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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting	)	
Network, Inc., and	)	
Danny Lee Shelton,	)	
Plaintiffs,	)	
	)	
	)	
vs.	)	Case No. 07cv40098-FDS
	)	
	)	
Gailon Arthur Joy,	)	
and Robert Pickle,	)	
Defendants.	)	

BEFORE: The Honorable F. Dennis Saylor, IV

Status conference/Motion for Voluntary Dismissal

United States District Court  
Courtroom No. 2  
595 Main Street  
Worcester, Massachusetts  
October 30, 2008

Marianne Kusa-Ryll, RDR, CRR  
Official Court Reporter  
United States District Court  
595 Main Street, Room 514A  
Worcester, MA 01608-2093  
508-929-3399  
Mechanical Steno - Transcript by Computer

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P R O C E E D I N G S

THE CLERK: Case No. 07-40098, Three Angels  
Broadcasting versus Joy.

Counsel and defendants, please identify yourself for  
the record.

MR. SIMPSON: This is M. Gregory Simpson, on behalf of  
the plaintiffs, Three Angels Broadcasting Network and Danny Lee  
Shelton.

MR. PUCCI: And John Pucci here in chambers, on behalf  
of the same parties.

THE COURT: Good afternoon.

MR. JOY: Gailon Arthur Joy, pro se.

THE COURT: Good afternoon.

MR. PICKLE: And Bob Pickle, pro se.

THE COURT: All right. Good afternoon.

All right. This is -- it was originally scheduled as  
a status conference in this case. I now have pending a motion  
for a voluntary dismissal.

Do the defendants wish to be heard on that? I've read  
the papers.

Mr. Pickle and Mr. Joy?

MR. JOY: Yes, sir.

THE COURT: Who -- who's this?

MR. JOY: I'm sorry. This is Mr. Joy, sir.

1 THE COURT: Yes.

2 MR. JOY: Your Honor, I think you'll find that we have  
3 filed an opposition, including a memorandum and affidavits  
4 along with exhibits.

5 THE COURT: When was that filed?

6 MR. JOY: It was --

7 THE COURT: Oh, I'm sorry. Yes, I did see it. I'm  
8 sorry. Yes.

9 MR. JOY: I'm sorry.

10 THE COURT: Yes. Okay.

11 MR. JOY: In summary, the difficulty here is that this  
12 is really just another maneuver on the part of the plaintiffs  
13 to very simply avoid their duty of discovery, and they're doing  
14 it at a point in the case where, frankly, we should have been  
15 close to a completion, which the case law clearly indicates is  
16 an inappropriate situation and prejudices the defendants'  
17 scenario, particularly reserve the right to relitigate at a  
18 future point.

19 So, for that reason, we feel it's imperative that  
20 the -- that the -- obviously, the dismissal be denied to  
21 preserve our rights, obviously, and to prevent the -- the great  
22 prejudice that has incurred to us, if this had to be  
23 relitigated in the future, which frankly we believe it's going  
24 to have to be.

25 THE COURT: All right. Anything else?

1 MR. SIMPSON: This is Mr. Simpson --

2 THE COURT: Well, before I --

3 MR. SIMPSON: Sure.

4 THE COURT: Anything else from the defendants?

5 MR. JOY: Yes.

6 THE COURT: Okay.

7 MR. JOY: I think -- you know, I think we've outlined  
8 specifically our basis for that in the memorandum, in  
9 support -- or pardon me -- in our opposition, and it's quite  
10 exhaustive. I'm sure you don't want us to go through that, but  
11 in any event, I think it pretty well outlines the case law as  
12 well as the basis for the case law applying in this particular  
13 case where it's already over 18 months in, and we're getting  
14 ready for trial.

15 THE COURT: All right. Mr. Simpson, why should this  
16 not be with prejudice, if I dismiss it?

17 MR. SIMPSON: Well, let me just begin by saying that  
18 the -- that I think that is the issue whether it should be with  
19 or without prejudice. If this is -- to my reading of the case  
20 law, it's a factor of the test, so it's within the discretion  
21 of the court to determine whether it should be with or without  
22 prejudice.

