

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

Ex. B

IN RE
COMPLAINT NO. 01-10-90001

BEFORE

Lipez and Thompson, Circuit Judges,
Lisi, Gelpi, and Laplante District Judges

ORDER

ENTERED: DECEMBER 14, 2010

Petitioners, litigants, have filed a petition for review of Chief Judge Lynch's order dismissing a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a), against a district judge in the First Circuit. The petitioners originally alleged that the judge engaged in misconduct while presiding over a trademark infringement proceeding filed against them. For the reasons explained below, the Chief Judge's Order of dismissal is affirmed.

Summary of Complaint

The petitioners charged that the judge was biased against them because of a relationship with plaintiffs' local counsel. The petitioners stated that both the judge and the attorney were employed with different United States Attorneys Offices during the same period of time, though in different cities, some years before the judge's appointment. As a result of this alleged relationship, the petitioners contended that the judge wanted to shield the attorney from the petitioners' claim of malicious prosecution.

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-10-90001

BEFORE

Lipez and Thompson, Circuit Judges,
Lisi, Gelpi, and Laplante District Judges

ORDER

ENTERED: DECEMBER 14, 2010

Petitioners, litigants, have filed a petition for review of Chief Judge Lynch's order dismissing a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a), against a district judge in the First Circuit. The petitioners originally alleged that the judge engaged in misconduct while presiding over a trademark infringement proceeding filed against them. For the reasons explained below, the Chief Judge's Order of dismissal is affirmed.

Summary of Complaint

The petitioners charged that the judge was biased against them because of a relationship with plaintiffs' local counsel. The petitioners stated that both the judge and the attorney were employed with different United States Attorneys Offices during the same period of time, though in different cities, some years before the judge's appointment. As a result of this alleged relationship, the petitioners contended that the judge wanted to shield the attorney from the petitioners' claim of malicious prosecution.

The petitioners asserted that the judge improperly: 1. relied on the attorney for legal advice during a specified hearing; 2. told the petitioners not to attend another hearing; 3. issued rulings without having reviewed the petitioners pleadings; 4. failed to accurately record and execute verbal orders; and 5. withheld evidence from the petitioners and from the appellate record.

As to the first claim, the petitioners stated that, during a status conference, the judge twice improperly asked the attorney for "advice on the rules," thus indicating "that a camaraderie exists between them." Second, the petitioners claimed that one of them had planned to appear in person at another hearing but "was told not to" by the judge's clerk. As a result, the conference was allegedly held in chambers with only the plaintiff's local counsel present while both petitioners appeared by telephone.

Third, the petitioners contended that the judge failed adequately to review the petitioners' pleadings before issuing rulings, including the petitioners' opposition to the plaintiff's motion for voluntary dismissal. The petitioners assert that the judge was predisposed to allow the plaintiff's motion, and that the transcript of the hearing demonstrated that the judge was "unaware that the [petitioners] had filed an objection." The petitioners concluded that the judge wrongfully dismissed the case without prejudice and without having read the petitioners' opposition, in order to "shield [the attorney] and his fellow attorneys from liability for malicious prosecution."

The petitioners alleged that the judge also failed to read other pleadings filed by the petitioners, including those in support of the petitioners' motion to file documents under seal, as well as the petitioners' submissions demonstrating that the "confidentiality order to did not require parties to return any documents." The petitioners argued that the judge's ignorance of these pleadings was evident from the court's orders denying the motion for costs and ordering

that the materials subject to the confidentiality order "should have been returned to the plaintiffs."

Fourth, the petitioners charged that the judge neglected to accurately record "key orders," thereby undermining the "effective and expeditious administration of the business of the courts." The petitioners stated that a verbal order was incompletely transcribed into the electronic notes for the proceeding and thus "falsely suggest[ed] that the return of the documents had been ordered regardless of what the confidentiality order stated." The petitioners also stated that a scheduling order omitted the judge's statement indicating that the number of permissible depositions would be revisited at a later time.

Lastly, the petitioners charged the judge with "withholding evidence." They stated that bank documents, requested by the magistrate judge for *in camera* review, were delivered to the courthouse from another district court where related litigation was pending. The petitioners said that, though they had subpoenaed the records and paid the associated costs, the judge's docket clerk failed to docket receipt of the records and told the petitioners that they were "lost." From this, the petitioners inferred that the judge unlawfully withheld the documents from the petitioners and wrongfully authorized their release to the plaintiffs in a "profound expropriation of defendants' property without due process."

