

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

MOTION AND
NOTICE OF MOTION FOR
LEAVE TO AMEND
COMPLAINT

CITIGROUP, INC., et al.,

Defendants.

-----X

To: Attorneys for the defendants:

David Lender, Esq.
Weil Gotshal and Manges, LLP
767 Fifth Avenue
New York, NY 10153

Michael H. Ference, Esq.
Sichenzia, Ross, Friedman & Ference LLP
1065 Avenue of the Americas
New York, N.Y. 10018

David Covey, Esq.
Sedgwick, Detert, Moran & Arnold
125 Broad Street, 39th Floor
New York, N.Y. 10004

PLEASE TAKE NOTICE that upon the attached affidavit of Henry M. Grubel, attorney for the plaintiff and the enclosed Memorandum of Law, the plaintiff will move the Court on January 5, 2005, at 10:30 a.m., or as soon thereafter as counsel can be heard, in the United States District Court, Eastern District of N.Y., at 225 Cadman Plaza East, Brooklyn, N.Y. 11201, to seek leave to amend his second amended complaint pursuant to Fed. R. Civ. P. 15(a).

1. The motion will be made:

A. To modify, the plaintiff's claims against CITISTREET and other defendants as set forth in the enclosed copies of the

proposed complaint, which differs from, and replaces any prior proposed third amended complaint heretofore sent to counsel for the defendants.

B. To alter the damages theory of various claims.

C. To restate its claims against CITISTREET and the liabilities of CITIGROUP and STATE STREET CORP for the acts of CITISTREET.


D. To alter the averments in the second amended complaint, as to the fact that CITISTREET is not a phantom or non-existent company or organization, rather that CITISTREET merely alleges by counsel, that it does not exist, when in fact CITISTREET is a 50/50 joint venture between CITIGROUP and STATE STREET CORP., which has received commissions from the co-defendant TRAVELERS INSURANCE COMPANY.

2. A copy of the proposed amended complaint is enclosed herewith.

3. A blacklined copy of the proposed complaint with deletions indicated by strikeouts and additions indicated by being underlined, with a vertical line in the left margin by each change, is also enclosed herewith, to show the changes referred to in ¶ 1 hereof. The previously provided proposed third amended complaint should be discarded.

PLEASE TAKE FURTHER NOTICE, that pursuant to Local Rule 6.1(b) of the U.S. District Court, Eastern District of New York, answering papers, if any, shall be served within ten (10) business days after service of the papers herein.

Dated: Freeport, New York
November 29, 2004


Henry M. Grubel (HG-3211)
Henry M. Grubel, P.C.
Attorney for Plaintiff
37 Prospect Street
Freeport, New York 11520
516-623-4130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LOPRESTI,

Plaintiff,

CV-02-6492 (SJ) (VVP)

-against-

CITIGROUP, INC., et al.,

ATTORNEY'S AFFIDAVIT IN
SUPPORT OF MOTION FOR
LEAVE TO AMEND COMPLAINT.

Defendants.

-----X

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

1. I am the attorney for the plaintiff in this matter, and I am fully familiar with the facts as stated herein. This affidavit is submitted in support of plaintiff's motion for leave to amend plaintiff's second amended complaint pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure*.

2. This action was brought to recover damages under a number of counts including, E.R.I.S.A., anti-trust, Civil RICO, and various New York State claims.

3. The action was commenced by filing the complaint on December 11, 2002. Plaintiff filed an amended complaint on January 24, 2003, as of right. On February 20, 2003 plaintiff filed the second amended complaint, on consent. Copies of the summons and complaint were duly served upon the defendants herein or their counsel, as the case may be.

4. Letters to counsel requesting their consent to file the third amended complaint has been mooted. The proposed amendments to the complaint revolve around two basic issues; the fact that the defendant CITISTREET is a 50/50 joint venture owned by CITIGROUP and STATE STREET CORP, which Weil, Gotshal & Manges LLP alleges does not exist, and that the defendants are advocating that plaintiff's customers transfer or rollover their accumulated Internal Revenue Code § 403(b) annuity account values into the defendants' § 401(k) retirement program; and how these issues impact plaintiff's complaint.