23 The case looks a lot older than it really is, because  
24 it was filed in May of '07, and you had us submit  
25 interrogatories and some documents exchanged and mandatory

1 discovery exchange; and then Mr. Joy filed for bankruptcy, and  
2 there was a stay in effect until almost December; and then  
3 there was a four-month period where we were working on getting  
4 that confidentiality order out. When that was finally signed,  
5 and, in fact, it was already April, and then there has been a  
6 period of document discovery since then, and depositions were  
7 scheduled, and they were canceled, because there was -- because  
8 the document exchange had not been completed.

9 So, it's not as old as -- as the date of filing would  
10 indicate. We're actually at the preliminary stages in terms of  
11 discovery. The factor test, if you run through it, and I'm  
12 sure you will, would indicate that it should be, I think,  
13 without prejudice. If it's with prejudice, I don't think the  
14 litigation ends, because there has been repeated threats,  
15 including in the brief that was just filed today by Mr. Pickle  
16 and Mr. Joy, that there will be a malicious prosecution  
17 counterclaim or a new lawsuit filed raising that issue, Judge;  
18 and so if the case is dismissed without prejudice, there  
19 would -- the elements of that tort would not be present,  
20 because one of the elements of a malicious prosecution tort is  
21 dismissal of the underlying -- there's a favorable resolution  
22 of the underlying lawsuit.

23 So, if the lawsuit is resolved with prejudice, that  
24 could give them one of the elements necessary to continue  
25 this -- this dispute, and the dispute would not end.

1           The question, I believe, for the court is a legal  
2 matter; and so, that would be a strategic or a tactical reason  
3 why the case would not end. There would still be litigation if  
4 the case were not dismissed without prejudice.

5           As a legal matter, Rule 41 is concerned with  
6 alleviating any prejudice to the defendants, and the Court is  
7 empowered to impose such terms and conditions as it feels will  
8 alleviate any prejudice that results from a dismissal. So, the  
9 question really is whether dismissal with prejudice is  
10 necessary to alleviate any prejudice.

11           And the cases say that in talking about prejudice,  
12 we're not talking about -- we're not talking about the prospect  
13 of a second lawsuit. That's not the kind of prejudice that the  
14 rule is concerned with, nor is it concerned with a technical  
15 advantage to the plaintiff. That should not bar dismissal.  
16 That's not the kind of prejudice we're talking about in legal  
17 prejudice; that is, are they worse off as a legal matter if  
18 it's dismissed with prejudice versus without prejudice. In  
19 other words, is it necessary to dismiss it with prejudice in  
20 order to alleviate them from legal prejudice, and the answer to  
21 that is just simply no. They are no worse off than they were  
22 before the lawsuit began. They're in exactly the same legal  
23 position whether -- in fact, they're in a better position  
24 legally than when the case began, because the three years  
25 statute of limitations for defamation has expired as to some of

1 the, if not all, of the original statements that they've made.

2 So, there is no legal prejudice, which is what the  
3 rule is concerned about, if the case were to be dismissed  
4 without prejudice.

5 THE COURT: Well, my concern, obviously, is I -- I  
6 strongly encourage both sides to, if that's what they want to  
7 do, to walk away from this dispute in whole or in part. My  
8 concern, obviously, is I don't know, and I'm just -- I'm not  
9 stating this because I -- I mean this in a pejorative way, or I  
10 don't -- I have any particular reason to distrust you, but I'm  
11 concerned that the same claim or -- or -- or a similar claim  
12 could simply be brought in some other forum, and that's the  
13 most obvious danger to me is that there's, you know, the  
14 possibility of some tactical issue going on here where  
15 plaintiffs decide they'd rather be in a different court.

16 MR. PICKLE: Your Honor, could I address that?

17 THE COURT: Well, let me hear from Mr. Simpson first.

18 MR. SIMPSON: Well, I -- I can assure you that that's  
19 not the concern. The only concern is that these gentlemen have  
20 indicated throughout and in the most recent filing that they  
21 intend to sue us for malicious prosecution, and they said that  
22 they were going to file counterclaims in this lawsuit, and they  
23 said then they were going to -- now, they said they're going to  
24 commence a separate lawsuit, but if we don't have at least a  
25 prospect of raising affirmative claims against them, I think



1 that would keep them in check. Maybe it would keep them in  
2 check. They would have to think twice about filing a lawsuit.  
3 I can tell you that there is no forum shopping going on, and I  
4 think Rule 41 also has some -- something to say about that.

