

CA FLORIDA HOLDINGS, LLC,
Publisher of *THE PALM BEACH POST*,

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of
Palm Beach County, Florida; SHARON R.
BOCK, as Clerk and Comptroller of Palm
Beach County, Florida,

Defendants.

**RESPONSE AND MEMORANDUM OF LAW OF PLAINTIFF CA HOLDINGS, LLC IN
OPPOSITION TO STATE ATTORNEY DAVE ARONBERG'S AMENDED MOTION
FOR ATTORNEYS' FEES UNDER FLA. STAT. § 57.105**

Plaintiff, CA Florida Holdings, LLC ("Plaintiff"), publisher of *The Palm Beach Post*, submits this Response and Memorandum of Law in Opposition to State Attorney Dave Aronberg's ("Aronberg") November 9, 2020 Amended Motion for Attorneys' Fees under Fla. Stat. § 57.105 [DE 50] ("Amended Motion").¹ For the reasons set forth below, the Amended Motion should be denied, with prejudice.

INTRODUCTION

Aronberg's Amended Motion for sanctions is legally and factually insufficient to meet the strict standards of Fla. Stat. § 57.105. First, the Amended Motion fails as a matter of law because Aronberg did not comply with the required 21-day notice period (safe harbor provision) set forth

¹ While the Amended Motion references Fla. R. Civ. P. 1.525 in the introductory paragraph, that Rule sets forth a deadline by which "[a]ny party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion[,] but does not itself provide grounds to those fees or costs. Rather, the Amended Motion is based upon, and seeks relief of sanctions under, Fla. Stat. § 57.105.

in Fla. Stat. § 57.105(4) prior to filing his November 9, 2020 Amended Motion, which was materially different than, and raised new arguments and cited record evidence not included in his first Motion for Attorneys' Fees ("First Motion") served on June 8, 2020 and filed on July 1, 2020 [DE 35]. Unlike his First Motion, which was served via email upon Plaintiff's counsel 21 days before filing, Aronberg's Amended Motion was never served via any method of delivery before it was filed on November 9, 2020. Thus, Aronberg precluded Plaintiff from taking advantage of the statutory 21-day safe harbor provision to voluntarily dismiss its then-pending claim as to Aronberg before filing his Amended Motion seeking sanctions. Moreover, Aronberg filed his November 9, 2020 Amended Motion nineteen days *after* Plaintiff had already dismissed him from the action by filing a notice dropping Aronberg as a party on October 21, 2020 [DE 48]. Thus, at the time the Amended Motion was filed, it was moot.

As to the merits, the Amended Motion fails under Fla. Stat. § 57.105 because the claim at issue, Count I of Plaintiff's First Amended Complaint, is exactly the type of claim specifically excepted from sanctions under Section 57.105(3)(a), as the Plaintiff's claim was presented to the Court as a good faith argument for the interpretation of existing law or, at least, the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

Further, Aronberg, in his official capacity as the State Attorney, was a proper party defendant. Sanctions are inappropriate under Fla. Stat. § 57.105.

BACKGROUND

On January 17, 2020, Plaintiff filed a First Amended Complaint [DE 17] ("Complaint") against the State Attorney, Aronberg, and the Clerk of Court, Sharon Bock (now Joseph Abruzzo), for declaratory relief (Count I) and relief under Fla. Stat. § 905.27 (Count II), seeking to obtain

access to records from the grand jury proceeding and criminal prosecution of the late Jeffrey Epstein, a convicted sex offender, by former State Attorney Barry Krischer.²

On January 24, 2020, Aronberg filed an Answer to Count I and a Motion to Dismiss Count II [DE 22]. The Clerk of Court also filed an Answer to Count I and Motion to Dismiss Count II [DE 24]. In his Answer to Count I of the Complaint, Aronberg admitted that Plaintiff *The Palm Beach Post* sought but Defendants “have refused to provide access to testimony, minutes, and other evidence presented in 2006” in the grand jury proceeding. Aronberg Answer, ¶ 72 [DE 22].

On June 8, 2020, the Court entered an Order Granting the Defendants’ Motions to Dismiss Count II of Plaintiff’s First Amended Complaint With Prejudice [DE 33]. The Order specifically did not address the merits of Count I.

