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-RWZ

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S ORDERS

On December 9 and 18, 2009, Defendants filed motions (a) requesting that the Court forward to the First Circuit Court of Appeals copies of bank statements subpoenaed from MidCountry Bank ("MidCountry") ("MidCountry records"), (b) seeking an order compelling Plaintiffs' counsel to return the MidCountry records to the Court, which Plaintiffs' counsel obtained in violation of the Court's own order,[1] and (c) requesting a stay (during Defendants' appeals) of the still unexecuted[2] October 30, 2008, order ordering that the MidCountry records be returned to MidCountry. (Doc. 204; Doc. 210). The magistrate judge denied these motions without comment in two separate electronic orders dated January 29, 2010. On February 3, 2010, Defendants filed objections to these electronic orders, and on February 18, Plaintiffs responded

[1]On October 30, 2008, the Court ordered that the MidCountry records be "returned to the party that produced those documents," which party Plaintiffs have admitted was MidCountry. (Doc. 141 p. 13; Doc. 216 p. 1).

[2]Since the MidCountry records have never been returned to MidCountry, that order has never yet been executed. (Doc. 141 p. 13).

to Defendants' objections. (Doc. 229; Doc. 231). Defendants now reply to Plaintiffs' response.

A. Only Possible Standard of Review Not "Clearly Erroneous"

Plaintiffs argue against this Court using any standard of review except "clearly erroneous," though "contrary to law" is clearly applicable for pretrial, non-dispositive motions.[3] (Doc. 231 pp. 3–5). Fed.R.Civ.P. 72(a); 28 U.S.C. § 636(b)(1)(A). "[T]he phrase 'contrary to law' indicates plenary review as to matters of law." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 91 (3rd Cir. 1992). The orders in question contain no factual findings to review. Therefore, even if Defendants motions were pretrial and non-dispositive, the end result is nearly a *de novo* review.

B. "Pickle and Joy have made unfounded allegations of misconduct against [the district judge], forcing him to recuse himself." (Doc. 231 p. 7).

Nothing in the Rules for Judicial-Conduct and Judicial-Disability Proceedings requires recusal simply because a complaint for judicial misconduct is filed. A judge should not recuse himself because of unfounded allegations. *In re American Ready Mix, Inc.*, 14 F.3d 1497, 1501 (10th Cir. 1994). What chaos the judicial system would be in if this were not so!

Defendants have neither made public their complaint nor served it on Plaintiffs. How therefore do Plaintiffs know that the allegations that complaint contains are unfounded?

Since the district judge himself found that his "impartiality might reasonably be questioned by an objective observer" (Doc. 226), Defendants' allegations cannot be unfounded.

C. Plaintiffs concede: "Not surprisingly, Judge Hillman also recused himself after ruling on the motions." (Doc. 231 p. 7).

If, in light of the misconduct investigations now being conducted, it is not surprising that the magistrate judge recused himself, then it follows that the magistrate judge should have recused himself before ruling on the motions, not after. Thus, this concession by Plaintiffs mandates that Defendants' objection A be sustained. (Doc. 229 pp. 2–3).

[3]Plaintiffs' own case citation makes this clear. *United States v. Gioia*, 853 F.Supp. 21, 26 n.3 (D.Mass. 1994).

Plaintiffs concede that 28 U.S.C. § 455(a) required the magistrate judge to recuse himself. Therefore, the act of issuing the orders in question was contrary to law.

Defendants' objection centers around "the extreme brevity of the January 29 orders, which disposed of such serious matters." (Doc. 229 p. 2). Post-9/11, Plaintiffs' counsel's employee walked out of a federal courthouse with the only copy of 11 to 12 pounds of sealed records, in violation of the Court's own order. (Doc. 160; Doc. 212-3; Doc. 141 p. 13).

The timing of this security breach, as well as the earlier mysterious "loss" of these records by court staff, and court staff's failure to notify Defendants when these records were found, leads one to suspect that court staff and Plaintiffs' counsel "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." (Doc. 213 pp. 10, 5–6; Doc. 206 ¶ 11; Doc. 230 ¶ 4).

