UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs, v. Gailon Arthur Joy and Robert Pickle, Defendants.	Case No.: 07-40098-FDS

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO FORWARD PART OF THE RECORD

INTRODUCTION

Plaintiffs opposed the instant motion, which seeks the forwarding to the court of appeals of bank statements produced by MidCountry Bank ("MidCountry") ("MidCountry records") which neither Danny Lee Shelton ("Shelton") nor Three Angels Broadcasting Network, Inc. ("3ABN") own, and which contain no privileged information. Plaintiffs' counsel obtained these records in violation of a court order, despite their being part of the record on appeal. Plaintiffs' refiling of the violated court order establishes their culpability. (Doc. 208-3 p. 9).

PLAINTIFFS' FACTS REBUTTED AND REFUTED

"Defendants ... ask this Court to reverse its October 30, 2008 order ... directing Magistrate Judge Hillman to return a box of raw discovery materials to the Plaintiffs, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton." *(Doc. 207 p. 1)*

The October 30, 2008, order of dismissal ("dismissal order") bears no date for executing the return of the MidCountry records. (Doc. 141 p. 13). That order has never been executed since

these records have never been "returned to the party that produced those documents," namely, MidCountry. (*Id.*). Therefore, no reversal is necessary to forward a copy of the MidCountry records to the court of appeals.

"The MidCountry Bank documents are the personal financial records of Plaintiff Shelton." "... sensitive, confidential, business, financial and operational records." *(Doc. 207 pp. 1, 3)*

These questions of law are firmly settled. The MidCountry records are "the business records of" MidCountry, not Shelton's "private papers"; 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 "from discovery in a civil suit." *Clayton Brokerage Co. v. Clement*, 87 F.R.D. 569, 571 (D.Md. 1980). Regarding bank records:

> ... 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 (W.D.Ar. 2007).

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. (Doc. 152-6 p. 19).

Shelton alleges that this Court ordered these bank statements to be surrendered to *3ABN*, not just himself (Doc. 207 p. 1), and Shelton did not object. Such disclosure destroys privilege.

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, 2004 U.S. Dist. LEXIS 5604, at *4–5 (N.D.Il. 2004).

"3ABN moved to quash this subpoena ...." *(Doc. 207 p. 3)*

Shelton, not 3ABN, moved to quash the third-party subpoena. (Doc. 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) .... 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).

"The Minnesota Court, the Honorable Arthur J. Boylan presiding, denied 3ABN's motion to quash the subpoena on July 1, 2008, but with specific conditions." *(Doc. 207 p. 3)*

Shelton also moved to stay enforcement of the subpoena and to remit the motion to quash to this Court. (Doc. 76-3 p. 18–19). As requested by Magistrate Judge Boylan, Plaintiffs' counsel reported back to him by letter on March 11 after this Court's March 7, 2008, hearing, requesting that court yet again to stay and remit, but abandoning the request that that court itself quash the subpoena. (Affidavit of Robert Pickle ("Pickle Aff.") ¶ 2, Ex. A).

Thus, Magistrate Judge Boylan's denial of Shelton's motion (Doc. 63-36) meant that the subpoena would be enforced, not stayed, and that the dispute would not be remitted to this Court. Since this Court had already conferred with that court (Doc. 206 ¶ 3), it may be inferred that this Court had no problem with the dispute dying a final death in the District of Minnesota.

"Pickle and Joy then moved for reconsideration of this order, which the Minnesota Court denied." *(Doc. 207 p. 4)*

Since the confidentiality order was issued before the MidCountry records were produced, Defendants requested this Court to permit their production directly to Defendants. (Doc. 77 pp. 16–17). As this Court then instructed Defendants to do, Defendants sought the desired relief by moving that court to amend its order. (Doc. 77 p. 17; Doc. 76-3 pp. 23–24). But that court then instructed Defendants to come back to this Court to seek that relief. (Doc. 92 pp. 30–32).

