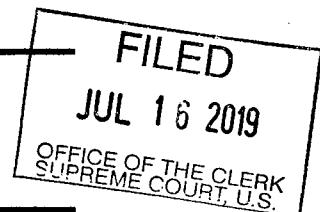


Case No. 20-483 **ORIGINAL**

In The Supreme Court of the United States

Case No.18-15124 / 18-15245



ARTEM KOSHKALDA,
Petitioner

v.

SEIKO EPSON CORPORATION, ET. AL.,
Respondent

**On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Ninth
Circuit**

PETITION FOR A WRIT OF CERTIORARI

Artem Koshkalda
3408 Chitgar Pl, San Jose, CA,
95117
Appearing *Pro Se*
September 12, 2020



QUESTIONS PRESENTED

1. Did The United States District Court District of Nevada (hereinafter “NV Court”) err in its Report and Recommendation Order For Case Terminating Sanctions (hereinafter “RORA”) and in its order adopting it?
2. Did United States Court of Appeals for the Ninth Circuit (hereinafter “Ninth Circuit”) err in affirming NV Court’s orders?

PARTIES TO THE PROCEEDING

The petitioner is Artem Koshkalda (“Koshkalda” or “Petitioners”). Artem Koshkalda appears for himself and as an assignee of all rights for this Petition for Certiorari by ART LLC.

Respondents are Seiko Epson Corporation and Epson America, Inc. (collectively, “Epson”).

RELATED CASES

1. 3:2016-cv-00524 (nvd) — before the United States District Court District of Nevada.¹ Closed. Appealed in this Writ of Certiorari.
2. 17-72193 — before the United States Court of Appeals for the Ninth Circuit. Disposed: 08/10/2017 Disposition: Denied - Judge Order
3. 17-73048 — before the United States Court of Appeals for the Ninth Circuit. Disposed: 11/16/2017.
4. 18-15124 — before the United States Court of Appeals for the Ninth Circuit.
5. 18-15245 — before the United States Court of Appeals for the Ninth Circuit.
6. 18bk30014-HLB — before the United States Bankruptcy Court Northern District of California. Pending.
7. 18bk30016-HLB — before the United States Bankruptcy Court Northern District of California. Pending.
8. 18bk03020-HLB — before the United States Bankruptcy Court Northern District of California. (affirmed by the United States Bankruptcy Appellate Panel of the Ninth Circuit, pending appeal before the United States Court of Appeals for the Ninth Circuit).

¹ (hereinafter “NV Action”);

9. 2:18cv05087 — before the United States District Court Central District of California. Closed, pending appeal before the United States Court of Appeal for the Ninth Circuit.

10. 19-56187 — before the United States Court of Appeals for the Ninth Circuit. Pending.

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OPINION AND ORDERS BELOW

The order of NV Court [ECF 84] in case *Seiko Epson Corp. v. Inksystem LLC*, No. 3:16-cv-00524-RCJ-VPC, 2018 U.S. Dist. LEXIS 7166 (D. Nev. Jan. 16, 2018) is reproduced at App. 1-5.

The order of NV Court [ECF 88] in case *Seiko Epson Corp. v. Inksystem LLC*, No. 3:16-cv-00524-RCJ-VPC, 2018 U.S. Dist. LEXIS 7166 (D. Nev. Jan. 16, 2018) is reproduced at App. 6-7.

The order of NV Court [ECF 112] in case *Seiko Epson Corp. v. Inksystem LLC*, No. 3:16-cv-00524-RCJ-VPC, 2018 U.S. Dist. LEXIS 7166 (D. Nev. Jan. 16, 2018) is reproduced at App. 8-16.

The order of NV Court [ECF 160] in case *Seiko Epson Corp. v. Inksystem LLC*, No. 3:16-cv-00524-RCJ-VPC, 2018 U.S. Dist. LEXIS 7166 (D. Nev. Jan. 16, 2018) is reproduced at App. 17-18.

The order of NV Court [ECF 304] in case *Seiko Epson Corp. v. Inksystem LLC*, No. 3:16-cv-00524-RCJ-VPC, 2018 U.S. Dist. LEXIS 7166 (D. Nev. Jan. 16, 2018) is reproduced at App. 19-31.

A memorandum by Ninth Circuit affirming the NV Court's final judgment order in case *Seiko Epson Corp. v. Koshkalda*, Nos. 18-15124, 18-15245, 2019 U.S. App. LEXIS 38703 (9th Cir. Dec. 27, 2019) is reproduced at App. 32-37;

A petition for panel rehearing and rehearing *en banc* in case *Seiko Epson Corp. v. Koshkalda*, No. 18-

15124, 2020 U.S. App. LEXIS 4977 (9th Cir. Feb. 18, 2020) is reproduced at App. 38;

JURISDICTION

The judgment by Ninth Circuit was entered on December 27, 2019. A petition for a panel rehearing and rehearing *en banc* was denied by Ninth Circuit on February 18, 2020.