Order of Dismissal

Based upon a review of the complaint, the case records, and the transcripts, Chief Judge Lynch determined that the essence of the complaint -- that the judge had a relationship with plaintiff's local counsel that caused the judge to be biased against the petitioners -- was without factual foundation. The inquiry revealed that the judge and the referenced attorney were

employed by different United States Attorneys' Offices for several years before the judge's appointment to the bench. The Chief Judge found no evidence of any relationship between the two whatsoever, let alone one that caused the judge's impartiality to reasonably be in question. See Code of Conduct, Canon 3(C)(1).

The Chief Judge then addressed each of the petitioner's remaining claims in turn. Regarding the charge of an improper "camaraderie" between the judge and the attorney, Chief Judge Lynch observed that, at the cited telephonic conference, the out-of-state lead counsel for the plaintiffs (not local counsel) presented the issues relevant to his clients, and both petitioners responded in turn. The Chief Judge determined that the judge endeavored to assist the petitioners, as pro se litigants, with the discovery process by asking both local counsel and his clerk about specific rules which the judge did not have before him. As there was no evidence of any "improper camaraderie," between the judge and local counsel, the claim was dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(d).

As to the second charge -- that the judge's clerk told one of the petitioners not to attend a hearing -- Chief Judge Lynch noted that the clerk reported no recollection of telling either petitioner anything specific about this hearing, although he had previously, at the court's direction, authorized the petitioners to appear by telephone. The Chief Judge explained that, regardless, any such statement by the clerk would not itself suggest judicial wrongdoing. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A). See Order, Boudin, C.C.J., In Re: Complaint No. 406, September 9, 2005, at 3 (Clerical error does not alone suggest judicial misconduct.)

Chief Judge Lynch went on to address the third claim that the judge neglected to

adequately review the petitioners' pleadings. As to the cited hearing on the plaintiff's motion for voluntary dismissal, the Chief Judge observed that the transcript demonstrated that the judge heard from both parties in full. The judge stated that he had seen the petitioners' opposition to the motion and there was no evidence to the contrary. Even if there was, the Chief Judge explained, the claim would not be a basis for misconduct. See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, December 22, 2005, at 4 (Court's allowance of motion to dismiss prior to receiving opposition does not, standing alone, constitute judicial misconduct.) Thus, the Chief Judge dismissed the claim as not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

The Chief Judge also found no evidence supporting the related charge -- that the court allowed the motion for voluntary dismissal (without prejudice) in order to undermine the petitioners' ability to file a malicious prosecution claim. Chief Judge Lynch noted that, in dismissing the matter, the judge relied "on the representation by the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can . . . achieve any meaningful relief based on the facts . . . as they now exist, including . . . the bankruptcy of one of the defendants." Chief Judge Lynch further noted that the court responded to the petitioners' concerns about costs by allowing them to file a motion, and to their concern that the case could be refiled in another forum by ordering that any related action by the plaintiffs be brought in the same court. Thus, the claim was likewise dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(d).

As to the other orders at issue, Chief Judge Lynch explained that the record was devoid of evidence that the judge had neglected to consider the petitioners' pleadings filed in connection with their motion for costs, the confidentiality order, and their motion to file documents under

seal. The Chief Judge reviewed the court's grounds for its rulings on these matters and found no basis from which to infer that they were illicitly motivated. Accordingly, the Chief Judge explained that the petitioners' disagreement with the merits of a ruling is not a basis for a finding of misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Regarding the petitioners' fourth claim -- that the judge failed to properly record and execute verbal orders -- Chief Judge Lynch explained that the clerk's notes are a summary of the proceedings before the court, and do not have either the specificity or the weight of a court order. Therefore, the alleged omission from the clerk's notes did not change or undermine the court's order, as recited from the bench, let alone suggest judicial wrongdoing.

The same held true for the cited scheduling order that the petitioners contended omitted the judge's verbal statement (that the issue of the number of permissible depositions would be revisited). Chief Judge Lynch explained that the scheduling order is a pre-printed timetable for discovery and motion practice into which deadline dates are inserted. The absence of such a verbal qualification from the scheduling order was not indicative of judicial misconduct. Regardless, Chief Judge Lynch noted that the issue was addressed at a subsequent status conference. Thus, the claim that the judge undermined the "effective and expeditious administration of the business of the courts" by neglecting to accurately record "key orders" was dismissed as baseless. See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(d).