5 The costs -- if we bring a second lawsuit after  
6 dismissing the first one, costs would ordinarily be imposed.  
7 We would have to reimburse them for all of that that occurred  
8 in the first lawsuit. So, there's -- so, there's mechanisms  
9 for dealing with that, and I think we would have quite a bit of  
10 explaining to do to a subsequent court if we were -- if we were  
11 to pull -- pull a fast one, and I can just tell you that that's  
12 not -- that's not the intent.

13 THE COURT: All right. I'm sorry. Do one of the  
14 defendants wish to be heard?

15 MR. PICKLE: Yes, your Honor. This is Bob Pickle.

16 THE COURT: Yes.

17 MR. PICKLE: In our memorandum, we've outlined eight  
18 different factors, I believe, that are supposed to be taken  
19 into consideration regarding legal prejudice or that different  
20 circuits have taken into consideration. One of those is  
21 adequacy of the plaintiffs' explanation for the need to  
22 dismiss; and one of the explanations they gave is that they've  
23 achieved one of the goals of their -- their suit. That is just  
24 one -- one aspect that we bring out in the memorandum. And  
25 they say that through the bankruptcy, they bought the domain

1 names, save3abn.com and save3abn.org. What they don't tell the  
2 Court is that there are at least 16 times as many save3abn  
3 websites now than when the plaintiffs filed suit, and these  
4 other websites were in operation prior to their purchase of  
5 save3abn.com.

6 And so I do have definite concern of a dismissal of  
7 this case without prejudice, and their referencing, well, you  
8 know, they say that, you know, a technical -- if they gain a  
9 technical advantage, that shouldn't be an obstacle. You know,  
10 that just raises red flags to me. And what you express about  
11 them raising the same claims in another forum, I really don't  
12 want to face that. I'd like to have the -- these issues  
13 resolved once and for all.

14 MR. SIMPSON: May I just say, your Honor --

15 THE COURT: Yes.

16 MR. SIMPSON: -- I wouldn't oppose the court imposing  
17 a restriction that if we were to bring an affirmative claim  
18 arising out of the same events that it would have to be brought  
19 in the same court. That would be -- that would seem perfectly  
20 fine and appropriate as a remedy as a -- to make sure we don't  
21 do that. I think that if -- if the plaintiffs -- I mean the  
22 defendants here, Mr. Pickle and Mr. Joy, were to bring a  
23 separate lawsuit for malicious prosecution, it probably would  
24 have to be brought in state court, because they wouldn't  
25 meet -- well, I'm just thinking they wouldn't have diversity or

1 jurisdiction. Maybe they would be able to get jurisdiction in  
2 the federal court. So, it's not -- it's not -- if we  
3 were -- if the plaintiffs were to want to raise their  
4 defamation claims by way of a counterclaim, as a defensive  
5 matter, we couldn't guarantee that it would be in the same  
6 court. It would be in your court, but I think if we -- I think  
7 the court could impose a restriction on dismissal that if we  
8 were to refile the same claims or any claims arising out of the  
9 same operative set of facts, it would have to be brought in the  
10 same court. I think that would be appropriate.

11 THE COURT: All right. Here's what I'm going to do.  
12 I'm going to grant the motion. I'm going to dismiss it without  
13 prejudice and with some conditions, which include the condition  
14 that any claims brought by the plaintiffs, based on the same  
15 facts and circumstances or -- or -- or nucleus of operative  
16 events may only be brought in the Central Division of  
17 Massachusetts, but let me be more formal about that.

18 The motion for voluntary dismissal is granted. I  
19 order that this lawsuit be dismissed without prejudice. I make  
20 no finding of any kind as to the merits or lack of merits of  
21 any of the claims or factual defenses set forth in the  
22 pleadings, and I'm dismissing the claim principally based on  
23 the representation by the plaintiff that there is no longer any  
24 purpose for the litigation, because plaintiffs do not believe  
25 that they can accomplish -- or achieve any meaningful relief

1 based on the facts and circumstances as they now exist,  
2 including, but not limited to, the bankruptcy of one of the  
3 defendants.