On July 1, 2020, Aronberg filed his First Motion seeking sanctions against Plaintiff under Fla. Stat. § 57.105. On June 8, 2020, prior to filing his First Motion, Aronberg’s attorney (Douglas A. Wyler, Esq.) served via email to Plaintiff’s counsel an unfiled copy of the First Motion with an enclosure letter. The enclosure letter was not filed along with the First Motion [DE 35], which has no exhibits.³ The enclosure letter accompanying the First Motion (but not the First Motion itself) alleged in conclusory fashion that Aronberg did not have possession, custody, or control of the grand jury documents sought by Plaintiff. See [DE 45] at Ex. A. Importantly, however, there was no evidence in the record to confirm this allegation, and the First Motion did not refute or even

² While much of the Epstein saga is a matter of public record, the public still does not know how former State Attorney Krischer used the grand jury process – and the secrecy that comes with it – to shield Epstein and his equally powerful and corrupt accomplices from the public and to justify Epstein’s lenient treatment. Access to the Epstein grand jury materials will reveal how the instrumentality of the grand jury was used in this case, which directly implicates the integrity of this State’s criminal justice process and is unquestionably a matter of vital public concern.

³ Aronberg later attached the June 8, 2020 enclosure letter as Exhibit A to his October 14, 2020 Response to Plaintiff’s Memorandum of Law in Opposition to the State Attorney’s Fla. Stat. Section 57.105 Motion (“Aronberg’s October 14, 2020 Reply”) [DE 45].

address the State Attorney’s ability to object to or impede attempts by the Plaintiff (or any other third party) to seek grand jury documents, whether through the Clerk of Court or other means.

At the time of Aronberg’s First Motion for sanctions, which he expressly admitted was a “place-marker” motion to the extent he ultimately prevailed on the merits,⁴ no motions for summary judgment had been filed and Aronberg had not served any affidavit(s) or identified any evidence relating to this matter or any allegations in the Complaint.

On or about August 18, 2020, Aronberg filed a Motion for Summary Judgment [DE 38] and an affidavit by Aronberg [DE 39] averring that he did not have possession or control over the Epstein grand jury materials and had no authority to demand that the Clerk of Court provide access to the materials. This was the first record evidence relating to Aronberg’s lack of possession or control of the grand jury materials sought by *The Palm Beach Post*. Notably, Aronberg’s affidavit still did not refute or address the State Attorney’s ability to object to or otherwise impede an attempt by Plaintiff to seek grand jury documents.

On October 21, 2020, Aronberg filed a motion to set a hearing on his Motion for Summary Judgment [DE 47]. On that same date, Plaintiff filed a Notice of Dropping Party as to Aronberg, dismissing him from the case [DE 48].

On November 9, 2020, Aronberg filed his Amended Motion for Attorneys’ Fees [DE 50], seeking sanctions under Fla. Stat. § 57.105 against Plaintiff relating to all fees and costs incurred by Aronberg after June 8, 2020. The Amended Motion, unlike his First “place-marker” Motion filed on July 1, referenced Aronberg’s August 18 Motion for Summary Judgment and exhibits. Importantly, neither Aronberg nor his attorney served a copy of the Amended Motion upon Plaintiff or its counsel at any time prior to filing the Amended Motion on November 9.

⁴ See Aronberg’s October 14, 2020 Reply [DE 45], at 5, 13.

The evidentiary hearing on Aronberg's Amended Motion for sanctions is set on the Court's ten-week docket between July 26 and October 1, 2021 [DE 56].

MEMORANDUM OF LAW

I. LEGAL STANDARD

Under Section 57.105, Florida Statutes, the Court may award reasonable attorneys' fees only if it finds that a party or its attorney knew or should have known that a claim or defense when initially presented to the Court or at any time before trial was not supported by material facts necessary to establish the claim or defense, or would not be supported by the application of then-existing law to those material facts. To award sanctions, "the trial court must find that there were no justiciable issues of law or fact and that the losing party's attorney did not act in good faith based on the representations of his or her client." *Siegel v. Rowe*, 71 So. 3d 205, 211 (Fla. 2d DCA 2011) (quotation omitted).

