

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

**REPLY TO DEFENDANTS'
RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SANCTIONS FOR FRAUD**

MEMORANDUM

Plaintiff requested access to the suppressed Electronic Assets before Defendants filed any motion to dismiss. That request was rejected by Defendants. Plaintiff made a second good faith offer to resolve this motion which Defendants rejected. Details about that second offer and rejection are below.

FRAUD ON THE COURT

This is a fraud **on the court** motion. Defendants obtained an order from the court based upon their fraud. Ceglia's opposition and response to that order involved a significant expenditure of time and resources and affected his rights. Declaration of Paul Argentieri at ¶12, ¶15 and ¶20.

FAILURE TO DISCLOSE

Once Defendants argued reliant on material discoverable on those undisclosed Electronic Assets, their duty to disclose was triggered. That duty arose

each time their arguments related to the intentional omission of those Electronic Assets.

One fraud was the false comparison regarding emails and the continuing argument of “fake contract.” The email comparison was the Ceglia-Zuckerberg email exchanges attached to the Amended Complaint with the Zuckerberg Harvard emails. Defendants and their counsel repeated this comparison as proof that the Ceglia emails were frauds because of their absence in the Harvard email record. This argument is nonsense if Defendants had mentioned to the court the existence of the unexamined Electronic Assets.

By at least June 30, 2011, if not earlier, Defendants, Snyder, Southwell and the Orrick Law Firm had a duty to disclose the existence of the Parmet Electronic Assets and the claimed “originals” of the Electronic Assets at issue. That duty to speak arose when Defendants made arguments like this one:

SNYDER: [T]he emails which we’ve told your Honor about which exist today on the Harvard University server...relate[] only entirely exclusively to StreetFax.

“THE COURT: And they in no way corroborate or are consistent with those emails that are purportedly genuine emails between the plaintiff and Mr. Zuckerberg that are attached to the complaint?”

“SNYDER: Correct, your Honor.” Doc. No. 94 at 10-11.

This Court would *not have* granted expedited discovery reliant on the email fraud argument or the fake contract argument knowing of the unexamined Electronic Assets. At the very least, the court would have delayed its ruling until Defendants conducted a search of those Electronic Assets and reported back on that search. Plaintiff would have provided case law and argument related to that issue

as well. Defendants made these arguments aware that this court was acutely concerned about the security of the Harvard email evidence.

“THE COURT: Now on these emails with Mr. Zuckerberg’s access to them at Harvard, how do we secure those going --” Doc. No. 94 at 105.

“MR. SNYDER: Those [Harvard emails] are safe and secure with belt and suspenders. First Harvard University has preserved and is preserving those; second...Stroz Friedberg imaged...the contents of the Harvard server as it relates to Mr. Zuckerberg....” Doc. No. 94 at 128. See also Id. at 107.

The defendants and their counsel employed experts to enhance the fraud. Those experts provided declarations about their methods assuring the court of the completeness of their examination of Zuckerberg’s Harvard email record. This deployment of experts in furtherance of their fraud magnifies its seriousness and the damage done to the court process.

FALSE FAKE CONTRACT ARGUMENT

The Electronic Assets are relevant to Defendants fraudulent “fake contract” argument. An email, instant message, unpublished blog post or merely contemporaneous notes of Defendant Zuckerberg or another person involved in the early stages of Facebook could easily defeat the “fake contract” claim. The Electronic Assets contain the electronic communication of Defendant Zuckerberg and other persons involved in the early stages of Facebook. The Electronic Assets also contain an early version of the source code for Facebook.

It now comes full circle. This court has repeatedly inquired of Defendants

about what harm could come from placing this case on a regular discovery track. Defendants have responded that such a decision by the court would “reward” Ceglia. Now, it seems obvious, that **not** immediately placing this case on a regular discovery track has provided Defendants time to seek destruction of discoverable evidence. And leaving this case off the regular discovery track given Defendants’ fraud will reward them and their counsel.

