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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO RECONSIDER AND TO AMEND FINDINGS

INTRODUCTION

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") submit this memorandum in opposition to Defendants' Motions to Reconsider and to Amend Findings [Docket # 169]. Plaintiffs oppose the motion because Defendants raise no new arguments that were unavailable to them before in support of their position on the underlying order issued by this Court, which had denied Defendants' motion for costs and attorneys fees. [Docket # 166]. The Court will recall that it granted Plaintiffs' motion for voluntary dismissal under Rule 41(a)(2), subject to conditions, and denied Defendants' motion for an award of costs and fees.

Defendants now move to reconsider the latter order, but in doing so merely rehash their previously rejected arguments, gussied up with a few more irrelevant and overblown

factual contentions that were known to Defendants all along. Their motion to reconsider completely misses the central point underlying this Court's denial of their costs and fees, namely, that the kind of prejudice contemplated by Fed. R. Civ. P. 41(a)(2), i.e., *legal* prejudice, would not be reduced by an award of costs and fees, and that the risk of duplicative litigation is adequately controlled by requiring Plaintiffs to refile any related litigation in the same forum.

FACTS

Regarding Defendants' factual presentation, as usual, it is hard to know where to begin. To the extent the alleged facts are *different* from those in Defendants' original motion, there is no reason they could not have been presented to the Court the first time around. To the extent they are the *same* facts as were presented in Defendants' original motion, they have already been considered and found to fall short of establishing prejudice such as would warrant an award of costs and fees. Setting aside the issue of whether the cited evidence supports the facts that Defendants allege in support of their motion to reconsider, Defendants are merely rehashing arguments that this Court previously rejected. The only new development is that the level of bombast has gone from ten to eleven.

Since a motion to reconsider or amend must not merely rehash previously rejected arguments, the beginning point here is to ascertain what arguments were made in support of the motion for fees and costs. Then it can be determined whether new or different arguments are being made, and whether there is an adequate reason to consider them now.

The original memorandum in support of Defendants' motion for costs identified two kinds of supposed prejudice resulting from dismissal of the case: (1) Difficulties arising from the impossibility of reusing discovery information in future litigation contemplated by the Defendants; and (2) likely spoliation of evidence due to death or incapacitation of witnesses. (Doc. # 131 at p. 2). Plaintiffs' memo responded to those arguments, which were, in a word, silly, because there would be no future litigation unless the Defendants themselves commenced it. (Doc. 140). Defendants then submitted a reply memorandum raising a host of new arguments, which are substantively indistinguishable from the arguments now being advanced in this motion for reconsideration. (*See* Doc. # 149).

Because Defendants' arguments in this motion for reconsideration were first raised in their reply memo in the original motion, Plaintiffs never had a chance to rebut them there because the rules do not permit a surreply. But there was no need to respond to the reply memo because courts ordinarily do not consider arguments raised for the first time in a reply memo. *Rivera-Muriente v. Agosto-Alicia*, 959 F.2d 349, 354 (1st Cir. 1992) ("It is well settled in this court, for good reason which need not be rehearsed here, that a legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed."); *In re Boston Regional Medical Center, Inc.***,** 328 F.Supp.2d 130, 143 (D. Mass. 2004) (same). The fact that Defendants had these same arguments available to them in the original motion shows that they do not have grounds for reconsideration now. Defendants have offered no reason why these arguments and evidence could not have

been presented in the original motion. They therefore lack grounds for a motion to reconsider.

This Court's order indicates that it considered the arguments raised by the Defendants in their reply brief and concluded that the only *legal* prejudice to them resulting from the dismissal was adequately addressed by the requirement that similar future litigation be filed in the same forum, and that no circumstances that might justify an award of fees and costs was present. (Doc. # 166 at pp. 3-4). The litigation expense they had incurred was not a form of legal prejudice, absent litigation misconduct or duplicative litigation, neither of which was a feature of this case.

Although a point-by-point refutation of Defendants' factual recitation is probably a waste of time, it appears to be necessary in order to avoid conceding any of their ridiculous claims. In their zeal to expose every bad act by the Plaintiffs that their imaginations can concoct, Defendants generally lose sight of the point of their brief, which should be to show new evidence of litigation misconduct that would justify an award of fees and costs under Rule 41(a)(2), and to show why that new evidence could not reasonably have been brought to the Court's attention in the original motion. The arguments advanced in support of the motion for reconsideration fall well short of what would be needed for this Court to reconsider its order. Each category of factual assertions will be discussed in turn.

