Ceglia v. Zuckerberg et al Doc. 386

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Facebook and Zuckerberg.

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

MOTION TO STRIKE DECLARATION/REPORT OF GERALD LAPORTE FOR FRAUD

MEMORANDUM

Plaintiff Paul Ceglia moves the court to strike Facebook and Zuckerberg Motion to Dismiss, Doc. No. 319 as it contains perjured testimony from the cornerstone expert in Facebook and Zuckerberg's case, Gerald LaPorte. Plaintiff also asks the court to award Plaintiff his reasonable attorney and expert fees under FRCP 37. The fraud also extends, unwittingly or not, to Facebook and Zuckerberg's arguments reliant on LaPorte's report.

This motion raises a critical question about Gerald LaPorte's continued role as an expert witness for Facebook and Zuckerberg in this litigation. Facebook and Zuckerberg cannot in good faith maintain their motion to dismiss containing fraud in the form of Gerald LaPorte's perjurious report. The court has the authority under Rule 37 to impose a wide range of sanctions including those sought in this motion.

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"It is well settled that a federal trial court has the inherent power to sanction litigation conduct taken in bad faith." *R.B. Ventures v. Shane*, No. 91 Civ.5678 (CSH), 2000 WL 1010400, at *3 (S.D.N.Y. 2000); see also *Scotch Game Call Co. v. Lucky Strike Bait Works, Ltd.*, 148 F.R.D. 65, 68 (W.D.N.Y. 1993) ("[T]he court has the inherent power to sanction bad-faith conduct of attorneys or their clients apart from any of the statutory or rules provisions."). "As the term 'inherent' reflects, the court's power is not derived from any particular statute or rule." *R.B. Ventures*, 2000 WL 1010400, at *3. "Perjurious testimony is of course sanctionable ... under the Court's inherent power." Id. at *5 (S.D.N.Y. 2000); see also *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691,694 (8th Cir. 2001) (affirming the district court's use of its inherent power to dismiss the plaintiff's claim because the plaintiff gave perjurious deposition testimony, thus, failing to disclose important information). Indeed, "[false testimony in a formal proceeding is intolerable." *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317,323 (1994). The Court "must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." Id.

LaPorte's false statements in this case that PE testing is reliable when compared to the content of his many previous sworn statements on PE testing mandate his exclusion from this case. Plaintiff does not raise this issue lightly and does so only because of unequivocal perjurious testimony that Plaintiff is obligated to bring to the Court's attention.

Facebook and Zuckerberg have offered LaPorte as an expert on ink dating

using his self-designed version of the PE test. However, Facebook and Zuckerberg and LaPorte failed to reveal to this court LaPorte's previous sworn statements that the PE test is not reliable. Even worse, Mr. LaPorte denied under oath that he had ever said the PE test is unreliable despite testifying to its unreliability. LaPorte's perjurious testimony is an affront to the Court. Plaintiff respectfully submits that the only appropriate remedy here is to exclude LaPorte from this litigation and strike Facebook and Zuckerberg's Motion to Dismiss for fraud which is itself built upon fraud. As will be shown by Plaintiff's other voluminous expert reports, that fraud is overwhelming and goes far beyond merely the fraud perpetrated by LaPorte here.

BACKGROUND

Facebook and Zuckerberg filed their two motions to dismiss on March 26, 2012. The Motion to Dismiss for fraud featured the report of an individual, Gerald LaPorte, that Facebook and Zuckerberg claim is an expert. Doc. No. 326. He is the centerpiece of the Facebook and Zuckerberg's argument regarding fraud against Plaintiff. LaPorte's submission of an expert report featured his application of a test that relied on the evaporation and other properties of an ink component known chemically as 2-Phenoxyethanol. (PE). LaPorte's PE test is a variation of a test originally developed by Valery Aginsky in 1997. Aginsky's version of the PE test has never been admitted over a Daubert objection in any court in the United States. Aginsky's version of the PE test has never been used in casework by any government agency. In short, Aginsky's 1997 PE test scheme has never satisfied

any court, much less the other experts in Aginsky's field, of its validity or reliability. Although Aginsky performed non-destructive testing on the document for Plaintiff more than a year ago, he was never hired to perform any other testing by Plaintiff.

