

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Submitted: February 1, 2012 Decided: February 28, 2013)

Docket No. 10-5100-cv

KEESHA MITCHELL, THERESA CAMPBELL, SEANNETTE CAMPBELL, and
TANISHA SELBY,

Plaintiffs-Appellants,

v.

LYONS PROFESSIONAL SERVICES, INC.,

Defendant-Appellee,

RICHARD TRIM and TERRY TATUM,

Defendants,

CHRISTOPHER M. LYONS and GARRISON PROFESSIONAL SERVICES, INC.,

Interested Parties-Appellees.*

B e f o r e: WINTER, RAGGI, and CHIN, Circuit Judges.

Appeal from the denial of plaintiffs-appellants' motion to
execute a monetary judgment entered as a sanction for attorney
misconduct in the United States District Court for the Eastern
District of New York (Brian Cogan, Judge). We vacate and remand.

* The Clerk of the Court is instructed to conform the caption in
accordance herewith.

1 Mitchell L. Perry, Rawlins Law Firm, New
2 York, New York, for Appellants.

3
4 Brooke L. Anthony, Law Offices of
5 Raymond A. Giusto, P.C., West Bay Shore,
6 New York, for Appellees.
7

8 WINTER, Circuit Judge:

9 Keesha Mitchell, Theresa Campbell, Seannette Campbell, and
10 Tanisha Selby appeal the denial of their motion for a writ of
11 execution against Christopher M. Lyons and Garrison Professional
12 Services, Inc. ("Garrison Services"). See Fed. R. Civ. P. 69(a)
13 and N.Y. C.P.L.R. § 5225(b). The motion was based on default
14 judgments appellants had earlier obtained against defendant Lyons
15 Professional Services, Inc. ("Lyons").¹ The district court
16 denied this motion as a sanction for appellants' counsel's
17 repeated failures to comply with the court's orders. We hold
18 that although the district court had more than an adequate basis
19 to sanction counsel and accorded the required procedural
20 safeguards, further findings are needed to support a sanction
21 that falls entirely on the clients rather than principally on the
22 lawyer.

23 BACKGROUND

24 The underlying action is against appellants' former employer
25 Lyons and two supervisory personnel, Trim and Tatum, for
26 employment discrimination under federal, state, and local law.

¹ The district court permitted appellants to proceed against Lyons and Garrison Services by motion rather than by filing a separate proceeding. We express no view regarding the propriety of that decision.

1 The complaint alleged incidents of sexual harassment and sexual
2 assault by Trim and Tatum, with vicarious liability attributable
3 to Lyons. Appellants obtained default judgments against Lyons
4 and Trim, who both failed to appear, and dismissed the case
5 against Tatum. At a damages inquest, the district court awarded
6 \$266,590, consisting of back pay, damages for emotional harm, and
7 punitive damages. On May 10, 2010, appellants filed an execution
8 motion under Federal Rule of Civil Procedure 69(a) and N.Y.
9 C.P.L.R. § 5225(b) against Lyons; Trim;² Lyons's alleged
10 successor in interest, Garrison; and Lyons's sole owner,
11 Christopher Lyons.

12 During the proceedings leading up to this motion,
13 appellants' counsel, Gary Rawlins, engaged in repeated acts that
14 sometimes individually, but certainly collectively, amounted to
15 willful disregard of court orders.

16 We summarize those relevant acts. Rawlins three times
17 sought and obtained adjournments of the Initial Status Conference
18 because he was unable to proceed. On one of these occasions he
19 was on vacation. On another, he notified the court of the
20 proposed adjournment only one day before the Conference was
21 scheduled, in violation of Judge Cogan's rule requiring 48 hours'
22 notice.

23 Twice Rawlins was ordered to provide notice of the Initial
24 Status Conference to Tatum, Lyons, and Trim and to file proof of

² Appellants later settled the action against Trim.

1 service of this notice with the court within one week. Twice
2 Rawlins failed to do so. After the court entered an Order to
3 Show Cause for why he should not be sanctioned for this failure,
4 Rawlins responded that he had served notice on Tatum (without
5 filing proof of the service) but had mistakenly overlooked the
6 court's requirement to also serve notice on Lyons and Trim. The
7 court declined to impose sanctions.