This petition is timely pursuant to this Court's order extending deadlines to 150 days after the appealed order,

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Federal Rules of Civil Procedure Rule 37, provides in pertinent part:

"If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending

*may issue further just orders. They may include the following.... (vi) rendering a default judgment **against the disobedient party.**"* (emphasis added)

STATEMENT OF FACTS

In September 2016 Epson commenced a lawsuit among others against Petitioners before NV Court. NV Court granted Epson's request for *ex parte* seizure. Epson seized everything from Petitioners' location, including, but not limited to, electronic and paper documents. Electronic documents have been stored on seized by Epson two laptops. [See NV Action, Decl. of Epson's counsel, ECF 17, 3:23-4:7].

In October 2016 Epson performed another seized on all locations of defendants, including the location of Petitioners. [See NV Action, Decl. of Epson's counsel, ECF 34, 3:23-4:7].

On March 28, 2017, Epson's counsel deposed Koshkalda.

Despite of the fact that Epson seized all documents from Petitioners' location, and while Epson did not provide to Petitioners' the seized documents, Epson kept complaining that some documents were withheld by Petitioners.

Essentially, both parties were stuck between two positions: Epson claimed that Petitioners were

withholding documents, while Petitioners claimed that everything was produced to Epson or seized by Epson, so nothing was withheld.

During April 17, 2017, hearing Magistrate Judge attempted to put a duty on Petitioners to force compliance of other unrelated and disobedient defendants.

THE COURT ... But this — so what's going to happen is — and I do have sympathy for particularly Mr. Koshkalda who I think is doing the very best he can...

I know you're trying to get these other people [Kravchuk and Bielov] to get in line and to do what they need to do, but if this continues, you are setting yourself up for a motion for a judgment based upon your inability to proceed in this court, and I don't know what that judgment would end up looking like, sounds to me like it would be a significant amount of money which should concern you [Koshkalda and Maliuk] and should concern the other two codefendants [Kravchuk and Bielov].

So everybody comes back here. Mr. Koshkalda, you understand that, sir?"

But the defendants [Kravchuk and Bielov] need to understand if they — not you two [Koshkalda and Maliuk], but if the other defendants continue to be in Ukraine or continue to ignore this case, there are going to be problems with that, and they need to get — understand that, and it's going to be a motion by the — by this very big company that could be potentially very devastating to all of you, and that would be bad.

Essentially, Magistrate Judge did recognize compliance of Petitioners in face of Koshkalda and notified Koshkalda that if other defendants will not start their obedience Koshkalda will suffer also, which is fundamentally wrong and is the crux of this Writ of Certiorari.

Notably, each and every defendant was a separate independent unit, which is consistent with the defendants' answers to complaints.

On or about August 8, 2017, Hon. Magistrate Judge Cooke issued RORA² against all defendants [ECF 112] which on August 22, 2017, has been adopted by NV Court Order [ECF 160].

² Report And Recommendation For Case Terminating Sanctions (hereinafter "RORA")

Here, in this Appeal, Petitioners request this Court to review and find that RARO was clearly erroneous specifically as to Petitioners,³ and Ninth Circuit's Order affirming NV Court default judgment order, based on clearly erroneous RARO, was also clearly erroneous as to Petitioners.

Petitioners hereby request this Court to review three (3) NV Court's Orders: (i) ECF 112, which references to (ii) unopposed ECF 84, and (iii) unopposed ECF 88.

In this litigation there were a total of three Epson's motions to compel and for sanctions, and only two sought relief against Petitioners (see table above).

In RORA [ECF 112] NV Court made illogical conclusion based on clearly erroneous finding that ECF 88 was against all seventeen (17) defendants, while ECF 88 was against only three (3) defendants where Koshkalda and ART LLC (Petitioners) were not amongst them. NV Court's finding in RORA [ECF 112] that Petitioners violated ECF 88 was clearly erroneous.

Petitioners complied with ECF 84.

NV Court abused its discretion when issued an order [ECF 160] affirming RORA [ECF 112].

³ Koshkalda in his personal capacity as well as assignee of all rights as to the Writ of Certiorari by ART LLC solely owned by Koshkalda (hereinafter, collectively "Petitioners");

Ninth Circuit erred when affirmed default judgment against Petitioners based on clearly erroneous RORA [ECF 112] and a subsequent ECF 160 Order of NV Court.