LaPorte's own employer with the U.S. Government prohibits him from using his variation of the PE test or any variation of the PE test in case work. It was not permitted to be used by the Secret Service in casework, LaPorte's previous employer. This is indisputable because Plaintiff's expert, Larry Stewart, was LaPorte's supervisor while LaPorte was at the Secret Service. It is not used by any U.S. government agency.

The reasons why LaPorte's PE test has never satisfied the Daubert criteria are provided by LaPorte himself. LaPorte provides those reasons in testimony in other cases which he and/or Facebook and Zuckerberg concealed from this court.

FACEBOOK NEEDS MORE INK TO CREATE A FAVORABLE RESULT

In July 2011 Gerald LaPorte took ink samples from both pages of the Facebook Contract. From that time to now, Facebook and Zuckerberg repeated their claim of fraud claiming that the ink on page one was "less than two year old."

Along with slandering Ceglia with baseless accusations sourced to unidentified persons (See Henne Declaration Doc. No. 49) of being a career criminal, Facebook and Zuckerberg's claims of having dispositive proof have become their mantra.

Facebook and Zuckerberg's experts and their tests obviously had a problem living up to their exaggerated claims of dispositive proof. After their July 2011

testing, they sought authorization to extract more ink samples. The Facebook and Zuckerberg have yet to disclose the results of their initial ink testing.[1] Both Plaintiff and the Court interpreted Facebook and Zuckerberg's request for a second round of ink samples similarly:

THE COURT: Well, you should be actually heartened by the fact that they are not conclusive….I think if they felt they had established that these signatures and initialings are refabrications, they would be done. They wouldn't be asking for additional samples. But the fact that they feel the need for additional samples, somebody might infer that they are having difficulty reaching the conclusion that the Facebook and Zuckerberg would like them to reach. Transcript of August 17, 2011 hearing at 151.

FACEBOOK VOWS THEIR EXPERTS WILL NOT CHANGE THEIR OPINION DESPITE WHAT EVIDENCE THEY UNCOVER

Facebook, through Orin Snyder, announced their lack of concern in verifying their experts' reports. No matter what Facebook's experts were to find, Mr. Snyder was bound to keep them on message and boldly declared to the court twice in the June 2011 hearing as follows:

> **THE COURT: So is it possible that your experts -- your experts would change direction and say, look --**
> **MR. SNYDER: No.**
> **THE COURT: -- it is authentic.**
> **MR. SNYDER: It's impossible that my experts will say that [the Facebook Contract is] authentic** Transcript of the June 2011 hearing at 33.

Minutes later the court tried to clarify this bold assertion. Facebook and Zuckerberg indicated that Facebook had purchased advocacy rather than unbiased expert testimony.

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[1] Plaintiff has requested this and other materials that Facebook and Zuckerberg claimed to have provide us directly, or in expert reports, yet they have not done so.

MR. SNYDER: So there's no chance that any of our experts will change their view….
THE COURT: There's no chance?
MR. SNYDER: No chance. Id. at 34.

Facebook refused to accept the results of their expert's initial testing. Instead, they appeared to have purchased a declaration that would permit them to continue their slander of Plaintiff and denial of the truth.

THE PE TEST UNRELIABILITY CHRONOLOGY

LaPorte published a paper suggesting the experimental potential of PE testing in 2004. Doc. No. 326 at footnote 12. LaPorte knew that PE testing was purely experimental then, i.e. not yielding reliable, repeatable and testable results as traditional science and this court require.

Since 2004, LaPorte knew that the PE test was not generally accepted by any of his peers for use. What LaPorte and Facebook and Zuckerberg concealed from this court was that LaPorte himself acknowledged three years later, in 2007, that his PE test was unreliable.

