

**United States District Court
Eastern District of New York**

RECEIVED
U.S. DISTRICT COURT, E.D.N.Y.
IN CLERK'S OFFICE
LONG ISLAND COURTHOUSE

JUL 08 2004 ★

ENTERED

★ ————— ★

LoPresti v. Citigroup, Inc, et al.

CV-02-6492 (SJ)(VVP)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR SANCTIONS UNDER RULE 11**

June 2, 2004

**Henry M. Grubel, P.C.
Attorney for Plaintiff
37 Prospect Street
Freeport, NY 11520
516-623-4130**

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR RULE 11 SANCTIONS

LoPresti v. Citigroup
CV-02-6492 (SJ) (VVP)

TABLE OF CONTENTS

I. INTRODUCTION 2

II. HISTORY OF CASE 3

A. FACTUAL BACKGROUND: 3

B. PROCEDURAL BACKGROUND. 4

III. ARGUMENTS AND AUTHORITIES 5

A. STATUTORY BASIS FOR SANCTIONS 5

B. THERE IS NO FACTUAL BASIS OR EVIDENTIARY SUPPORT FOR ALLEGATIONS
THAT 'JUST' CITISTREET IS REALLY CITISTREET LLC. 7

C. THERE IS NO LEGAL BASIS FOR THE ALLEGATIONS ASSERTED 11

D. THESE ALLEGATIONS WERE ASSERTED FOR IMPROPER PURPOSE OF
HARASSMENT 14

E. Award of Attorney's Fees Is Warranted to Deter Further
Misconduct 15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LoPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
RULE 11 SANCTIONS

CITIGROUP, INC., et al.,

Defendants.

-----X

I. INTRODUCTION

Plaintiff, Carmine A. LoPresti has moved this court for an order awarding sanctions, pursuant to Rule 11 Federal Rules of Civil Procedure, ('F.R.C.P.') against the defendants CITISTREET and COPELAND ASSOCIATES, Inc. ('COPELAND') their attorneys, David Lender, Esq.; Peter Hageman, Esq.; their law firm Weil, Gotshal and Manges, LLP and Robert C. Dughgi, (collectively the 'Respondents').

This memorandum of law is submitted in support of plaintiff's motion for sanctions. Plaintiff seeks an award of reasonable attorney's fees incurred in responding to the allegations by the respondents that the defendants CITISTREET and COPELAND, who deliberately defaulted, are non existent and/or non cognizable entities. As such, they are claiming to be immune from the jurisdiction of this Court, and having a default judgment entered against them.

CITISTREET is a target defendant in this matter. Its liability is not contingent upon the liability of any other defendant.

II. HISTORY OF CASE

A. FACTUAL BACKGROUND:

Plaintiff filed this action asserting ERISA, RICO, Antitrust violations plus statutory and common law, New York State claims arising, inter alia, out of the fact that the defendants refused to allow plaintiff to continue selling tax sheltered I.R.C. § 403(b) annuities to the employees of co-defendant Lutheran Medical Center. Lutheran had made the defaulting defendant CITISTREET, the sole and exclusive provider of annuities at Lutheran.

The Weil firm appeared on behalf of the co-defendants CITIGROUP, Inc., STATE STREET CORP., their subsidiaries and employees. However, neither the Weil firm, nor anyone else appeared on behalf of CITISTREET and COPELAND. Both defendants deliberately defaulted.

Although the Weil firm did not appear on behalf of CITISTREET and COPELAND, Weil formally opposed both the Clerk's docketing of the default, and plaintiff's motion for a default judgment, on the ground that 'just' CITISTREET does not exist. They allege that 'just' CITISTREET, is really CITISTREET LLC. Further, that COPELAND became non existent in 2000 when it was merged out of existence. The respondents also allege that neither defaulting party was a cognizable legal entity.

Plaintiff asserts that there is no evidentiary basis for their allegations. The proof as shown in the exhibits attached to the

affidavit in support hereof reveals that CITISTREET is a self declared joint venture, completely separate from the co-defendant CITISTREET LLC. COPELAND, while dissolved in 2000, was still writing checks in its corporate name in 2003, and that CITISTREET is now writing checks in 2004 out of its own CITISTREET checking account, which bears the identical account number as the dissolved COPELAND account number, 1014768373.

None of the co-defendants have opposed plaintiff's motion for a default judgment. The co-defendant Lutheran Medical Center has averred to this Court, in a prior unrelated filing, that 'just' CITISTREET, is indeed a joint venture.

