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

MOTION TO VACATE DOC. NO. 348 AND SCHEDULE RULE 16(B) CONFERENCE

MEMORANDUM

This motion to vacate is not Plaintiff's response to Defendants' motion to dismiss for fraud on the court, Doc. No. 319. As the court knows, we are about to embark on two months of expert depositions pursuant to the existing order Doc. No. 348. Our response to Doc. No. 319 is being prepared based upon those depositions and our review of both side's expert reports which is ongoing. This motion, instead, is aimed at the underlying basis upon which the court granted Defendants' motion to delay or defer discovery, Doc. No. 323.

In summary, Defendants argued that FRCP 26(c) permitted the court to stay discovery for good cause. Id. at 7. They then highlighted four factors the court should weigh in deciding their motion:

1. Whether a dispositive motion is pending
2. The breadth of discovery sought

3. The burden on the responding party

4. The potential prejudice to the party opposing the stay. Id.

Defendants then acknowledged that "whether a dispositve motion is pending is a critical part of the good cause determination" because this court's decision on such a motion may eliminate the need for general discovery. Id. at 8. Established case directs that the evaluation the court must make of that dispositive motion is whether it:

1. Appears to have substantial grounds; and

2. Does not appear to be without foundation in law. Id.

As the Defendants' argued, these two factors, together, establish good cause. Id. Conversely, without either of these two factors, good cause is not shown.

Defendants certified to the court that to the best of their knowledge, formed after an inquiry reasonable under the circumstances, that their legal contentions in their motion to dismiss for fraud were warranted by existing law. Defendants asserted their motion to dismiss for fraud on the court also "does not appear to be without foundation in law." Id.

As shown below, Defendants' motion for fraud on the court, reliant entirely on intrinsic fraud claims, is completely, categorically without any foundation in law.

Therefore, the basis by which Defendants argued for the 26(c) stay of discovery is without merit. The court's order, Doc. No. 348, following the April 4, 2012 hearing relied on Defendants' arguments in their motion to delay or defer

discovery. Defendants knew or should have known the indisputable law which prohibits their motion to dismiss for fraud reliant on intrinsic fraud. Simply put, there is no species of motion that is recognized under New York law that permits a court to take any action against any party based upon an allegation of fraud on the court founded in intrinsic fraud. The motion Defendants' relied on to obtain the order in Doc. No. 348 is not permitted at any time under New York law. The straightforward analysis of this point is below.

THIS COURT IS SITTING IN DIVERSITY ON THIS CASE

This court is sitting "in diversity" as a result of a successful action to remove this case from New York State court to this court. Doc. No. 6. Doc. No. 36-1. The court's docket also reflects that the court is sitting in diversity on this case.

COURT SITTING IN DIVERSITY IS OBLIGATED TO APPLY SUBSTANTIVE STATE LAW

It is a long standing principle of jurisprudence that a federal court sitting in a diversity of citizenship case is obligated to adhere to state substantive law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Specifically in New York state, courts sitting in diversity must apply substantive New York law. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). A prior decision by this court in the Western District of New York confirms this view. It is, of course, incumbent upon Federal District Court sitting on a diversity action to apply substantive State law. *Rowe v.*

Wal-Mart Stores, Inc., 11 F. Supp. 2d 265, 266 (W.D.N.Y. 1998).

Defendants acknowledge this point in that their motion to dismiss for statute of limitations violation. That motion cites exclusive to substantive New York state law regarding a variety of issues. Doc. No. 321.

NEW YORK SUBSTANTIVE LAW RECOGNIZES INTRINSIC AND EXTRINSIC FRAUD DISTINCTION

Under New York substantive law, there is a distinction between extrinsic and intrinsic evidence when a court is asked to consider a Fraud on the Court motion. This is because New York law permits collateral attacks on judgments obtained by extrinsic, but not intrinsic, fraud. *Altman v. Altman*, 150 A.D.2d 304, 542 N.Y.S.2d 7, 9 (N.Y.App.Div.1989)). Emphasis added.

Thus, extrinsic fraud "must be in some matter other than the issue in controversy in the action." *Chenu v. Board of Trustees*, 12 A.D.2d 422, 424, 212 N.Y.S.2d 818 [quoting *Crouse v. McVickar*, 207 N.Y. 213, 218, 100 N.E. 697], aff'd, 11 N.Y.2d 688, 225 N.Y.S.2d 760, 180 N.E.2d 913, remittitur amd., 11 N.Y.2d 765, 227 N.Y.S.2d 14, 181 N.E.2d 760, cert. denied, 370 U.S. 910, 82 S.Ct. 1256, 8 L.Ed. 2d 404.