5. This proposed third amended complaint is necessitated by the facts discovered after the service of the second amended complaint. Plaintiff was not completely aware of the status of CITISTREET as a 50/50 joint venture, vis-a-vis the fact that Weil, Gotshal & Manges LLP would falsify statements of material fact as to the non existence of CITISTREET and COPELAND ASSOCIATES, Inc., or that CITISTREET and COPELAND ASSOCIATES, Inc. would deliberately default.

6. Further and most to the point, plaintiff just learned in early November 2004 that the defendant LUTHERAN MEDICAL CENTER, filed under penalty of perjury, its Federal Form 5500 with the United States Department of Labor, wherein it stated that TRAVELERS INSURANCE COMPANY paid CITISTREET \$23,513 in commissions for its work at LUTHERAN MEDICAL CENTER in the year 2002. Further that there were about fifty six (56) employers in the United States who

filed Form 5500 attesting to the fact that commissions were paid to the defendant CITISTREET.

7. The allegations in the second amended complaint about the non existence of CITISTREET were interposed throughout the second amended complaint. These allegations were predicated on the fact that the attorneys from Weil, Gotshal & Manges LLP deliberately misled me as counsel for the plaintiff, about the fact that CITISTREET was a non existent entity.

8. In addition, plaintiff wishes to have the third amended complaint set forth the consequences of making certain rollovers from a 403(b) annuity into a 401(k) plan.

9. Two of the defendants, CITISTREET and COPELAND ASSOCIATES, Inc. have defaulted in appearing or answering the complaint.

10. On or about January 3, 2003 plaintiff was asked in writing by Mr. Hageman of Weil Gotshal & Manges, LLP to delete CITISTREET, CITISTREET, Inc. and COPELAND ASSOCIATES, Inc. as defendants, on the stated grounds that they did not exist. Plaintiff thereafter removed CITISTREET, Inc. as a defendant but left CITISTREET and COPELAND ASSOCIATES, Inc. in as named defendants.

11. In prior conversations with Mr. Lender and Mr. Hageman of WEIL, GOTSHAL & MANGES LLP, I was also told that these defendants did not exist.

12. On or about January 16, 2003 a faxed letter from Mr. Lender to me repeated the assertions that these defendants did not exist.

13. Another fax dated January 29, 2003 from WEIL, GOTSHAL & MANGES LLP reiterated that these defendants did not exist.

14. A further fax to me from WEIL, GOTSHAL & MANGES LLP dated February 4, 2003, again stated that these defendants did not exist. These writings are all attached hereto as Exhibit 'A'.

15. After receiving all of the false information from Weil, Gotshal & Manges LLP, plaintiff then served the second amended complaint on consent of all counsel. It served the defendants represented by Weil, Gotshal & Manges LLP well, for plaintiff asserted in said second amend complaint, the non existence of the defendant CITISTREET, instead of asserting that it was merely an allegedly non existent organization. All of this was based upon the misleading and false information received from the attorneys from WEIL, GOTSHAL & MANGES LLP on this issue.

16. In addition when CITISTREET and COPELAND ASSOCIATES, Inc. defaulted in appearing, Weil, Gotshal & Manges LLP had a defense that was buttressed by their having had plaintiff serve a complaint that averred to the non existence of CITISTREET and COPELAND ASSOCIATES, Inc., instead of to the alleged non existence of these defendants, as in the proposed third amended complaint.

17. Although plaintiff elaborated on the contents of the citisreetonline website and other exhibits attached to the second

amended complaint, that were contrary to the statements made by WEIL, GOTSHAL & MANGES LLP to your affiant, I foolishly took the words to the contrary from Weil, Gotshal & Manges LLP at face value, all to plaintiff's prejudice.

18. The second amended complaint made references to the non existence of CITISTREET and COPELAND. WEIL, GOTSHAL & MANGES LLP seized upon this, and took plaintiff's statements regarding their non existence, that were made based upon the falsities and misstatements Weil, Gotshal & Manges LLP fed to me as plaintiff's counsel, about the non existence of CITISTREET, in their motion under FRCP 12(b)(6), [see page 4 of the of the Weil, Gotshal & Manges LLP memorandum of law in support of their motion to dismiss], all to plaintiff's possible future prejudice.