After Defendants recently discovered what happened, two misconduct investigations commenced. (Doc. 226; Doc. 230 ¶¶ 2–3; Doc. 211 pp. 5–6; Doc. 212 ¶¶ 6–8).

Public confidence of the judicial system must not be undermined, necessitating counsel's duty and responsibility to point out when a judge's impartiality is reasonably subject to question. *In re Bernard v. Coyne*, 31 F.3d 842, 846–847 (9th Cir. 1994). In this instance, the denial of the motions in question without explanation or findings of any sort undermined public confidence in the judicial system, and thus constituted an abuse of discretion.

D. Were the Motions in Question Pretrial or Post-trial?

The motions in question concern retrieving from Plaintiffs' counsel and forwarding to the court of appeals part of the district court record which Plaintiffs' counsel unlawfully obtained in violation of and after the order of dismissal given from the bench. (*supra* 1; Doc. 160).

Plaintiffs argue that the motions in question must instead be pretrial because these motions concerned issues "unconnected to issues litigated at trial." (Doc. 231 p. 4). Yet Plaintiffs'

dismissal motion sought to obtain the MidCountry records in part on the basis of Defendants' alleged propensity to publish confidential information revealing Plaintiffs' wrongdoing, which Plaintiffs simultaneously admitted was an issue to be litigated at trial. (Doc. 121 pp. 2, 7–9). Plaintiffs' response to Defendants' objections sings the same refrain. (Doc. 231 pp. 5–6).

Thus, according to Plaintiffs' logic, to the extent the motions in question were denied because of such considerations, the motions were not pretrial, non-dispositive motions, and the orders denying those motions must be reviewed *de novo*.

E. Plaintiffs concede: "... these documents, which were filed under seal ...." (Doc. 231 p. 7)

Defendants contended that the MidCountry records are part of the record because, *inter alia*, these records were "filed with the Court." (Doc. 205 p. 6). Plaintiffs now concede that the MidCountry records were indeed "filed" after all. (Doc. 231 p. 7). And they were filed in consequence of Plaintiffs' own motion to quash. (Doc. 63-36). Pursuant to Fed.R.App.P. 10(a)(1), the MidCountry records must therefore be part of the record on appeal.

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 n.3 (2nd Cir. 1942). Therefore, the order denying Defendants' motion to forward the MidCountry records to the court of appeals was contrary to law.

Plaintiffs evade the conclusion that the MidCountry records are part of the court record by wrongly citing *Naser Jewelers v. City of Concord, New Hampshire*. In that case documents that were indisputably part of the court record could not be considered on appeal because they did not meet the standard of Fed.R.Civ.P. 56(e). 538 F.3d 17, 19 n.1 (1st Cir. 2008). But unlike *Naser*, Defendants' appeals do not concern a ruling on a summary judgment motion.

F. "The substantive information in these records is of no consequence to the subsequent appeal." (Doc. 231 p. 9)

Defendants will argue on appeal that, *inter alia*, (a) the April 13, 2009, finding that "[t]here is nothing in the record to suggest" abuse of process or malicious prosecution (Doc. 166 pp. 3–4) is clearly erroneous, (b) the Court's withholding of the MidCountry evidence from Defendants prejudiced their ability to litigate, and (c) depriving Defendants of the MidCountry records prejudices Defendants in future abuse of process and malicious prosecution litigation. These arguments depend on the substantive contents of the MidCountry records, such as whether these records document the $10,000 check purportedly sent by Three Angels Broadcasting Network, Inc. ("3ABN") to Tommy Shelton in 1999. (Doc. 80 p. 9). But Defendants cannot list here every such argument from their second appellants' brief, since that brief is not written yet.

G. "Their contention that the records contain anything unflattering is pure conjecture ...." (Doc. 231 p. 6)

Since a 3ABN employee claimed to have seen the $10,000 check, the contention is hardly pure conjecture. The documents produced by Remnant Publications, Inc. ("Remnant") ("Remnant documents") now on file in the court of appeals conclusively demonstrate that Danny Lee Shelton ("Shelton") received large sums in kickbacks and royalties that were not reported on his July 2006 affidavit, and manipulated bank balances in order to evade reporting his true assets on that same affidavit. (Doc. 224-13 pp. 3–4, 8; Affidavit of Robert Pickle ("Pickle Aff.") Ex. A at ¶¶ 3–59, 33–36; Ex. B). Due to the transaction details in the Remnant documents regarding transfers of money between 3ABN, Remnant accounts, and Shelton accounts, it is indisputably established that the MidCountry records contain "unflattering" information. (*Id.*).

