

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

REPLY  
AFFIDAVIT

CITIGROUP, INC., et al.,

Defendants.

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Henry M. Grubel, declares and affirms under penalty of perjury as follows:

I am the attorney for the plaintiff herein. This affidavit is submitted in reply to the opposition to the plaintiff's motion to amend his second amended complaint, filed by Weil Gotshal & Manges, LLP on behalf of the Citigroup, Inc. and State Street defendants.

I was told that the Sedgwick, Detert, Moran, and Arnold law firm will not be filing papers in opposition to this motion. I have been told that counsel for Lutheran Medical Center will be filing papers in opposition to this motion by December 23, 2004.

The statements made in the preliminary statement by the Citigroup defendants are conclusory, argumentative and non dispositive. They also bemoan, mock and urge this Court to deny plaintiff's motion, due to plaintiff's attempts to assert his rights to obtain a fair and impartial hearing from an impartial magistrate judge.

The Citigroup defendants assume presumptuously, and without attribution, that the Court will dismiss plaintiff's action under their motion pursuant to FRCP 12(b)(6).

Citigroup avers that the claims being made in the third amended complaint are of no consequence. If so, then why are the Citigroup defendants opposing the motion to amend?

With regard to the reference to the transcript of the hearing on plaintiff's motion for default judgment wherein magistrate judge Pohorelsky said that 'plaintiff was playing games.'

The magistrate judge's statement was totally injudicious, biased and prejudicial to the plaintiff. He made his 'playing games' canard without holding any evidentiary hearing. He refused to take plaintiff's proof. Now 'playing games' has become a mantra of revealed wisdom to Weil Gotshal & Manges LLP.

The question presented is, if the magistrate judge has not held an evidentiary hearing how can he come to these conclusions? It proves his bias in favor of Weil Gotshal & Manges, LLP, and his strong prejudice against plaintiff.

With regard to the Federal Form 5500 filings being made by disinterested third parties, plaintiff also included a Federal Form 5500 filing made by the defendant Lutheran Medical Center, (which Weil Gotshal & Manges, LLP failed to mention), wherein they stated under penalty of perjury that

they paid over \$20,000 in commissions to the defendant CITISTREET.

CITISTREET has defaulted in appearing in this case on the grounds advanced by Weil Gotshal & Manges LLP that CITISTREET is a non-existent entity of any sort.

As to why these Federal Form 5500s were just served. Plaintiff first heard of their availability on November 2, 2004. We ordered and received them on November 3, 2004. We received the Blue ribbon copy of the Lutheran Medical Center Form 5500 Federal Filing on November 10, 2004. On November 11, 2004 copies of the Blue Ribbon filing were sent to all counsel, the magistrate judge and Judge Johnson.

The reason that we just found out about the existence of these sworn Federal Form 5500 filings for the year 2002, is, as it was explained to me, the Federal Form 5500s are due seven months after the close of the employer's fiscal or plan year. The Federal Form 5500s are filed with the Internal Revenue Service. The I.R.S. has them for six to eight months.

The I.R.S. then gives the Federal Form 5500s to the United States Department of Labor for archiving and public disclosure. This takes the Department of Labor about six to eight months to do. So there is generally this two year lag time.

The database from which the plaintiff got the Federal Form 5500 filings, relevant copies of which, were sent to

the Court and to all counsel, was not available until November 2004.

With regard to the transferring of Internal Revenue Code § 403(b) account values, into the I.R.C. § 401(k) plans of Citigroup, that will be subject of proof on the plaintiff's part at the trial of this matter.

The Citigroup defendants have not contested the truth, accuracy or veracity of the items contained in the online website called citistreetonline.com, or in the Federal Form 5500s. Nor have they denied misleading the plaintiff as to the existence of CITISTREET.

The Citigroup defendants have not contested the contents of the plaintiff's Memorandum of Law or the affidavit that was submitted in support of plaintiff's motion for leave to serve his proposed third amended complaint.

With regard to the dismissal by the Supreme Court in Kings County of the LoPresti case versus Massachusetts Mutual Life Insurance Company, it is to be noted that there were no RICO claims filed in said case, nor were there any ERISA claims filed in that case.

Said case is going to be appealed. It is a New York State case and different from the Federal case that is before the court herein, however both cases are in the spirit of the filings made by the Attorney General of the

State of New York, Elliot Spitzer, against various insurance companies and insurance brokerages.

There is no reason why this court should not allow plaintiff to serve his proposed third amended complaint. The Citigroup and State Street defendants have not pleaded any bona-fide prejudice to them, by plaintiff's filing of this third amended complaint.

WHEREFORE, it is respectfully requested that the Court grant plaintiff's motion for leave to amend his second amended complaint in its entirety, and allow him to serve his proposed third amended complaint.

Dated: December 21, 2004  
Freeport, New York

/s

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