

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

CITIGROUP, INC., et al.,

PLAINTIFF'S MEMO
IN OPPOSITION
TO FURTHER
SANCTIONS

Defendants.

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FURTHER SANCTIONS ARE NOT WARRANTED

Additional sanctions against plaintiff's counsel are not warranted. Judge Johnson has already sanctioned plaintiff's counsel in his order dated January 24, 2005.

MR. DUGHI'S AFFIDAVIT

The court had elected to decide Plaintiff's Rule 11 motion on the credibility of Mr. Dughi. He was the only witness allowed to testify at the January 5, 2005, hearing so that the magistrate judge could test his credibility.

Mr. Dughi gave an affidavit dated May 1, 2003 to this court by his counsel Weil Gotshal and Manges, (WG&M) stating in relevant part that the defaulted defendants Citistreet and Copeland Associates, Inc., did not exist, and that 'there is no cognizable legal entity called just "Citistreet".'

Said affidavit by Mr. Dughi was submitted by WG&M in opposition to plaintiff's motion for default judgments

against Citistreet and Copeland Associates, Inc..

The Dughi affidavit also became the sole basis of the opposition of WG&M to plaintiff's Rule 11 motion against them, for advocating that neither Citistreet, nor Copeland Associates, Inc., were existing entities.

MR. DUGHI CONTRADICTED HIS AFFIDAVIT

Mr. Dughi admitted that Citistreet was indeed a joint venture. TR 72/22 et seq.

Mr. Dughi also stated that a joint venture and a limited liability company were two separate entities. TR 40/19 et seq.

Mr. DUGHI'S TESTIMONY
AND THE COMMENTS BY THE MAGISTRATE JUDGE

At TR 72/22:

THE WITNESS: Can we agree we are a joint venture?

THE COURT: Let's not agree on anything just yet? Let's just give testimony. I don't think we'll ever get agreement on that, on what that means. We'll agree that you're saying that Citistreet is a joint venture.

THE WITNESS: Yes, it is.

THE COURT: It is a joint venture.

THE WITNESS: 50% owned by Citigroup and 50% owned by State Street Corporation.

THE COURT: Okay, that's your testimony.

PLAINTIFF'S RULE 11 MOTION WAS WELL FOUNDED.

Plaintiff submitted reams of proof in support of his motion under Rule 11. Plaintiff complied with the 21 day safe harbor provisions of Rule 11.

Voluminous copies of the Citistreet website press releases, stated that Citistreet was a joint venture owned 50/50 by Citigroup and State Street Bank.

Public directories and listings confirmed the existence of 'just Citistreet'.

An attorney from a major Wall Street firm stated in his online bio that he had represented State Street Bank in the formation of the joint venture called Citistreet with Citigroup.

In this case the court has elected to place the entire question of sanctions on the credibility of Mr. Dughi.

Weil Gotshal & Manges (WG&M), has not asserted that they conducted their own inquiry, reasonable under the circumstances, into the veracity of the Dughi affidavit as required by FRCP Rule 11(b), after they were confronted and advised by plaintiff of the public documentary proof that stated that Citistreet was a joint venture .

Plaintiff incorporates herein by reference all of the issues raised in his January 19, 2005 Rule 72, objections to the findings of the magistrate judge.

SANCTIONS TO THE PREVAILING PARTY ARE NOT AUTOMATIC.

(A copy of RULE 11 is annexed hereto)

The operative modifier regarding sanctions on behalf of the prevailing party, are the words **'IF WARRANTED'**.

The Supreme Court in Business Guides v. Chromatic Communications (1991) 498 US 533 stated that Rule 11 is not a fee shifting statute.

The Supreme Court has also stated '*The sanctions are not designed to reallocate the burdens of litigation, since they are tied not to the litigation's outcome, **but to the issue whether a specific filing was well founded**; they shift only the cost of a discrete event rather than the litigation's entire cost; **and the Rule calls only for an appropriate sanction but does not mandate attorney's fees.**'*

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. (1991) 498 U.S. 533, 534 (Emphasis Supplied).

Courts have recognized that Rule 11 does not automatically authorize the full amount of the prevailing party's attorney's fees as the appropriate sanction. Farino v Advest (1986 EDNY) 111 FRD 345.

A prevailing party is not entitled to recover the entire amount of its costs and attorney fees where not all of the claims and allegations were without merit; they can only recover costs and fees which were incurred because of meritless motions. Evergreen v. Merritt (1996 CA2 NY) 95 F.3d 153

DUE PROCESS REQUIRED BEFORE IMPOSING SANCTIONS

Due process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions. In re Ames Dept. Stores, Inc. 76 F.3d 66, 70 (2nd Cir. 1996) (emphasis in original), as cited in Lapidus v. Vann 112 F.3d 91, 96 (2nd Cir 1997).

Under due process clause the sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable, and standard by which that conduct will be assessed, and an opportunity to be heard on that matter. Id. at 97.

"An attorney is entitled to rely on his or her clients statements as to factual claims when those statements are objectively reasonable" Calloway v Marble Entertainment Group, 854 F.2d 1452, 1470 (2nd Cir. 1988), as cited in Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1329.