H. "Their interest in these records does not outlive the litigation to which they relate." (Doc. 231 p. 9)

That litigation of necessity includes future litigation for abuse of process and malicious prosecution pertaining to the instant case.

I. Whose Property Are the MidCountry Records?

Plaintiffs appear to assert that the MidCountry records are Shelton's personal property. (Doc. 231 pp. 6, 1, 9, 11). But the bank statements in question are property of MidCountry, not Shelton. (Doc. 211 pp. 10). *United States v. Miller,* 425 U.S. 435, 440 (1976); *Clayton Brokerage Co. v. Clement,* 87 F.R.D. 569, 571 (D.Md. 1980). If Shelton owned the MidCountry records, the court would never have forbidden MidCountry to give copies to Shelton. (Doc. 63-36 p. 2).

Moreover, only four of the ten bank accounts in question were owned by Shelton. Of 548 bank statements produced by MidCountry, *only 241 concerned Shelton's accounts*. 24 concerned an account owned by DLS Publishing, Inc. ("DLS"), and 283 concerned five accounts owned by 3ABN. (Doc. 223 p. 8, citing Doc. 63-30 p. 5). Since Shelton first objected two years ago to Defendants' subpoena of MidCountry, DLS and 3ABN have never similarly objected. (*Id.*). DLS never filed an appearance, and never contacted Defendants. (Doc. 154 p. 2).

MidCountry intended to voluntarily comply with Defendants' subpoena. (Doc. 63-27 p. 5; Pickle Aff. Ex. C at ¶ 12). MidCountry "charges ... fees for ... copies" (Doc, 63-30 pp. 3–4, 6; Doc. 206-4 p. 2), which language suggests that MidCountry does not retain ownership of the copies purchased, and MidCountry has never said otherwise. (Pickle Aff. ¶ 2). The April 17, 2008, confidentiality order of the instant case did not require Defendants to ever surrender the MidCountry records. (Doc. 60). MidCountry provided copies of its records after Defendants' May 28, 2008, payment of $3,682.50. (Doc. 206 ¶ 5). MidCountry provided the copies without asserting ownership of them, and has never requested them to be returned. (Pickle Aff. ¶ 2).

Whether Plaintiffs can eventually prove that MidCountry, not Defendants, holds legal title to the copies of MidCountry's records is essentially irrelevant. Defendants were never told that they would be deprived of more than $3,500 worth of copies before the conclusion of all litigation, including future litigation for abuse of process and malicious prosecution. This constitutes a *de facto* expropriation of Defendants' property without due process.

J. "Pickle and Joy have long made uncorroborated, unfounded allegations against Danny Shelton and 3ABN, including claims that they covered up allegations of child molestation against a 3ABN employee ...." (Doc. 231 p. 5).

Before Plaintiffs filed suit on April 6, 2007, Defendants had published (a) statements by alleged Tommy Shelton ("Tommy") victims Brad Dunning, Roger Clem, and Duane Clem, (b) statements by Vicki Barnard and Charlotte Hopper, mothers of two other alleged victims, (c) a statement by alleged eye-witness Sherry Avery, (d) a quasi-confession letter by Tommy, (e) an announcement by Pastor Glenn Dryden ("Dryden") of new allegations in Virginia, (f) emails from 3ABN Board chairman Walter Thompson ("Thompson") that indicated that Shelton lied to cover up the allegations against his brother Tommy, and (g) communications with Shelton. (Doc. 81-10 pp. 23–25; Doc. 81-11 pp. 6–7; Doc. 127 ¶ 19; Doc. 127-15 to Doc. 127-17; Doc. 127-19; Doc. 81-2 pp. 1–102; Pickle Aff. ¶¶ 3–4, Ex. D–E). Other alleged victims Defendants personally had contact with include T.D., Greg Houseworth, and D.C. (Pickle Aff. ¶ 3). Also part of the record are the statement of a new alleged victim from Virginia, an earlier quasi-confession letter by Tommy, and a 2003 recording by Shelton seeking to intimidate Dryden into silence but acknowledging that instances had occurred. (Doc. 81-11 pp. 8–9; Doc. 127-18; Doc. 171 ¶¶ 11–14; Doc. 171 Ex. H: Folder 1; Doc. 170 p. 6). Tommy's son-in-law's brother also alleged in writing that he was molested by Tommy.[4] (Pickle Aff. ¶ 7, Ex. F). Uncorroborated, unfounded?

