

District Court Refuses to Vacate Sanctions Awards Following Settlement

by Thomas E.L. Dewey

When parties agree to settle an action, they usually try to wrap up all aspects of the litigation. Pending motions are withdrawn, ancillary actions in other fora are voluntarily dismissed, and binding promises are made not to relitigate the dispute. But a recent decision from the Southern District of New York reminds us that the parties are not the only ones who have a say in what can be resolved in a settlement agreement. Courts have an interest in preserving their authority to enforce orders and procedural rules, and parties cannot avoid the consequences of noncompliance through private settlement.

In *Rogue Wave Software v. BTI Systems*, No. 16-cv-7772 (VM), 2018 WL 6920770 (S.D.N.Y. Dec. 14, 2018), the parties reached a settlement agreement following a contentious discovery process, during which the defendants were sanctioned twice for failing to produce requested documents and information. As a part of the settlement, the plaintiff agreed to use its best efforts to cooperate with the defendants in seeking to vacate the sanctions orders. The parties jointly moved to vacate, but Magistrate Judge Kevin Fox denied the motions and Judge Victor Marrero affirmed, holding that the public interest in deterring noncompliance with procedural rules and court orders in this case outweighed the public interest in encouraging settlements.

Background

In *Rogue Wave*, plaintiff *Rogue Wave Software*, sued defendants *BTI Systems* and *Juniper Networks* (collectively, *BTI*) for copyright infringement based on *BTI*'s alleged continued use of *Rogue Wave*'s software after the expiration of a software license agreement. *Id.* at *1. The action was originally brought in the District of Colorado but was later transferred to the Southern District of New York and referred to Magistrate Judge Fox for all pretrial purposes. *Id.*

In June 2017, several months after the referral to Magistrate Judge Fox, *Rogue Wave* filed a motion to compel *BTI*'s compliance with an interrogatory requesting information concerning due diligence connected with *Juniper Networks*' acquisition of *BTI Systems* and with a request for production seeking documents on the same subject. *Id.* at *1-2. In a Sept. 7, 2017 order, Judge Fox found that *BTI*'s responses had been so deficient as to warrant sanctions and invited *Rogue Wave* to make an application to recover costs and fees associated with motion to compel. *Id.* at *2-3.

In October 2017, before *Rogue Wave* filed its fee application in connection with the first discovery dispute, *Rogue Wave* filed a motion for sanctions related to a separate discovery issue. *Id.* at *3. In that

motion, Rogue Wave sought to compel BTI to produce the business records that BTI had used to prepare a made-for-litigation sales and revenue summary. *Id.* at *3-4. Magistrate Judge Fox had previously verbally ordered BTI to comply with that request during a telephonic status conference, but BTI offered multiple shifting excuses to Rogue Wave as to why the data could not be produced and ultimately informed Rogue Wave that it was unwilling to make the efforts necessary to compile and produce the information. *Id.* In its motion, Rogue Wave sought to preclude BTI from relying on the information set forth in its sales and revenue summary and also requested reasonable attorneys' fees in connection with the motion. *Id.* at *4. In a Dec. 15, 2017 order, Magistrate Judge Fox granted the motion in part and held that Rogue Wave was entitled to fees. *Id.*

Days after that order, and before any attorney's fees had been paid, the parties requested a stay pending settlement discussions. *Id.* at *5. Then, on Jan. 3, 2018, the parties informed the court that they had reached a settlement "in full resolution of this dispute" and that they intended to file dismissal papers after resolving the September 7 and December 15 orders, which the parties agreed to cooperate in seeking to vacate. *Id.* The parties jointly moved to vacate the December 15 order, which Magistrate Judge Fox denied. BTI filed an unopposed objection with the District Court, and the parties jointly moved in the District Court to vacate both the September 7 and December 15 orders. *Id.*

District Court Refuses to Vacate the Sanctions Orders

In affirming Judge Fox's denial of the parties' motion to vacate the December 15 order, and denying the parties' joint motion in the district court to vacate the September 7 and December 15 orders, Judge Marrero described a change in approach to such motions that began in the 1990s. *Id.* at *6. Before then, regular practice in the Second Circuit had been to vacate district court judgments that were "mooted" by settlement, in part because of the "importance of honoring settlements over the finality of trial court judgments." *Id.* (quoting *Nestle Co. v. Chester's Mkt.*, 756 F.2d 280, 283 (2d Cir. 1985)).

Judge Marrero explained that this approach shifted following *Keller v. Mobil*, 55 F.3d 94 (2d Cir. 1995), in which the Second Circuit noted that while district courts have an interest in encouraging settlements, including by vacating interim orders where appropriate, courts need not accede to party requests to vacate sanctions orders "despite the parties' agreement to ask for the withdrawal of the sanction order as a condition to settlement." *Keller*, 55 F.3d at 99. The Second Circuit explained that the "public interest in having rules of procedure obeyed is at least as important as the public interest in encouraging settlement of disputes." *Id.* Judge Marrero noted that a year after *Keller*, a district court followed that decision in refusing to vacate a fee award following settlement, explaining that "[i]f parties could simply erase such judgments by including a clause in their settlement agreements, the district court's power to deter frivolous litigation would be gutted." *Rogue Wave*, 2018 WL 6920770, at * 7 (quoting *Agee v. Paramount Commc'ns*, 932 F. Supp. 85, 88 (S.D.N.Y. 1996)).

Turning to the facts of this case, Judge Marrero observed that the importance of the public interest in enforcing deterring detrimental conduct and enforcing procedural rules was “exemplified” by BTI’s conduct before Magistrate Judge Fox. *Id.* BTI’s justifications for its failures to produce requested information and documents were inconsistent and not credible, and BTI had refused to comply with the court’s oral order to produce information underlying its sales and revenue summary. *Id.* On the other side of the ledger, Judge Marrero found that vacating orders would do little to promote the public interest in encouraging settlements. *Id.* Although the parties had agreed in their settlement to cooperate in seeking to vacate the awards, the settlement was expressly not conditioned on successful vacatur. *Id.* Moreover, there was nothing to prevent Rogue Wave from simply agreeing not to collect on the fee awards, while at the same time keeping the court’s sanctions awards in place. *Id.*

Practice Tips

We are used to hearing that courts favor the settlement of disputes over litigation, and that preference for settlement can lead courts down interpretive paths they might not otherwise have taken in order to preserve and promote private settlements. But this case provides an important reminder that other interests can outweigh the interest in encouraging settlements, particularly where a court’s authority to enforce its own orders is at issue. It also teaches that bad faith during the discovery process can have lasting consequences that cannot always be avoided.

This article first appeared in the *New York Law Journal* on January 25, 2019. Sean K. Mullen, an associate at the firm, assisted with the preparation of this article.