Fraud is extrinsic when it is collateral to the matter decided by the court and deprives the opposing party of an opportunity adequately to present his claim or defense, as where a defendant is induced not to defend by a false promise to discontinue the action. *DiRusso v. DiRusso*, 55 Misc. 2d 839, 844, 287 N.Y.S.2d 171, 177-78 (Sup. Ct. 1968)

Fraud is intrinsic under New York state law when it relates to the very matter decided by the court, as when perjured testimony is produced. Id.

The distinction between extrinsic and intrinsic fraud was well expressed by Judge Phillips in Chisholm v. House, 160 F.2d 632, at p. 643 (10th Cir., 1947). He said:'* * * Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Where, however, the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts pertained to an issue involved in the original action and litigated therein, the fraud is regarded as intrinsic.'1011 The distinction between extrinsic and intrinsic fraud is important because New York allows collateral attack upon any judgment only when extrinsic fraud is established.

In *Crouse v. McVickar*, 207 N.Y. 213, 218, 100 N.E. 697, 45 L.R.A.N.S., 1159 (1912) the Court said 'fraud for which a judgment can be impeached must be in some matter other than the issue in controversy in the action.' Emphasis added. See *Jacobowitz v. Metselaar*, 268 N.Y. 130, 197 N.E. 169, 99 A.L.R. 1198 (1935); *Chenu v. Board of Trustees, Police Pension Fund*, 12 A.D.2d 422, 212 N.Y.S.2d 818 (1961); *Cohen v. Randall*, 137 F.2d 441 (2d Cir., 1943), cert. denied, 320 U.S. 796, 64 S.Ct. 263, 88 L.Ed. 480 (1943). Emphasis added.

Any fraud claimed must be extrinsic fraud on the court and relate to matters other than issues that could have been litigated. Emphasis added. *Diners Club,*

Inc. v. Makoujy, 110 Misc. 2d 870, 871, 443 N.Y.S.2d 116, 117 (Civ. Ct. 1981). Emphasis added. (See also *Mtr. of Holden*, 271 N.Y. 212, 218, 2 N.E.2d 631, 633—634). *Overmyer v. Eliot Realty*, 83 Misc. 2d 694, 705, 371 N.Y.S.2d 246, 258 (Sup. Ct. 1975)).

SECONDARY SOURCES RECOGNIZE INSTRINSIC/EXTRINSIC FRAUD DISTINCTION

Restatement of Judgments § 126(2)(b): Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out. Emphasis added. In addition, the legal system contains other sanctions against perjury. See *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C.1969); *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952) (Brennan, J.). "Fraud on the court is therefore limited to the more egregious forms of subversion of the legal process already suggested, those that we cannot necessarily expect to be exposed by the normal adversary process." Id.

SECOND CIRCUIT DEFINES FABRICATED EVIDENCE AND PERJURY CLAIMS AS INTRINSIC FRAUD CLAIMS

Perjury and fabricated evidence allegations are insufficient to obtain a Fraud on the Court dismissal. Courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as "fraud on the court." See, e.g., *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 193-95 (8th Cir. 1976), cert. denied, 429 U.S. 1040, 97 S.Ct. 738, 50 L.Ed.2d 751 (1977); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972) (Claims of perjury by a witness is recognized as

intrinsic fraud); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D.Wisc.), aff'd without opinion, 588 F.2d 838 (7th Cir. 1978); *Koningsberg v. Security National Bank*, 66 F.R.D. 439, 442 (S.D.N.Y.1975); *Lockwood v. Bowles*, 46 F.R.D. 625, 630 (D.D.C.1969).

Perjury and fabricated evidence are evils that can and should be exposed at trial." In addition, the legal system contains other sanctions against perjury. See *Lockwood, Shammas.*

Fraud upon the court does not exist where a judgment has simply been "obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944).

In addition, fraud which involves "witness perjury or fabricated evidence that does not involve officers of the court and that could and should have been discovered" during the previous litigation is insufficient to establish fraud on the court. *Barrett v. United States*, No. 06–CV–1324, 2006 WL 3248396, at * 7 (N.D.N.Y. Nov.7, 2006); see also *Gleason v. Jandrucko*, 860 F.2d 556 at 559 (2d Cir. 1988) (holding that the credibility and veracity of a witness at issue in an original proceeding cannot be later challenged by way of an independent action and that evidence of alleged perjury by a witness is simply not sufficient for a finding of "fraud upon the court"); *Trowbridge, et al v. Institute for Basic Research in Developmental Disabilities* 2003 WL 21143086, at * 4 (holding that fraud upon the court is not shown by presenting evidence attacking the veracity of a witness in the

original proceeding).