B. PROCEDURAL BACKGROUND:

Plaintiff's complaint was filed with the Court on February 20, 2003. All of the defendants were duly served therewith. All defendants appeared by counsel, except for CITISTREET and COPELAND. They chose to default.

On April 21, 2003 plaintiff noticed a motion for a default judgment under Rule 55 of the F.R.C.P. against CITISTREET and COPELAND, and requested that the Clerk of the Court note the defaults of CITISTREET and COPELAND on the Court's docket pursuant to F.R.C.P. Rule 55(a). Both CITISTREET and COPELAND opposed having default judgments entered against them on the alleged grounds that they do not exist.

A hearing was ordered to be held on July 7, 2003 on plaintiff's motion. No evidence or testimony was taken before Magistrate Judge

Pohorelsky. Only counsel from the Weil firm and for plaintiff were present, because the order for the hearing required that only defense counsel opposing plaintiff's motion needed to appear.

The decision on plaintiff's motion for a default judgment is still pending. The Clerk of the Court has refused to note the defaults of the defendants CITISTREET and COPELAND on the Court docket.

All of the defendants that appeared made motions to dismiss under F.R.C.P. 12(b)(6). Plaintiff opposed all of said motions. Decisions thereon are currently pending.

III. ARGUMENTS AND AUTHORITIES

A. STATUTORY BASIS FOR SANCTIONS

Rule 11 of the F.R.C.P. provides in part, that in presenting any document to the court, an attorney certifies that to the best of his or her knowledge, information, and belief, the document is not being filed for an improper purpose; "the claims ... and other legal contentions therein are warranted by existing law;" and "the allegations and other factual contentions have evidentiary support..." *F.R.C.P. 11(b)*.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper the proponent certifies that to the best of the proponent's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that -

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless

increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Rule 11 may also be the basis for imposing sanctions on a party except that monetary sanctions may not be imposed on a party for a violation of Rule 11(b)(2). F.R.C.P. 11(c)(2)(A).

Rule 11 includes a 21-day "safe harbor" provision, which gives a proponent an opportunity to avoid sanctions by withdrawing the challenged allegation or other filing within 21 days after the filing of a Rule 11 motion. F.R.C.P. 11(c)(1)(A).

The same section of Rule 11 also provides that "absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees."

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court has discretion to impose sanctions on the attorneys, law firms, or parties responsible for the violation, F.R.C.P.11(b).

The sanctions that are imposed should be sufficient to deter the offender from engaging in similar conduct in the future, and may

include, in addition to non monetary sanctions and penalties, an order directing payment to the moving party of the reasonable attorney's fees and other expenses incurred as a direct result of the violation. *F.R.C.P. 11(c)(2)*.

B. THERE IS NO FACTUAL BASIS OR EVIDENTIARY SUPPORT FOR ALLEGATIONS THAT 'JUST' CITISTREET IS REALLY CITISTREET LLC.

As seen in the exhibits attached to the affidavit in support hereof, CITISTREET is purely and simply as it states repeatedly an admitted, self declared, and self described joint venture. It is a joint venture that is owned 50/50 by the co-defendants CITIGROUP, Inc. and STATE STREET CORP. There is no competent evidentiary support to the contrary. Respondents wish to confuse the issue by claiming that CITISTREET is the co-defendant CITISTREET LLC.

There are major differences between a joint venture and an LLC. An organization can not be both an LLC and a joint venture at the same time. CITISTREET does not use the LLC designation after its name and it states in its press releases and elsewhere that it is a joint venture.

COPELAND was a de facto corporation, in that it was still writing checks in 2002 and 2003, after it dissolved in 2000 and CITISTREET now maintains the identical bank account number under the CITISTREET name that COPELAND had. In addition it now adds the name of Citistreet Associates, Inc. to its check.

Evidentiary support for plaintiff's position is contained on the CITISTREET web site. The effect of admissions, in a party's web

site was recently opined upon in: *N.Y.C. Med. & Neurodiagnostic v. Republic*, 774 N.Y.S.2d 916 (April 12, 2004, N.Y. Civil Ct.)

The term "www" stands for the "world wide web" (see, *Charles E. Hill & Assocs. v. Compuserve, Inc.*, 2003 U.S. Dist. LEXIS 18187, 2003 WL 22327827 [SD Ind. 2003]). The statements placed on the web sites of Republic and U-Haul were made, not by this Court or some bystander, but by Republic and U-Haul and operate as admissions (see, *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1353, 71 P.3d 296, 304, 1 Cal. Rptr. 3d 32, 41 [2003] [statement posted on company's web site operated as an admission against it]).

