

In The
United States Court of Appeals
For The First Circuit

No. 09-2615

Three Angels Broadcasting Network, Inc.,
an Illinois Non-Profit Corporation;
Danny Lee Shelton,

Appellees,

v.

Gailon Arthur Joy and Robert Pickle,

Appellants.

**APPELLEES' RESPONSE TO APPELLANTS' MOTION TO
STAY OR HOLD IN ABEYANCE THEIR APPEAL**

M. Gregory Simpson, # 1133359
Meagher & Geer P.L.L.P.
33 South Sixth Street #4400
Minneapolis, MN 55402
Telephone: (612) 337-9672
Facsimile: (612) 877-3138

John P. Pucci, #26961
J. Lizette Richards, #94745
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northampton, MA 01060
Telephone: (413) 584-8067
Facsimile: (413) 585-0787

Attorneys for Appellees

INTRODUCTION

Appellants Robert Pickle and Gailon Arthur Joy (“Pickle and Joy”) now make a second attempt to enlarge the appellate court record — this time, by asking the district court to reverse its own order requiring return of the MidCountry Bank confidential financial documents. The MidCountry Bank documents are personal, confidential financial records of Appellee Danny Shelton that Pickle and Joy sought via a subpoena issued by the U.S. District Court for the District of Minnesota. Shelton had opposed the subpoena on the basis that his personal banking records had nothing to do with the case. The Minnesota court ultimately ordered that the records be produced under seal to Massachusetts Magistrate Judge Hillman, whereby Judge Hillman would make further decisions concerning whether they should be released to Pickle and Joy and if so, under what circumstances.

But before Judge Hillman was asked to take any action with respect to the MidCountry Bank records, Appellees (Plaintiffs in the district court) Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to as “3ABN”) moved to voluntarily dismiss this case. In the same motion, 3ABN also requested that these confidential documents — which the district court had never substantively reviewed — be returned. When the district court dismissed this case, it also ordered that the MidCountry Bank documents be returned. Pickle and Joy did not take issue with that part of the district court’s order by seeking reconsideration, nor did they seek to stay implementation of the order. Accordingly, Magistrate Judge Hillman released the records to counsel for 3ABN.

Pickle and Joy now request a stay or abeyance of the appellate proceedings to allow the district court to reverse itself and order that the MidCountry Bank records be forwarded to the First Circuit Court of Appeals as part of the district court record. Because the district court's orders are now on appeal, the district court no longer has jurisdiction to revisit the issue of whether or not it should have ordered the MidCountry Bank documents returned. Moreover, this belated request to reconsider the district court's order is untimely. Pickle and Joy's proper recourse is to oppose the order requiring return of these documents in its appellants' brief. Thus, this Court should deny Pickle and Joy's motion to stay this appeal.

STATEMENT OF RELEVANT FACTS

This case arises from a lawsuit by 3ABN alleging trademark infringement, trademark dilution, defamation, and intentional interference with advantageous economic relations against Pickle and Joy. (Docket #1).¹ The allegations in the Complaint were based upon Pickle and Joy operating a web site that used the "3ABN" logo to attract viewers and then bombarded them with disparaging and defamatory statements about 3ABN. (*Id.*).

The parties commenced discovery in the Massachusetts Federal District Court. Pickle and Joy served written Requests for Production of Documents upon 3ABN requesting financial records and bank statements. (*Affidavit of M. Gregory Simpson*, Ex. A at Ex. C). Around this time, Pickle and Joy also issued a subpoena from the District of

¹ "Docket #" refers to the United States District Court District of Massachusetts Civil Docket number of the document.

Minnesota on a branch of MidCountry Bank in Minnesota, served on January 16, 2008. (*Simpson Aff.*, Ex. A at Ex. F). This subpoena sought Appellees' sensitive financial records. (*Id.*). The subpoena was strikingly similar to document requests in Massachusetts that were the subject of 3ABN's motion for protective order, which was unresolved at that time. (*Simpson Aff.*, Ex. A at Ex. H, ¶ 10). 3ABN then moved to quash this subpoena based on the fact that a directly-related motion for protective order was pending in the Massachusetts Federal Court. (*Simpson Aff.*, Ex. B).

The U.S. District Court for the District of Minnesota Federal District Court, Magistrate Judge Arthur J. Boylan presiding, denied Appellees' motion to quash the subpoena on July 1, 2008, but with specific conditions. (*Simpson Aff.*, Ex. C). The Court ordered Pickle and Joy to pay MidCountry Bank's reasonable costs in responding to the subpoena. (*Id.* at 2). Upon payment of these costs, MidCountry Bank was to ship all documents **under seal** to Magistrate Judge Timothy S. Hillman in Massachusetts, whereupon Judge Hillman could determine future handling of the documents. (*Id.*). Pickle and Joy moved for reconsideration of this order, which the Minnesota court denied. (*Simpson Aff.*, Ex. D).

In the meantime, Magistrate Judge Hillman issued a confidentiality order that governed "all documents and information produced, or to be produced by any party or third party in connection with this litigation" (Docket #60). In September 2008, Magistrate Judge Hillman further ordered that all subpoenas to non-parties could only be issued by leave of court. (Docket #107).