K. Plaintiffs concede: "... claims that they covered up allegations of child molestation against a 3ABN employee ... that framed the original basis for Plaintiffs' lawsuit against them." (Doc. 231 p. 5).

Defendants long contended that this case was conceived as retaliation for Defendants' releases exposing the child molestation allegations against Tommy, and Shelton's cover up of those allegations. (Doc. 152-6 p. 9; Doc. 149 pp. 7–8; etc.). Plaintiffs finally concede this point.

Defendants repeatedly accused Plaintiffs of obstructing discovery. (Doc. 71 ¶¶ 13, 16;

[4] Every alleged victim but Duane Clem claims to have been under 18 at the time of the alleged misconduct. (Pickle Aff. ¶ 8).

Doc. 79 p. 1; etc.). Plaintiffs earlier declared the child molestation allegations against Tommy Shelton to be irrelevant to this case, and sought to prohibit their discovery. (Doc. 75 pp. 12–13; Doc. 91 p. 8). Plaintiffs' present concession proves that Plaintiffs wrongfully obstructed discovery through bogus relevancy objections.

L. "Pickle and Joy ... went so far as to bring a baseless motion alleging a violation of Fed. R. Civ. P. 11 ...." (Doc. 231 p. 7)

The Court found Plaintiffs' disputed statements at issue in that Rule 11 motion to be somewhat problematic, a finding Plaintiffs never appealed. (Doc. 193 p. 3). Several disputed statements concerned mischaracterizations regarding the Remnant documents. (Doc. 184 pp. 2–3, 6, 11–13, 18–20). Of interest here is Plaintiffs' repeated and indisputably fallacious assertion that the Remnant documents were not relevant to the instant case, when Plaintiffs included allegations of hidden royalties, hidden marital assets, and private inurement in their complaint. (Doc. 184 pp. 11–12; Doc. 75 p. 5; Doc. 92 p. 33–34; Doc. 220 pp. 28–29; Doc. 158 pp. 1–2; Doc. 188 p. 18; Doc. 1 ¶¶ 46(g)–(i), 50(i); Doc. 224-13 pp. 3–4, 8; Pickle Aff. Ex. A at ¶¶ 3–59).

M. "Plaintiffs have contended throughout that the MidCountry records were never relevant." "Shelton resisted the subpoena on the basis that the information sought was ... not relevant to the case." "In fact, the court never determined whether these documents were even relevant to the litigation." (Doc. 231 pp. 1, 6, 9–10)

A clear pattern emerges: Plaintiffs falsely contended that the Tommy Shelton allegations, Remnant documents, and MidCountry records are irrelevant to the instant case.

The Court found these arguments fallacious, denied Plaintiffs' request to conduct an *in camera* review of the MidCountry records for relevancy, and sternly rebuked Plaintiffs over the issue of relevancy. (Doc. 74 p. 3; Doc. 75 pp. 16–17; Doc. 107 pp. 3–5). The contention that bank statements for accounts owned by Shelton, 3ABN, and DLS are irrelevant to defending against defamation *per se* allegations concerning private inurement, undisclosed royalties, and a perjurious financial affidavit (Doc. 1 ¶¶ 46(f)–(i), 50(i), 75) is utterly ludicrous and frivolous.

N. "Before the bank records were reviewed for relevancy, Judge Saylor granted plaintiffs' motion for voluntary dismissal. Plaintiffs moved that the MidCountry records be returned to them. Judge Saylor granted that motion as well." (Doc. 231 p. 2).

