

No.

IN THE
Supreme Court of the United States

MIDAMINES SPRL LTD.
HASSAN ABBAS,

Petitioners,

v.

KBC BANK N.V.

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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April 30, 2018

Your Petitioners, Midamines Sprl Ltd., a duly registered Illinois corporation, and Hassan Abbas, an Illinois attorney, were ordered to pay the amount of \$75,000 in attorneys fees, because of the filing of a motion to disqualify opposing counsel, and without being informed as to the sanctioning standard used against each party sanctioned, and without hearing, and without being allowed to view the unredacted statements, before the imposition of the sanctions, and without a specific finding of bad faith conduct. The Petitioners acted in good faith to recover their money unlawfully withheld by the KBC Bank N.V., the respondent, for the past six years. Petitioners sought leave to file a Declaratory judgment action. One or more of the following questions are presented:

QUESTIONS PRESENTED

1. Whether the Petitioners were entitled to have a hearing in federal court and to be informed of the sanctioning standard used before the imposition of sanctions of attorney's fees?
2. Whether the federal courts are required to find bad faith with specificity under *Goodyear* and to reduce hours that are excessive, redundant, or otherwise unnecessary due to overstaffing under *Hensley*?
3. Whether claimants to property or res are entitled to a declaration of rights under 28 U.S.C. § 2201?

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LIST OF THE PARTIES

The parties to the action below include Midamines Sprl Ltd., a duly registered Illinois corporation, and the Illinois attorney Hassan A. Abbas, as Plaintiffs and Petitioners here; and KBC Bank N.V., a Belgian bank, with a branch in New York, as the Defendant.

OPINIONS BELOW

The U.S. Court of Appeals for the Second Circuit order denying the Petition for Panel Rehearing or En Banc Rehearing was on January 30, 2018, and is at App. A: 1a. The order of December 6, 2017 is at App. B: 2a. The order of July 16, 2014 is at App. D: 12a.

SUPREME COURT'S JURISDICTION

The petition for writ of certiorari is timely filed, and within the 90 days from the denial of the Petition for Rehearing. The Petitioners' motion for panel and en banc rehearing was denied on January 30, 2018. The Supreme Court's jurisdiction to review the judgment is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions include the Fifth (5TH) Amendment. "No person shall be ... (middle part omitted)...., nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case began in 2012 with the stop payment of the Petitioner's certified bank checks which are drawn upon and payable by the KBC Bank N.V. ("KBC") in New York and Brussels. The KBC has unlawfully taken the funds of Petitioners, Midamines Sprl Ltd., and Hassan Abbas. KBC has refused to return the Petitioners' funds even though KBC has no claim to the funds, and KBC admitted it has no right to the funds. During the course of litigation, in 2014, the co-defendant Antwerp Diamond Bank was closed and the forum selection clause ceased to exist rendering the issue of the forum clause moot and inapplicable. During the appeal in 2014, an attorney for KBC, waived privilege by sending out emails to various third parties who had no common interest. The Plaintiff's attorney filed a motion to disqualify based on the email which showed KBC's counsel intended to pursue a frivolous position. The Second Circuit denied the motion to disqualify as "unwarranted under the present circumstances" but cited case law that work product "privilege" is waived when it is disclosed to third parties with no common interest, see App. A at 13a, citing *In re Steinhardt LP*, 9 F.3d 230 (2d Cir. 1993), and *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), yet despite the waiver by KBC's counsel, the Second Circuit ordered Petitioners to pay reasonable attorneys fees, even though Plaintiff's motion to disqualify had a reasonable factual basis and proper legal basis and was prompted by KBC's counsel own email. KBC's counsel also voluntarily disclosed to the public and third parties the alleged email by voluntary filings in

court docket documents referencing the email as exhibits to KBC's motions.

The Second Circuit did not inform Petitioners of the sanctioning standard used to sanction each party, the attorney Hassan Abbas, and the Illinois corp., Midamines Sprl Ltd. Also, the Second Circuit did not find any alleged bad faith with specificity against the Petitioners, who have acted in good faith to recover their funds and alerted the Court of the email that had been sent out and was received.