Indeed, "[w]here there is an *arguable basis* in law and fact for a party's claim, a trial court may not sanction that party under section 57.105." *Minto PBLH, LLC v. 1000 Friends of Florida, Inc.*, 228 So. 3d 147, 149 (Fla. 4th DCA 2017) (citing *Kowallek v. Rehm*, 189 So.3d 262, 263–64 (Fla. 4th DCA 2016)) (emphasis added). Courts must apply Section 57.105 "with restraint to ensure that it serves its intended purpose of discouraging baseless claims without casting a chilling effect on use of the courts." *MacAlister v. Bevis Constr., Inc.*, 164 So.3d 773, 776 (Fla. 2d DCA 2015).

Taking into account the amendments that broadened the statute after 1999, "Florida courts have continued to caution that section 57.105 must be carefully applied to ensure that it serves the purpose for which it was intended – to deter frivolous pleadings." *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397, 403 (Fla. 3d DCA 2018) ("Thus, an award of fees under section 57.105 requires more than the moving party succeeding in obtaining a dismissal of the action or

the entry of a summary judgment in its favor, . . . and a party does not need to have conclusive evidence to prove its case at the time of filing in order to avoid sanctions. Where a party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts. If attempts to prove those facts are fruitless, that is still not cause for sanctions where the party’s initial belief was well-founded.”) (internal citations omitted). Thus, a voluntary dismissal does not automatically equate to sanctionable conduct.

Before awarding sanctions, the trial court must make “explicit findings” that “the action was ‘frivolous or so devoid of merit both on the facts and the law as to be completely untenable.’ . . . This burden is a heavy one.” *Id.* (internal citations omitted) (emphasis added). Additionally, the trial court’s findings “must be based on substantial competent evidence presented to the court at the hearing on attorney’s fees or otherwise before the court and in the trial court record.” *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). The trial court “must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after suit was filed.” *See Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009).

II. ARONBERG’S AMENDED MOTION MUST BE DENIED FOR FAILURE TO COMPLY WITH THE 21-DAY SAFE HARBOR PROVISION IN FLA. STAT. § 57.105(4) AND BECAUSE THE AMENDED MOTION WAS MOOT WHEN IT WAS FILED

A. ARONBERG FAILED TO SERVE 21 DAYS PRIOR TO FILING THE AMENDED MOTION ASSERTING NEW ARGUMENTS, IN VIOLATION OF FLA. STAT. § 57.105(4).

Aronberg did not serve his Amended Motion at any time before filing it, and thus failed to comply with the 21-day notice provision set forth in Fla. Stat. § 57.105(4). The Amended Motion must be denied outright for that reason alone. Because Aronberg’s Amended Motion raised arguments not raised in his First Motion, and cited evidence not in the record at the time the First

Motion was filed, Aronberg was required to independently comply with the 21-day safe harbor provision of Section 57.105(4). *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013) (“We hold that if a party files a subsequent or amended motion for sanctions under section 57.105 and raises an argument that was not raised in the original motion for section 57.105 sanctions, the subsequent motion must independently comply with the twenty-one-day ‘safe harbor’ provision of section 57.105(4).”). His failure to do so requires denial of the Amended Motion. *See id.*

As the Fourth District Court of Appeal noted in *Lago*, “[t]o hold otherwise would allow a party to raise a new ground for sanctions in a subsequent motion under section 57.105 without giving the other side the opportunity to withdraw the offending claim or defense within twenty-one days after receiving notice of the new ground for sanctions.” *Id.* Because Aronberg’s barebones First Motion did not include the substantive arguments or cite any evidence now raised in the Amended Motion, Aronberg was required to serve the Amended Motion at least 21 days before filing same, in order to give *The Palm Beach Post* the opportunity to withdraw the count that remained against Aronberg (Count I). The Amended Motion was filed in violation of Fla. Stat. § 57.105(4) and must be denied.

B. THE AMENDED MOTION WAS MOOT UPON FILING.

On November 9, 2020, Aronberg filed the Amended Motion seeking sanctions against Plaintiff relating to Count I of the Complaint against him. However, the entire action, which necessarily included Count I, was dismissed as to Aronberg on October 21, 2020, *nineteen days before* Aronberg filed his Amended Motion. The Amended Motion was therefore moot at the time it was filed on November 9, 2020 and must be denied.

C. ARONBERG’S SELF-DESCRIBED “PLACE-MARKER” FIRST MOTION FOR SANCTIONS WAS INSUFFICIENT AND DID NOT ABSOLVE ARONBERG OF THE REQUIREMENT TO SERVE THE AMENDED MOTION PRIOR TO FILING.