8 In the proceedings to execute the money judgment, Rawlins
9 continually failed both to comply with court orders and to
10 communicate in advance with the court in an effort to reduce the
11 disruptive effects of his noncompliance. Rawlins again violated
12 the 48-hour rule when he requested an adjournment of a damages
13 inquest the day before it was scheduled. At one point during
14 discovery proceedings, he could not proceed with a scheduled
15 hearing on the execution motion. Following both sides' failure
16 to appear at the discovery hearing, the district court issued a
17 detailed scheduling order with several warnings. These included
18 a statement that Rawlins's nonappearance was "the latest in a
19 series of failures by plaintiffs' counsel to effectively
20 communicate with the Court and to demonstrate basic familiarity
21 with the requirements of federal practice" and a warning that
22 "[t]he Court believes that it would be acting within its
23 discretion to simply deny plaintiffs' [execution] motion based on
24 counsel's failure to appear, particularly in light of the history
25 of prior miscues." Minute Entry & Order at 1, Mitchell v. Lyons
26 Prof'l Servs., Inc., No. 09 Civ. 1587 (BMC) (E.D.N.Y. Sept. 27,

1 2010). Nevertheless, the district court allowed the execution
2 action to continue with specific scheduling dates and
3 requirements in the scheduling order.

4 The order set a hearing for November 8, required Rawlins to
5 prepare certain materials, and stated specifically that "failure
6 to comply with these procedures will result in denial of [the
7 execution] motion without further accommodations." Id. at 2.
8 Nevertheless, Rawlins appeared at the November 8 hearing without
9 having prepared the required materials. Despite the language in
10 the scheduling order warning of dismissal for failure to comply
11 with the court's procedures, the court instead sanctioned Rawlins
12 \$500 and rescheduled the hearing for November 15, one week later.

13 Rawlins then failed to appear timely for the rescheduled
14 hearing, even though the original scheduling order regarding the
15 hearing stated expressly that "failure to appear on time will
16 result in denial of [the execution] motion." Id. at 2-3. After
17 fruitlessly waiting for him and without any notice that he would
18 ever appear, the district court dismissed the execution motion.

19 Subsequently, appellants and Rawlins moved for
20 reconsideration of the sanction. The court gave Rawlins an
21 opportunity to explain or justify his transgressions and why the
22 sanction of dismissal should not be imposed. Appellants as
23 individuals also made submissions to the district court, arguing
24 that their motion should not be dismissed. After considering the
25 submissions, the district court found Rawlins's account of his

1 misconduct -- mistaken scheduling notes -- to be "not . . .
2 compelling" in light of his chronic failures and denied the
3 motion for reconsideration. This appeal followed.

4 DISCUSSION

5 Every district court "has the inherent power to supervise
6 and control its own proceedings and to sanction counsel or a
7 litigant for . . . disobeying the court's orders." Mickle v.
8 Morin, 297 F.3d 114, 125 (2d Cir. 2002); see also Lewis v.
9 Rawson, 564 F.3d 569, 575 (2d Cir. 2009) (noting that the
10 district court's power to dismiss an action, while codified in
11 the Federal Rules of Civil Procedure and elsewhere, is inherent).
12 We review a district court's decision to impose sanctions for
13 failure to comply with its orders for abuse of discretion. See
14 Lucas v. Miles, 84 F.3d 532, 534-35 (2d Cir. 1996); see also
15 Lewis, 564 F.3d at 575 (reviewing dismissal for failure to
16 prosecute). Dismissing an action, which effectively occurred
17 here, is the harshest of sanctions and must be proceeded by
18 particular procedural prerequisites. Specifically, notice of the
19 sanctionable conduct, the standard by which it will be assessed,
20 and an opportunity to be heard must be given. See Mickle, 297
21 F.3d at 126 (reversing sanction of dismissal for attorney
22 misconduct due to lack of notice and opportunity to be heard);
23 cf. Agiwal v. Mid Island Mortg. Corp., 555 F.3d 298, 302-03 (2d
24 Cir. 2009) (recognizing that, in context of Federal Rule of Civil
25 Procedure 37(b) and (d) sanctions, a warning that noncompliance

1 with court order will result in dismissal may suffice).
2 Moreover, the sanction of dismissal with prejudice -- the
3 effective result of the denial of appellants' motion for a writ
4 of execution -- must be supported by "clear evidence" of
5 misconduct and "a high degree of specificity in the factual
6 findings." Mickle, 297 F.3d at 125-26 (quoting Oliveri v.
7 Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986)) (internal quotation
8 marks omitted).