KBC counsel submitted a blacked out and redacted invoice, that had been overstaffed with five lawyers, demanding \$75,000, when it was not necessary to have five lawyers on a single response to a motion to disqualify. So, Petitioners objected, and requested the unredacted bills and statements and challenged the excessive 197 hours and alleged attorneys fees.

The Second Circuit upheld the Plaintiffs' right to challenge the attorney's fees but then remanded the matter to the District court to make a calculation of "reasonable" fees. The District court did not allow a hearing, and did not allow Petitioners to view the unredacted billing statements, and so Petitioners could not properly challenge the unreasonable fees requested of \$75,000. Petitioners were not given a hearing as required by New York law and federal law. The District court stated that under *Hensley v. Eckerhart*, the Supreme Court did not specifically require a hearing to be held. However, a hearing should have been allowed under the court's diversity

jurisdiction in the District court. The District court only conducted the review of the alleged hours and unredacted statements *in camera*, but the District court did not apply the *Hensley* standard, so as to reduce the excessive hours and the inefficient and duplicative hours submitted by KBC's five lawyers.

The District court indicated that state law was not applicable, however, state law is relevant and applies here in the federal court context under the diversity jurisdiction, and also which requires an evidentiary hearing before the imposition of attorney's fees, which is the law in New York. In *Price v. Price*, 496 N.Y.S. 2d 455, 463 (1985), the Appellate Court in New York, Second Department, stated:

“Finally, it was error to have awarded attorney's fees solely on the basis of the affirmations of counsel without first conducting a hearing. Where attorney's fees are challenged, the opposing spouse is entitled to a hearing, not only to examine into the financial conditions of the parties, an issue which, in this case was thoroughly examined at trial, but also as a “meaningful way of testing the [attorney's] claims relative to time and value....”

The courts below dismissed valid legal claims for payment of certified bank checks against KBC when there is no existing forum selection clause as to KBC Bank. Petitioner's choice of forum in the United States, with the bank checks deposited in New York, and also payable in New York, was entitled to some deference and Petitioners' due process rights under

the Fifth Amendment were entitled to protection against arbitrary sanctions or dismissal of the claims and the right to declaratory judgment action should be protected and unfair sanctions of attorneys fees reversed, particularly, when the Petitioners have done no wrong and have acted in good faith.

Petitioners have a right to obtain their funds and monies, and “whenever there is a legal right, there is also a legal remedy...whenever that right is invaded.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.). Petitioners presented valid legal claims and sought a decalartion of their rights as the KBC Bank intentionally converted and has improperly taken the Petitioners’ monies which should be fully reimbursed with the interest for six years.

The refusal by the lower courts to enforce the bank certified and irrevocable cashier’s checks, allows the KBC Bank to flout the law, and causes severe injury to the Petitioners. The Petitioners are entitled to a declaration of their rights under 28 U.S.C. § 2201 and to recover their monies. KBC Bank must respect the law, and the cashier’s checks, and pay her legal obligations, and KBC should return the Petitioners’ funds. The Second Circuit’s and District court’s order also stands inconsistent with the wealth of cases that insist upon individualized findings of bad faith to support inherent authority sanctions. Before an award of sanctions under inherent powers, a court must find that the purported misconduct was done with bad faith. *Roadway Express v. Piper*, 447 U.S. 752, 767 (1980). Here, there was no statute and

no sanctioning standard mentioned by the lower courts, and there was no but-for-bad faith misconduct direct causation under the *Goodyear* standard established, and no proper basis for sanctions of attorneys fees.

The courts below were aware that 28 U.S.C. § 1927 does not apply to corporations such as Midamines Sprl Ltd., and lumped the Petitioners together, and the lower courts alleged an alter ego conclusion with no evidentiary basis and no legal basis and no factual basis. See *CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991) (“Where, however, the court sanctions more than one party, it must make particularized findings and conclusions as to each party’s liability considering his or her unique circumstances.”).