19. Plaintiff's subsequent further research on the issue of the existence of CITISTREET and COPELAND ASSOCIATES, Inc. after the second amended complaint was filed, showed conclusively that CITISTREET and COPELAND ASSOCIATES, Inc. were both cognizable legal entities, despite what was said by Weil, Gotshal & Manges LLP. Thus the plaintiff needs to serve this third amended complaint to have it properly reflect plaintiff's allegations.

20. The defendants have moved to dismiss this action under F.R.C.P. § 12(b)(6). A decision on their motions is pending. Weil, Gotshal & Manges LLP has wrongfully made said motion on behalf of CITISTREET and COPELAND ASSOCIATES, Inc. without appearing for them and letting them deliberately default.

21. Answers to the complaint have not been interposed by any defendant. Accordingly, the defendants will not have to amend their answers.

22. The defendants will not be prejudiced at this early stage of the litigation, if the Court grants plaintiff's instant motion to amend his complaint.

23. No discovery of any sort has taken place as yet, nor have any discovery orders been issued.

24. Two motions are pending in this matter including a motion for sanctions against Weil, Gotshal & Manges LLP under Rule 11 for their false and misleading statements about the non existence of CITISTREET and COPELAND ASSOCIATES, Inc., and the motion for default judgments against CITISTREET and COPELAND ASSOCIATES, Inc.

25. Plaintiff has also sought to have the Clerk of this Court note the defaults of the defendants CITISTREET and COPELAND ASSOCIATES, Inc., on the docket, without success. Further, plaintiff has moved to have U.S. Magistrate Judge Pohorelsky recuse himself, based upon his bias and prejudice against plaintiff and in favor of Weil, Gotshal & Manges LLP, which motion he has denied. Plaintiff has requested the Court's intervention with regard to these issues.

26. Plaintiff has submitted the proposed third amended complaint to the Court and to all counsel in a finished format, as well as in a blacklined format that shows the second amended complaint in its entirety, with the additions thereto being

underlined, and the deletions having been stricken through, to show how the proposed complaint is presented.

27. There have not been any changes made in the exhibits that were attached to the second amended complaint in this proposed third amended complaint, which will retain those same exhibits.

28. No new counts have been added to the proposed complaint, nor have any counts been removed. All counts remain intact.

WHEREFORE it is respectfully requested that the Court grant plaintiff's motion to serve the third amended complaint in order to properly reflect the facts discovered by plaintiff after service of the second amended complaint.

Dated: Freeport, New York
November 28, 2004



Henry M. Grubel (HG-3211)
Henry M. Grubel, P.C.
Attorney for Plaintiff
37 Prospect Street
Freeport, NY 11520
516-623-4130

EXHIBIT 'A'

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE • NEW YORK, NY 10153-0119

(212) 310-8000

FAX: (212) 310-8007

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WRITERS DIRECT LINE
212-310-8505
peter.hageman@weil.com

January 3, 2003

BY FACSIMILE

Henry M. Grubel, Esq.
Henry M. Grubel, P.C.
37 Prospect Street
P.O. Box 628
Freeport, NY 11520

Re: Carmine A. LoPresti v. Citigroup, Inc., et al
Civil Action File No. Cv-02-6492

Dear Mr. Grubel:

Enclosed please find a stipulation with respect to the answer date for the defendants we are representing, consistent with what you discussed with David Lender. Please send the executed stipulation back to this office and we will see that it is filed with the Court.

In addition, as you discussed with David Lender, please amend the caption of the Complaint and the body of the Complaint in the above-referenced matter to accurately reflect the correct parties. Specifically, Citistreet, Citistreet, Inc. and Copeland Associates, Inc. do not exist; instead, the correct name of the Citistreet entity is Citistreet, LLC and Copeland Associates, Inc. merged into Citistreet Associates, LLC. In addition, because Smith Barney Corporate Trust Company is a cognizable legal entity, we ask that you delete the Complaint's reference to Solomon Smith Barney, Inc. Should you have any questions, please feel free to contact us. Thanks for your cooperation.