The United States Supreme Court, in *Reno v. American Civ. Liberties Union* (521 U.S. 844, 853, 138 L. Ed. 2d 874, 117 S. Ct. 2329 [1997]), discussing the importance of the web, stated: "From the publisher's point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers" (*id.* at 853, quoted by the Court of Appeals with approval in *Firth v. State*, 98 N.Y.2d 365, 370, 775 N.E.2d 463, 747 N.Y.S.2d 69 [2002]); see, e.g., *Gaidon v. Guardian Life Ins. Co. Of America*, 94 N.Y.2d 330, 342, 725 N.E.2d 598, 704 N.Y.S.2d 177 [1999]

The Supreme Court's observation about the internet's power and scope is not lost on Republic and U-Haul, companies that smartly employ a web site in order to drum up business. Corporations want their web sites to be read, not ignored, and, indeed, are constantly devising ways for search engines to catapult their web sites to the top of a search request. Republic and U-Haul posted the information on their web sites, hoping to attract the attention of literally millions of persons spanning the globe "for an indefinite period of time" (*Firth v. State*, 98 N.Y.2d at 370).

The allegations regarding the non existence of the defendants CITISTREET and COPELAND by the respondents are not warranted by the publicly available evidence to the contrary. As a preliminary consequence of these assertions Magistrate Judge Pohorelsky stated

that he is of the opinion that CITISTREET and COPELAND do not exist and told plaintiff's counsel at the 'hearing' that he was 'playing games'; the Clerk of this Court has refused to note the defaults of CITISTREET and COPELAND on the docket of this matter; the Magistrate Judge has not conducted an evidentiary hearing, in that he refused to allow plaintiff to produce documentary evidence; the Weil law firm has been allowed to represent the interests of CITISTREET and COPELAND without appearing on their behalf; and the current motions under F.R.C.P.12(b)(6) are offered by the Weil firm to include CITISTREET and COPELAND as if by proxy or osmosis.

The exhibits attached to the affidavit in support of this motion are prima facie proof that CITISTREET and COPELAND are cognizable legal entities fully subject to the jurisdiction of this Court.

CITISTREET and COPELAND have defaulted and plaintiff is entitled to have a default judgment entered on their default.

Plaintiff's letters to the Weil firm regarding the existence of the CITISTREET web-site and the COPELAND checks had no affect on the recipients. They have stated that these defendants are non existent entities. The evidence proving otherwise was well known to the respondents before they filed papers in opposition to plaintiff's motion for a default judgment, and wrote letters to the Clerk of this Court and Magistrate Judge Pohorelsky, opposing the noting of a default under F.R.C.P. Rule 55a.

The CITISTREET evidentiary admissions in its press releases and on its web site, establish conclusively that the respondents were

aware of these facts, yet no actions were taken by the respondents to correct or withdraw their allegations.

As the respondents have not withdrawn their claims that CITISTREET and COPELAND are non-existent and/or non-cognizable legal entities, plaintiff now moves this Court for sanctions.

In the present case, even the slightest pre-filing inquiries by the respondents, would have revealed that there was overwhelming public documentation and evidence, showing that CITISTREET was a joint venture separate and apart from CITISTREET LLC, and that COPELAND was acting as a de facto corporation. The evidence shows that they are bona fide legal entities.

The respondents were on notice to conduct a serious inquiry as to the existence of the joint venture called 'just' CITISTREET and of COPELAND. It appears to be obvious that, prior to their default the respondents knew, or at the very least, should have known, that CITISTREET and COPELAND did exist. The conduct of respondents in filing the opposition to plaintiff's motion for default judgment despite the lack of any evidentiary support or factual basis for their allegations that CITISTREET and COPELAND did not exist, other than the self-serving statements of Robert C. Dughi, violated Rule 11(b)(3) and was therefore sanctionable.

It is important to note that the respondents continued to press their false allegations even after they were informed by plaintiff's counsel of the existence of the 'just' CITISTREET web site, and the existence of the checks that were written by COPELAND, years after they allegedly dissolved.

The respondents continued to resist withdrawing their baseless allegations. They have opposed the pending motion for default judgment and, despite 21 days of notice of this motion for sanctions, they have not withdrawn or even attempted to correct their baseless allegations.

