No. 08-2457; No. 09-2615

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 07-40098

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STAY OR HOLD IN ABEYANCE DEFENDANTS' APPEALS

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INTRODUCTION

Defendants' motion in the district court ("DM") to forward to this Court the bank statements produced by MidCountry Bank ("MidCountry") ("MidCountry records") does not ask the lower court to reconsider or reverse its October 30, 2008, order pertaining to those records. That order has never yet been executed, but Plaintiffs violated that order when Plaintiffs obtained the MidCountry records. The district court appears to be complicit.

Attached to Plaintiffs' response ("PR") to the instant motion was Exhibit G, Plaintiffs' response to Defendants' motion below. Defendants' reply to that response which was filed below is attached hereto as **Exhibits 1–3.**

PLAINTIFFS' RESPONSE REBUTTED AND REFUTED

I. THE OCTOBER 30, 2008, DISMISSAL ORDER

A. Plaintiffs Admit Obtaining the MidCountry Records in Violation of That Order

As Exhibit E of Plaintiffs' response to the instant motion, Plaintiffs refiled Record on Appeal Docket Entry ("RA") 141 pages 1–2, 13–15, confirming that Plaintiffs know that the order at the top of page RA 13 says the following:

> THE COURT: ... And any records that were delivered under seal and that are in the custody of the magistrate judge shall be returned *to the party that produced those documents.*

(italics added).

Plaintiffs do not dispute that MidCountry is the party that produced the

MidCountry records. (PR 3). Plaintiffs admit that Plaintiffs, not MidCountry, now possess the records, a clear violation of the above order. (PR 5). In their response to the instant motion, Plaintiffs repeatedly use the word "return," knowing full well that "return" never means "surrender to someone who never had them before."

B. Staying the Order to Return the MidCountry Records

Since the MidCountry records have never yet been returned to MidCountry, that order has never yet been executed. Defendants' new motion in the district court, with accompanying memorandum and exhibits, is also a motion to stay, and is attached hereto as **Exhibits 4–7.**

But Defendants are in doubt that a motion to stay is even required. Plaintiffs requested the "return" of confidential documents pursuant to the confidentiality order of the underlying case. (RA 121 pp. 6–7). That confidentiality order does not require parties or court staff to return any documents. (RA 60 pp. 1–6). Since the district judge explicitly conditioned his orders to return documents on the requirements of the confidentiality order (RA 141 pp. 12, 14–15), it is questionable whether the MidCountry records were really truly ordered to be returned and any order to convey these documents to Plaintiffs constitutes expropriation.

Plaintiffs believed that the MidCountry records couldn't be returned without Defendants' consent, even with the order of October 30, 2008. (RA 162-6). If Plaintiffs were correct, no stay is required, since Defendants have never consented.

The district court retains jurisdiction to correct or add to the record, but

cannot remove material from the record. Fed. R. App. P. 10(e)(2); *Belt v. Holton*, 197 F.2d 579, 581 (D.C.Cir. 1952); *U.S. v. Forness*, 125 F.2d 928, 932 (2nd Cir. 1942). Thus, the district court is probably without authority to return the MidCountry records during Defendants' pending appeals, even without a stay.

II. DEFENDANTS' NEW MOTION IN THE LOWER COURT: OVERLAPPING, NOT IDENTICAL, RELIEF

A. Defendants Request a Stay and Return of MidCountry Records

Plaintiffs argue that Defendants' new motion in the lower court seeks the same relief as Defendants' first motion (PR 7 n.3), but Defendants' new motion, unlike Defendants' first motion, seeks a stay, and seeks for Plaintiffs to return the MidCountry records to the district court. (Ex. 4).

B. Lower Court on Notice of Expropriation of Defendants' Property

Unlike Defendants' first motion, the new motion puts the district court on notice that the court expropriated Defendants' property by surrendering the MidCountry records to Plaintiffs in violation of the court's own order, without a legal basis for doing so, and without due process. (Ex. 4; Ex. 5 pp. 3, 10–11).

This expropriation occurred when Plaintiffs' counsel John Pucci ("Pucci") sent his employee to a federal courthouse, who then walked out with the sole copy of 11 to 12 pounds of sealed records, all without authorization. (Ex. 5 p. 6). Defendants' first motion made no reference to this serious security breach.

III. LOWER COURT HAS NO JURISDICTION TO ALTER ORDERS

Plaintiffs would obviously like the lower court to alter its order of October 30, 2008, to sanction the surrender of the MidCountry records to Plaintiffs, but this it cannot do during Defendants' pending appeals.

Plaintiffs also would like the lower court to alter the confidentiality order in order to impose the latter order's non-party return requirements upon parties. (PR 5–6). To the extent that the lower court's October 26, 2009, order was an attempt at such an alteration (*Id.*), Plaintiffs were successful in persuading the lower court to do what it has no jurisdiction to do during Defendants' pending appeals.