Although fraud on the court motions citing intrinsic fraud are more often lodged post-judgment, the logic inherent in their application remains whether filed pre-judgment or post-judgment. In sum, "neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant," *Gleason*, 860 F.2d at 560, and thus, is insufficient to justify relief under the savings clause of Rule 60. See, e.g., *Tesser v. Board of Educ. of City of New York*, No. 97–CV–6719, 2005 WL 2977766, at * 5 (E.D.N.Y. Nov. 7, 2005) (holding that allegations of witness perjury and nondisclosure during pretrial discovery does not constitute grounds for an independent action under Rule 60).

It is important to note that the key substantive law here is the law of New York state. That state law, as noted above, clearly prohibits a motion for fraud on the court citing intrinsic fraud at any point in litigation.

DEFENDANTS' FRAUD CLAIMS JUSTIFYING EXPEDITED DISCOVERY AND DELAY OR DEFERRAL OF DISCOVERY DOC. NO. 348 ARE INTRINSIC

Defendants have no claim that the type of fraud they are alleging is extrinsic. In fact, their own words in countless pleadings and oral argument repeatedly allege the precise language that defines intrinsic fraud.

1. "[T]he Amended Complaint...is based upon a doctored contract and **fabricated evidence**." Doc. No. 40 at 1. Emphasis added.
2. "Ceglia appears to have doctored the genuine contract...and then **fabricated emails**...." Doc. No. 45 at 2. Emphasis added.

3. "[Ceglia] has previously **fabricated documents**...." Doc. No. 72 at 9. Emphasis added.
4. "[S]moking gun documents...conclusively establish that he **fabricated the purported contract** and this entire lawsuit is a fraud and a **lie**." Doc. No. 99 at 4. Emphasis added.
5. "Defendants' papers stated that certain unidentified documents confirmed Defendants' longstanding public position that **Ceglia fabricated the purported contract**...." Doc. No. 110 at 11. Emphasis added.
6. "This case is based upon on a **fraudulent contract and fabricated emails**." Hearing Transcript, June 30, 2011 at 5. Emphasis added.
7. Defendants' counsel asserts the **email exchanges** between the parties offered by Plaintiff are "**made up**." Id. at 16.
8. "This is a case where plaintiff **fabricated a purchase agreement**." Id. at 37. Emphasis added.
9. The Facebook Contract is an "**amateurish forgery**." Id. at 112.
10. "Given that Ceglia has **fabricated emails** in this case...." Doc. No. 155 at 16. Emphasis added.
11. "Defendants have already gathered substantial proof that **Ceglia fabricated the emails**...just as he **doctored the contract**...." Doc. No. 224 at 21. Emphasis added.
12. "Ceglia's motion for sanctions based upon the purported 'spoliation' of the **fabricated contract**...should be denied...." Doc. No. 237 at 6. Emphasis added.

13. "This Court granted expedited discovery on July 1, 2011, based on **Defendants' showing that Ceglia had fabricated the [Facebook Contract]**." Id. at 6. Emphasis added.

14. "Evidence[s] demonstrat[es] that [Plaintiff] **fabricated the 'emails'** in his first Amended Complaint." Id. at 12. Emphasis added.

15. "The Purported Emails themselves, which Ceglia has proffered as authentic **communications with Mark Zuckerberg, are fabricated**." Doc. No. 324 at 6. Emphasis added.

16. "This lawsuit is a fraud. Ceglia...[has] **forged documents**, **fabricated emails**...." Doc. No. 319 at 9. Emphasis added.

17. "[T]his Court granted expedited discovery to allow Defendants to assemble evidence that **Ceglia is perpetrating a fraud on the court based on his forged contract**...and the **fabricated emails**." Id. at 9. Emphasis added.

18. "[P]laintiff had **fabricated a document** submitted in support of its claim...." Id. at 31. Emphasis added.

19. "[H]e inserted into the **fabricated contract** a historical anomaly...." Id. at 50. Emphasis added.

20. "The Purported **'emails'** quoted in the Amended Complaint are **Fabricated**." Id. at 53.

21. "When he **fabricated the emails**...." Id. at 55. Emphasis added.

22. "[T]he **fabricated 'emails'** were typed in manually." Id. at 55. Emphasis added.

23. "According to the fictitious narrative reflected in the **fabricated 'emails'**...." Id. at 56. Emphasis added.

24. "[T]he lie to the fictional narrative in his **fabricated 'emails**.'" Id. at 57. Emphasis added.

25. "Defendants have established...that Ceglia is perpetrating a fraud on the court through the submission of a **forged Work for Hire document** and **fabricated emails**." Id. at 58. Emphasis added.