"There is no ECF record of these documents on this date; thus, they were not filed with the Court." *(Doc. 207 p. 4)*

Plaintiffs cite no authority contrary to *Hernandez v. Aldridge*, 902 F.2d 386, 388 (5th Cir. 1990), a case Defendants' cited in their opening brief. (Doc. 205 p. 6). Though no docket entry records the Court's receipt of the MidCountry records, a docket entry does record the surrender of these records to Plaintiffs in violation of this Court's own order. (Doc. 160; Doc. 141 p. 13). One might suspect that the failure to docket the reception of these records was an intentional effort to shield Plaintiffs' counsel from liability for malicious prosecution. (*infra* 10–12).

"In the same motion, 3ABN moved this Court to 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." *(Doc. 207 p. 4)*

As a point of law, since the ordered return was to be "pursuant to" the confidentiality order of this Court, and since that confidentiality order requires no such return by parties (Doc. 60 pp. 1–6), the dismissal order could not effect the return of the MidCountry records.

"This Court granted Plaintiffs' motion for voluntary dismissal before Judge Hillman was asked to review the MidCountry Bank documents." *(Doc. 207 pp. 2, 4)*

Defendants already reminded Plaintiffs that Plaintiffs did request such review by motion on June 25, 2008, more than four months before dismissal. (Doc. 205 p. 3; Doc. 75 pp. 16–17). Therefore, Plaintiffs' assertion is a fraud upon the court intended to evade the conclusion that the MidCountry records are rightly part of the record on appeal.

"Pickle and Joy did not seek a stay of the order directing Magistrate Judge Hillman to return the MidCountry Bank records, nor did they seek reconsideration of that part of the order in any of their many post-judgment filings." *(Doc. 207 p. 2)*

Whether Defendants sought a stay is irrelevant, because that part of the dismissal order has never yet been executed by returning the records to MidCountry. (*supra* 1–2). Since the confidentiality order does not require the return of those records by Defendants or court staff, since Plaintiffs believed on November 11, 2008, that no return was possible without Defendants'

consent, and since this Court is without authority to eliminate part of the record during a pending appeal, it is questionable that a stay was ever required. (Doc. 60 1–6; Doc. 162-6; *infra* 9).

Defendants did indeed seek reconsideration of that part of the dismissal order, but did so only to the extent that Plaintiffs were correct that the dismissal order was not a final, appealable order. (Doc. 169 p. 2; Doc. 170 pp. 1–2; Doc. 177 pp. 1–2). By this means, Defendants conditionally incorporated into their motions for reconsideration the facts, arguments, and request for relief filed in their appeal. (*see* Doc. 171-3; Doc. 178-2).

"... 'to the extent that the materials ... 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.'" *(Doc. 207 p. 5)*

This sentiment found in this Court's October 26, 2009, order was clearly erroneous since, *inter alia*, the confidentiality order requires no such return, and the dismissal order was pursuant to the confidentiality order of this court. (Doc. 60 pp. 1–6; Doc. 141 pp. 12, 14–15). If this Court was attempting to alter the confidentiality and dismissal orders by the above words, even though those orders are at issue in a pending appeal, this Court had no authority to do so.

"The MidCountry Bank records were returned to 3ABN's counsel by Magistrate Judge Hillman's office." *(Doc. 207 p. 5)*

Based on the record as well as their response to the instant motion, Plaintiffs and their counsel have no credibility and their word cannot be trusted. Thus, without verification or an evidentiary hearing, Defendants cannot accept Plaintiffs' counsel's allegation that Magistrate Judge Hillman's office is responsible for the December 16, 2008, security breach and the resulting expropriation of Defendants' property without due process. (Doc. 211 p. 6, 10–11). Plaintiffs' counsel could just as well be trying to hide what really happened. (*infra* 10–12).

Discovery and an evidentiary hearing are required to determine what happened to the MidCountry records and why, including, *inter alia*, the "loss" of these records after this Court's September 12, 2008, reception of them, this Court's failure to docket their reception, their

surrender to Plaintiffs' on December 16, 2008, and the history of those records since.

"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." *(Doc. 207 p. 5)*

Plaintiffs' counsel has broken his promises before. (Doc. 127 ¶ 7). Defendants have no confidence in the assurances of any of Plaintiffs' counsel. Plaintiffs' counsel has no authority to possess and control documents that the record clearly demonstrates were to be remitted to Defendants in the due course of discovery, and were wrongfully withheld contrary to the orders of the Minnesota court and this Court. (Doc. 211 p. 3; Doc. 63-36; Doc. 107 p. 5). Under no circumstances was a surrender to Plaintiffs or Plaintiffs' counsel justified. The Court's turning over these records to the wrong party clearly constitutes expropriation of the defense's chattel.