1. The Motion to Impound.

Defendants' factual recitation begins with their gripe that Plaintiffs began the case by filing a motion to impound. (Doc. # 170 at p. 2). This fact was known to the Court

and the parties since the motion to impound was filed in April of 2007. (*See* Doc. # 2). Yet, it was not argued in support of Defendants' motion for fees and costs. (*See* Doc. # 131). The motion to impound was temporarily granted, then was denied following briefing and a hearing. Although Defendants characterize the motion to impound as "outrageous," this Court did not suggest that a good faith basis for the motion was lacking. In short, there is nothing new here that would warrant a motion for reconsideration.

2. Discovery Conduct.

Defendants next recite their usual litany of complaints about Plaintiffs' discovery conduct. (Doc. # 170 at pp. 2-3). These claims have been raised and rejected any number of times before by every judge to consider them, including this Court, Magistrate Judge Hillman, and several out-of-district judges who heard motions to quash the third party subpoenas served by the Defendants. But Defendants did not raise their allegations of discovery misconduct as a basis for the award of fees in their original brief in support of their motion for costs. (Doc. # 149). They argued discovery misconduct as a basis for the fee claim for the first time in their reply memo, where they presented exactly the same facts that they present now in their motion for reconsideration. (*See* Doc. # 149 at pp. 2-15).

Thus, when it denied Defendants' motion for fees and costs, this Court had all the information before it that Defendants are now proferring regarding the supposed litigation misconduct, which was really just routine litigation pretrial activity. This Court summarized all of the Defendants' assertions with the following succinct observation:

> There is nothing in the record to suggest that the plaintiffs filed this suit simply to harass, embarrass, or abuse the defendants or that they sought to increase their costs, and the court sees no other reason to award attorneys' fees under the circumstances.

(Doc. # 144 at pp. 3-4). In other words, Defendants made the same arguments that they make now, and this Court rejected them. Defendants suggest that this finding would be "impossible to make if the Court had reviewed those documents" (Doc. # 170, p. 1) and that this Court's failure to more specifically address their arguments "suggests that the Court ruled . . . without reading all of Defendants' submissions in connection with that motion." (Doc. #170, p. 13). The possibility that the Court read and understood their arguments but simply disagreed with them does not exist for these gentlemen.

3. The "Sweeping Admission" in Appellate Brief.

This Court has not had the misfortune of being required to read Defendants' appellate briefs, in which they wove together snippets from dozens of exhibits that they had submitted with their numerous pretrial motions, and from those snippets argued the merits of the underlying case instead of the appellate issue, i.e., whether this Court abused its discretion in granting voluntary dismissal with the conditions it imposed. Unaware of the limited scope of appellate review, Defendants are treating the appeal as an opportunity to try the case on paper, and their briefs string together hearsay from unsourced emails to smear the Plaintiffs with many of the same baseless allegations that caused the suit in the first place, and some new ones too.

In response to this barrage of irrelevant information (irrelevant because whether Defendants' statements are in fact defamatory is not an issue now that the case is

dismissed), Plaintiffs noted in their brief to the First Circuit Court of Appeals that the materials they had filed in the pretrial motion activity in the case did not contain the information necessary to rebut Defendants' smear job.

This statement was made to explain why Plaintiffs' appellate brief did not cite to affidavits or other evidence from the district court record establishing the merits of Plaintiffs' claims, and rebutting the contentions of the Defendants that the Plaintiffs had engaged in wrongdoing. The merits had never been at issue before; thus there had been no opportunity to present evidence on that topic and the district court record lacked evidence from which the Defendants' claims could be shown to be false.

This is the "sweeping admission" that Defendants contend constitutes "new evidence" that justifies reconsideration. (Doc. # 170, pp.3-4). In fact, this is just one of many examples in which the Defendants fail to appreciate that pretrial motion practice was not the occasion to prove up the merits of either side's case. The quoted "astonishing admission" was not an admission, evidentiary or otherwise. Defendants simply fail to recognize that the merits of the lawsuit are not supposed to be proven in pretrial motion practice.

4. The Dryden Recording.

Defendants next argue that a tape recording they acquired long ago constitutes "new evidence" that Danny Shelton was dishonest, about something that is not material to the case, in a phone call with a non-party on one occasion in 2003. Defendants say that a recording of the call has Shelton making a statement which Defendants think cannot be reconciled with another statement he made to somebody else. (Doc. # 170, pp.

5-6). Even if the tape recording was evidence of dishonesty, which it is not, the relevance of this "new evidence" is hard to fathom. It doesn't show litigation misconduct, which is what Defendants need to show to have a hope of getting an award of fees and costs. Further, it is not newly discovered. Defendants artfully dodge the question of exactly when they acquired this tape, both in their brief and in the Pickle affidavit (Doc. # 171, ¶ 13), because they have had it since before the lawsuit started. There is nothing relevant, or new, or remotely interesting, here.

5. 3ABN World Articles.