26. "Of course we were not there when **Mr. Ceglia...fabricated the document**." Hearing Transcript of April 4, 2012 at 9. Emphasis added.

27. "[H]e had the **first fabricated document**...." Id. at 12. Emphasis added.

28. "Your Honor, because, I would submit, he was **trying to create an electronic version of his fabricated contract** to further his fraud...." Id. at 62. Emphasis added.

29. "The Purported Emails themselves which Mr. Ceglia has proffered as authentic **communications with Mr. Zuckerberg, are fabricated**." Doc. No. 325 at 7. Report of Stroz Friedberg. Emphasis added.

30. "[T]he text of the **Purported Emails** themselves demonstrates that they **are fabricated**." Id. at 28. Emphasis added.

31. "[T]he text of the **Purported Emails** themselves constitutes substantial evidence that they **are fabricated**." Id. at 31. Emphasis added.

32. "This **document was fabricated** on or after February 15, 2011." Id. at 44. Emphasis added.

33. "**Ceglia's sworn declaration** has now been revealed to be **false**." Doc. No. 295 at 9. Emphasis added.

34. "[T]he story he tells in his Amended Complaint is a **lie**." Doc. No. 45 at 11. Emphasis added.

35. "Nor should the Court be forced to devote judicial resources to supervising a concocted **lawsuit that rests on a lie**." Id. at 19. Emphasis added.

There are many more instances of Defendants asserting that the basis for their claimed fraud on the court using alternatives to the words perjury and fabrication. Defendants' fraud claims are intrinsic in total. Occasionally, Defendants even explicitly confirm their view that the basis for this Court's granting of the expedited discovery order was their supposed "showing" of perjury and fabricated documents by Plaintiff.

UNDER SUBSTANTIVE NEW YORK LAW, THERE IS NO REMEDY FOR DEFENDANTS' MOTION TO DISMISS FOR INTRINSIC FRAUD

The obvious distinction between intrinsic and extrinsic fraud is clear throughout state and federal case law. Defendants by the record noted above, have no argument that their fraud claims in this case are anything other than intrinsic. Defendants will have the opportunity to bring their fabricated documents and perjury claims before a jury. Nothing could be more intrinsic to the case than the Defendants' claims of fraud repeated throughout the record of this case.

New York law does not recognize a motion to dismiss for fraud on the court reliant on intrinsic fraud. In a pre-trial setting, fraud on the court motions reliant

on intrinsic fraud are not recognized because, as noted above, the adversary system of justice is designed to handle precisely such allegations. Even post-judgment, a motion for Fraud on the Court reliant on intrinsic fraud is insufficient to reverse as New York state law regards a party's trial as their opportunity to expose alleged fabricated evidence and perjury.

SECOND CIRCUIT

FEDERAL COURT SITTING IN DIVERSITY SHOULD NOT GRANT RELIEF FOR CLAIM OF INTRINSIC FRAUD IF SUBSTANTIVE STATE LAW PROHIBITS IT

In 7 Moore, Federal Practice P60.37(3) (2d ed.), page 634, the author writes, "a federal court sitting in another state, which allows relief only where the fraud is extrinsic, should not grant relief from a judgment of that state on the basis of intrinsic fraud * * * Certainly the policy of *Erie-Tompkins* demands this where the state court judgment was rendered in a case involving only non-federal matters; and, further, the policy is in accord with that underlying res judicata and full faith and credit." *Alleghany Corp. v. Kirby*, 218 F. Supp. 164, 183-84 (S.D.N.Y. 1963) aff'd, 333 F.2d 327 (2d Cir. 1964) on reh'g, 340 F.2d 311 (2d Cir. 1965).

"It is not a judgment which could be collaterally attacked in a New York court and therefore a collateral attack must fail in this Court as well." Id. Likewise, Defendants' pre-trial motion to dismiss for fraud, reliant on intrinsic fraud as it is, "must fail in this Court as well." Id.

DEFENDANTS MOTION FOR FRAUD ON THE COURT HAS NO REMAINING SUBSTANTIAL GROUNDS

Without the barred intrinsic fraud motion to dismiss on fraud argument, only two insubstantial grounds remain - litigation misconduct and spoliation. The court noted the insubstantial nature of a spoliation claim in response to Plaintiff's earlier claim of spoliation by Defendants:

> **And [Defendants] they [yellowed the Facebook Contract] and they're going to get the benefit even if they're not allowed to argue it.**
> **THE COURT: You can ask for a curative instruction.**
> **MR. BOLAND: And that's what I'm asking for in our motion.**
> **THE COURT: Well, that's exact -- but we're not here for trial. I'm not authorized to make in limine motions -- or to consider in limine motions or to -- or to direct the district judge what his cautionary instruction should sound like."** Hearing Transcript, December 13, 2011 at 69.

