

No. 08-2457

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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

Appellees,

v.

GAILON ARTHUR JOY and ROBERT PICKLE,

Appellants.

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

BRIEF OF THE APPELLEES

**M. Gregory Simpson
Wm. Christopher Penwell
Siegel, Brill, Greupner, Duffy
& Foster, P.A.
100 Washington Ave. S. Suite 1300
Minneapolis, MN 55401
(612) 337-6100**

**John P. Pucci
Lizette M. Richards
Fierst, Pucci & Kane, LLP
64 Gothic St. Suite 4
Northampton, MA 01060
(413) 584-8067**

lawsuit for monetary damages, which is consistent with his affidavit. (JA0323-JA-324). Although they relied on his credibility when it suited them, later in the brief they called him “factually challenged” but did not supply any reasons for the epithet. (JA0338). In short, the evidence purporting to show that Thompson lacks credibility was not offered to the district court, and this Court should disregard it.

The district court is expressly authorized to decide motions based on affidavit testimony. Fed. R. Civ. P. 43(c). Where there are conflicting affidavits and a credibility determination is necessary to decide the motion, it may be an abuse of discretion for the district court to decline to allow cross examination of the witnesses. *Boit v. Gar-Tec Products, Inc.* 967 F.2d 671, 676 (1st Cir. 1992). But here, no competing affidavit or evidence was offered to the district court, so there was no credibility contest. Pickle and Joy did not even request to cross-examine the affiant. Therefore, the district court did not abuse its discretion in relying on Thompson’s affidavit.

For the foregoing reasons it is not necessary to examine in detail the appellants’ arguments and purported evidence that Thompson is not credible. But were the Court to consider Pickle and Joy’s offerings, the evidence does not support their argument. In the first place, the evidence was gleaned from affidavits that Pickle and Joy had submitted to the district court in connection with unrelated motions. It was rank hearsay and lacked foundation to begin with. The district

C. The District Court Did Not Err by Granting the Motion Despite Pickle and Joy's Contentions About Bad Faith and Vexatious Conduct.

Pickle and Joy contend that the district court should have agreed with their contentions that 3ABN and Shelton engaged in bad faith and vexatious conduct. Judge Saylor did not abuse his discretion in granting dismissal without expressly ruling on Pickle and Joy's allegations of vexatious conduct for several reasons. First, the evidence did not support such a finding. Pickle and Joy primarily contend that 3ABN and Shelton acted in bad faith by suing them in the first place, and argue strenuously, citing hearsay contained in dozens of foundationless exhibits that were submitted along the way in connection with other motions, that the suit lacked merit. But the actual record demonstrates no bad faith or vexatious conduct on the part of 3ABN and Shelton. *See Puerto Rico Maritime*, 668 F.2d at 50 (upholding dismissal where defendants asserted suit was brought to harass, but where record indicated ample grounds to find plaintiffs' good faith). And contrary to appellants' assertions, the district court was quite familiar with the case (having held six status conferences and one motion hearing) and understood quite well that Pickle and Joy were quick off the mark when it came to accusing people of bad faith and vexatiousness.

Second, the allegations of vexatious conduct specified by appellants are irrelevant to whether the case should have been dismissed. Pickle and Joy

C. The District Court Did Not Err by Not Imposing Terms that Preserve Evidence From Spoliation.

Pickle and Joy argue that the district court should have imposed terms that preserve evidence from spoliation. The arguments they advance to support their claim that spoliation is a danger are unfounded. First, they cite hearsay regarding a billing dispute with 3ABN's former corporate counsel, Nick Miller, in which Miller apparently claimed that his bills had been altered by 3ABN. That matter was not before the district court in this case, or any other case, and has never been adjudicated.

Second, they cite statements from Shelton and one of his current attorneys, Gerry Duffy, that they ordered destruction of "documents pertaining to the IRS criminal investigation." In fact, the statements were to the effect that the IRS had obtained *copies* of pretty much every financial record of 3ABN and Shelton for the audit period, and at the conclusion of the IRS investigation the IRS closed its file and asked whether 3ABN and Shelton wanted the records back or would prefer that they be destroyed. 3ABN and Shelton did not need a second set of these incredibly voluminous records, and has not destroyed the originals.

Throughout the litigation, Pickle and Joy threatened to counterclaim for malicious prosecution, but they allowed the deadline for amending pleadings to expire without making such claims. When Pickle indicated at the hearing on the motion to dismiss that they intended to file a counterclaim, Judge Saylor cut him