Plaintiffs' counsel ambiguously asserts that the MidCountry records are at "our offices." (Doc. 208 ¶ 8). Does he mean that the records have been unsealed, copied, and distributed to multiple offices? More importantly, can the MidCountry records be properly certified pursuant to the Federal Rules of Evidence without a return to the originator of those documents?

PLAINTIFFS' ARGUMENTS REBUTTED AND REFUTED

I. THIS COURT LACKS JURISDICTION TO ALTER ITS ORDERS DURING DEFENDANTS' PENDING APPEALS

A. The October 30, 2008, Dismissal Order Cannot Be Altered

The dismissal order, which Plaintiffs did not appeal, stated:

> 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.

(Doc. 141 p. 13). Plaintiffs have repeatedly admitted that the producing party was MidCountry, not themselves, and that the dismissal order called for the MidCountry records to be "returned." (Doc 121 p. 9; Doc. 207 pp. 1–4, 6–8, 10–11).

In blatant violation of this clear order, Attorney John Pucci ("Pucci") sent his staff

member, Christine Parizo ("Parizo"), to the federal courthouse on December 16, 2008, to obtain the sole copy of these documents from this Court. (Doc. 160; Doc. 212-3; Doc. 212 ¶ 12). These records were therefore surrendered to Plaintiffs, not "returned" to MidCountry, a profound expropriation of Defendants' property without due process by this Court. (Doc. 211 pp. 10–11).

Since Defendants' filing their notice of appeal on November 13, 2008, divested this Court of jurisdiction to alter the above order, this Court had no authority to alter that order to allow the surrender of the MidCountry records to Plaintiffs, and cannot sanction that surrender now.

B. The Confidentiality Order Cannot Be Altered

By their argument, Plaintiffs still seek by deceit to alter the confidentiality order (a) by imposing non-party return requirements upon parties, and (b) by revoking the safeguards of ¶ 7 of that order. (Doc. 60; Doc. 207 pp. 5–7). But Plaintiffs never sought reconsideration of the confidentiality order, and never appealed it.

Since the confidentiality order as written is a critical aspect of Defendants' appeals (Doc. 171-3 pp. 9, 36, 39, 42, 62, 64–65, 67–68), this Court has no jurisdiction to alter that order now to require the return of documents the order does not so require, despite Plaintiffs' behest.

Plaintiffs again note that the proposed confidentiality orders of "all parties" contemplated the return of confidential documents at the end of litigation. (Doc. 207 p. 6; Doc. 121 pp. 6–7). But Plaintiffs ignore the fact that Defendants' proposed orders contained an explicit procedure for challenging erroneous confidentiality designations during the litigation, which placed the burden of proof upon the designating party. (Doc. 57 § 6; Doc. 59 § 6). The confidentiality order actually issued contained no such procedure, but instead allowed the attack of confidentiality designations after the litigation was over. (Doc. 60 ¶ 7). Because Plaintiffs have never shown good cause for any specific documents as required by Defendants' proposed orders (Doc. 57 p. 1; Doc. 59 p. 1), the return requirements of those proposed orders are utterly irrelevant.

C. This Court Had No Authority to Alter These Orders on October 26, 2009

Plaintiffs based their dismissal motion's request for the "return" of documents on the confidentiality order, but that order does not require parties to return documents. (Doc. 121 pp. 6–7; Doc. 207 p. 4; Doc. 60 pp. 1–6). The dismissal order conditioned the return of confidential documents on whatever the confidentiality order actually does require. (Doc. 141 pp. 12, 14–15).

Plaintiffs repeatedly note that this Court's October 26, 2009, order stated that Defendants should have returned confidential documents "to plaintiffs some time ago." (Doc. 193 p. 3; Doc. 207 pp. 5, 7). But that order is clearly erroneous because this Court had no authority to alter the confidentiality and dismissal orders to so require once Defendants filed their notice of appeal.