IV. NATURE OF MIDCOUNTRY RECORDS

A. MidCountry Records Not Owned by Shelton

The MidCountry records are "the business records of" MidCountry, not the "private papers" of Danny Lee Shelton ("Shelton"), and Shelton "can assert neither ownership nor possession" of them. *U.S. v. Miller,* 425 U.S. 435, 440 (1975). Shelton "has no proprietary interest" in these bank records. *Provenza v. Rinaudo*, 586 F.Supp. 1113, 1116 (D.Md. 1984). The Financial Privacy Act does not shield such records of transactions "from discovery in a civil suit." *Clayton Brokerage Co. v. Clement,* 87 F.R.D. 569, 571 (D.Md. 1980).

> ... in the absence of privileged information, Federal Rule of Civil Procedure 26(b) does not limit the discovery of otherwise confidential or private information.

Rotoworks v. Grassworks, 2007 U.S. Dist. LEXIS 30713 at *5–6 (W.D.Ar. 2007).

B. MidCountry Records Not Personal, Confidential, or Private

Because the subpoena of MidCountry sought only bank statements, not copies of checks or deposit slips (Doc. 76-3 p. 13), the information sought could not possibly be privileged:

> ... the records—mostly printouts of computerized bank account summaries in the form of monthly statements—do not contain details such as the origin of deposits or destination of withdrawals or copies of checks. ... Nothing in the bank documents at issue identifies "clearly personal" matters such as perhaps checks to healthcare or psychiatric care providers.

Laborers' Pension Fund v. Quality General Constr., 2004 U.S. Dist. LEXIS 5604, at *4–5 (N.D.Il. 2004).

Based on the finding of the court in the District of Southern Illinois, Shelton waived whatever non-existent privilege he had in regards to the MidCountry records when he filed suit alleging defamation *per se* over allegations of private inurement. (RA 152-6 p. 19).

Shelton alleges that the lower court ordered these bank statements to be surrendered to Three Angels Broadcasting Network, Inc. ("3ABN"), not just himself, and does not object. (PR Ex. G at p. 1). Such an order destroys privilege.

V. ORDERS OF D. MINN. CONCERNING MIDCOUNTRY RECORDS

A. Shelton Never Had Standing to Object to MidCountry Subpoena

Shelton, not 3ABN or DLS Publishing, Inc., moved to quash the third-party subpoena. (RA 76-3 p. 18). But Shelton never had standing to do so:

> The law is clear, absent a claim of privilege, a party has no standing to challenge a subpoena to a nonparty. *See Clayton*

> *Brokerage Co., Inc. of St. Louis v. Clement*, 87 F.R.D. 569, 571 (D.C. Md. 1980)(citation omitted). The party to whom the subpoena is directed is the only party with standing to oppose it. *See U.S. v. Tomison*, 969 F. Supp. 587, 591-592 (E.D. Cal.1997).

Donahoo v. Ohio Dept. of Youth Servs., 211 F.R.D. 303, 306 (N.D. Ohio 2002).

B. Order on the Motion to Quash

Shelton not only moved to quash the subpoena, but also moved to stay enforcement of the subpoena, and to remit the motion to quash to the District of Massachusetts. (RA 76-3 p. 18–19). Plaintiffs' counsel's March 11, 2008, letter to Magistrate Judge Boylan abandoned the request to quash, but repeated the request to stay and remit. (Ex. 3 p. 1). Thus, when Magistrate Judge Boylan denied Shelton's motion (RA 63-36), he was ruling that the subpoena would be enforced, not stayed, and that the dispute would not be remitted to the district court here. Since Magistrate Judge Boylan there had conferred with Magistrate Judge Hillman here (DM Ex. 3 at pp. 1–2), the district court here had no problem with the dispute dying a final death in the District of Minnesota.

Magistrate Judge Boylan specifically stated, "MidCountry Bank shall not provide copies of the documents to *any party* herein absent further order of the court." (RA 63-36 p. 2, italics added). No subsequent court order authorized Plaintiffs to obtain a copy of the MidCountry records.

C. Confidentiality Order Requires Filing

The confidentiality order of the underlying case requires confidential

documents to be filed under seal for review when requesting and responding parties disagree over the production of confidential information. (RA 60 pp. 2–3).

Similarly, Plaintiffs' disagreement with Defendants resulted in Magistrate Judge Boylan's ordering the MidCountry records to be sent under seal to the district court here for review. (RA 63-36 pp. 2–3). Given the similarity of Plaintiffs' dispute and what triggers the confidentiality order's filing requirement, the MidCountry records should be considered filed, and thus part of the record.