However, Rule 11 requires that an attorney conduct "an inquiry reasonable under the circumstances" into whether "factual contentions have evidentiary support" F.R.C.P. 11(b)&(b) (3), Id. at 1330.

ARGUMENT

The right to be advised of prospective sanctions, and the reasons therefore, is a matter of due process, which is mandated before the imposition of any type of sanctions.

Sanctions can only be imposed if they are warranted.

FURTHER SANCTIONS AGAINST THE PLAINTIFF OR HIS COUNSEL ARE NOT WARRANTED FOR THE FOLLOWING REASONS:

Plaintiff was not allowed to prove the existence of the joint venture called Citistreet.

Mr. Dughi swore that Citistreet was a joint venture.

Mr. Dughi also testified that there are differences between a joint venture and a limited liability company, contrary to the position of WG&M.

WG&M failed to set forth what steps, if any, they took to determine if the statements made by Mr. Dughi in his affidavit had evidentiary support, as required by Rule 11.

The Supreme court has stated that the inquiry to be made when awarding sanctions under Rule 11 is whether the papers submitted are "well founded".

The papers submitted by the Plaintiff in support of his Rule 11 motion were all "well founded". They were based upon public documents, Federal Form 5500 filings and the website of the Citistreet, wherein they state repeatedly that Citistreet is a joint venture owned 50/50 by Citigroup and State Street.

As seen above, Mr. Dughi testified that Citistreet was a joint venture. His testimony impeached his own affidavit.

Plaintiff should have been allowed to subpoena documents and witnesses to support his position in the Rule 11 motion, that Citistreet is a joint venture and that Copeland Associates, Inc. was operating as a de facto

corporation, when it issued six figure checks in its name years after it dissolved.

Plaintiff did not receive a fair hearing on his Rule 11 motion, by an impartial judge.

The court failed to hold a hearing on the issue of the existence of Citistreet and Copeland Associates, Inc., even though the referring order from Judge Johnson made a finding of fact on this issue, a basis for the referral of the motion to the magistrate judge.

ADDITIONAL EVIDENCE

At the end of the hearing, plaintiff's counsel was suddenly challenged by the court to state what other evidence he wished to present and be made part of the record.

The contents of the Citistreet website and plaintiff's moving papers were then deemed in evidence by the court, together with the bio of the attorney from a Wall Street firm who stated that he represented State Street in the formation of the joint venture called Citistreet, but the court refused to allow plaintiff to subpoena him or any other person or document into the hearing.

Plaintiff asked for discovery and the court said that the discovery was not permitted on plaintiff's motion.

As stated above the magistrate judge said that there would never be agreement on the joint venture issue.

The court cut off the testimony of Mr. Dughi when his testimony did not support his affidavit, as seen above.

The application by Mr. Lender presupposes that sanctions would be awarded to him automatically because he prevailed on this motion. His position is contrary to the decisions of the Supreme Court and the 2nd Circuit Court of Appeals.

Should this court rule that further sanctions will be imposed against plaintiff or his counsel, despite the authority of the cases cited herein, and the fact that counsel (and by implication the plaintiff) have already been severely sanctioned by Judge Johnson, then plaintiff will address the issue separately, if it arises.

Judge Johnson's Order dated January 24, 2005, admonishing plaintiff's counsel, is so severe, that it renders counsel's ability to continue to represent the plaintiff, highly questionable and problematic.

Judge Johnson's order sanctioning plaintiff's counsel, (and by implication plaintiff) came without any notice.

Mr. Lender failed to submit a memorandum of law in opposition to plaintiff's Rule 11 motion. This permits the court in its discretion, to grant plaintiff's motion for sanctions.

Plaintiff and his counsel to their detriment, have had the misfortune of stumbling upon and exposing an apparent \$200 billion scam by Citigroup & State Street that can

affect some 9 million retirement plan participants, 4,000 of whom are employees of Lutheran Medical Center.

Plaintiff has been punished by the rulings of this court. The rulings seem to protect the interests of the Citigroup defendants. To levy additional sanctions of any sort against plaintiff or his counsel will be unjust.

Plaintiff is merely carrying out his duties as a fiduciary under E.R.I.S.A. Plaintiff is in the nature of a statutorily mandated whistleblower. To punish the messenger and/or his attorney is contrary to the statutory intent of E.R.I.S.A.

WHEREFORE, in view of the foregoing, it is respectfully submitted that further and additional sanctions are not warranted against plaintiff or his counsel.

Dated: Freeport, N.Y.
January 28, 2005

/s

Henry M. Grubel
Henry M. Grubel, P.C.
Attorney for Plaintiff,
Carmine A. LoPresti
37 Prospect Street
Freeport, New York 11520
516-623-4130

FRCP RULE 11 READS AS FOLLOWS:

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected

promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(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.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in [Rule 5](#), but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. ***If warranted***, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees. (Emphasis Supplied)

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply

to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of [Rules 26](#) through [37](#).