9 Further, mindful that the sanction of dismissal with
10 prejudice has harsh consequences for clients, who may be
11 blameless, it should be used only in "extreme situations," see
12 Lewis, 564 F.3d at 575-76 (internal quotation marks omitted); cf.
13 Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 764 (2d Cir.
14 1990) (reviewing Federal Rule of Civil Procedure 37(d) sanction
15 order), and even then only upon a finding "of willfulness, bad
16 faith, or reasonably serious fault," Commercial Cleaning Servs.,
17 L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 386-87 (2d Cir.
18 2001); Lucas, 84 F.3d at 535 (adopting five-factor fault standard
19 based on (1) duration of noncompliance; (2) "whether plaintiff
20 was on notice that failure to comply would result in dismissal";
21 (3) likely prejudice to defendant from delay resulting from
22 noncompliance; (4) "balancing of the court's interest in managing
23 its docket with plaintiff's interest in receiving fair chance to
24 be heard"; and (5) whether the district court adequately
25 considered the adequacy of lesser sanctions).

1 Applying these principles, we find no defect in the
2 procedural safeguards afforded. The district court's detailed
3 scheduling order clearly stated that future noncompliance and
4 tardiness would be met with dismissal of the execution motion and
5 gave appellants and Rawlins the opportunity to respond. It
6 explicitly stated that "failure to comply with [the scheduling
7 order's] procedures will result in denial of [the execution]
8 motion without further accommodations." Minute Entry & Order at
9 2, Mitchell v. Lyons Prof'l Servs., Inc., No. 09 Civ. 1587 (BMC)
10 (E.D.N.Y. Sept. 27, 2010). The order further warned Rawlins that
11 "failure to appear on time will result in denial of [the
12 execution] motion." Id. at 2-3. This language indisputably gave
13 notice to Rawlins that the execution motion would be dismissed
14 for future transgressions.

15 Once the execution motion was denied, appellants had another
16 opportunity to be heard in connection with their motion for
17 reconsideration, that, when coupled with the clear notice of
18 impending sanctions, satisfies the procedural safeguards outlined
19 in Mickle. An opportunity to be heard before a dismissal takes
20 effect is not required when the notice of impending dismissal is
21 clearly communicated, in the context of a scheduling order or by
22 other means. Mickle's requirements are met so long as the
23 opportunity to be heard occurs before or at the time of dismissal
24 or, as in this case, at a separate motion for reconsideration.
25 Cf. Link v. Wabash R.R. Co., 370 U.S. 626, 632 (1962) (noting

1 that a Rule 60(b) motion provides an “escape hatch” with respect
2 to counsel’s opportunity to be heard, which can render even a
3 lack of notice prior to sanction dismissal “of less
4 consequence”).

5 Finally, because dismissal of the action is particularly
6 harsh, the dismissal must be accompanied by “a high degree of
7 specificity in the factual findings.” Mickle, 297 F.3d at 125-26
8 (internal quotation marks omitted). When dismissing appellants’
9 case in open court, the district court did not specifically
10 elaborate on the reasons for dismissal. Nevertheless, given the
11 specificity in the court’s prior scheduling order and its
12 reference in open court to Rawlins’s repeated failures to comply
13 with court orders, the court’s reasons for refusing to enforce
14 appellants’ execution motion were self-evident, thereby providing
15 them with an opportunity to respond in an informed manner to the
16 reasons for the sanction. See id.