4 I am imposing this dismissal with the condition that  
5 any claim or claims brought by plaintiffs based on the same or  
6 similar facts and circumstances may only be brought in the  
7 Central Division of the District of Massachusetts, so that if  
8 this lawsuit in some ways comes back to life, it will be in  
9 front of me, and I'll have all the facts and circumstances at  
10 my disposal at that point and can make such orders as I think  
11 are just under the circumstances.

12 I will order that all materials produced in discovery  
13 that were designated as confidential under the confidentiality  
14 and protective order issued in this case on April 17th will be  
15 returned, as set forth in that order.

16 Destruction of the documents will only be permitted if  
17 consistent with the terms of the order; and similarly, any  
18 photocopying or other copying of any such materials will only  
19 be permitted if permitted under that order.

20 Any pending third-party subpoenas are deemed moot, and  
21 the party will -- any party having issued such a third-party  
22 subpoena will take reasonable steps to notify the recipient of  
23 the subpoena that the lawsuit has been dismissed, and the  
24 subpoenas are no longer in effect.

25 MR. PICKLE: Your Honor, could I -- could I --

1 THE COURT: Let me -- let me just finish. And any  
2 records that were delivered under seal and that are in the  
3 custody of the magistrate judge shall be returned to the party  
4 that produced those documents.

5 Yes, sir. Is this Mr. Pickle?

6 MR. PICKLE: Yes, it is.

7 THE COURT: Yes.

8 MR. PICKLE: Your Honor, one of the concerns that the  
9 case law brings up is that -- see -- a voluntarily dismissal  
10 without prejudice, one of the questions is well, will there be  
11 plain legal prejudice to the defendants, and one of the things  
12 that is, like, undue expense.

13 We've had -- and one of the factors they look at is  
14 amount of time and effort and expense the defendants have  
15 expended. We bring this out in our memorandum. Okay. What  
16 the -- what the plaintiffs are doing -- see, our basis for  
17 counterclaim --

18 THE COURT: Hold on. Hold on, Mr. Pickle. There's no  
19 counterclaim filed, as I understand; is that right?

20 MR. PUCCI: Right.

21 THE COURT: In this case.

22 MR. PICKLE: That is correct, your Honor.

23 THE COURT: You know, and -- and, you know, whether  
24 you have some future claim against the plaintiffs, I make no  
25 comment on of any kind whatsoever.

1 MR. PICKLE: It is --

2 THE COURT: In terms of -- just let -- let me, if I  
3 can. Just in terms of your costs and expense and attorney's  
4 fees, my understanding is that but for a brief appearance by  
5 Mr. Heal, I think, at the beginning of the litigation, you've  
6 been proceeding pro se; and let me add as a further condition  
7 that I will at least permit defendants to seek recovery of  
8 reasonable costs, fees, expenses -- reasonable cost of  
9 attorney's fees or expenses, if they file something within 21  
10 days of the date of this order. I'm not promising that I will  
11 allow those to be paid, and I'll permit plaintiffs to oppose  
12 it, but I will give you the opportunity to make that argument  
13 formally and with a specific itemized detailing of your costs  
14 and expenses.

15 MR. PICKLE: Okay. Your Honor, if the discovery in  
16 this case and work product is not transferable to -- to the  
17 other -- the future actions, either by the plaintiff or  
18 ourselves, that would prejudice the defendants.

19 THE COURT: Well, it's -- it is transferable, unless  
20 it's subject to the confidentiality order. If it's subject to  
21 the confidentiality order, you have to return it, or do  
22 whatever the order says you're supposed to do with it; and, you  
23 know, you have gained presumably a certain amount of  
24 information. You're not required to erase it from your brain,  
25 and you can use it consistent with the terms of the order

1 as -- as may be permitted by that order, but that's --

2 MR. PICKLE: That would mean, your Honor, that we  
3 would have to spend months and months litigating again to get  
4 the documents from Remnant, for example.

5 THE COURT: There is going to be no lawsuit pending.  
6 You'll have -- we'll have to wait and see how that plays out  
7 and in what court.

8 MR. PICKLE: And the one other thing, your Honor, is  
9 that the MidCountry Bank records, as far as I know, they were  
10 never designated confidential by MidCountry Bank, and it cost  
11 us \$3,500 to get those.