II. THIS COURT RETAINS JURISDICTION TO FORWARD THE MIDCOUNTRY RECORDS TO THE COURT OF APPEALS

This Court retains jurisdiction to issue orders pertaining to the record on appeal, and to forward the record on appeal. Fed. R. App. P. 10(e), 11(b); *Venen v. Sweet*, 758 F.2d 117, 120 n.2 (3rd Cir. 1985). Thus, this Court may forward the MidCountry records to the court of appeals, and issue orders that may be required to facilitate that forwarding.

Since Fed. R. App. P. 10(e)(2) allows this Court to correct omissions or misstatements in the record caused by error or accident, this Court may forward the MidCountry records despite the clerk's failure to docket their reception by the Court on September 12, 2008.

III. THE MIDCOUNTRY RECORDS ARE PART OF THE RECORD ON APPEAL

A. Plaintiffs Abandon Their Argument in the Court of Appeals

The same day Defendants filed the instant motion, Defendants moved the court of appeals to hold in abeyance Defendants' appeals until the MidCountry records are forwarded. (Pickle Aff. Ex. B). The day after Plaintiffs filed their response to the instant motion, Plaintiffs filed a parallel response in the court of appeals which, in its argument section, did not dispute that the record on appeal includes the MidCountry records. (Pickle Aff. Ex. C at pp. 5–7).

Plaintiffs' difficulty is that the court of appeals has already ruled that documents produced by Remnant Publications, Inc. ("Remnant documents") are part of the record on appeal, despite those documents not being filed in the district court or being given to the district court clerk. (Doc. 212-2). In contrast, the MidCountry records were shipped to this Court pursuant to a court order, and were signed for by a clerk of court. (Doc. 63-36; Doc. 206-2).

B. Plaintiffs' Dispute Made MidCountry Records Part of Record on Appeal

The fact that Plaintiffs in their response to the instant motion falsely and intentionally denied that they had asked this Court to review the MidCountry records (Doc. 207 pp. 2, 4) suggests that Plaintiffs' request for review makes these records part of the record on appeal.

Plaintiffs contend that the requirements of Fed. R. Civ. P. 5(d)(1) and Loc. R. 26.6(a) for filing the MidCountry records have not been met (Doc. 207 p. 8), but Defendants assert that Magistrate Judge Boylan's order and Plaintiffs' request for review meet those requirements.

The confidentiality order specifically requires the filing under seal of confidential documents for review when the requesting and responding parties disagree over production. (Doc. 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 this Court for review. (Doc. 63-36). Thus, the MidCountry records should be considered filed.

C. This Court Cannot Control the Content of the Trial Record

District courts cannot control the content of the trial court record, since the appealing parties, not the trial court, control the issues to be reviewed on appeal. *IBM v Edelstein*, 526 F.2d 37, 45–46 (2nd Cir. 1975). The district court may add to or correct the record, but cannot remove material. 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 MidCountry records cannot be removed from the record during a pending appeal.

The record on appeal was declared complete on December 9, 2008. (Doc. 206-8 p. 1). Not until after that date did this Court surrender the MidCountry records to Parizo. (Doc. 160). Defendants served their designation of appendix and issues for review upon Plaintiffs on December 23, 2008. (Pickle Aff. Ex. D). Not until that day was Parizo's receipt docketed. (Docket text for Doc. 160). One might thus suspect that both Plaintiffs and this Court believed that the MidCountry records were part of the record on appeal, and that evidence was purposely withheld from both Defendants and the court of appeals.[1]

In their second appeal, Defendants shall seek appellate review of this Court's handling of the MidCountry records, and that makes the MidCountry records part of the record on appeal.

IV. THIS COURT MUST APPLY THE LAW FAIRLY AND IMPARTIALLY

The presiding judge in this case has a rich pre-judicial background, enabling him to quickly and adequately grasp key aspects of this case. Training in journalism makes him familiar with the First Amendment implications of investigative reporters being sued because of their stories. (Pickle Aff. Ex. E p. 2). His 1998 report on Robert Urciuoli establishes his familiarity with private inurement in a not-for-profit context, and with irresponsible boards refusing to fire guilty executives. (Pickle Aff. Ex. F). He has experience as an assistant U.S. attorney (as does Pucci), as a chief of staff in the criminal division of the Department of Justice ("DoJ") providing litigation advice, and in white-collar criminal defense. (Pickle Aff. Ex. G–H; Doc. 212-4).