Chief Judge Lynch found the petitioners' fifth and final charge -- that the judge withheld evidence -- to be equally unfounded. The Chief Judge explained that the documents at issue were, as alleged, delivered from a bank to the court from another district court, where related

litigation was pending. The record reflected that they were received by clerk's office staff and forwarded to the presiding magistrate judge for *in camera* review. In accordance with clerk's office practice, the discovery documents delivered under seal were not docketed. At the hearing on the plaintiff's motion for voluntary dismissal, the judge ordered the return of "any records that were delivered under seal and that are in the custody of the magistrate judge [to be] returned to the party that produced [them]." In accordance with this order, the documents were retrieved by a representative of the plaintiffs' counsel.¹

Chief Judge Lynch determined that there was no information suggesting that the judge's order was improperly motivated, much less any evidence that the judge wrongfully retained, concealed, or withheld the documents - either from the petitioners or from the appellate record. See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(d). Furthermore, the Chief Judge explained, if there was a clerical error made in connection with the management of these documents -- of which there was no evidence -- it would not be attributable to the judge. See Order, In Re: Complaint No. 406, supra.

Petition for Review

In the petition for review, the petitioners essentially reiterate their initial claims. They assert that Chief Judge Lynch improperly decided "reasonably disputed" issues, based the order of dismissal on "clearly erroneous findings," and failed to address "key allegations" in the complaint. Despite the petitioners' lengthy arguments on each issue, their underlying claim --

¹It appears from the record that the petitioners had been directed by the other district court to pay the costs associated with the reproduction of the documents but the bank records were those of the plaintiffs.

that the judge was biased because of the judge's personal or professional relationship with the plaintiffs' local counsel -- is not supported by a shred of evidence. The basis for this charge is the fact that both the judge and this attorney were employed by different U.S. Attorneys' Offices for an overlapping period of time, some years before the judge was appointed to the federal bench. As Chief Judge Lynch observed, there was no evidence of any relationship between the two whatsoever, let alone one that provided grounds to question the judge's impartiality or necessitated the judge's recusal from the case. See Code of Conduct, Canon 3(C)(1).

From this alleged relationship, the petitioners infer bias throughout the judge's handling of their case. They contend that, in addressing their specific charges of bias, Chief Judge Lynch improperly decided "reasonably disputed issues" that should have been left to a special committee. However, dismissal is appropriate where the allegations "lack any reliable factual foundation . . . are conclusively refuted by objective evidence," such as transcripts, or where "the allegations [even if true] do not constitute misconduct." Rules for Judicial-Conduct, Commentary on Rule 11. As explained below, Chief Judge Lynch correctly dismissed the petitioners' claims within the parameters of Rule 11.

Regarding the first charge - that the judge improperly asked the attorney for advice on procedural rules -- the petitioners assert that Chief Judge Lynch erroneously concluded that the judge directed a question to the clerk, when the record demonstrates that the question had been directed only to counsel, thus indicating the illicit "camaraderie" between the two. The petitioners state that, "[b]ecause the attributing of the judge's actions to camaraderie and friendship with [this attorney] is logical and reasonable, a limited inquiry cannot determine otherwise."

The petitioners' inference is misplaced. The transcript demonstrates that the parties

present during the telephonic conference engaged in a dialogue concerning the permissible number of depositions. As the Chief Judge observed, at one point one of the petitioners asked "how this ten is calculated," and the court responded: [i]t's just the rule. . . . I don't know -- it's ten per side, or is it. . . ?" The judge's clerk responded: "I think it's ten per side." The judge then asked whether local counsel had the rule "handy" and the attorney said "I don't, but I recall it being ten per side." There is nothing in this dialogue that is remotely suggestive of an improper relationship between the attorney and the judge, a camaraderie between the two, or any other judicial wrongdoing. The charge to that effect was properly dismissed. See 28 U.S.C. §§ 352(b)(1)(B), and 352(b)(1)(A)(i).

Second, the petitioners charge that Chief Judge Lynch wrongfully dismissed, as clerical error, their claim that one of the petitioners was told not to attend a hearing. The petitioners state that the clerk's contention that he did not recall making any such statement raised an issue of credibility not appropriate for resolution by limited inquiry. The petitioners reiterate the charge that the request for the petitioner not to appear was given at the judge's direction and evidenced the judge's "favoritism toward [plaintiff's local counsel]"

As indicated by the Chief Judge, court staff reported that the judge had previously authorized both petitioners to appear by telephone, as one of the petitioners and their counsel resided out-of-state. The clerk stated that he did not recall telling the petitioners anything specific about the cited hearing. Moreover, as the Chief Judge determined, the issue is not determinative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). There was no evidence whatsoever that the judge directed the clerk to prohibit the appearance of the parties at the specified hearing, or interfered with the petitioners' access to court at any other time during the course of the proceeding. See 28 U.S.C. § 352(b)(1)(B).

