

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Sanctions Stick Even After Settlement

An order imposing sanctions catches the attention of litigants, sometimes even encouraging the parties to settle. When they do, the sanctioned party often will seek to have the sanctions award vacated as part of the settlement. Increasingly, judges are resistant to vacating sanctions orders. Southern District Judge Victor Marrero's recent decision in *Rogue Wave Software v. BTI Systems*, 2018 WL 6920770 (S.D.N.Y. Dec. 14, 2018), is a case in point. There, the parties jointly requested, as part of their settlement of the case, to vacate two sanctions orders issued by Southern District Magistrate Judge Kevin N. Fox against defendants and their counsel for discovery-related misconduct. In upholding the sanctions orders,

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Judge Marrero discussed the trend away from courts vacating orders just because the parties' settlement agreement provides for it, and emphasized the strong public interest in maintaining sanctions orders to "deter[] detrimental conduct such as that Defendants exhibited here." *Id.* at *7.

'Rogue Wave Software'

Rogue Wave Software v. BTI Systems was a copyright infringement case. In two orders, the first issued on Sept. 7, 2017, and the second on Dec. 15, 2017, Magistrate Judge Fox sanctioned defendants and their counsel under Federal Rule of Civil Procedure 37 for (1) failing to respond adequately to a document request and an interrogatory, and (2) refusing unjustifiably to

produce certain business records that were used to create a made-for-litigation sales and revenue report.

Magistrate Judge Fox determined that sanctions were warranted because, among other things, (1) defendants "failed to provide any justification for not responding to the [interrogatory] prior to [plaintiff] filing [a motion to compel]," 2017 WL 4712425, at *10 (S.D.N.Y. Sept. 7, 2017) (the "first sanctions order"); (2) defendants "failed even to discuss" in their opposition to the motion to compel, let alone attempt to defend, their assertion of privilege over the documents responsive to the document request, excepting a single email chain, *id.*; and (3) defendants failed to produce the relevant business records even after Magistrate Judge Fox verbally ordered that they be produced during a telephonic conference, and instead defendants argued that Magistrate Judge Fox had never issued such an order, 2017 WL 6805329, at *8, *11 (S.D.N.Y. Dec. 15, 2017) (the "second sanctions order").

On Dec. 20, 2017, the parties informed Judge Marrero that they had reached an agreement in principle to settle the case; the next day, they filed joint motions to vacate the sanctions orders. Two weeks later, on Jan. 3, 2018, the parties updated Judge Marrero that they had reached a full settlement of the case, would file dismissal papers only after Judge Marrero resolved the motions to vacate, and had agreed to cooperate and exercise their best efforts to vacate the sanctions orders. However, the parties added that the settlement was not contingent on vacatur of the orders.

On Jan. 10, 2018, the parties also filed a joint motion before Magistrate Judge Fox to vacate the second sanctions order. Magistrate Judge Fox denied that motion on Feb. 16, 2018. Pursuant to Federal Rule of Civil Procedure 72, defendants filed an unopposed objection to that order.

The parties did not file a corresponding motion before Magistrate Judge Fox to vacate the first sanctions order, presumably because defendants previously had filed an objection to that order, also pursuant to Rule 72.

Accordingly, pending before Judge Marrero at the time he issued his decision were (1) the parties' joint motions to vacate both sanctions orders; (2)

defendants' objection to Magistrate Judge Fox's order denying vacatur of the second sanctions order; and (3) defendants' objection to Magistrate Judge Fox's first sanctions order.

Standard of Review

Judge Marrero began his decision by addressing the standard of review applicable to the objections defendants raised to Magistrate Judge Fox's orders. He noted

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that under Rule 72(a), "a 'pretrial matter not dispositive of a party's claim or defense'" is reviewed "under the 'clearly erroneous or ... contrary to law' standard," but under Rule 72(b), "a pretrial matter that is 'dispositive of a claim or defense' is reviewed de novo." 2018 WL 6920770, at *5 (quoting Rule 72). Judge Marrero concluded that because "sanctions determinations made pursuant to Rule 37 are nondispositive," his review of the first sanctions order was under the more deferential, Rule 72(a) standard. *Id.* at *6.