D. Order on "Motion for Reconsideration"

Since the confidentiality order was issued before the MidCountry records were produced, Defendants requested the district court here to permit their production directly to Defendants. (RA 77 pp. 16–17). The district court here instructed Defendants to seek that relief from the District of Minnesota, so Defendants moved that court to amend its order as instructed. (RA 77 p. 17; RA 76-3 pp. 23–24). But that court then instructed Defendants to instead seek relief from the district court here. (RA 92 pp. 30–32).

VI. PLAINTIFFS REQUEST *IN CAMERA* REVIEW OF RECORDS

Plaintiffs fallaciously assert, more explicitly below, that the underlying case was dismissed before anyone asked the lower court to review the MidCountry records, when Plaintiffs had so requested over four months before dismissal. (PR 1, 4, Ex. G at pp. 2, 4; RA 75 pp. 16–17). Plaintiffs must believe that such a request made the MidCountry records, if for no other reason, part of the record on appeal.

On September 11, 2008, Plaintiffs' request for an *in camera* review of the MidCountry records was denied. (RA 107 p. 5). Thus, when the MidCountry records arrived at the district court the very next day, no legal impediment remained to obstruct Defendants' access to them.

VII. COMPLICITY OF THE DISTRICT COURT

To keep the MidCountry records out of the record on appeal, Plaintiffs assert that the lower court "did not consider the substance of these records," and never reviewed them. (PR 1, Ex. G at 10). But knowledge of the contents of those records may have led to their being mishandled by the district court, and to several adverse rulings. Defendants will seek review in the pending appeal of the district court's mishandling of the MidCountry records.

A. Reception at the District Court

On September 12, 2008, Sherry Jones ("Jones") signed for 11 to 12 pounds of sealed MidCountry records. (DM Ex. 4 at pp. 1–5). Jones is the district judge's docket clerk, and is in charge of multi district litigation. (Ex. 3 pp. 27–30), making it unlikely that she misplaced the documents. Yet when Defendants inquired, they were told by clerks that no one could find the MidCountry records. (DM Ex. 3 pp. 2–4). Those records should have been promptly given to Defendants.

B. No ECF Record of Reception of MidCountry Records

Plaintiffs note that no ECF record was made of the reception by the lower court of the MidCountry records. (PR 4). Yet since an ECF record was made of the

lower court's surrender of those records to Plaintiffs (Doc. 160), an ECF record should have been made of their reception. The failure to do so was an error.

C. The Docketed Receipt for the MidCountry Records (RA 160)

The ambiguity of the docketed receipt (RA 160) and associated docket text gave the impression that the MidCountry records were still in the district court's custody. (Ex. 5 pp. 5–6). But a recent, closer look revealed otherwise. The district court surrendered those records to Pucci on December 16, 2008, one week after the record on appeal in Defendants' first appeal was declared complete. (*Id.*; Ex. 7 p. 1). The receipt filed that day was not entered until December 23, 2008, which was Defendants' deadline for serving their designation of appendix and issues for review. One could suspect that someone knew the MidCountry records were part of the record on appeal, and didn't want Defendants to know that until it was too late.

D. District Judge Understood Significance of MidCountry Records

Given the district judge's rich pre-judicial experience handling the issues found in the underlying case (Ex. 3 pp. 7–23), he must have known that the MidCountry records further establish the guilt of Plaintiffs and their counsel.

Defendants made steady progress in the underlying case until Plaintiffs' counsel informed the district judge that Defendants had claims for malicious prosecution against Plaintiffs and their counsel. (RA 141 pp. 6–10). Since then, the district judge's rulings have handicapped Defendants' ability to pursue those claims, perhaps best explained by a desire to shield his former colleague, Pucci,

from liability for litigating an utterly frivolous and baseless case. (Ex. 1 pp. 10–12).

VIII. PLAINTIFFS' COUNSELS' ASSURANCE: RECORDS ARE SAFE

Plaintiffs' counsel has already demonstrated that he cannot be trusted, for he broke his word that he would not file a motion to dismiss. (RA 127 p. 2). His assurance that the MidCountry records are and will be kept safe (PR 5) does not alleviate Defendants' evidentiary concerns regarding control and custody.

Rather, the fact that Plaintiffs' counsel sent his employee into the federal courthouse to expropriate without authorization the sole copy of 11 to 12 pounds of sealed records (Ex. 5 p. 6) yet again verifies Defendants' long-held concern regarding risk of spoliation of evidence by Plaintiffs.

CONCLUSION

The MidCountry records are a crucial part of the record on appeal, and Defendants' appeals should be held in abeyance until a copy of those records, meeting all standards of the Rules of Evidence, are forwarded to this Court.

Respectfully submitted,

Dated: December 24, 2009

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on December 24, 2009, I served copies of this reply with accompanying exhibits on the following registered parties via the ECF system:

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