Aronberg specifically admitted that his First Motion for sanctions under Fla. Stat. § 57.105 was filed as a “place-marker” to “notify Plaintiff of the State Attorney’s intention to seek sanctions should he prevail on the merits at a future substantive hearing.” *See* Aronberg’s October 14, 2020 Reply [DE 45], at 5, 13 (“The 57.105 Motion was filed . . . to further put the Plaintiff on notice that the State Attorney would seek sanctions should he prevail on the merits of the lawsuit.”).

The First Motion for sanctions was insufficient under Fla. Stat. § 57.105 when filed – it set forth no substantive arguments as to why Count I of the Amended Complaint was insupportable based on material facts in the record or the application of existing law to those facts. Rather, at the time the First Motion was filed, there was no evidence in the record supporting the statement by Aronberg’s counsel that it was impossible for him or the State Attorney’s Office to provide the documents sought in the Complaint.

Essentially, what Aronberg argued in his “place-marker” First Motion is that if he prevailed in defending the lawsuit, his attorneys’ fees should be awarded as sanctions against Plaintiff in his favor.⁵ There is no such mechanism as a “place-marker” motion for sanctions. Otherwise, any defendant could file a threadbare and conclusory “place-marker” notice of his intent to seek fees if he ultimately prevails, and then seek fees based on *later-filed* evidence and arguments. A motion for sanctions must be supported by the record evidence at the time it is filed. Because the First Motion was not so supported, it fails under the statute. Further, as explained above, service of the First Motion did not absolve Aronberg of his obligation to serve the Amended Motion on Plaintiff

⁵ Aronberg’s “place-marker” First Motion appeared to be based erroneously on a prevailing party standard (*see* Reply, at 5, 13), which is not the applicable standard for imposing sanctions expressly set forth in Fla. Stat. § 57.105.

through counsel prior to filing the Amended Motion. The First Motion cannot be a “place-marker” for the mandated service of the Amended Motion.

III. THE ISSUES RAISED IN COUNT I OF THE COMPLAINT WERE NOVEL AND COMPLEX AND PRESENTED A GOOD FAITH ARGUMENT FOR THE INTERPRETATION OF EXISTING LAW OR ESTABLISHMENT OF NEW LAW

Both counts of the Complaint raised novel and complex issues and were presented to the Court as a good faith argument for the interpretation of existing law, or at the very least, the establishment of new law, based on the material facts.

Where an issue is novel and complex, sanctions under Section 57.105(a) may not be imposed. *Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879 (Fla. 3d DCA 2015). Sanctions are plainly inappropriate under the statute where, as here, a good faith basis exists for a proposed interpretation of the law applied to the material facts. See Fla. Stat. § 57.105(1). Moreover, even in the absence of existing supportive law, if the claim at issue was presented as a good-faith argument for the extension or modification of existing law or the establishment of new law, with a reasonable expectation of success, the Court cannot sanction the party or its attorney. See *Key Biscayne Gateway Partners, Ltd. v. Village Council for Village of Key Biscayne*, 240 So. 3d 84, 87 (Fla. 3d DCA 2018) (reversing order of sanctions under 57.105 as good faith argument was presented for extension of existing law with reasonable expectation of success).

Indeed, Fla. Stat. § 57.105(3)(a) mandates that monetary sanctions shall not be awarded

if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success. [Emphasis added.]

The claims in the Complaint presented a case of first impression. Indeed, in the motions and orders in this action, neither this Court nor the State Attorney or the Clerk cited to any case that previously resolved the issues presented relating to the media’s implied private right of action under Fla. Stat.

§ 905.27 (as alleged in Count II) or for declaratory relief to obtain grand jury materials (as alleged in Count I).⁶ The November 9, 2020 Amended Motion appears to relate only to Count I of the Complaint (although, as set forth above, no count was pending against Aronberg as of October 21, 2020). While Count II alleged that *The Palm Beach Post* has constitutional and statutory standing to overcome grand jury secrecy provisions “in furtherance of justice,” Count I, in contrast, did not allege a Section 905.27 private right of action. Instead, Count I sought declaratory relief under the U.S. Constitution’s First Amendment and the Florida Constitution’s analogous provisions.

