

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.,

Defendants.

PLAINTIFF'S FIRST
OBJECTIONS TO
FINDINGS OF
MAGISTRATE JUDGE
MADE AT JAN 5, 2005
HEARING

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Pursuant to FRCP 72, plaintiff sets forth his objections to the rulings and findings made by Magistrate Judge Viktor V. Pohorelsky at a hearing held before him on January 5, 2005.

On January 6, 2005 a copy of the transcript of said hearing was ordered by plaintiff. On January 7, 2005 the transcript was picked up and paid for.

The transcript of the hearing was then noted to the docket of this matter on January 7, 2005. It is docket number 186. A copy thereof is not downloadable to the outside user. Plaintiff will forward a hard copy thereof under separate cover to Judge Johnson and Magistrate Judge Pohorelsky.

These first objections are being submitted by plaintiff without the benefit of having received by mail a copy of the magistrate judge's proposed findings of fact, and his recommendation for the disposition of plaintiff's FRCP Rule

11 motion, pursuant to 28 USC § 636(b)(1)(A). Nor do the findings and recommendations appear on the docket of this case as of 1/19/05 at 1:45 p.m.

Accordingly, plaintiff respectfully reserves the right to file a more complete objection to the rulings, then is being herein presented, when the subject findings and recommendations are mailed to him or posted.

On information and belief, it seems to plaintiff that portions of the proceedings were either not recorded on the tapes, or they were not transcribed completely. The transcript seems to refer to too few of plaintiff's exhibits. (At this time plaintiff's counsel does not have enough time to compare the tape to the transcript, due to the time constraints involved herein).

Plaintiff incorporates by reference herein all of the objections made in his letter and his motion to vacate the decisions of the magistrate judge, made at the 11/30/04 proceeding, wherein the ground rules for this hearing were established by the magistrate judge.

Prior to the 1/5/05 hearing, plaintiff was not made aware of the fact that Judge Johnson had denied plaintiff's Rule 72 objections, to the pre hearing ground rules established by the magistrate judge at the 11/30/04 proceeding.

Plaintiff was also not aware of the ruling on the fact that the magistrate judge would not be disqualified because

his mortgage is with Citibank, and for his previously alleged bias and prejudice against plaintiff, and in favor of Weil Gotshal & Manges.

Plaintiff was first made aware of these decisions, when they were read into the record by David Lender, Esq., at the hearing held on 1/5/05. Tx 5/21

Mr. Lender said he had received faxed copies of said orders on January 4, 2005. Tx 5/3. Plaintiff, to his prejudice, did not receive copies of the orders from the court until January 7, 2005. Mr. Lender did not advise plaintiff of his receipt of said orders.

At the hearing, the magistrate judge denied having a mortgage currently with Citibank. The magistrate judge also denied having had a mortgage with Citibank as of March 29, 2001. Tx 7/5.

The records of the Kings County Clerk indicate that the magistrate judge had his mortgage assigned from Chase Manhattan Mortgage Corp. to Citibank, N.A. on June 11, 1999. According to the Kings County Clerk's records said assignment was recorded in the office of the Kings County Clerk of the State of New York on March 29, 2001, at Liber 5119 Page 1316.

The magistrate judge volunteered on the record that he did however have a current business relationship with Citibank. He stated that both his checking account and his IRA are with Citibank. Tx 7/18

Given the prior history of this matter wherein the bias and prejudice of the magistrate judge was asserted, plaintiff questions whether it was appropriate for the magistrate judge to preside in a case such as this where: a) the public record indicates that his mortgage is, or was with Citibank; b) His bank account is with Citibank; and c) his IRA is with Citibank. Citibank is a known affiliate of, or subsidiary of the defendant herein called Citigroup, Inc.

At the 11/30/04 proceeding the magistrate judge stated at Page 5 line 3 of said transcript 'As to -- it seems to me that as to the imposition of sanctions, that all turns on whether or not Copeland Associates, Inc. and Citistreet exist'. Yet the hearing he conducted did not address this core issue, only the credibility of Mr. Dughi.

Plaintiff claims that it was error for the magistrate judge to have:

Allowed only one biased and interested witness, Mr. Dughi, the President of the defendant Citistreet LLC, to testify.

Held the hearing merely ' --- in an effort to establish the good faith basis for statements made in an affidavit submitted by Mr. Dughi ----' tx 3/22.

The fact that DW&T claims that it acted in 'good faith' based upon the affidavit of Mr. Dughi, is not the standard by which an attorney can defend a Rule 11 motion. 'Simply put, subjective good faith no longer provides the safe

harbor it once did.' Eastway v. Kanarek 762 F2d 243, 253 (2nd Cir 1985)

Stated at the November 30, 2004 proceeding that 'I want to see him (referring to Mr. Dughi), testify in person, make my own assessment as to his credibility'

Based his decision on the plaintiff's Rule 11 motion on the 'credibility' of one biased employee of Citistreet.