LAPORTE ADMITS HIS PE TEST IS UNRELIABLE IN 2007

[Q.]Now, can you tell from your results exactly when ink was put to paper on this document?
[LaPorte]. No, we can't.
Q. Are you aware of any scientifically reliable way to make such a determination looking only at the ink for a document like this?
[LaPorte]. There is no scientifically reliable methodology that could be used to determine the age of the ink or to determine when exactly they were placed on that piece of paper. Exhibit A at 54. Testimony of Gerald LaPorte on July 12, 2007 in *U.S. v. Padilla, et al, 04-60001-CR-Cooke,* Southern District of Florida, Miami Division.

LaPorte continues and specifically denies that PE is a reliable test.

Q. Now, if I understand this correctly, there is a test that can be done to determine the time in which ink was placed on a document, right?

[LaPorte]. No, there is no scientifically reliable test to determine exactly when an ink was put down on a piece of paper.

Q. Have you ever run a phenoxyethanol test?

[LaPorte]. Yes, it's called phenoxyethanol. Id. at p. 65.

This demonstrates that LaPorte was not suffering from some temporary amnesia during this 2007 testimony. Within moments of asserting no reliable test for ink dating exists, he mentions PE testing as one of the unreliable methods. LaPorte admits performing the PE test in past work, but quickly concedes that he has never obtained a "positive result."

Q. In fact, in other cases, haven't you performed that test and testified about that test?

[LaPorte]. I have never testified about using that particular -- like, then I found a positive result. I have testified about the procedure itself, yes. Id. at 66.

LaPorte admits that his PE test is not scientifically reliable unless the questioned ink is written on the same paper, stored under the same known environmental conditions using the specifically identified ballpoint ink. Exhibit A at 66.

LaPorte repeats this admission in 2009. "[T]here are a lot of uncertainties when a document is prepared as to how it's stored, the type of ink that's being used. And then there's variables within inks….I would say it would be very safe to – if you were going to utilize [PE methodology] to issue a qualifying statement." Exhibit B, Testimony of Gerald LaPorte in *Georgio, et al v. Rosenblum*, Docket No. MON-L-2652-06, August 26, 2009 at *21. Yet, he issued no qualifying statement in his

report here.

LaPorte also testified that "when I was at the Secret Service, if we were given a document with a single signature and a date and somebody said was that signature created on that purported date, **that would <u>not</u> be a situation that I would recommend PE** be used because there is nothing to compare it against." Id. at *22-*23. Emphasis added. The ink formulations on pages one and two of the Facebook Contract are unknown. Doc. No. 326 at 26, ¶8. There is "nothing to compare" his analysis of the ink on page one to in this case either. This is another fact he concealed from this court.

"[B]ecause there are different inks that are being used on the document, that may not render itself to -- you know, to doing the appropriate testing and coming up with a reliable conclusion." Id. at *66. In this case, LaPorte admits having no idea whether there are different inks used in the document. Doc. No. 326 at 26, ¶8. And, in fact, his claim in his own report is that the ink from page two and page one are different inks. Id. This conclusion underlines the unreliability of PE testing in this case specifically, yet he also concealed this fact from the court when issuing his report.

He notes that the different levels of PE in the ink samples from page one and page two indicate these writings were made at different times. Doc. No. 326 at 26, ¶5(d). However, in prior testimony, he has stated that if "three documents [are purported to have been created] over a [three different] period[s] of time...all have the same high levels of PE, is that definitive that those documents were created

contemporaneously? No." *Georgio* Testimony at *24.

Therefore, the opposite must also be true. Two samples with different levels of PE cannot be definitive proof that they were created at different times. Obviously, this assumption was also concealed from the court.

LAPORTE FALSELY DENIES EVER TESTIFYING THAT PE TESTING IS UNRELIABLE

In LaPorte's 2009 testimony on PE testing he said the following:

Q My question is, did you ever testify in your career that ink dating involving 2-phenoxyethanol was not scientifically reliable?

[LaPorte] No, I have not…

Q My question was, have you ever testified in your career that using 2-phenoxyethanol was not a scientifically reliable method to date ink?