The Constitutional provisions and interpretive case law, along with Fla. Stat. § 905.27, provided ample grounds for this Court to direct the release of the Epstein grand jury materials to *The Palm Beach Post* as a surrogate for the public, or require the Court to conduct an *in camera* examination of the same, to balance the public’s right to know through a free media with Florida’s qualified statutory interest in grand jury secrecy, as sought in Count I. Plaintiff relied upon such authorities in its prior filings and arguments in this matter to propose a good faith interpretation of existing law in support of its declaratory relief claim in Count I. See, e.g., First Amended Complaint [DE 17], at 15-19; Plaintiff’s Opposition to Aronberg’s Motion to Dismiss Count II of the First Amended Complaint [DE 26], at 10-20; Plaintiff’s Memorandum of Law in Opposition to Aronberg’s First Motion [DE 43], at 5-7. At the very least, Plaintiff provided a good-faith argument for the extension or modification of existing law or the establishment of new law, and thus sanctions are not appropriate under Fla. Stat. § 57.105(3)(a).

⁶ As to Count II, Plaintiff presented various reasoned arguments why Section 905.27 creates a private right of action in favor of the media on both constitutional and statutory grounds. See Plaintiff’s Opposition to Aronberg’s Motion to Dismiss Count II of the First Amended Complaint, at pp. 10-15.

Moreover, the material facts in the record at all times supported Plaintiff's claim against Aronberg. When Count I was filed, and throughout the litigation prior to Aronberg's dismissal, Plaintiff had a good faith basis for understanding that the State Attorney's Office had either access to, control over, or the ability to impinge, prevent, or thwart Plaintiff's attempts to obtain public access to the Epstein grand jury materials. *See, e.g., Ferlanti*, 193 So. 3d at 1000 (reversing trial court's award of 57.105 fees for naming husband as defendant in mortgage foreclosure proceeding, even though husband was never a signatory to mortgage or note and plaintiff made no such allegations, but there was at least some triable set of facts under which defendant could have been liable). The Amended Motion for sanctions should be denied based on the explicit provisions of Fla. Stat. §§ 57.105(1)(a)-(b) and (3).

IV. STATE ATTORNEY ARONBERG WAS A PROPER PARTY

While Aronberg alleged in the enclosure letter to his First Motion that his office did not have physical possession of the Epstein grand jury materials, he nevertheless argued in that same letter, relying on Section 905.27, that the Clerk should not produce them. By taking a position against disclosure, Aronberg, in effect, asserted his right to the secrecy of the Epstein grand jury materials. Stated another way, Aronberg claimed the statutory right for the State Attorney's Office to *prevent* access to the Epstein grand jury materials, a position which actually supported the propriety of naming him, in his official capacity, as a party defendant in this action.

As State Attorney, Aronberg was not named in this action solely as a custodian of the grand jury records. Rather, he was a defendant in his official capacity as his office has "as its *primary* interest the protection of its grand jury system." *In re Grand Jury Proceedings*, 832 F. 2d 554, 559 (11th Cir. 1987) (italics in original). In that case, the federal government petitioned a Florida State Attorney to turn over state grand jury transcripts. In opposition, the Broward State Attorney argued against their release, citing to Section 905.27. Later, a federal grand jury served a subpoena upon

the same State Attorney seeking grand jury transcripts. The State Attorney advised the federal court that he would produce the transcripts, thereby demonstrating that irrespective of physical possession, he had legal authority to obtain and deliver them pursuant to the subpoena. For these same reasons, State Attorney Aronberg, in his official capacity, was a necessary party, at the very least as a nominal defendant.

Further, even assuming the State Attorney did not have physical possession, Florida law does not prohibit his office from requesting the Epstein grand jury materials from the Clerk. Indeed, as the State Attorney is well aware, Florida Statutes Chapter 905 does not bar any State Attorney from accessing grand jury materials, even after a defendant has been convicted and sentenced.

CONCLUSION

Based on the foregoing, Plaintiff, CA Florida Holdings, LLC, respectfully requests that the Court deny State Attorney Dave Aronberg's Amended Motion for Attorneys' Fees in its entirety, and grant such other and further relief as the Court deems necessary or proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2021, a true and correct copy of the foregoing has been filed with the Clerk of the Court using the State of Florida e-filing system, which will send a notice of electronic service for all parties of record herein.

/s/ Stephen A. Mendelsohn
STEPHEN A. MENDELSON