Judge Marrero found it "less clear" which standard applied to his review of Magistrate Judge Fox's order refusing to vacate the second sanctions order. *Id.*

He concluded, however, that he "need not delineate the precise standard," because, for the reasons discussed below, he would affirm that order under either standard. *Id.*

Increased Judicial Reluctance To Vacate

Judge Marrero then addressed the parties' efforts to vacate the sanctions orders. Judge Marrero observed that until the mid-1990s, "the practice in the Second Circuit had been to vacate district court judgments when a settlement mooted the controversy given the importance of honoring settlements over the finality of trial court judgments." *Id.* (internal quotation marks and alterations omitted). He noted, however, that this practice changed with the Supreme Court's ruling in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994), that "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* (internal quotation marks omitted). Judge Marrero found that, under the current state of the law, a "district court ha[s] the power to preserve a sanction already imposed," notwithstanding "the parties' agreement to ask for the withdrawal of the sanction order as a condition to settlement." *Id.* (internal quotation marks omitted).

Judge Marrero characterized the Second Circuit's "guidance" on this topic as being "grounded in the public interest in having rules of procedure obeyed, which is at least as important as the public interest in encouraging settlement of disputes." *Id.* (internal quotation marks omitted). Based on "[t]his guidance," Judge Marrero concluded that, in evaluating whether to vacate a prior judgment in connection with a settlement, "at a minimum, courts must weigh the interest in enforcing procedural rules against the interest in encouraging settlement." *Id.* Judge Marrero then went on to balance those interests in the context of this case.

On the one hand, he found that "[t]he public has a strong interest in deterring detrimental conduct such as that defendants exhibited here." *Id.* at *7. Judge Marrero identified the "detrimental conduct" as including "Defendants['] refus[al] to comply" with Magistrate Judge Fox's oral order, and instead arguing that "no such Order existed," as well as defendants having given "inconsistent reasons and justifications" to plaintiff and Magistrate Judge Fox for their refusal to produce the relevant discovery material. *Id.*

On the other side of the balance, Judge Marrero found that "the interest in promoting settlement

is minimal here," as the parties' settlement was "not contingent on vacatur of the Sanctions Orders." *Id.* Moreover, he found the parties' expressed concerns regarding the impact of the sanctions orders unpersuasive in light of, among other things, "the excessiveness of the conduct that generated the need for sanctions." *Id.* Accordingly, Judge Marrero affirmed Magistrate Judge Fox's order refusing to vacate the second sanctions order and denied the parties' joint motions to vacate both sanctions orders.

Defendants' Objection To the First Sanctions Order

Having rejected the parties' settlement-related vacatur arguments, Judge Marrero turned to defendants' underlying, merits-based objection to the first sanctions order. In asserting that the order should be overturned, defendants raised a number of arguments, including that they responded to the relevant interrogatory "as quickly as possible" and their assertions of privilege in response to the relevant document request were "substantially justified" (which is an affirmative defense to a Rule 37 motion for attorney fees). *Id.* at *8, *9. Judge Marrero rejected each argument, noting that (1) defendants only responded to the interrogatory

after plaintiff filed its motion to compel, (2) Rule 37 provides that attorney fees are appropriate where, as here, the "requested discovery is provided after the motion was filed," and (3) defendants never addressed their claim of privilege with respect to 600 of the withheld documents. *Id.* at *8-*9 (quoting Rule 37(a)(5)).

Conclusion

It is no longer a given that courts will vacate sanctions orders as part of a settlement. Rather, courts will balance the relevant interests at stake, and the more egregious the conduct leading to a sanctions order, the less likely it is that a court will vacate it.