Ninth Circuit illogical conclusions were reached against Petitioners. In pertinent part Ninth Circuit concluded:

“The district court did not abuse its discretion by imposing case terminating sanctions against appellants Artem Koshkalda, ART LLC . . . Koshkalda and ART LLC failed to produce discovery, failed to appear in court and violated various court orders.”⁴

It might be true as to Petitioners for the period *after* RORA, but *not before.* RORA is clearly erroneous and has been crucial for the resolution of the case on merits against Petitioners.

Imposition of case terminating sanctions against Petitioners was not appropriate and was drastic. Petitioners substantively complied with discovery. Epson seized everything from Petitioners right from day one after commencement of the litigation. Litigation started from *ex parte* seizure by Epson which gave Epson access to all documents in

⁴ Case No. 18-124 Dkt. 45-1, at p. 2;

Petitioners' possession. Then, Petitioners provided premises for additional seizure by Epson. Epson never raised any issues with Petitioners disobedience with NV Court's orders prior to RORA. Petitioner did not miss a single hearing prior to RORA. Record does not simply support imposition of an extreme remedy against Petitioners in a form of case terminating sanctions.

REASONS FOR GRANTING THE WRIT

1. Without a separate finding that all defendants could be treated as one, NV Court should not have punished with case terminating sanctions substantially compliant and obedient Petitioners for violations of other non-compliant and not obedient defendants.
2. Ninth Circuit should not have justified erroneously entered RORA with Petitioners' post-order conduct.

LEGAL ARGUMENTS

- a. ***FRCP 37 Does Not Authorize NV District Court To Issue Sanctions Against "Obedient" Party.***

RORA should not have been entered by NV Court against Petitioners based on FRCP

37(b)(2)(A)(iii)-(vi) because Petitioners were not a disobedient party.

Federal Rules of Civil Procedure Rule 37, provides in pertinent part:

"If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders."

RORA stated:

"On June 16, 2017 plaintiff filed another motion to compel and for sanctions (ECF No. 85). Plaintiffs' motion related to depositions of defendant Kravchuk and defendants' continued, willful noncompliance with court orders and discovery obligations. (ECF No. 85.) Plaintiffs argued that defendants are "willfully withholding relevant evidence which clearly prejudices plaintiffs and supports the relief requested," and defendants are "simply abusing the discovery process to delay a final adjudication." (Id. at 6.) This court granted the motion and ordered that: 1) defendants pay \$16,146.50 to plaintiffs; 2) defendants be precluded from seeking any offset as to damages using documents or

*information not disclosed or produced; 3) a factual finding of willfulness is entered against defendants as to plaintiffs' trademark claims; 4) Andrey Ushakov is to be produced for deposition in the United States on shortened notice; and 5) if defendants fail to comply with the court's order, the court will issue a report and recommendation that all of defendants' answers be stricken and their defaults entered. (ECF No. 88.)*⁵

None of that applies to Petitioners. Petitioners were not part of ECF 88.

Prior to RORA nothing suggests that Petitioners were disobedient parties. In RORA Hon. Magistrate Judge analyzed the compliance of Petitioners with the previous NV Court orders for sanctions, which NV Court erroneously believed were ECF 84 and ECF 88, completely ignoring the fact that ECF 88 was *not* against Petitioners.

Plain reading of F.R.C.P. Rule 37 suggests that the court may impose various sanctions on disobedient party. Nowhere in the Rule 37 it says that one can be liable for violations of others and the Supreme Court "evinces a deep-seated antipathy" to "liability without fault." See *Gertz v. Robert Welch*, 418 U.S. 323, 389, 94 S. Ct. 2997, 3031 (1974).

The plain meaning of the statute suggests that F.R.C.P Rule 37 prescribes individualized liability of

⁵ [NV Action, ECF 112, 3:2-18]

disobedient party, not obedient one, or party whose fault and connection to the disobedient parties limited to the presence on the same side of the "v."

Thus, NV Court erred concluding that Petitioners violated NV Court orders which could justify entering of case terminating sanctions against Petitioners which deprived Petitioners from resolution of the litigation on merits.

In affirming NV Court order Ninth Circuit concluded that Petitioners failed to appear on the hearings, failed to attend depositions. It is simply false and not supported by the record as to Petitioners' behavior prior issuance of ECF 112.

Thus, NV Court abused its discretion in imposing case terminating sanctions against Petitioners pursuant to FRCP Rule 37.

CONCLUSION

Based on above-mentioned arguments Petitioners request this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for The Ninth Circuit, which affirmed orders of the United States District Court District of Nevada.

DATED: September 12, 2020

By: Artem Koshkalda
Artem Koshkalda, Petitioner