Defendants made steady progress in this case. Magistrate Judge Boylan complimented them, Plaintiffs' counsel felt "outgunned," and Defendants came through Plaintiffs' blitzkrieg of the summer of 2008 unscathed and still advancing. (Pickle Aff. ¶¶ 2, 10–11).

Plaintiffs' counsel's informing this Court that a dismissal without prejudice was required to prevent Defendants from having the elements of a malicious prosecution counterclaim or

[1] Defendants raised the issue of extrinsic fraud in connection with their motions for reconsideration. (Doc. 177 p. 12; Doc. 182 p. 12).

claim against Plaintiffs and their counsel was a notable turning point. (Doc. 141 pp. 6–10). Pucci, the only one permitted to be present in the chambers for the October 30, 2008, status conference, though not taking the lead, could not remain totally silent on the topic. (Doc. 141 pp. 2–3, 13).

Subsequently, Defendants were deprived of their legal right to sue for malicious prosecution, quasi-ordered to surrender their documents (impairing Defendants' ability to prevail against an anti-SLAPP motion), and Defendants' property was expropriated by this Court without due process. (Doc. 141 pp. 6, 8, 10–13; Doc. 211 pp. 10–11). Findings in Defendants' favor were set aside without being clearly erroneous. (Doc. 182 p. 9; Doc. 177 p. 3 n.2, p. 4). The Court denied costs to Defendants because there was allegedly no suggestion of abuse of process or malicious prosecution in the record, but then contradictorily ruled that the Remnant documents were not relevant. (Doc. 170 p. 13). While ruling that Plaintiffs' counsel's assertions were problematic, Defendants' motions for reconsideration on the basis of the fraudulent nature of Plaintiffs' assertions were contradictorily denied. (Doc. 193 pp. 2–3; Doc. 170 pp. 16–17).

The handling of the MidCountry records raises the question of whether problems existed before the October 30, 2008, status conference. The clerk who signed for the MidCountry records on September 12, 2008, is the presiding judge's docket clerk. (Doc. 206-2; Pickle Aff. Ex. K–L at p. 1). Since she is in charge of multi district litigation, one would expect her to handle professionally 11 to 12 pounds of sealed records from another district, avoiding careless loss or misplacement. (Pickle Aff. Ex. K–L at p. 2). How then were they lost? (Doc. 206 ¶¶ 7–12).

The most plausible answer appears to be that the presiding judge has tried to shield Pucci, his friend from DoJ days, from liability. That a camaraderie exists is suggested by the December 14, 2007, status conference, during which the Court twice asked Pucci for advice on the rules, though a law clerk was present and Pucci was not taking the lead that day. (Doc. 144 pp. 25, 28).

Plaintiffs contend that the content of the MidCountry records was not reviewed or taken

into consideration by this Court. (Doc. 207 p. 9). But that may not be so. The presiding judge is well aware of the importance of bank statements in cases involving private inurement. (Pickle Aff. Ex. E–H). One might suspect that this Court knows that the MidCountry records further establish the guilt of Shelton and his counsel, and that this has influenced its rulings.

"With liberty and justice for all." Not just for the rich or attorneys or friends, but *for all*, whether represented or *pro se*. Therefore, this Court must fairly and impartially apply the law, regardless of the potential liability or consequences fellow former federal prosecutor Pucci (and other attorneys) may face for litigating this utterly frivolous and baseless case.

CONCLUSION

This Court need reverse no order to forward the MidCountry records to the court of appeals, since the MidCountry records have never been returned to MidCountry. Defendants have designated these records to be part of the record on appeal, and will seek appellate review of this Court's handling of these records. Both Plaintiffs and this Court may have long believed these records to be part of the record on appeal. The MidCountry records should be forwarded to the First Circuit Court of Appeals as a supplemental record upon satisfactory certification of those records pursuant to the Federal Rules of Evidence.

Respectfully submitted,

Dated: December 24, 2009

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