The day before DHL delivered the MidCountry records to the Court on September 12, 2008, the Court denied Plaintiffs' request to review the MidCountry records. (Doc. 107; Doc. 206-2). Judge Saylor ordered that those records be returned to MidCountry, not surrendered to Plaintiffs, and thus never granted Plaintiffs' motion in its entirety. (Doc. 141 p. 13).

Many of the papers filed with the Court were never reviewed. (Doc. 224-13 pp. 5–6; Doc. 170 p. 13; Doc. 171-3 p. 40–41; Doc. 178-2 pp. 18–19). They are still part of the record.

O. "Notably, Pickle and Joy did not seek reconsideration or request a stay of execution of this part of Judge Saylor's order." (Doc. 231 p. 10)

The order was issued on October 30, 2008. (Doc. 141 p. 13). Defendants filed their first notice of appeal on November 13, 2008, and sought reversal of that part of the order in their appellants' briefs. (Doc. 133; Doc. 171-3 pp. 65–66, 68; Doc. 178-2 pp. 35–36). Defendants conditionally sought reconsideration of that part of the order on April 27, 2009. (Doc. 169 p. 2). Defendants sought a stay of the still unexecuted order on December 18, 2009. (Doc. 210 p. 2).

P. The motions in question sought "to stay the pending appeals." (Doc. 231 pp. 2–3)

The district court has no authority to stay an appeal to the court of appeals. Plaintiffs apparently seek to obscure the fact that since the MidCountry records have never been returned to MidCountry, the order to do so has never yet been executed and can thus be stayed, and that Defendants have requested such a stay.

Q. "... they never voiced disagreement with the order when it issued." (Doc. 231 p. 11)

Defendants' detailed opposition, filed just before the status conference during which the case was dismissed, opposed Plaintiffs' request to obtain the MidCountry records, and Defendants repeatedly referenced that opposition. (Doc. 126 pp. 9, 15; Doc. 141 pp. 4–5, 9, 13).

Defendants did voice disagreement with the order when it issued. (Doc. 141 pp. 14–15).

R. "Judge Hillman obeyed the order and returned the MidCountry records to counsel for the Plaintiffs." "Judge Hillman's orders confirming his decision to return these confidential documents to plaintiffs is in compliance with Judge Saylor's order." (Doc 231 pp. 2, 10).

Judge Saylor ordered that the MidCountry records be returned to MidCountry. (Doc. 141 p. 13). Whoever surrendered those records to Plaintiffs' counsel thereby unlawfully violated that order, and the magistrate judge's refusal to rectify the matter was therefore contrary to law.

Plaintiffs cite the October 26, 2009, order which falsely stated that the confidentiality order requires parties to return documents. (Doc. 231 p. 10; Doc. 193 p. 3; Doc. 60). Since the dismissal order conditioned the return of documents upon whatever the confidentiality order requires, the October 26 finding that Plaintiffs cite is clearly erroneous, since the confidentiality order nowhere requires parties to return any documents. (Doc. 141 pp. 12, 14–15; Doc. 60).

S. "... they took the position that they did not presently have unprivileged information to support these allegedly defamatory statements, but intended to find such evidence through discovery." (Doc. 231 p. 6).

Rather, by alleging defamation *per se* (Doc. 1 ¶ 75), Plaintiffs intended to roll the burden of proof upon Defendants. Plaintiffs' imposition of the standards of the Federal Rules of Evidence upon articles by the press is unconstitutional. Of course Defendants' discovery would have to go beyond what Defendants already possessed as journalists, but Plaintiffs stated, "There's nothing, as far as we're concerned, that they would need more ...." (Doc. 144 p. 10).

T. "Frustrated by delays they encountered as this Court considered what sort of protective order and limits on the scope of discovery would be appropriate, Defendants circumvented this Court and obtained subpoenas from sister courts in Minnesota, Illinois, Michigan ...." (Doc. 231 p. 6).

On December 14, 2007, the Court denied Plaintiffs' request that discovery be stayed until Plaintiffs could file a motion for and obtain a confidentiality order. (Doc. 144 pp. 11, 22–23).