The MidCountry records were then produced and delivered to the Federal

Courthouse in Worcester, Massachusetts on September 12, 2008. (*Pickle Aff.*, Ex. 4). There is no ECF record of these documents on that date, indicating that they were not filed and did not become part of the district court record.

On October 23, 2008, before anybody asked Judge Hillman to address the MidCountry Bank documents, 3ABN moved to voluntarily dismiss this lawsuit under Fed. R. Civ. P. 41(a)(2). (Docket # 120, 121). 3ABN's motion to dismiss requested that the Court order the return of all confidential information pursuant to the Confidentiality and Protective Order issued on April 17, 2008 (Docket #60), including but not limited to the MidCountry Bank records then in the custody of Magistrate Judge Hillman. (Docket #139).

The district court dismissed this case on October 30, 2008. (Docket #129). The district court ordered that "all confidential documents be returned, All subpoenas are ordered moot, *Records in possession of Mag. Judge will be returned . . .*" (Electronic Order dated 10/31/08; *see also Simpson Aff.*, Ex. E at 13-15) (emphasis added). At the time of dismissal, Pickle and Joy complained about the cost to obtain the MidCountry records, and the district court invited them to request reasonable costs and fees by motion. (*Simpson Aff.*, Ex. E at 15).

Pickle and Joy then filed a Notice of Appeal with this Court on November 13, 2008. (Docket #133). On the same day, Pickle and Joy filed a motion for costs. (Docket #130). On April 13, 2009, the district court denied Pickle and Joy's motion for costs and attorneys' fees. (Docket #166). Pickle and Joy then filed a motion to reconsider and to amend findings on April 27, 2009. (Docket #169). On October 26, 2009, the district

court denied Pickle and Joy's motion for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions. (Docket #193). In doing so, the court noted that, "to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago.*" (*Id.* at 3) (emphasis added). Pickle and Joy appealed from this order on November 23, 2009. (Docket # 196). These documents have subsequently been returned and are in the possession of 3ABN's counsel. (*Simpson Aff.* at ¶ 8). 3ABN's counsel has assured Pickle and Joy that the records will be maintained in the condition under which they were received until the appellate process has been exhausted. (*Simpson Aff.*, Ex. F).

ARGUMENT

I. Pickle and Joy's motion to stay is procedurally improper and should be denied.

Pickle and Joy's motion to stay or hold in abeyance their own appeals so that the district court can reverse its own order requiring the return of the MidCountry Bank documents has no support in the federal rules. The fact that Pickle & Joy filed a notice of appeal in this Court has absolved the district court of jurisdiction over its order requiring the return of these records:

[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). Under the jurisdictional-transfer principle, once a notice of appeal has been filed, the federal district court cannot take any action that would alter the appellate status of the case. *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1030 (N.D. Ia 2004) (citations omitted). The district court, therefore, cannot reverse its own order requiring return of the MidCountry Bank documents while this order is on appeal.²

The district court has already filed an order concerning the physical disposition of the MidCountry Bank documents. In its motion to dismiss this lawsuit, 3ABN moved the district court to have the MidCountry Bank documents returned. (Docket #139). In response, the district court agreed and ordered that all confidential documents in possession of the magistrate judge be returned. (Electronic Order dated 10/31/08; *see also Simpson Aff.*, Ex. E at 13-15). Pickle and Joy then moved for reconsideration and costs, which the district court denied. (Docket #166). Pickle and Joy then moved for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions, which the district court also denied. (Docket #193). In doing so, the district court noted that, “to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago.*” (*Id.* at 3) (emphasis added). Pickle and Joy appealed from this order on November 23, 2009. (Docket #196). The notice of appeal

² 3ABN’s response to Pickle and Joy’s motion in the district court is attached as Exhibit G to the Affidavit of Gregory Simpson.

acted to remove the district court's jurisdiction over its previous orders.

Thus, the district court has no jurisdiction to reconsider a matter that it has already considered and decided. Moreover, to the extent that Pickle and Joy are asking for reconsideration of the district court's order concerning the physical disposition of these records, this request is untimely. The district court has already denied the motion for reconsideration. The proper procedure for Pickle and Joy's objection to the district court's order to return the MidCountry Bank documents is through the current appeals. The district court has no further say in the matter. Thus, there is no legal basis for this Court to order a stay or abeyance on Pickle and Joy's appeals.³

CONCLUSION

This Court should deny Pickle and Joy's motion to stay these appeals because the district court has no jurisdiction to reverse its own order, which is now on appeal.

³ Pickle and Joy have now filed yet another motion before the district court to "compel" that 3ABN return the MidCountry Bank documents to the district court. (Docket # 210 and *Simpson Aff.*, Ex. F). This motion seeks the same relief as their motion to forward the documents to the court of appeals, and will be opposed for similar reasons.

Respectfully submitted,

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By:

s/ M. Gregory Simpson

M. Gregory Simpson, #1133359
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661
Facsimile: (612) 877-3138

John P. Pucci, #26961
J. Lizette Richards, #94745
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northampton, MA 01060
Telephone: (413) 584-8067
Facsimile: (413) 585-0787

Attorneys for Appellees Three Angels
Broadcasting Network, Inc. and Danny
Lee Shelton

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