UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually,

Plaintiffs,

Case No. 07-40098-FDS

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO MAGISTRATE JUDGE'S ORDERS

INTRODUCTION

Defendants Gailon Arthur Joy and Robert Pickle ("Pickle and Joy") assert that the MidCountry Bank records — consisting of private financial records of Plaintiff Danny Lee Shelton, founder of Plaintiff Three Angels Broadcasting Network, Inc. ("3ABN") — will support their baseless allegations against the Plaintiffs. In effect, they want to continue gathering private information about the Plaintiffs more than a year after the suit was dismissed. Plaintiffs have contended throughout that the MidCountry records were never relevant. Now that the case is over but for Defendants' appeal, even the Defendants cannot articulate a plausible or even coherent reason for this information.

The suit was dismissed without reference to the MidCountry records. The documents had been produced pursuant to a third-party subpoena issued out of the U.S.

District Court for Minnesota, which had ordered that they be delivered under seal to Magistrate Judge Hillman. Before the bank records were reviewed for relevancy, Judge Saylor granted plaintiffs' motion for voluntary dismissal. Plaintiffs moved that the MidCountry records be returned to them. Judge Saylor granted that motion as well. Defendants never sought reconsideration of that part of Judge Saylor's order and did not seek to suspend its operation pending their appeal of the case to the First Circuit Court of Appeals. Judge Hillman obeyed the order and returned the MidCountry records to counsel for the Plaintiffs. Thus, the documents were never part of the district court record.

On January 29, 2010, Magistrate Judge Hillman denied Pickle and Joy's: (1) motion to forward copies of the MidCountry Bank records to the First Circuit Court of Appeals; and (2) motion to compel Plaintiffs' counsel to return the MidCountry Bank records and to stay the pending appeals. Both the United States Code and the Federal Rules of Civil Procedure require the reviewing court to consider Judge Hillman's decision under a "clearly erroneous" standard. Pickle and Joy make no legal argument as to why Judge Hillman's discretionary decisions are "clearly erroneous." Instead, they make thinly-veiled threats to this Court — reminding it that they have now filed a judicial misconduct complaint against Judge Saylor and court administrative staff demanding an inquiry into why Danny Shelton's own financial records were returned to him unopened. This lawsuit was intended to put an end to Defendants' baseless allegations against the Plaintiffs. Defendants' bombast was then directed at the counsel for Plaintiffs, and now

has focused on the Court itself. Their objections to Judge Hillman's decisions should be overruled because the rulings are not clearly erroneous.

LEGAL ARGUMENT

I. 28 U.S.C. § 636(b)(1)(A) requires a district judge to apply the "clearly erroneous" standard of review when reconsidering a magistrate judge's order.

Pickle and Joy have objected under Fed. R. Civ. P. 72(a) to Magistrate Judge Hillman's January 29, 2010 electronic orders: (1) denying their December 9, 2009 motion to forward copies of the MidCountry Bank records to the First Circuit Court of Appeals; and (2) denying their December 18, 2009 motion to compel Plaintiffs' counsel to return the MidCountry Bank records and to stay the pending appeals. (Electronic Order dated January 29, 2010). Under Rule 72(a), a magistrate judge may "hear and determine" non-dispositive pre-trial matters. This language is taken directly from 28 U.S.C. § 636(b)(1)(A) and implements the congressional mandate that certain matters be handled by magistrate judges.

Section 636(b)(1)(A) mandates that a district court review a magistrate judge's order under the "clearly erroneous" standard:

> A judge of the court may reconsider any pre-trial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A). This standard is mirrored in this court's Rules for United States Magistrate Judges: "The district judge to whom the case is assigned will consider such objections and will modify or set aside any portion of the magistrate judge's order determined to be clearly erroneous or contrary to law." Rule 2 for United States

Magistrates Judges in the United States District Court for the District of Massachusetts. The Federal District Court, District of Massachusetts explains that matters of discretion are rarely, if ever, contrary to law:

> This would preclude reconsideration of any orders which involve the exercise of discretion, such as rulings on motions . . . would be within the "discretion" of the judicial officer. In such a situation, none of the actions which the magistrate judge could take would be "contrary to law" although another judicial officer might have chosen to exercise discretion in a different manner.

United States v. Gioia, 853 F.Supp. 21, 26 (D.Mass. 1994). Thus, the district court must review Magistrate Judge Hillman's January 29 orders under a "clearly erroneous" standard.

Pickle and Joy, however, "request" a "de novo" standard of review based upon their interpretation of the word "pretrial." They make the tortured argument that not only were Judge Hillman's rulings "posttrial," but that Judge Hillman must have been given power to make these rulings as a special master under Fed. R. Civ. P. 53. (Def. Brf. at 1-2). However, First Circuit caselaw makes clear that "pre-trial" matters are defined as those "unconnected to issues litigated at trial and not defined with respect to the time of trial." *United States v. Flaherty*, 668 F.2d 566, 586 (1st Cir. 1981). In other words, courts considering the term "pre-trial" in Section 636(b) have not interpreted the term literally with respect to the time of trial. *Robinson v. Eng*., 148 F.R.D. 635, 641 (D.Neb. 1993). Rather, courts have long interpreted this term to refer generally to matters unconnected to issues litigated at trial, such as postjudgment sanctions, attorney fees, and awards of discovery expenses. *Id.* (citations omitted). The fact that a ruling takes place

"following dismissal of the action is of little significance, and does not transform the motions from preliminary procedural matters into posttrial matters." *Id.* Thus, magistrate judges have the power to decide postjudgment matters that occurred pre-trial. *Id.* at n. 13.