The petitioners reiterate the charge that the judge failed to read the petitioners' opposition to the motion to dismiss, as well as other pleadings filed by the petitioners. They contend that Chief Judge Lynch erroneously found no evidence to support this claim. The petitioners state that the judge's question about when the opposition to the plaintiff's motion for voluntary dismissal was filed, asked at the beginning of the hearing, indicated that he had not read the document, and that the judge's subsequent statement that he had seen the pleading, raised an issue of credibility not resolvable by a limited inquiry. The petitioners add that the cited order in Complaint No. 406 was not applicable because it concerned oppositions that had not been filed with the court, as opposed to those that had been received but not reviewed.

Contrary to the petitioners' claims, the judge's question at the hearing (concerning when the petitioners' opposition had been filed) and his subsequent statement (that he had seen the document) do not demonstrate that the judge had not reviewed the petitioners' opposition to the motion for voluntary dismissal. Nor was there any evidence that the judge had neglected to review the petitioner's other pleadings, including those pertaining to the petitioners' motion for costs, the confidentiality order, and their motion to file documents under seal.² The petitioners rely on orders with which they disagree as purported evidence that the judge neglected to consider their arguments. Where, as here, the lengthy record of the case demonstrates the judge's

²The petitioners contend that the fact that the judge denied their motion for costs two days before he ruled on the petitioners' related motion to file under seal indicates that the judge had not read all of the petitioners' submissions when it ruled on their motion for costs. However, the relative timing of the court's rulings indicates nothing. Each of the pleadings referenced by the petitioner -- their motion for costs, the plaintiff's reply, their response to this reply, and the motion to file under seal -- were filed several months before the judge issued the relevant rulings. The fact that the two rulings were issued two days apart is irrelevant. Moreover, for the reasons indicated, the court's failure to have read each of these submissions would not alone suggest misconduct.

careful consideration of the issues presented, both in the transcripts and in the court's orders, the level of attention that the judge gives to each individual pleading remains a matter of discretion. Accordingly, the charge that the judge neglected to adequately consider the petitioners' filings was appropriately dismissed as factually unsupported, pursuant to 28 U.S.C. § 352(b)(1)(B), and as not indicative of misconduct, pursuant to 28 U.S.C. § 352(b)(1)(A)(i).³

The petitioners next contend that Chief Judge Lynch erroneously determined that there was no evidence that the court granted the motion to dismiss, specifically without prejudice, in order to undermine the petitioners' malicious prosecution claim. The petitioners assert that the judge issued this order directly in response to plaintiffs' counsel's argument that to do so was necessary to avoid such a claim by the petitioners, and that the judge's ostensible reasoning for dismissing the case raised an issue of credibility.

There is no issue of credibility because there is no evidence that the judge harbored any illicit motivation in dismissing the case without prejudice. The governing rule provides that a voluntary dismissal is to be without prejudice unless the court decides otherwise. See F.R.C.P. 41(a)(2). The parties briefed and argued the issue in full at the hearing. Despite the petitioners' claim to the contrary, the number of words uttered by each party at the hearing is not determinative of whether the judge heard the parties in full. The court repeatedly asked whether the petitioners had "anything else," or if they wanted to "be heard," before allowing the voluntary

³The petitioners seemingly assert that a judge is obligated to review an opposition once received but, consistent with the Order in Complaint No. 406, could have decided the issue prior to receipt of the pleading. If it is within the court's discretion to rule on a matter before receipt of a pleading, it is necessarily within the court's discretion to determine the level of review warranted by a given submission. See Order, Judicial Council of the First Circuit, In Re: Complaint No. 406, December 22, 2005, at 4 (Court's allowance of motion to dismiss prior to receiving opposition does not, standing alone, constitute judicial misconduct.) In any event, the judge ruled promptly and thoroughly on all pending matters.

dismissal on the stated grounds. Chief Judge Lynch correctly determined that there was no evidence that the judge was improperly motivated in allowing the motion for voluntary dismissal without prejudice. See 28 U.S.C. § 352(b)(1)(B). The petitioner's disagreement with this ruling did not provide a cognizable basis for a misconduct complaint. See 28 U.S.C. § 352(b)(1)(A)(ii).