Stated at the November 30, 2004 proceeding that 'I'm not deciding the bigger issue of whether Copeland Inc. exists or doesn't exist, whether Citistreet is a distinction from Citistreet LLC'.

Failed to hear and report on the existence or non existence of Citistreet, which was the basis for the referral order from Judge Johnson. Tx 25/23

Failed to inquire into whether or not Weil Gotshal & Manges LLP ('WGM') conducted a 'reasonable' inquiry into the legal and factual claims of their clients, regarding the existence of Citistreet as a joint venture or as an LLC, as required by FRCP 11.

Failed to allow the plaintiff, under a claim of privilege, to cross examine the witness about his dealings, or discussions with Weil Gotshal & Manges LLP about the issues set forth in the Rule 11 motion.

Plaintiff was precluded from a full inquiry about the allegations of WGM, that they complied with the requirements

of Rule 11, which required WG&M to conduct a reasonable inquiry about Citistreet's existence as a joint venture, after having been given evidentiary proof thereof, which contradicted them by the plaintiff.

Failed to address the failure of WG&M to conduct such a reasonable inquiry as required by Rule 11, particularly when the admissible documentary evidence submitted by plaintiff to WG&M, contradicted the statements made by Citistreet and Copeland Associates, Inc.

Failed to address the issue of whether it was proper for WG&M to represent Citistreet, an allegedly non-existent company for whom they had not put in an appearance.

Disregarded the fact that the attorneys for the defendant Lutheran Medical Center have averred to this court in their motion to dismiss under FRCP 12(b)(6) that Citistreet is in fact a joint venture.

Refused plaintiff, as the moving party with the burden of proof, to affirmatively submit his evidence in support of his motion.

Refused to permit plaintiff to subpoena any documents or witnesses.

Allotted only three hours for the hearing.

Wrongfully insisted that the sole basis for sanctions or no sanctions was the credibility of Mr. Dughi.

Plaintiff was denied an impartial judge and an

impartial hearing.

Refused to give Mr. Dughi credence and seemed to cut him off when Mr. Dughi testified, at Tx 72/22 et seq, as follows:

(By the witness, Mr Dughi): A. 'Can we agree that 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% owed by State Street Corporation.

The decision by the magistrate judge is against the weight of the credible evidence.

Further, when Mr. Dughi was asked at Tx 40/9:

Q. 'To you is there a difference between an LLC and a joint venture?'

He responded at Tx 40/20, as follows:

THE WITNESS: There's no relationship between a

joint venture and an LLC.

BY MR. GRUBEL:

Q. So they're not one and the same

A. No.

Thereafter the witness stated at Tx 41/12 that when referring to the terms joint venture and LLC, that 'They are not comparable terms' and that ' - - They refer to different topics' and that they could refer to different business entities.

Mr. Dughi was impeached by his own testimony. His testimony lacked credibility. He contradicted himself regarding the existence or non existence of the joint venture known as Citistreet. The documentary evidence and his company's own website contradicted his allegations that Citistreet was not a joint venture.

Mr. Dughi's explanation of the fact that Copeland was still using its prior supply of unused checks to write \$100,000 plus checks, years after it was allegedly merged out of business are lame.

In addition to the clearly contradictory testimony of Mr. Dughi, the magistrate judge appeared to give no weight to the following documentary proof submitted by plaintiff in support of his Rule 11 motion:

The Citistreet website, at citistreetonline.com, where it constantly refers to itself as being a 50/50 joint

venture between Citigroup, Inc., and State Street Corporation, particularly at the end of most press releases.

The magistrate judge chose to ignore this clear self description of Citistreet by Citistreet.

The U.S. Supreme Court has spoken on the impact and importance of the contents of a party's website. Reno v. ACLU 521 US 844, 853.

Neither Mr. Lender nor Mr. Dughi disavowed or challenged the veracity of the statements made by Citistreet about itself on its website, which stated that it was a joint venture.

Lutheran Medical Center told its employees in its introductory letter to its 4,000 employees, that Citisreet was a joint venture, before these issues arose.

The defendant introduced into evidence the summaries of 56 Federal Form 5500, wherein employers under oath averred, as did Lutheran Medical Center, that Citistreet received commissions on the sale of its products to the employees of their companies.

It was error for the magistrate judge to ignore the evidentiary statements made by Citistreet and the contradictory testimony of Mr. Dughi, and then rule in Mr. Lender's favor.