17 A consideration of the five Lucas factors also supports a
18 finding of “reasonably serious fault,” Commercial Cleaning
19 Servs., 271 F.3d at 386, justifying the sanction imposed. The
20 first four factors weigh in favor of dismissal: (1) instances of
21 noncompliance occurred throughout the entire 18 months of the
22 district court proceedings; (2) notice was given by the court two
23 months before the motion was dismissed that future misconduct
24 would result in dismissal; (3) further delays would continue to
25 waste the time and resources of adversary parties; and (4) the

1 court has a clear need to manage its docket, which Rawlins
2 seriously disrupted. Conduct such as occurred here can impose
3 serious costs on adversaries, on parties to other matters before
4 the court who may find their scheduling disrupted or decisions
5 delayed, and on the efficiency with which the district court
6 addresses its business.

7 We take issue with the district court only with regard to
8 the final Lucas factor, whether alternative sanctions not
9 involving the serious harm to counsel's clients were adequately
10 considered. The district court first threatened a lesser \$500
11 sanction against Rawlins, to no avail. However, on the present
12 record, we cannot determine, and the district court has made no
13 findings as to, whether the delays leading to dismissal were
14 solely a result of Rawlins's actions and not those of his
15 clients. We have held that "the more the delay was occasioned by
16 the lawyer's disregard of his obligation toward his client, the
17 more this . . . argues in favor of a less drastic sanction
18 imposed directly on the lawyer." Dodson v. Runyon, 86 F.3d 37,
19 40 (2d Cir. 1996). It is true that a client is typically bound
20 by the acts of his lawyer, see Link, 370 U.S. at 633-34 & n.10,
21 but as we noted in Dodson, "[t]his principle, however, does not
22 relieve the district court of the obligation to consider the
23 relevant factors before dismissing an action -- especially the
24 suitability of lesser sanctions," 86 F.3d at 40.

1 A wide panoply of sanctions was, and is, at the district
2 court's disposal. These options include monetary sanctions on
3 counsel and the assessment of costs and counsel fees generated by
4 the delinquency. A suspension from practice may be imposed for a
5 failure to pay such sanctions. See In re Flannery, 186 F.3d 143,
6 146 (2d Cir. 1999) (per curiam). The district court's
7 disciplinary and contempt powers would support sanctions beyond
8 costs and fees, such as mandated disclosure by counsel of his
9 sanctionable conduct to the bar, to future clients, and to courts
10 in which Rawlins may appear. See Chambers v. NASCO, Inc., 501
11 U.S. 32, 44-45 (1991); Gallop v. Cheney, 667 F.3d 226, 230 (2d
12 Cir. 2012) (per curiam) (requiring attorney to provide notice of
13 his sanctions to any federal court within the Second Circuit for
14 a period of one year); Dodson, 86 F.3d at 41 (citing Shea v.
15 Donohoe Constr. Co., Inc., 795 F.2d 1071, 1078 (D.C. Cir. 1986)
16 (noting that sanctions may include communication of attorney's
17 actions to clients and the bar association)). While a district
18 court need not exhaust these alternative possibilities, we do not
19 know on the record before us whether these alternatives were ever
20 considered or the grounds on which they were rejected. In this
21 case appellants are "unsophisticated," Minute Entry & Order at 2,
22 Mitchell v. Lyons Prof'l Servs., Inc., No. 09 Civ. 1587 (BMC)
23 (E.D.N.Y. Sept. 27, 2010), and the sanctionable conduct may have
24 been due entirely to counsel's personal irresponsibility and
25 afforded no strategic advantage to appellants. See Dodson, 86

1 F.3d at 40. We also note that appellants had secured a judgment
2 and only execution of the judgment remained. We therefore remand
3 to allow the district court to give explicit consideration to the
4 full range of other available sanctions, after according a
5 hearing to the parties and Rawlins on the issue, and only then,
6 if necessary, effectively to dismiss the action.

7 CONCLUSION

8 For the foregoing reasons, the district court's final order
9 denying appellants' writ of execution is VACATED and the case is
10 REMANDED for further proceedings consistent with this opinion.
11 Appellants' attorney is directed to furnish a copy of this
12 opinion to his clients.