

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: OUT OF DISTRICT SUBPOENA,

Hon. Richard Alan Enslin

ROBERT PICKLE, PETITIONER

Hon. Ellen S. Carmody

v

Case No. 1:08-mc-00003

REMNANT PUBLICATIONS, INC.,
RESPONDENT

**RESPONDENT REMNANT PUBLICATIONS, INC.'S BRIEF IN SUPPORT OF
APPEAL FROM MAGISTRATE'S ORDER**

PROCEDURAL HISTORY AND FACTS

The Plaintiffs in this case, Three Angels Broadcasting Network (hereinafter "3ABN"), and Danny Lee Shelton (hereinafter "Shelton"), filed suit against the defendants, Gailon Arthur Joy and Robert Pickle, in the United States District Court for the District of Massachusetts, for trademark infringement, trademark dilution, defamation, and intentional interference with advantageous economic prospective business advantage. (C.A. No. 07-40098-FDS (D. Mass.)). Defendants first sought documents from Daniel Hall of Remnant Publications, Inc. (hereinafter, "Remnant") via subpoena issued from the United States District Court for the District of Massachusetts and served on November 30, 2007. Remnant objected to the subpoena in a written letter to defendants dated December 10, 2007, on the basis that the subpoena was irrelevant, overbroad, burdensome, and sought confidential documents.

Defendants then sought documents from Remnant in a second subpoena issued from this Court and served on March 31, 2008. Remnant objected in a written letter to the defendants dated April 1, 2008 on the same basis. Defendants served a Motion to Compel on Remnant on May 1, 2008. Remnant responded to that Motion on May 19, 2008.

Magistrate Ellen S. Carmody heard defendants' Motion to Compel on June 16, 2008, which was granted in part and denied in part. (*See* Remnant Exhibit A.) Magistrate Carmody ordered that the motion was granted as to documents described in the subpoena involving 3ABN and Shelton. The motion was denied as to other entities. From the bench, Magistrate Carmody also ordered that the documents be submitted for *in camera* review to the Massachusetts District Court for a determination of relevancy. In her written order, Magistrate Carmody ordered that the documents be submitted **without** *in camera* review because she found the relevancy to be clear.

Remnant filed a Motion to Amend Order on June 27, 2008. That Motion was denied on July 28, 2008, with the provision that Remnant had fourteen (14) days to comply from the entry of an order by the District Court in Massachusetts. On July 24, 2008, plaintiff's Motion for Protective Order Limiting Scope and Methods of Discovery was heard. The District Court in Massachusetts took its decision under advisement.

ARGUMENT

Pursuant to Local Civ. R. 72.3(a), a judge of this Court shall set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Amb's v. Kalamazoo Co. Rd. Comm.*, 662 N.W.2d 424, 432 (Mich. App. 2003).

Magistrate Carmody's order requiring Remnant to submit documents without *in camera* review by the trial court in Massachusetts is clearly erroneous because it allows for the distribution of documents that may later be determined to be irrelevant. Therefore, it should be set aside.

I. THE DOCUMENTS SOUGHT BY DEFENDANTS IN THEIR MOTION TO COMPEL ARE NOT RELEVANT TO THE UNDERLYING LAWSUIT.

The documents sought by defendants, Gailon Arthur Joy and Robert Pickle, from Remnant Publications, Inc. (hereinafter, "Remnant") are not relevant to the underlying lawsuit between plaintiffs, Three Angels Broadcasting Network, Inc. (hereinafter "3ABN") and Danny Lee Shelton (hereinafter "Shelton"), and the defendants. As stated in plaintiffs' Motion for Protective Order Limiting Scope and Methods of Discovery, plaintiffs' claims focus on the following three allegations made by the defendants:

- (A) that "3ABN and its President Danny Shelton have committed financial improprieties with donated ministry funds";
- (B) that "3ABN and its President Danny Shelton have committed administrative and operational improprieties at 3ABN and that the organization is not properly or competently managed by its managers, officers, and directors"; and
- (C) that "3ABN and its President Danny Shelton acted without grounds in removing Linda Shelton from the 3ABN Board of Directors, that Danny Shelton had no grounds for divorcing Linda Shelton, that 3ABN and Danny Shelton conspired to hide evidence and information concerning the removal and divorce, and that 3ABN and Danny Shelton have lied and made otherwise purposeful misstatements concerning the Shelton's divorce and Danny Shelton's remarriage." (*See* Plaintiffs' Memo in Support of Motion, p 2-3).