Mr. Lender has misled the court with his arguments, that despite what Citistreet says it is, that Citistreet is

both a joint venture and an LLC at the same time.

However, if Citistreet is both a joint venture and an LLC, then it is in fact a cognizable legal entity, fully subject to having defaulted in appearing in this action.

Mr. Lender is in a conflict situation herein with his own clients, requiring the retention of new counsel by them on this issue.

The magistrate judge applied what he said were the New York rules of confidentiality, in this FRCP Rule 11 proceeding. He said this precluded plaintiff from inquiring about the role that WG&M played in this case on this issue.

He failed to apply the law of New York which states that you cannot be both a joint venture and an LLC at the same time.

Mr. Lender's argument that Delaware law controls how New York deals with a foreign LLC, is incorrect, particularly in that Citistreet LLC is not registered or authorized to do business in the State of New York.

It was error for the magistrate judge to construct a set of ground rules for this hearing that, as predicted by plaintiff's counsel, would result in a decision favorable to Citistreet and WG&M.

Plaintiff was therefore unprepared to argue his Rule 11 motion affirmatively and submit his proof on the existence of Citistreet. The magistrate judge blindsided the plaintiff

at the end of the proceeding in his attempt to overcome the prejudicial effects of his rulings made at the November 30, 2004 proceeding, when he challenged plaintiff's counsel to submit further proof.

Although Judge Johnson affirmed the 11/30/04 rulings of the magistrate judge in an order dated 1/4/05, plaintiff has requested that Judge Johnson withdraw said order, because it was predicated on the erroneous fact that plaintiff had failed to object thereto under Rule 72, when in fact the plaintiff had made his objections known in a separate motion supported by a memo of law, which WG&M had opposed.

The cases cited by Mr. Lender were not on point, and distinguishable. Plaintiff should have been given the opportunity and time needed to point this out to the magistrate judge in papers.

The magistrate judge failed to consider any aspect of this issue except to base his entire decision on the no longer relevant issue under Rule 11, of the good faith of the affidavit made by Mr. Dughi.

WG&M had an obligation under Rule 11 to conduct their own independent inquiry about the veracity of Mr. Dughi's affidavit, once they were presented with plaintiff's contrary evidentiary support in opposition to Mr. Dughi's affidavit.

The magistrate judge made no inquiry of WG&M about what steps, if any, they took to investigate plaintiff's

evidence. His failure to allow plaintiff his orderly presentation of his proof as to the existence of Citistreet, was prejudicial.

WG&M failed to file a memo of law in opposition to plaintiff's Rule 11 motion. Under this court's Local Rule 7.1 submission of a memorandum of law in opposition is mandatory. Willful failure to submit a memorandum of law can be deemed sufficient cause for granting this motion by default.

The world is told by Citistreet that it is a joint venture. The world and their 9 million customers must now be told the truth, that they have entrusted their retirement savings to a small Limited Liability Company.

Their 9 million retirement plan participants are not dealing with a Trillion dollar plus financial powerhouse.

They, plaintiff, and the world have been deceived. The misdeeds of Citigroup, Inc. in Enron and its ilk are well known. They will all pale in comparison to the fallout that can ensue from the fact that the joint venture owned 50/50 by Citigroup and State Street, known as Citistreet is deceiving the world, about having over 3,000 employees and \$200 billion in assets, because in reality, Citistreet tells a claimant when it is sued, that it does not exist.

It is to be noted that on 1/18/05 plaintiff by counsel made an email request to the New York State Insurance Department asking them to advise if either Citistreet or

Citistreet, LLC, were licensees of the New York State Insurance Department. At 10:16 a.m. on 1/19/05 the response from the Department was that neither of them were licensees of the New York State Insurance Department.

Plaintiff questions how Citistreet, LLC or Citistreet, as the case may be, can be receiving commissions or conducting its annuity sales activities in the State of New York without being duly licensed to engage in the aforementioned activities.

It is also remarkable that neither of these entities is authorized to do business in the State of New York, according to the records of the N.Y. Secretary of State. A foreign limited liability company is not excused or exempt from registering with the Secretary of State of New York when doing business in the State of New York.

Plaintiff questions Mr. Lender's position in stating that only Delaware law applies to the operations of a Delaware LLC, when it comes to registering and being authorized to do business as a foreign LLC in New York.

The findings that were announced at the end of the hearing were not sufficiently detailed and exact to indicate the factual basis for the court's ultimate conclusions, however it is error to contemplate counter sanctions against plaintiff's counsel.

WHEREFORE, in view of the foregoing, it is respectfully requested that the findings and recommendations of

Magistrate Judge Pohorelsky be set aside and vacated in their entirety.

Dated: Freeport, New York
January 19, 2005

/s

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