Mr. Lender and his firm were given a faxed heads up from plaintiff's counsel, about the pendency of this filing on May 25, 2004. Later that day, Mr. Lender called and threatened plaintiff's counsel with severe consequences. He said the full force of his law firm would be used against plaintiff's counsel. He also warned him over and over not to make this motion, that the Weil firm would counter move for sanctions against him, and that they are very expensive lawyers.

C. THERE IS NO LEGAL BASIS FOR THE ALLEGATIONS ASSERTED

This court should also exercise its discretion to sanction respondents for filing allegations for which there were clearly no factual basis or evidentiary support. It is well-established that every business must indicate in its name what sort of an entity it is, in order not to deceive the public. The appropriate suffix after its name, such as LLC, Inc, Corp, etc. is required by law

A corporate entity must have in its name an indicia of its being a corporation. As set forth in N.Y. Gen Business Law § 301:

(a) Except as otherwise provided in this chapter, the name of a domestic or foreign corporation:

(1) Shall contain the word "corporation", "incorporated" or "limited", or an abbreviation of one of such words; or, in the case of a foreign corporation, it shall, for use in this state, add at

the end of its name one of such words or an abbreviation thereof.

The N.Y. Limited Liability Company Law, § 204 requires the use of an indicia of the fact that the entity is a Limited Liability Company. It must be used in the company name, whether it is a foreign or domestic LLC. CITISTREET does not use the suffix LLC after its name when it refers to itself as "CITISTREET a 'CITIGROUP and STATE STREET COMPANY'". When CITISTREET presents themselves as 'just' CITISTREET they are a joint venture. CITISTREET can not be an LLC and a joint venture at the same time, when it suits their purposes.

The 'just' CITISTREET web site uses no corporate indicia in its name. To the contrary it describes itself as being a 50/50 joint venture between the defendants CITIGROUP, Inc and STATE STREET CORP, and not as being CITISTREET LLC, which is a separate entity. A corporation can not be both an LLC and a joint venture at the same time. A joint venture is a cognizable legal entity Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, clearly subject to suit.

As seen in the attachments to plaintiff's affidavit in support of this motion, CITISTREET is self admitted, self described, and self declared as being a joint venture. CITISTREET states that it is a joint venture owned 50/50 by the co-defendants CITIGROUP, Inc. and STATE STREET CORP.

ERISA is specifically applicable to a joint venture, 29 USCS § 1002(9) reads as follows:

The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock

company, trust, estate, unincorporated organization, association, or employee organization.

CITISTREET is a joint venture, and as such is a cognizable legal entity, subject to ERISA and to the jurisdiction of this Court.

In the present case, the respondents have never alleged that any information contained on the CITISREET web site was not true, nor did they deny that Copeland had written the checks that were presented to them, or that the Ohio authority to do business was not surrendered until March 24, 2003, and the authority to do business in the State of Massachusetts was not withdrawn until January 31, 2003. Moreover, the evidentiary value of the web site admissions and the reality of the checks are apparent on their face.

If the respondents had conducted a reasonable inquiry prior to filing the opposition to plaintiff's motion for a default judgment, or before sending the letters to Mr. Giokas and Magistrate Judge Pohorelsky, they would have known that their allegations could not form a legal basis for their opposition to plaintiff's motion for a default judgment, which CITISTREET and COPELAND brought upon themselves. They deliberately defaulted.

Moreover, as the respondents did not attempt to advance an argument for a modification of or departure from existing law, their pursuit of this opposition may not be justified on that basis. By filing and pursuing allegations that lacked evidentiary support, the respondents violated Rule 11(b)(2).

D. THESE ALLEGATIONS WERE ASSERTED FOR IMPROPER PURPOSE OF HARASSMENT

A party who files a pleading for an improper purpose, such as harassing or punishing the opposing party, (as Mr. Lender threatened he would do to plaintiff's counsel), violates Rule 11(b)(1) and may therefore be sanctioned. The test for whether a party acted with an improper purpose is objective--that is, whether the party's outward behavior manifested an improper purpose. A court may infer from the facts that a pleading was filed for an improper purpose. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1366 (9th Cir. 1990) (en banc).

In the present case, the respondents alleged that the defaulting defendants did not exist. They were completely unconcerned about and unaffected by plaintiff's statements and letters to them or to the contents of plaintiff's motion for a default judgment to the contrary. Crucially, they also indicated this to the Magistrate Judge, and repeatedly conveyed their lack of concern to plaintiff's counsel.