12 THE COURT: Again, I'm giving you 21 days to file  
13 something with me setting forth what you believe are your  
14 reasonable costs, expenses, and attorney's fees incurred in  
15 this litigation.

16 Again, I'm not promising I'm going to pay any of them,  
17 or permit them to be paid, but I will entertain any filing you  
18 wish to make.

19 MR. JOY: Your Honor, are you looking for -- this is  
20 now Gailon Joy again.

21 Are you looking for our motion's total cost or --

22 THE COURT: Please characterize it as a motion, so  
23 that it -- under the computer system, it -- it's flagged as  
24 something requiring my action.

25 MR. JOY: Thank you.

1 THE COURT: But you can, you know, designate it  
2 however you wish or think it's appropriate, and I'll permit  
3 plaintiffs to oppose whatever it is you file, and I'll make  
4 whatever decision I think is right under the circumstances.  
5 I'll simply give you that opportunity is all I'm doing at this  
6 point. Okay?

7 And if I do award -- decide to award any kind of costs  
8 or expenses or fees, it will obviously be a further condition  
9 of the order of voluntary dismissal, but we'll -- we'll take  
10 that up as it comes.

11 MR. SIMPSON: Thank you, your Honor.

12 THE COURT: And I'll retain jurisdiction for that  
13 purpose.

14 Okay. All right. If there's nothing further, then  
15 we'll stand in recess.

16 MR. SIMPSON: Nothing further from the plaintiffs.

17 THE COURT: Okay.

18 MR. JOY: Your Honor, I do have another question. I  
19 was noticing this week, I think it was, that there are three  
20 items on the docket that aren't visible on Pacer. Nos. -- I  
21 think it's Nos. 22, 28, and 88, and at some point are those  
22 unsealed?

23 THE COURT: Not unless someone -- if they're sealed,  
24 they're not going to be unsealed, unless someone moves to  
25 unseal them.



1 MR. JOY: Thank you, your Honor.

2 MR. PICKLE: And, your Honor, this is Bob Pickle  
3 again.

4 Attorney Simpson told me on Friday, the 17th -- well,  
5 he called me up and made a settlement proposal, and one thing  
6 he said was that if we didn't agree, you know, to settle, that  
7 one thing that the plaintiffs could do is to file a motion to  
8 dismiss, and it would be just kind of automatic, and there  
9 wouldn't be anything further we could do about it. So, I point  
10 blank asked him, Are you going to file a -- a motion to  
11 dismiss? And he told me no. And then six days later, he went  
12 ahead and filed it, and it just took us by surprise.

13 In our opinion, he didn't follow -- and he never  
14 talked to Mr. Joy about it at all. In our opinion, he did not  
15 comply with local Rule 7.1.

16 MR. SIMPSON: May I address that, your Honor?

17 THE COURT: Very -- very briefly, yes.

18 MR. SIMPSON: Just, it's a certain Alice in Wonderland  
19 quality to this whole litigation and hearing my conversations  
20 with Mr. Pickle translated back to you, your Honor, that's not  
21 at all what the conversation was like.

22 I read the rule to Mr. Pickle, Rule 41, including the  
23 terms and conditions, and we discussed whether there was any  
24 possible -- possible basis on which they would agree to the  
25 dismissal of the lawsuit. He said that he would speak with Mr.

1 Joy over the weekend, get back to me on Monday, if there was an  
2 interest; and he didn't get back to me and continued to move  
3 forward with the lawsuit.

4 THE COURT: All right. All right.

5 MR. SIMPSON: So that's -- that's all I want to say.

6 THE COURT: Okay. I've heard enough. My order will  
7 issue. It will be an electronic order, as indicated, and we'll  
8 stand in recess.

9 Thank you.

10 MR. SIMPSON: Thank you, Judge.

11 MR. JOY: Thank you.

12 MR. SIMPSON: Bye-bye.

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14 (At 3:33 p.m., Court was adjourned.)

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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of 18 pages, is a true and accurate transcription of my stenographic notes in Case No. 07cv40098-FDS, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton versus Gailon Arthur Joy and Robert Pickle, before F. Dennis Saylor, IV, on October 30, 2008, to the best of my skill, knowledge, and ability.

/s/ Marianne Kusa-Ryll

Marianne Kusa-Ryll, RDR, CRR  
Official Court Reporter