Defendant's claim of spoliation, spurious as it is, is likewise something "direct[ed] [to] the district judge" at a later time.

THE LITIGATION MISCONDUCT CLAIM IS NOT SUBSTANTIAL

Defendants' Motion to Dismiss for Fraud includes a claim of "litigation of misconduct." However, as the court knows, this claim is not substantial for several reasons. First, Defendants have raised this claim before and either obtained rulings from this court regarding sanctions requests or withdrawn those requests. More importantly, the court has sanctioned Plaintiff on one occasion already satisfying any appropriate thirst for punishment Defendants still harbor. Finally, there are currently no sanction motions pending against either party. Therefore, this claim is not substantial.

MOTION TO DISMISS FOR STATUTE OF LIMITATIONS VIOLATION

As to Defendants' motion to dismiss arguing Ceglia's case is time barred the

court summarized that claim as follows:

> **Defendants' arguments that Plaintiff's claims are time-barred or barred by laches turn, in large part, on Defendants' assertion that on April 13, 2004, Defendant Mark Elliot Zuckerberg ("Zuckerberg"), formed in Florida a limited liability company, Thefacebook, LLC ("the LLC"), to run the business, which was the precursor to Thefacebook, Inc. ("the Inc."), which later became known as Defendant FaceBook. Inc. ("FaceBook"). According to Defendants, Zuckerberg, by listing himself and two others, but not Plaintiff, as the owners of the LLC, "publicly and unequivocally excluded [Plaintiff] from ownership of the company in April 2004."** Doc. No. 366 at 4.

As a result of this analysis, the court granted discovery to Plaintiff in two areas:

1. "[W]what intellectual property rights and other ownership interests were created by the contract's language...." Id. at 5. Emphasis added.

2. "[A]nd the how the formation of the [Florida] LLC [in April 2004] necessarily divested Plaintiff of any and all interest in the partnership's assets, including intellectual property rights." Id.

Defendants then improvidently filed a motion to clarify Doc. No. 373. In that motion, Defendants graciously offered their unsolicited assistance to the court in drafting a better order. That motion included a condescending list of precise questions divided into two categories that it urged the court were "inappropriate" and those that were "appropriate." Doc. No. 373 at 10. "Examples of appropriate discovery requests...might include [while] [i]n contrast, examples of <u>inappropriate</u> discovery requests would include...." Id. at 10-11. Emphasis in the original. The court disagreed with Defendants' lawyers' dim view of the court's writing ability.

and denied the motion. The court responded to that motion by thanking Defendants and sending them on their way: "Defendants, by claiming, as plaintiffs in the Saverin case, that no intellectual property rights were transferred into the LLC formed by Saverin on April 13, 2004 under Florida law, moots that issue in the instant case." Doc. No. 401 at 7-8. Item number 2 above from Doc. No. 366 was eliminated as a potential triggering event for the start of Plaintiff's statute of limitations clock.

Contrary to Defendants' assertion in their motion to delay or defer discovery, Doc. No. 321 no longer offers "substantial grounds" at all. Their key event triggering the running of the statute of limitations clock argued in that ill-conceived motion, turns out to be the formation of a shell corporation that their client and former lawyers knew was a shell corporation all along. Defendants failed to reveal that fact in their motion further damaging any argument that their motion contains "substantial grounds." In fact, as it sits now, neutered by the court's order recognizing no intellectual property was transferred by Zuckerberg to any person or any entity until, at the earliest, July 2004, their motion contains **no grounds** to argue Plaintiff's claim is time barred. Defendants do not even argue that Zuckerberg transferred Plaintiff's share of any intellectual property into the Delaware incorporation occurring in July 2004.

Plaintiff is now permitted discovery regarding how Defendants' define the "intellectual property rights and other ownership interests" created by the Facebook Contract. No matter the definitions Defendants provide, those definitions alone

have no connection to an argued date of breach. This claim is not substantial.

CONCLUSION

For the reasons noted above, Plaintiff respectfully requests this court vacate Doc. No. 348 and schedule a Rule 16(b) conference to develop a regular discovery schedule as this court intended to schedule previously. The offered justifications for a delay or deferral of discovery in Defendants' motion no longer exist. Their claim that their motion to dismiss for fraud may well obviate the need for discovery is contrary to New York state law. The only reasons urged by Defendants for this court to delay or defer discovery are now non-existent as this motion makes clear.

Respectfully submitted,

/s/Dean Boland

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