[LaPorte]: No, I have not testified that it's not reliable. Exhibit B at p. 12, LaPorte testimony in *Giorgio, et al. v. Rosenblum* Docket No. MON-L-2652-06, Superior Court of New Jersey, Monmouth County, Law Division.

This 2009 statement is an obvious false statement compared to his 2007 testimony about PE testing's unreliability.

Q. Are you aware of any scientifically reliable way to make such a determination looking only at the ink for a document like this?

[LaPorte]. There is no scientifically reliable methodology that could be used to determine the age of the ink.… Exhibit A at 54.

LaPorte obviously wants to run from this testimony in this case. We know that because in blatant violation of the Federal Rules he omitted any reference to his testimony in *Giorgio* in his CV. This is an intentional act designed to conceal his fraud.

AN ADMITTED UNQUALIFIED EXPERT

In 2009 LaPorte testified that he had **never conducted his PE test and**

obtained a conclusive result. As a reminder, this testimony was given just 22 months before his testing of the document in this case using his bogus PE test.

> **Q So again, is it your testimony that since working at Riley Welch & LaPorte, you have not conducted ink-dating analysis using the PE method?**
>
> **[LaPorte] No, I never said that. I said I've never testified to that. But yeah, I've conducted -- I've done it in a couple cases, yes.**
>
> **Q When you say "a couple," could you give me an exact number.**
>
> **[LaPorte] Two, three? I'm not exactly sure. I'd have to go to all my records.**
>
> **Q And did any of those situations end up in a deposition or a courtroom?**
>
> **[LaPorte] No, no, I have not testified with regards to PE analysis with a Riley Welch LaPorte case.**
>
> **Q Did you ever write a report in any of the situations?**
>
> **[LaPorte] Yes, I have.**
>
> **Q And what were your conclusions about PE testing in those reports?**
>
> **[LaPorte] I believe that the reports that I've issued have been inconclusive. I can't [*45] -- I can tell you for certain that I have not issued a report making a conclusion that an entry or entries were backdated or not produced on their purported date based on PE testing. They have been inconclusive reports.** Exhibit B at 25-26.

22 months before his testing in this case, LaPorte had **never** obtained a PE test result other than inconclusive. And, he had only conducted the PE test "in a couple of cases" in his moonlighting work with his private firm. As his declaration demonstrates, there is no science of any kind between his testimony in 2009 and his PE testing of the document in this case in August 2011 supporting this dramatic and sudden change in the supposed validity of his test. In short, LaPorte has changed his entire testimony about the PE test to fit the needs of the Facebook and Zuckerberg in this case. The appropriate action for Facebook and Zuckerberg to take, in light of the exposure of obvious fraud by LaPorte, is to withdraw their

Motion to Dismiss for fraud, his report and LaPorte as a witness. The government, LaPorte's own employer, has already done that in a previous case.

LAPORTE AND FACEBOOK AND ZUCKERBERG CONCEAL GOVERNMENT WITHDRAWAL OF PE TEST TESTIMONY IN CRIMINAL CASE

Along with the lack of general acceptance of LaPorte's unreliable PE testing in the scientific community, he and Facebook and Zuckerberg also concealed from this court LaPorte's withdrawal as a witness in a government case because of his invalid PE testing. This concealment is intentional and obvious as the case referenced below, *Rago*, was also omitted from LaPorte's CV submitted to this court in this case.

The government, LaPorte's employer, offered LaPorte and his junk science PE test as potential evidence in the *U.S. v. Rago*, Criminal Action 08 CR 10268 WGY, District of Massachusetts. The case involved two defendants, Frank Rago and Louis Desisto. Rago's attorneys filed a motion requesting a hearing to demonstrate that LaPorte's PE test fails to satisfy the requirements for expert testimony as outlined in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579.