Plaintiffs filed a motion for a confidentiality order *on December 18, 2007.* (Doc. 40).

Plaintiffs didn't file their motion seeking to limit the scope of discovery *until June 25, 2008.* (Doc. 74). Defendants served two subpoenas upon MidCountry, *dated December 6 and 12, 2007.* (Doc. 76-3 pp. 10, 12). Plaintiffs already know that their misstated timeline is a fraud upon the court. (Doc. 63-28 p. 11; Doc. 75 p. 4; Doc. 190 pp. 7–8). This indisputable fabrication is illustrative of the vexatious nature of Plaintiffs' filings which has characterized this entire case.

U. "Magistrate Judge Hillman ultimately put a stop to that activity and ordered that all subpoenas on third parties be preapproved." (Doc. 231 p. 6)

By the time the magistrate judge issued his order on September 11, 2008, it was clear that Defendants would not be prejudiced by such an inconvenience, since Defendants had, on August 25 and September 8, 2008, already filed four well-documented motions for leave to serve third-party subpoenas. (Doc. 94; Doc. 98). But the magistrate judge's restriction also applied *to Plaintiffs' counsel*, not just to the Defendants *pro se.* (Doc. 107 p. 5). This addressed Defendants' own concerns about Plaintiffs' improper use of third-party subpoenas. (Doc. 80 pp. 6–7).

V. "Pickle and Joy were never authorized to view these documents." (Doc. 231 p. 10).

Ever since MidCountry was forbidden by the court to give a copy to Plaintiffs, Plaintiffs have never been authorized to view or possess the MidCountry records. (Doc. 63-36 p. 2). But by denying Plaintiffs' request that an *in camera* review be conducted before these records were given to Defendants, the last legal obstacle to Defendants obtaining these records was removed on September 11, 2008. (Doc. 107 p. 5; Doc. 74 p. 3; Doc. 75 pp. 16–17).

W. Miscellaneous Misrepresentations of Fact

Plaintiffs mischaracterize the First Circuit ruling (that the Remnant documents were already part of the record on appeal) as an administrative order from the Chief Deputy Clerk, when the docket text for that order explicitly states, "ORDER entered by Bruce M. Selya, Appellate Judge." (Doc. 231 pp. 8–9; Pickle Aff. Ex. G).

Contrary to Plaintiffs' false assertion, Defendants clearly stated that the magistrate judge

was not appointed as a special master. (Doc. 231 p. 4; Doc. 229 p. 2, n.2).

X. Present Condition, Location, and Safety of the MidCountry Records

It is indisputable that the mere unsupported assertions of Plaintiffs and their counsel are not credible. Defendants therefore object on evidentiary grounds to the acceptance of such assertions regarding the present condition, location, safety, and description of the MidCountry records. (Doc. 231 pp. 2, 11). "Plaintiff's Counsel has stated under oath that the documents are in a sealed box and will be maintained until the conclusion of this litigation. (Docket #208 at ¶ 8)." (Doc. 231 p. 11). But Doc. 208 ¶ 8 says nothing about a sealed box! Plaintiffs' counsel already represented that the records were at multiple offices, and refused to deny that the MidCountry records had been unsealed, copied, and distributed. (Doc. 208 ¶ 8; Doc. 224-17 to Doc. 224-20).

CONCLUSION

Legally and equitably, Defendants' objections should be sustained, and a *de novo* review of Defendants' motions should be conducted. The MidCountry records which were filed with the Court, which Plaintiffs obtained in violation of the Court's order, should be returned to the Court, properly certified pursuant to the Federal Rules of Evidence. A copy should then be forwarded to the court of appeals as part of the record on appeal. The still unexecuted October 30, 2008, order should be stayed, if required to prevent the return of the MidCountry records to MidCountry.

Respectfully submitted,

Dated: February 26, 2010

/s/ Gailon Arthur Joy, *pro se*
Gailon Arthur Joy, *pro se*
Sterling, MA 01564
Tel: (508) 872-8000

and

/s/ Robert Pickle, *pro se*
Robert Pickle, *pro se*
Halstad, MN 56548
Tel: (218) 456-2568