No explanation has ever been offered as to why they did not pay heed to the CITISTREET web site and the checks written by Copeland years after they were merged out of existence. There has never been a question that the web site was genuine and that the checks were authentic copies, nor has there been an explanation offered by the respondents. The web site remains to this date. The statements contained therein are admissible.

The frivolousness of the opposition must have been apparent to the respondents prior to filing their opposition papers and writing the subject letters to Mr. Giokas and Magistrate Judge Pohorelsky.

Thus, this court may infer that the letters and opposition to the motion for a default judgment were filed for the improper purpose of prejudicing plaintiff.

E. Award of Attorney's Fees Is Warranted to Deter Further Misconduct

This court may exercise its discretion to impose sanctions against the respondents for their violations of Rule 11(b) See *In re Pennie & Edmonds LLC*, 323 F3d 86 (2nd Cir. 2003), attorney's obligation to determine the veracity of a client's affidavit before it is filed with the court.

Rule 11 sanctions are to be imposed with caution, *Knipe v. Skinner*, 19 F.3d 72, 78 (2^d Cir. 1994), and should be limited to those sanctions necessary to deter the offender and those similarly situated from engaging in similar conduct. *F.R.C.P. 11(c)(2)*.

In determining whether to impose sanctions, the court may consider the following factors, among others: (1) whether the improper conduct was willful, or negligent; (2) whether it was part of a pattern of activity, or an isolated event; (3) whether it infected the entire pleading, or only one particular count or defense; (4) whether the person has engaged in similar conduct in other litigation; (5) whether it was intended to injure; and (6)

what effect it had on the litigation process in time or expense. See, F.R.C.P. Rule 11, advisory committee notes of 1993 .

Applying the above factors, it is clear that sanctions are appropriate in the present case. The misconduct of the respondents was clearly willful. The defendant CITIGROUP, Inc. has been implicated in the ENRON debacle, and it has been fined for wrongful acts in other matters. The respondents know that their conduct adversely affected and prejudiced plaintiff's motion for a default judgment, and was without evidentiary foundation from its inception.

The misconduct of the respondents in this case has infected the entire management of plaintiff's case, and its impact on the Court. It was a direct cause of the expenses incurred by plaintiff in bringing the subject motions for a default judgment and for sanctions.

Finally, the very nature of the misconduct--filing groundless opposition on behalf of defendants who have defaulted--makes it clear that the respondents acted with the intent to injure and punish plaintiff, and for the improper purpose of using the Courts to defend and protect CITISTREET and COPELAND from being subject to the jurisdiction of this Court. In short, their conduct was precisely the type of egregious abuse of the legal process that Rule 11 sanctions were designed to deter.

In *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370 (2d Cir. 2003) the court stated that with regard to factual contentions, "sanctions may not be imposed unless a particular allegation is

utterly lacking in support." *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996) (interpreting the 1993 amendment to Rule 11(b)]. The actions of the respondents meets this standard.

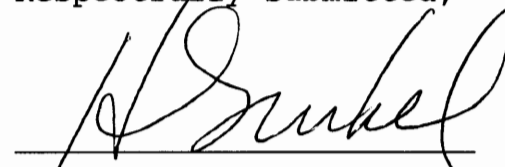
The allegation that just CITISTREET is really CITISTREET LLC, is utterly lacking in support. Respondents cannot deny that COPELAND was issuing six figure checks years after it was dissolved, and that CITISTREET is now issuing checks from a bank account bearing the identical account number.

Appropriate sanctions in this case should include an award of the total amount of reasonable attorney's fees and expenses incurred by plaintiff in bringing and pressing his motion for a default judgment. Without an award of fees, the respondents will have achieved their goal of punishing plaintiff for exercising his right to access to the Court for the wrongs of CITISTREET and COPELAND, and they will have taken significant steps towards foreclosing all those who might do likewise, and bring an action against CITISTREET and/or COPELAND.

Thus, an award of sanctions including reasonable attorney's fees to plaintiff is necessary to deter the respondents and others like CITISTREET from continuing to file opposition to a motion by alleging facts that lack evidentiary support.

Dated: Freeport, New York
June 2, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Grubel", written over a horizontal line.

Henry M. Grubel (HG-3211)
Henry M. Grubel, P.C.
Attorney for plaintiff
37 Prospect Street
Freeport, New York 11520
516-623-4100