Here, Pickle and Joy's requests concerning discovery documents were "pre-trial," even though their requests were made postjudgment. The discovery issue concerning the MidCountry Bank records are unconnected to any issue that might ultimately have been litigated at a future trial. Thus, Magistrate Judge Hillman's power to decide these matters was based in Section 636(b)(1)(1) and Rule 72(a). The district court's review, therefore, must be made under the "clearly erroneous" standard.

II. Pickle and Joy provide no legal basis for this Court to deem Judge Hillman's decisions "clearly erroneous."

Pickle and Joy's campaign of harassment has now focused on this Court. It began with the allegations of wrongdoing against the plaintiffs that necessitated the initiation of this lawsuit. Pickle and Joy have long made uncorroborated, unfounded allegations against Danny Shelton and 3ABN, including claims that they covered up allegations of child molestation against a 3ABN employee, financial mismanagement, and other misconduct that framed the original basis for Plaintiffs' lawsuit against them. In their Answer to the Complaint, they generally asserted that they were republishing information from a source which they then refused to reveal, claiming journalistic privilege. (Docket # 9 at ¶ 50). With respect to Plaintiffs' claim that Defendants' allegations of financial misconduct were false, Defendants asserted that they lacked information sufficient to

respond and indicated an intention to obtain information supporting their allegations through discovery. (*Id.*) In other words, they took the position that they did not presently have unprivileged information to support these allegedly defamatory statements, but intended to find such evidence through discovery.

Frustrated by delays they encountered as this Court considered what sort of protective order and limits on the scope of discovery would be appropriate, Defendants circumvented this Court and obtained subpoenas from sister courts in Minnesota, Illinois, Michigan and elsewhere in the hope of finding something to prove the truth of their assertions, which Plaintiffs contended were baseless. Magistrate Judge Hillman ultimately put a stop to that activity and ordered that all subpoenas on third parties be pre-approved. (Docket # 106 at 5).

The subpoena for the MidCountry Bank records at issue in this motion was issued from the U.S. District Court for Minnesota. (Docket #208, Ex. A at Ex. F). The records are the personal financial records of Plaintiff Danny Lee Shelton. (*Id.*). Shelton resisted the subpoena on the basis that the information sought was personal and was not relevant to the case. (Docket #208, Ex. B). The Minnesota judge ordered the records produced to Judge Hillman under seal. (Docket #208, Ex. C). The case was voluntarily dismissed before anybody ever had occasion to look at the records. (Docket #139).

Plaintiffs continue to contend that Defendants want these records for reasons unrelated to this litigation – they are simply snooping into Shelton's personal life in order to find something with which to discredit him. Their contention that the records contain anything unflattering is pure conjecture because they have never seen them. Pickle and

Joy contend that their currently unsupported allegations *might* be proven through these documents, which were filed under seal and never reviewed by the court or the parties. Pickle and Joy have waged an internet campaign of harassing commentary about Plaintiffs' counsel, and went so far as to bring a baseless motion alleging a violation of Fed. R. Civ. P. 11, which was properly denied. And now their venom is aimed at this Court. Pickle and Joy have made unfounded allegations of misconduct against Judge Saylor, forcing him to recuse himself. (*Affidavit of Robert Pickle*). These allegations of misconduct also are directed at court staff. (*Id.*). Not surprisingly, Judge Hillman also recused himself after ruling on the motions. (Electronic Order dated January 29, 2010). Although Pickle and Joy do not directly allege misconduct against Judge Hillman, they cannot resist stating that, "the extreme brevity of the January 29 orders . . . leads one to suspect that, rather than ruling on the motions, the magistrate judge should have also recused himself . . ." (Def. Brf. at 2-3). Thus, the thinly-veiled threats continue.

The unfounded allegation that Judge Hillman's decisions are suspect is no basis for finding his decisions clearly erroneous. In fact, this Court cannot overturn Judge Hillman's decisions even if the district court would have exercised discretion differently. *Gioia*, 853 F.Supp. at 26. Pickle and Joy's paranoia and suspicion is not a legal basis for finding Judge Hillman's decisions clearly erroneous.

The remainder of Pickle and Joy's brief is a rehash of the original briefings, containing no new argument. (Def.'s Brf. at 3-5). Plaintiffs, therefore, incorporate the facts and argument contained in its original briefings in opposition to Pickle and Joy's motions. (Docket # 207, 216). Nevertheless, several points prompt a brief response.