Cordially,



Peter Hageman

PH/vjr

Enclosure

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE - NEW YORK, NY 10153-0119

(212) 310-8000

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DAVID LENDER
DIRECT LINE (212) 310-8153
E-MAIL: david.lender@weil.com

January 16, 2003

BY FACSIMILE

Henry M. Grubel
HENRY M. GRUBEL, P.C.
37 Prospect Street
Freeport, New York 11520

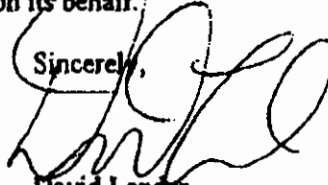
Re: LoPresti v. Citigroup, Inc., et al

Dear Mr. Grubel:

In response to your January 15, 2003 letter, please be advised once again that Copeland Associates Inc. no longer exists because it merged into Citistreet Associates LLC in August 2000. See attached. In addition, I have checked again, and can confirm that there is no entity called Citistreet, Inc. related to the Citistreet entities named in the Complaint. The document you sent me only indicates that some entity was incorporated as "Citistreet" in 1984 to conduct foreign business, and that the entity is inactive and was terminated. Therefore, I again request that you amend the caption to eliminate these non-existent companies.

Lastly, as I mentioned, Smith Barney Corporate Trust Company has authorized me to accept service on its behalf.

Sincerely,



David Lender

Exhibit A

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE
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pierre.davis@weil.com

January 29, 2003

BY FACSIMILE

Henry M. Grubel
HENRY M. GRUBEL, P.C.
37 Prospect Street
Freeport, NY 11520

Re: LoPresti v. Citigroup, Inc., et al

Dear Mr. Grumbel:

This is to verify that the following legal entities do not exist: Copeland Associates, Inc. and Citistreet. As set forth in our letter of January 16, 2003, Copeland no longer exists because it merged into Citistreet Associates, LLC in August 2000. Further, "Citistreet" is not and has never been a legal entity. It is, therefore, not necessary that you provide a waiver of service and summons with respect to these parties.

Again, we request that you amend the caption and the complaint to eliminate those non-existent companies. Thanks for your attention to this matter.

Cordially,



Peter Hageman

FAX NO. : 1732 739 3014

Apr. 18 2003 09:47AM P1

Feb U4 2003 5:56PM

HENRY GRUBEL 0

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P. 1

FEB-04-2003 17:56

P.02/02

WEIL, GOTSHAL & MANGES LLP

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lender@weil.com

February 4, 2003

BY FACSIMILE

Henry M. Grubel
HENRY M. GRUBEL, P.C.
37 Prospect Street
Freeport, NY 11520

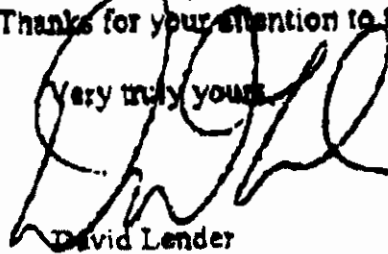
Re: LoPresti v. Citicorp, Inc., et al

Dear Mr. Grubel:

This is to verify that the following legal entities do not exist: Copeland Associates, Inc. and Citistreet. As set forth in our letter of January 16, 2003, Copeland no longer exists because it merged into Citistreet Associates, LLC in August 2000. Further, "Citistreet" is not a legal entity. It is, therefore, not necessary that you provide a waiver of service and summons with respect to these parties.

Again, we request that you amend the caption and the complaint to eliminate those non-existent companies. Thanks for your attention to this matter.

Very truly yours,



David Lender

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 TO
AMEND COMPLAINT

CITIGROUP, INC., et al.,

Defendants.

-----X

I. INTRODUCTION

Plaintiff, Carmine A. LoPresti has moved this court for an order for leave to serve an amended complaint in this matter, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, ('F.R.C.P.').

This memorandum of law is submitted in support of plaintiff's motion for leave to serve the proposed amended complaint.

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.

None of the defendants other than those represented by Weil 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 second amended 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.