Both of Defendants’ key arguments (“fake contract” and “fake emails”) are undercut by their failure to disclose the Electronic Assets. They are further questionable given that Defendants refuse to trust this court with a copy of those Assets as a means to have this fraud motion withdrawn as is noted below. Their bargain seems to be, risk a fraud sanction, but do not allow anyone to see what is on the Electronic Assets. There is a reason Defendants and their counsel are fighting so hard to prevent an examination or allow protection of those Electronic Assets. Plaintiff and this court do not know what that reason is and it can only be discovered once those Assets are examined as well as the so-called “originals” Defendants argue they possess.

JUST FOLLOWING ORDERS

Defendants falsely argue claim that their actions in furtherance of the destruction of the Electronic Assets at issue was merely following the court’s order in the ConnectU case. The Defendants and their counsel had the power all along to prevent destruction of that evidence and an email or phone call was all that was needed. The order at issue in the ConnectU case did not prohibit the Defendants

from moving the court to amend the order upon Ceglia's filing of this case. We know now that Defendants arguments of the immutable nature of that order was false.

The Defendants and Plaintiffs in ConnectU bypassed the order entirely, securing the Electronic Assets, without even filing a motion or obtaining a modified order in that case. Exhibits A and B.

COPIES VERSUS "ORIGINALS"

Defendants claim the Parmet Electronic Assets are copies of "original" computers which they possess. Defendants' failed to produce **any** declaration supporting the claim they possess the "originals" of the Electronic Assets. Declaration of Dean Boland at ¶18. Mr. Snyder conspicuously failed to sign a declaration supporting **anything** in Defendants' response to Plaintiff's fraud claim. That omission is something deserving of note by this court. Therefore, there is no evidence before this court that the Electronic Assets are anything but originals of evidence. Even if the Electronic Assets were copies, Defendants claims of no foul here because they possess the originals are meritless. Throughout expedited discovery, Defendants have pursued copies and "originals" of evidence with equal vigor. They have made no distinction between the evidentiary value of either. Their attempt to do so now is self-serving.

The undersigned participated in that phone conference along with this court on November 23, 2011. Declaration of Dean Boland at ¶3. The undersigned has contemporaneous notes that differ with Mr. Snyder's **argument** which he failed to

support with a declaration. Id. at ¶4.

Mr. Snyder was told during that phone conference precisely what Assets were at issue. Id. at ¶5, ¶6. He repeated throughout the phone conference that he had no idea what those were. Id. at ¶8. Then, magically, two days later and now, he claims in *argument* that he was aware of those assets all along.

WASTED TIME, MONEY AND CEGLIA'S RIGHTS AFFECTED

This court held multiple hearings on issues involving expedited discovery. Ceglia, his counsel and experts expended significant time, energy and financial resources dealing with Defendants pursuit of an conducting of expedited discovery. Declaration of Paul Argentieri at ¶12, ¶15 and ¶20.

Defendants' and their counsels' committed fraud **each time they advanced their arguments** regarding “fake emails” and the “fake contract.” This represents a history and pattern of discovery abuse, not merely one incident.

“Mr. SNYDER: “We’re willing to...provide plaintiff discovery into the *critical emails on the Harvard server....*” Doc. No. 94 at 47. Emphasis added. Defendants had a duty to speak at this moment that they were withholding the existence of other electronic communications when describing the Harvard emails as the “critical emails.” How about mentioning then that the Harvard emails were not the only Electronic Assets with electronic communications?

This court was clearly led to believe that the “Harvard emails” as they were described were all of Zuckerberg’s relevant electronic communications.

“THE COURT: [Y]ou think [Ceglia] can lay his hands on software that will

enable him to fabricate yet new emails...to...rebut, contradict, undermine the Harvard emails.

MR SNYDER: Yes.” Id. at 47-48.

“THE COURT: Is that the only reason to not grant mutual discovery, expedited discovery, is the potential for him to engage in a further fraud to rebut the Harvard emails?” Id. at 50.