The petitioners likewise have no basis for the related inference that the judge imposed conditions on this ruling -- that any subsequent action would have to be filed in the same court and that the petitioners could file a motion for costs -- knowing that they were "essentially meaningless." The petitioners suggest that the judge never had any intention of allowing the motion for costs and that he knew that any subsequent claim for malicious prosecution would have to be brought in state court for lack of diversity. First, the issues of forum shopping and jurisdiction were discussed at the hearing. The court stated that its concern was that the plaintiffs could bring "the same . . . or a similar claim . . . in some other forum, and that the most obvious danger . . . is that there's . . . the possibility of some tactical issue going on here where plaintiffs decide they's rather be in a different court." In response, plaintiff's counsel explained that, because the petitioners had voiced an intent to sue for malicious prosecution, they needed to retain the ability to bring an affirmative claim. The judge's statement -- that "we'll have to wait and see how that plays out and *in what court* (emphasis added)," -- is consistent with this dialogue and evidences no improper animus. Nor does the court's subsequent denial of the petitioners' motion for cost demonstrate that the judge did not consider the motion impartially, or intended to deny it when he authorized its filing. The order cites its reasons and the petitioners' disagreement with it does not mean that the judge was biased or neglected to adequately review the record.

With regard to the court's reliance on verbal orders, the petitioners argue that Chief Judge

Lynch erroneously concluded that, at the status conference, the court addressed the issue of the number of depositions as originally "framed during the (previous) scheduling conference." The transcript of the status conference demonstrates that the court spoke to the issue, noting that "[o]ne size does not fit all" (in terms of the appropriate number of depositions allotted), and ordered the petitioners to file a motion if they wanted more than 10 depositions. If the petitioners' contention is that the court did not resolve the issue to their satisfaction, the claim is not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii).

In support of the final claim that the judge withheld evidence, the petitioners contend that the court failed to docket a receipt for the documents received from the bank and improperly returned the documents to the plaintiffs. The petitioners reiterate the charge that Chief Judge Lynch, like the judge charged in this matter, mistakenly determined that the confidentiality order required the return of the bank documents to the plaintiffs. The petitioners argue that either the court or the clerks erred in this regard and the determination is beyond the permissible scope of a limited inquiry.

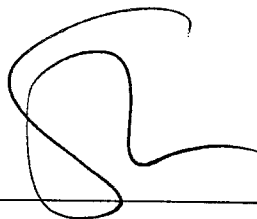
In the original complaint, and in their pleadings, the petitioners contended that the bank documents should have been turned over to them because they paid the cost of production. The petitioners now argue that the documents, produced by the bank, should have been returned to the bank as the party that produced them. Regardless, nowhere do the petitioners provide any evidence that the judge harbored any illicit animus in ordering the return of documents in accordance with the confidentiality order. Any suggestion that the judge intentionally directed the clerk to release them to the incorrect party is untenable, and was properly dismissed.⁴ See 28

⁴Although not necessary to the determination of the present matter, the issue of the handling of the bank documents was addressed in correspondence from the Clerk of the District

U.S.C. § 352(b)(1)(B). As the Chief Judge also explained, if there was a clerical error made in connection with the management of these documents -- of which there was no evidence -- it would not be attributable to the judge. See 28 U.S.C. § 352(b)(1)(A)(i), and Order, In Re: Complaint No. 406, *supra*.

In sum, from a supposed relationship between the judge and the plaintiff's local counsel, the petitioners infer that virtually every statement and order issued by the judge in their case was a manifestation of the judge's nefarious intentions to protect this attorney. However, there is, as Chief Judge Lynch properly concluded, nothing in the complaint or in the record of the case to support the petitioners' inferences. Accordingly, the misconduct complaint was properly dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-10-90001 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).



Susan Goldberg, Acting Secretary

Court to one of the petitioners. The Clerk explained that the documents were handled pursuant to court policy and in accordance with the judge's order. Another district judge, to whom the case was transferred, recently upheld the magistrate judge's order denying the petitioners' motions for return of the documents. ("The fact that defendants paid for the copying of these records does not confer ownership on them and until a ruling by the magistrate judge that defendants were entitled to these documents, [the plaintiff's] right to this private information trumped defendants' right to see and distribute them.").