Defendants' next offer "new facts" relating to some issues of a magazine published by Plaintiffs called "3ABN World" that Plaintiffs supposedly "refused to produce." (Doc. # 170, p. 6). Through a convoluted process of reasoning that is impossible to follow, Defendants conclude from these magazines that Shelton "conspired to hide" the date he wrote a book in order to hide assets from his wife in their marital dissolution. The "conspiracy to hide" arises from the fact that these issues of the magazine were apparently inadvertently omitted from the document production in the case, a matter which would have been rectified had it been brought to the attention of counsel. In any case, since Defendants admit they got these magazines from the *library* after the case was dismissed (Doc. #170, p. 6), it is a bit hard to see how omitting them from a document production could be evidence of a conspiracy. They were publicly available from any number of sources, including a simple request to 3ABN for back issues of their magazine. Again, this is not evidence of litigation misconduct that might justify reconsideration of the order denying costs.

6. Fraud and Misrepresentation.

Defendants finally spew a more or less random assortment of nitpicky complaints about statements made by Plaintiffs or their counsel, in briefs or argument, every one of which is said to demonstrate fraud, but every one of which is demonstrably accurate. (Doc. # 170, pp. 7-10). It is tempting to respond to the substance of each of them, but it would simply take too much time and they are all irrelevant to the issues under consideration anyway. Restraint will therefore be the order of the day. These facts were all known to Defendants at the time they briefed their motion for fees and costs. They chose not to present these facts and arguments at that time. Now, with no explanation for their failure to raise these arguments before, they simply throw them against the wall to see if they will stick, labeling them "fraud" which is apparently a synonym for "something we disagree with." The Court should not consider any of these arguments.

ARGUMENT

A rule 59(e) motion to alter or amend a judgment may not be used to relitigate or rehash the same matters already determined by the court. *In re Williams*, 188 B.R. 721, 725 (D. R.I. 1995); *see also* 12 Moore's Federal Practice 3d, § 59.30[6] (Matthew Bender 3d ed.) ("A Rule 59(e) motion to alter or amend a judgment may not be used to relitigate the same matters already determined by the court."). Further, a motion to amend may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment. *Williams v. Poulos*, 11 F.3d 271, 289 (1st Cir. 1993); *FDIC v. World Univ. Inc.,* 978 F.2d 10, 16 (1st Cir. 1992); *see also* 12 Moore's Federal Practice 3d, § 59.30[6].

The moving party in a motion to amend must clearly establish a manifest error of law or present newly discovered evidence. *FDIC v. World Univ. Inc.,* 978 F.2d at 16. A motion to amend must demonstrate why the court should reconsider its previous decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision. 12 Moore's Federal Practice 3d, § 59.30[3]. Reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. *Id.*, § 59.30[4].

The present motion to reconsider, amend or alter the prior order, however it is characterized, does everything that such motions are not supposed to do. It rehashes old arguments that were made and rejected, not just by this Court, but also by Magistrate Judge Hillman and the out-of-district courts that considered the third-party subpoenas. For example, the pretrial wrangling over discovery that Defendants have complained endlessly about, was nothing unusual in a case of this nature. Defendants told anybody who would listen that Plaintiffs' position on those pretrial motions was not well-founded, but not one court agreed. To the contrary, Plaintiffs prevailed every time: in getting a protective order issued, in getting Defendants' discovery requests nullified because they were overbroad, in getting out-of-district documents funneled to the Massachusetts court for consideration of their relevancy, and so on. These arguments are old. They have been considered and rejected. Defendants are simply rehashing arguments that they lost.

In addition to rehashing old arguments, Defendants are guilty of making new ones without any explanation for their failure to make them in their original motion. For example, they complain about the fact that Plaintiffs brought a motion to impound, which

is a fact they knew when they brought their original motion. They also offer a tape recording of Danny Shelton saying something they, without apparent justification, consider a lie. They had this tape recording when the filed their original motion, and offer no justification for failing to call it to the Court's attention at that time. The same can be said of the supposed "conspiracy" to hide issues of 3ABN World, which Defendants eventually got from that repository of all deep, dark secrets: the local library. The same can be said about the "fraud and misrepresentation" by Plaintiffs detailed on pages 7-10 of their memo. They had the raw material for these arguments all along, and offer no explanation for not raising them in their original motion papers. There is no basis for the "extraordinary remedy" of a motion to reconsider. The motion should be denied.

CONCLUSION

For the reasons stated above, Plaintiffs oppose the motion of the Defendants for reconsideration or amendment of this Court's order denying them an award of their costs and attorneys fees.

Respectfully Submitted:

Dated: May 11, 2009

SIEGEL, BRILL, GREUPNER,
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Certificate of Service

I, M. Gregory Simpson, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 11, 2009.

Dated: May 11, 2009

/s/ M. Gregory Simpson
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