's action was frivolous and what, if any, legal fees the defendant incurred in defending the instant, allegedly frivolous, action that would be an appropriate sanction.

**CONCLUSION**

The defendant's motion is denied without prejudice.

This constitutes the decision and order of the court.

ENTER:



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J.S.C.

**HON. CAROLYN E. DEMAREST**