They made incomplete representations to the court in support of the court acting. They had a duty to inform the court when seeking the court’s authority to make decisions affecting Ceglia’s rights. This court issued orders affecting Ceglia’s rights based on Defendants’ fraudulent arguments omitting critical evidence.

A POTENTIAL RESOLUTION REJECTED

Defendants were contacted before the filing of this reply to resolve this sanction motion. Exhibit C. They rejected the opportunity to resolve the matter and refused to provide this court with a forensically sound copy of the Electronic Assets held by Parmet. Id. There is no more obvious indication that these Electronic Assets hold evidence valuable to Ceglia’s case. Defendants seem to know this as they knew it when they failed to disclose their existence and sought their destruction.

This refusal now makes Defendants’ assurance they will hold the so-called “originals” of these Electronic Assets **and** the copies, securely, during this litigation an empty promise. Plaintiff has no reason to rely on Defendants’ claim that they possess the “originals” or that those “originals” have not already been altered in a

way that can be mirrored on the Parmet Electronic Assets once Defendants get their computer hacker hands on them.

For the integrity of our justice system to work, the violation of the duties of lawyers before this court must be punished. Without such sanctions, Defendants will be emboldened to push further into this territory, now familiar to them, of evidence suppression and destruction. An evidentiary hearing is necessary. All counsel for the Defendants (i.e. Mr. Snyder, Southwell, Benjamin, Flynn, Ms. Aycock, Ms. Simpson) and Monte Cooper from the Orrick Law Firm must be held to account for what they knew of these Electronic Assets, when and whether they told their clients.

A jury verdict in this case will only have the public's confidence if the best measure of fairness can be seen applied to both parties. That measure is that billion dollar companies and billionaire defendants are not entitled to ignore the rules of our federal court system nor direct their lawyers to do the same. Likewise, parties and their counsel are not entitled to waste this court's time with arguments and assurances that are based on frauds and obtaining court orders, expedited discovery in this case, reliant on incomplete disclosures.

AUTHORITY OF THE COURT TO SANCTION FOR FRAUD

Rule 37 authorizes a broad range of sanctions when a party fails to permit discovery or to comply with the court's discovery orders. The sanctions range from an order to reimburse the opposing party for expenses to orders striking out portions of the pleadings, prohibiting the introduction of evidence, deeming

disputed issues determined adversely to the position of the disobedient party, or rendering a default judgment against the disobedient party. Fed.R.Civ.P. 37; see *Cine Forty-Second St. Theatre v. Allied Artists*, 602 F.2d 1062, 1066 (2d Cir. 1979).

When deciding on proper discovery sanction, a court considers:

(1) willfulness or bad faith on the part of the noncompliant party, (2) the history, if any, of noncompliance, (3) the effectiveness of lesser sanctions, (4) whether the noncompliant party has been warned about the possibility of sanctions (5) the client's complicity, and (6) prejudice to the moving party. FRCP 37.

The court possesses broad inherent power to protect the administration of justice by levying sanctions in response to abusive litigation practices. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

In *National Hockey League* at 642-43, the Court expressed itself clearly:

“[H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”

The 2nd Circuit has adhered to that view, holding in *Cine Forty-Second St. Theatre v. Allied Artists*, 602 F.2d 1062 (2d Cir. 1979), that even grossly negligent failure to obey a discovery order may justify severe disciplinary measures:

The principal objective of the general deterrent policy of National Hockey is

strict adherence to the “responsibilities counsel owe to the Court and to their opponents,” *National Hockey League* at 640. See also *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664 (2d Cir. 1980).

“Severe sanctions are justified, however, when the failure to comply with a court order is due to willfulness or bad faith, or is otherwise culpable.” *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357 at 1367 (2d Cir. 1991).

CONCLUSION

As additional requested sanctions, Plaintiff seeks an order from this court that Defendants cause to be deposited with this court’s technical assistant a forensically sound copy of all Electronic Assets held by Parmet and Associates.

/s/Dean Boland
Dean Boland
Counsel for Paul Ceglia