Defendants continue to insist that the MidCountry Bank records are part of the substantive record on appeal. Yet, as explained in detail in plaintiff's opposition to defendants' motion to certify and forward part of the record, only documents presented to and examined by the district court in support of a motion are part of the record on appeal. *See, e.g., Naser Jewelers v. City of Concord, New Hampshire*, 538 F.3d 17, 19 n. 1 (1st Cir. 2008) (*See also* Docket #207). There is no record that Judge Hillman ever substantively reviewed the records because he never determined whether they should continue to be held under seal or released to the parties. Judge Saylor did not consider these confidential documents in making his decision dismissing this lawsuit. Thus, to supplement the appellate record with information that the district court never reviewed would not accurately reflect what occurred at the trial level. *See United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1982) ("New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the reach of [Rule 10(e)]). Thus, Judge Hillman's decisions comply with existing legal precedent and are not clearly erroneous.

Pickle and Joy maintain, however, that the First Circuit Court of Appeals has deemed these documents part of the record based on an administrative order from the Chief Deputy Clerk. In this order, dated December 4, 2009, the Clerk denied Pickle and Joy's motion to enlarge the record on appeal. (Order dated 12/4/09 in Case No. 08-2457). The Clerk then "noted' that to the extent that Pickle and Joy intend to argue that the district court erred when refusing to add these documents to the record, that issue may be raised in the forthcoming second appeal. (*Id.*). The Clerk stated that the records

would be part of the record on that appeal. (*Id.*). This administrative decision does not change the fact that the substantive information in the MidCountry Bank records were never part of the record. The district court never considered them below when ruling on the motion to dismiss and made no substantive review of these records when denying Pickle and Joy's motion for reconsideration. The substantive information in these records is of no consequence to the subsequent appeal. Rather, the only question will be in regard to their physical disposition. To that end, the substantive information cannot be reviewed on appeal. Thus, this administrative order does not make Judge Hillman's decisions clearly erroneous.

Pickle and Joy continue to insist that the MidCountry Bank records are their personal "property" and their return to plaintiffs was unlawful. Yet their disagreement with Judge Hillman's orders does not make these decisions clearly erroneous. After all, this Court has confirmed that matters of discretion are rarely, if ever, contrary to law. *Gioia*, 853 F.Supp. at 26 (stating that even if another magistrate judge would have chosen to exercise discretion in another way, this would not be "contrary to law"). To be clear, the MidCountry Bank records are merely reproductions of Plaintiff Danny Shelton's personal financial documents. Merely because Pickle and Joy paid MidCountry Bank's expenses incurred to reproduce these records does not make these confidential documents their own personal property. Pickle and Joy did not "buy" Shelton's bank records. They did not acquire an ownership interest in these documents independent of their evidentiary value. Their interest in these records does not outlive the litigation to which they relate. In fact, the court never determined whether these documents were even relevant to the

litigation. Pickle and Joy were never authorized to view these documents. Thus, even if the district court was still in possession of these documents and if they were transmitted to the First Circuit on appeal, the First Circuit would have no use for them because the substantive information was never considered at the district court level.

Judge Hillman's orders confirming his decision to return these confidential documents to plaintiffs is in compliance with Judge Saylor's order. 3ABN's motion to voluntarily dismiss this lawsuit under Fed. R. Civ. P. 41(a)(2) contained a request to order the "return to Plaintiffs" of all confidential information under the Confidentiality and Protective Order issued on April 17, 2008, including "records of MidCountry Bank which were delivered under seal to, and remain in the custody of, Magistrate Judge Hillman. . ." (Docket #120 at 1). When the Court granted this motion, it ordered that "all confidential documents be returned, All subpoenas are ordered moot, *Records in possession of Mag. Judge will be returned* . . . ." (Electronic Order dated 10/31/08; *see also* Docket #208, Ex. E at 13-15) (emphasis added). Finally, when the Court denied defendants' motion for reconsideration, it stated that, "to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago*." (Docket #193 at 3) (emphasis added). Thus, there is nothing "clearly erroneous" about Judge Hillman's orders, directly following Judge Saylor's orders. Notably, Pickle and Joy did not seek reconsideration or request a stay of execution of this part of Judge Saylor's order. Their sudden realization that the records had been returned to Plaintiff more than a year after

the fact is disingenuous, given that they never voiced disagreement with the order when it issued.

Finally, there will be no irreparable harm based upon plaintiff's counsel's storage of Danny Shelton's personal financial records. Plaintiff's Counsel has stated under oath that the documents are in a sealed box and will be maintained until the conclusion of this litigation. (Docket #208 at ¶ 8). Pickle and Joy's absurd suggestion that these documents contain the district court's or its administrative staff's "notes" on these exhibits is unfounded, and would not materially change the analysis and make these documents relevant anyway.

CONCLUSION

Because Pickle and Joy provide no legal argument that would render Magistrate Judge Hillman's January 29, 2010 orders clearly erroneous, their objections to these decisions must be rejected.

Respectfully submitted,

Dated: February 18, 2010

s/ M. Gregory Simpson

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