Petitioners operated in good faith to recover their funds. There was no intent to “harass” and Petitioners were not “frivolous” or “vexatious” as indicated by the lower courts, and it is unfortunate such terms were used. Petitioners’ good faith extended to the complaint, all of the motions that were filed, and all aspects of the litigation, and the Petitioners have expended considerable time and effort in the past six years simply to recover the money that was stolen by KBC, and the funds belong to the Petitioners.

JURISDICTION BELOW

The 2nd Circuit Court of Appeals has jurisdiction to review the District court's decision under 28 U.S.C. §1291, and the notice of appeal was timely filed. The District court has diversity jurisdiction under 28 U.S.C. § 1332. There is supplemental jurisdiction under 28 U.S.C. §1367.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted, for one or more, of the following reasons.

First, it is respectfully submitted that the Supreme Court should grant certiorari to clarify whether a hearing is required in federal court or under the federal law (as this Court did not explicitly reach that question in *Hensley v. Eckerhart*, 461 U.S. 424 (1983)) before the imposition of sanctions of attorneys fees?

Second, it is respectfully submitted the Court should grant certiorari to clarify whether a federal court must make a specific finding of bad faith, and inform the sanctioned party of the sanctioning standard used prior to the imposition of sanctions of attorneys fees, under *Goodyear v. Haeger*, No. 15-1406 (S. Ct., April 19, 2017)?

Third, it is respectfully submitted the Court should grant certiorari to clarify whether a claimant to property or a res is entitled to a declaration of rights under 28 U.S.C. § 2201?

ARGUMENT

A federal court sitting in a diversity case such as here – is ordinarily bound to follow on the issues of substantive state law, such as attorney’s fees, under the Erie doctrine, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In *Alyeska Pipeline Svc. Co. v. Wilderness Soc’y*, 421 U.S. 240, at note 31 (1975), the Supreme Court stated: “A very different situation is presented when a federal court sits in a diversity case. [I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.”

When a court’s jurisdiction is based on diversity of the parties, a district court’s award of attorneys’ fees is governed by relevant state law. See e.g., *IOM Corp. v. Brown Forman Corp.*, 627 F.3d 440, 451 (1st Cir. 2010); see *Northon v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011) (per curiam); see *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1280 (10th Cir. 2011); *Chin v. Chrysler LLC*, 538 F.3d 272, 279 (3d Cir. 2008).

The Second Circuit upheld Plaintiff’s challenge to the reasonableness of Orrick’s attorney’s fees and remanded for a calculation of reasonable fees so Plaintiffs had the right to challenge the fees (Doc. 222, Appeal No. 14-862, 2d Cir.), thus a hearing should have been permitted, under the law – as Plaintiffs had no access to the unredacted billing

statements. The District court abused its discretion in refusing a hearing and refusing to allow Plaintiffs to view the detailed billing statements used, and the Petitioner Mr. Abbas only received blacked-out page after blacked-out page, that were heavily redacted, representing the unreasonable hours of five lawyers seeking \$75,000 in fees for a response to the motion to disqualify, and a motion to seal which the KBC's attorneys sought, obtained, and violated by filing the alleged privileged email in unredacted and unsealed form in court exhibits in the Second Circuit and the District court. KBC rendered the entire motion to seal an exercise in futility by KBC's own conduct and filings and KBC's own disclosures of the allegedly "privileged" email.

The day the sanctions order was entered KBC's counsel began to harass attorneys in Chicago, who had nothing to do with the bank checks, nor with the underlying case, and KBC's counsel used the threats which were sent by email to the partners of a Chicago law firm so as to cause damage to Mr. Abbas' Of Counsel relation with the law firm based in Chicago, which led to the tortious interference claim against the New York law firm of Orrick, Herrington, Sutcliffe LLP. All the elements of the claim for tortious interference were properly pled and were factually supported.

The unredacted billing statements should have been provided to Petitioners, as a matter of fairness, and as a matter of law, to challenge the unreasonableness of the fees, and *in camera* review

was not sufficient – as the Second Circuit previously stated, “However, the attorney client privilege cannot at once be used as a shield and a sword”. See *In re von Bulow*, 828 F.2d 94, 103 (2d Cir.1987); Therefore, “A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.” See *In re Von Bulow*, 828 F.2d at 101-02.