Although the defendants are entitled to discovery in order to prove the purported truth of these allegations, none of the allegations have anything to do with Remnant. In fact, Remnant is not implicated, discussed, or even mentioned in plaintiffs' complaint.

Therefore, any documents sought by the defendants from Remnant are not relevant to the underlying lawsuit.

II. THE DEFENDANTS HAVE ABUSED THE DISCOVERY PROCESS BY USING DELAYING TACTICS AND OVERBROAD SUBPOENA REQUESTS TO UNINVOLVED THIRD PARTIES.

As noted in plaintiffs' motion, defendants have issued subpoenas on six non-parties during this discovery process. (See Plaintiffs' Memo in Support of Motion, p 3-4). In these subpoenas, the defendants have asked for every possible document that mentions the name of 3ABN or Shelton. (See Plaintiffs' Exhibit 19). Obviously, all of these documents are not relevant to the underlying lawsuit, as they relate to dates, persons, and institutions that are not pertinent to the claims made by the plaintiffs. As a result, defendants' requests are not only overbroad, but also duplicative many times over.

Furthermore, defendants themselves have stated that their goal is to "launch a full scale and public effort to ... indict Danny [Shelton] in the public eye and to put pressure on 3ABN." (See Plaintiffs' Exhibit 20). In order to reach this goal, defendants have tried to "substantially expand the case to bring in the most damaging and certain to sway the jury details" and have "deliberately dragged [their] feet." (See Plaintiffs' Exhibit 21). These statements demonstrate that the defendants have abused the discovery process by issuing overbroad, duplicative subpoenas to numerous non-parties in the hopes of delaying litigation and placing pressure on the plaintiffs. Defendants' actions have resulted in expensive and unnecessary litigation for these non-parties.

III. FAILURE TO PROVIDE *IN CAMERA* REVIEW OF THE DOCUMENTS PROVIDED BY REMNANT WILL ALLOW DEFENDANTS ACCESS TO DOCUMENTS THAT MAY LATER BE PROHIBITED.

Although this Court has authority to enforce subpoenas issued by it under Fed.R.Civ.P. 45, the “concept that the district court in which an action is pending has the right and responsibility to control the broad outline of discovery” remains unchanged. *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001)(citing *Fincher v. Keller Industries, Inc.*, 129 F.R.D. 123, 125 (M.D.N.C. 1990)). A party’s discovery rights in one district should reach no further than they do in the district having jurisdiction over the action. *Id.* The district having jurisdiction in this action is the District Court in Massachusetts, and thus, its determination of relevancy regarding the requested documents is decisive.

The Order entered June 20, 2008, by Magistrate Carmody provided for the submission of documents from Remnant to the defendants without the protection of *in camera* review by the District Court in Massachusetts. If this Order is not amended to consider the relevancy determination yet to be made by the District Court in Massachusetts, the defendants will gain access to documents that may later be prohibited. This is clear error because it provides for the distribution of information that cannot later be taken back, and as such, a mistake will have been made. Therefore, the Order entered June 20, 2008, should be amended to provide for *in camera* review of the documents submitted by Remnant pending a relevancy determination by the United States District Court for the District of Massachusetts. As the matter is already before that court, no particular delay or denial of justice will fall upon defendants if the amendment sought

herein is granted. This time-sensitive appeal may well be mooted by a decision in the United States District Court for the District of Massachusetts.

RESPECTFULLY SUBMITTED,

BIRINGER, HUTCHINSON, LILLIS,
BAPPERT & ANGELL, P.C.
Attorneys for Defendant Wendy Black

Dated: August 8, 2008

By: /s/ Charles R. Bappert
Charles R. Bappert (P41647)