Plaintiff's motion to have Magistrate Judge recuse himself was denied.

Plaintiff sought mandamus in the 2nd Circuit Court of Appeals on the failure of the Clerk to note the defaults of CITISTREET and COPELAND, and on the failure of the Magistrate Judge to recuse himself. Both issues were thereafter referred again to this Court.

A conference was scheduled by the Magistrate Judge to consider the logistics of these issues, after the Court referred them to him. It is to be held on November 30, 2004.

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

No Rule 16 pretrial discovery conference has been held and no scheduling order has been made. No conference or preliminary discovery under FRCP 26 has taken place.

III. ARGUMENTS AND AUTHORITIES

A. STATUTORY BASIS FOR AMENDMENT OF COMPLAINT ARE FREELY ALLOWED

Pursuant to FRCP Rule 15, amendments of pleadings, other than those which are allowed as a matter of course, or to which the adverse party consents in writing, may be made only by leave of court.

FRCP 15(a) states that leave to amend a pleading "shall be freely given when justice so requires," and the U. S. Supreme Court has stated that this mandate is to be heeded. Foman v Davis (1962) 371 US 178,; The liberal allowance of amendments of pleadings is a recognition that controversies should be decided on the merits whenever practicable. 2nd Circuit--United States v New York (1978, ND NY) 82 FRD 2,

The decision as to whether to grant leave to amend is entrusted to the sound discretion of the trial court, Foman v Davis (1962) 371 US 178,

It is an abuse of discretion for the District Court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend. Ellison v Ford Motor Co. (1988, CA6 Mich) 847 F2d 297.

It is an abuse of discretion to deny an amendment if the reason for doing so is not substantial, Dussouy v Gulf Coast Inv. Corp. (1981, CA5 La) 660 F2d 594, and it may be an abuse of discretion for the District Court to refuse to permit an amendment to the complaint where the court goes on to grant a motion to dismiss upon grounds that would have been eliminated by the proposed amendment. Childers v Independent School Dist. (1982, CA10

Okla) 676 F2d 1338.

When parties have discovered new facts and a basis for new delay is routinely justified. State Teachers v. Fluor Corp., 654 F.2d 843, 856 (2d Cir.1981)

Mere delay absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend. Middle Atlantic v. S.M.W. Development Co., 392 F.2d 380, 384 (2d Cir. 1968).

Amendments should be granted liberally. Fed.R.Civ.P. 15(a) provides that 'leave (to amend) shall be freely given when justice so requires.' If the proposed amendment alleges facts or circumstances which may be a proper subject of relief, the suitor, in the absence of sufficient reasons for denying him this opportunity, should have a chance to test his claim on the merits. Foman v. Davis, supra, 371 U.S. at 182, 83 S.Ct. 227.

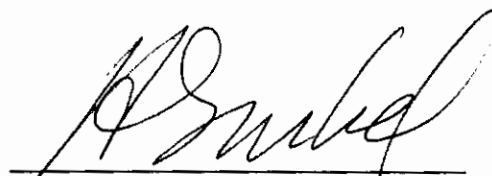
Narrow pleading rules should not be applied to foil an honest plaintiff's efforts to gain redress. In examining the circumstances which might justify not granting plaintiff this opportunity to be heard on the merits, the trial courts should normally focus on the resultant prejudice to defendant. United States v. Hougham, 364 U.S. 310, 316 ; Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 814 (2 Cir. 1960).

A three-year delay from the filing of the initial complaint is an inadequate basis for denying a motion to amend. It may be a

factor to be considered but unless the motion either was made in bad faith or will prejudice defendant, delay by itself is not enough to deny the requisite relief. Public Administrator v. Curtiss-Wright Corp., 224 F.Supp. 236, 238 (S.D.N.Y.1963). Middle Atlantic v. S. M. W. Development Corp. 392 F.2d 380, *384 - 385 (C.A.N.Y. 1968)

Dated: Freeport, New York
November 29, 2004

Respectfully submitted,



Henry M. Grubel (HG-3211)
Henry M. Grubel, P.C.
Attorney for plaintiff
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