The defense requested the court deny the use of LaPorte's PE test as a fraud on the court. *Rago,* Doc. No. 60, attached as Exhibit C at p.3. Following briefing on the issue of a *Daubert* examination of LaPorte and his PE test, the government withdrew LaPorte as a witness. Following his withdrawal, one of the defendants, Desisto, whose entire case was predicated on LaPorte and PE, was found not guilty.

FACEBOOK AND ZUCKERBERG'S BLATANT RELIANCE ON LAPORTE

AND ATTEMPTS TO MISLEAD THIS COURT ARE EGREGIOUS

At the November 2011 hearing, Facebook's lawyer, Orin Snyder, stated "our expert thankfully was able to extract enough to prove definitively the highest order of proof experts can reach that the ink was still wet." Transcript of Hearing, November 3, 2011 at 30.

Historically Facebook and Zuckerberg have repeated their unfounded assertions and assured the court that all experts would agree that Facebook Contract was a fraud.

> **THE COURT: What is your point? You're saying to me that, Judge, not to worry, when we get through with this document and they get through with the document, all the experts are going to be in agreement it's a fraud.**
> **MR. SNYDER: That is our expectation. And in the event that we are able to establish that based on this testing, we believe at that time this Court would not only --**
> **THE COURT: In the event that you are able to establish it?**
> **MR. SNYDER: Yes.**
> **THE COURT: No. You say you will establish it.** Transcript of the June 30, 2011 Hearing at 32.

LaPorte's fraud here shows that Facebook and Zuckerberg cannot even establish agreement within their own expert. Dueling experts are everywhere. Facebook and Zuckerberg's Motion To Dismiss for fraud conflicts with their own expert's testimony and their lawyer's repeated now false claim that all experts will agree. Despite dueling experts, Facebook and Zuckerberg persist in their frivolous motion to dismiss for fraud forcing Plaintiff to have to combat bogus experts and motions propped up by their fraudulent expert reports.

FACEBOOK AND ZUCKERBERG'S INTENTIONAL RULE 26(A)(2)(B)(v)

VIOLATION

As incriminating as these acts in his testimony are, LaPorte's further concealment from this court of his very participation in the above cited cases.

The FRCP 26(a)(2)(B)(v) requires an expert report to contain: "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Notably absent from LaPorte's CV (Doc 326 at 35) are two of the cases noted above: *Georgio* and *Rago*. The omission of these particular cases is no accident. It evidences LaPorte's intention to suppress evidence from the court.

As the court will recall, *Rago* is the case where his own employer, the U.S. Government, withdrew him and his bogus PE test as a witness resulting in a not guilty for a defendant in that case. *Georgio* is the case noted above where he obviously perjured himself.

FRCP 37(c)(1) is clear that Facebook and Zuckerberg's concealment of such information required by Rule 26(a), prohibits the use of LaPorte's report or LaPorte as a witness supporting any motion, hearing or at a trial.

Rule 37(c)(1) invites the court to consider the appropriate sanction for Facebook and Zuckerberg's submission of such false information:

a) may order payment of reasonable expenses, including attorney's fees, caused by the failure;

b) may inform the jury of the party's failure; and

c) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). FRCP 37.

PLAINTIFF IS ENTITLED TO AN ATTORNEY FEE AWARD AND OTHER REASONABLE RELIEF

This motion for sanctions is necessary to combat Facebook and Zuckerberg's pattern of deceiving this court with known half truths and outright false statements. This blatant attempt to improperly influence the court should not be permitted. This will be the first of such motions Plaintiff will file as our experts wade through the web of false statements Facebook and Zuckerberg have created over their nine months of obfuscation.

CONCLUSION

Facebook and Zuckerberg knew or should have known that the report by LaPorte that they were offering was fabricated. Their entire Motion to Dismiss sits atop that illicit foundation. For all of these reasons, this Court should strike Facebook and Zuckerberg's Motion to Dismiss for Fraud and award Plaintiff his reasonable attorneys' fees in evaluating that motion, reviewing the expert reports and composing the response to LaPorte's perjurious report and any associated costs under Rule 37.

Respectfully submitted,

/s/Dean Boland

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