The alleged “privilege” has been implicitly waived, as KBC has asserted a claim for attorney’s fees, that in fairness, requires examination of alleged billing statements. The Second Circuit recognized implied waiver is found where the alleged privilege holder, “asserts a claim that in fairness requires the examination of protected communications.” *U.S. v. Bilzerian*, 926 F.2d 1285 at 1292 (2d. Cir. 1991). The Second Circuit also stated in *In re von Bulow*, 828 F.2d at 103, and in *Bilzerian*, 926 F.2d at 1292, “fairness considerations arise” when a party attempts to use the privilege both as “a shield and a sword.” See *U.S. v. Doe*, 219 F.3d 175 (2nd Cir. 2000). Thus, a party cannot rely on privileged communications to support its claim and then shield the underlying communications from scrutiny by the opposing party. In *Ideal Electronic Sec. Co. v. International Fidelity Ins. Co.* 129 F.3d 143, 152 (D.C. Cir. 1997) the court held that it was an abuse of discretion for the District court not to require the disclosure of the unredacted billing statements, notwithstanding the claim of privilege, and that *in camera* review was not sufficient.

The courts below should have allowed some hearing for the Petitioners before imposing \$75,000 in sanctions of attorneys fees, and ought to have permitted the Petitioners to also view the unredacted billing statements, so as to properly challenge the unreasonable fees. The main purpose of sanctions is deterrence, and not financial or reputational damage, and normally the party's inability to pay, and/or lack of income, is also considered as a factor in assessing reasonableness of fees. The District court was aware that Plaintiff, Mr. Abbas cannot pay the excessive and unreasonable fees of \$75,000, and thus the order was financially ruinous for Mr. Abbas. Also, Midamines Sprl Ltd., the Illinois corp., is not able to financially pay the \$75,000. In *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1027 (2d Cir. 1979) there, the Second Circuit reduced a fee award due to the Plaintiff's low income and inability to pay. See also, *Sassower v. Field*, 973 F.2d 75, 80-81 (2d Cir., 1992).

There is no forum clause as to the country of "Belgium", and the prior forum selection clause no longer exists, and thus it is a moot issue, and it will not be relitigated. The alleged forum clause was only previously limited to a court in Antwerp, but which is currently not available, because the Antwerp court has no jurisdiction under Belgian law as to the KBC because KBC is domiciled in New York and Brussels. KBC has no forum clause and no contract with the Petitioners and no banking relationship, but, KBC has been withholding the Petitioners' funds for six years for no legitimate reason. The bank that wrote

the moot forum clause, the Antwerp Diamond Bank, is closed since 2014, and not a party herein.

Mr. Abbas, who received the payment of checks as his legal fees, and Midamines Sprl Ltd., who then deposited the checks in New York, have a right to their funds. KBC has no right to possess the funds and no claim to the funds. Petitioners' property and a substantial part of Petitioners' funds, i.e. the "res", is located in New York. Plaintiffs have a right to file a suit under 28 U.S.C. § 2201 so as to declare their rights to their Dollar funds which are being withheld in the city of Manhattan, at KBC New York, Avenue of the Americas, and the Euro funds are in Brussels. As the Second Circuit previously held that a federal court may "not enjoin suits to declare the rights of a claimant to a res". *Bryant v. Atlantic Coast Line R. Co.*, 92 F. 2d 569, 570 (2d Cir. 1937), citing Supreme Court in *General Baking Co v. Harr*, 300 U.S. 433, 434 (1937), and the Second Circuit held, "two actions in personam upon the same cause of action may go on pari passu in different jurisdictions." *Bryant*, 92 F.2d at 571.

Petitioners respectfully request the decisions below be reversed and remanded, and the sanctions of \$75,000 be reversed, so that Petitioners may have a hearing in the federal court, to challenge the unfair sanctions that lacked due process, and to be informed under what "standard" they were sanctioned, and challenge the hours and attorney's fees, and view the unredacted statements, and to be able to proceed with a Declaratory judgment action against KBC to

recover Petitioners' funds, which is an alternative remedy that is provided by the U.S. Congress, and is not an exclusive remedy.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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