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 TO PLAINTIFF'S MOTION TO VACATE

MEMORANDUM

Defendants' motion to dismiss, Doc. No. 319, claims the law warrants this court, under its inherent power, to dismiss Plaintiff's claims based upon the mere allegation of intrinsic fraud. No case has ever held that a district court's inherent power permits dismissal of a case based upon mere allegations of intrinsic fraud. Defendants' motion to dismiss (Doc. No. 319) and response to Plaintiff's motion to vacate (Doc. No. 433) present no contrary cases to Plaintiff's position. No federal case sitting in diversity has ever held that a court can dismiss based upon mere allegations of intrinsic fraud reliant on its inherent power or for any other rationale. Defendants invite this court to be the first.

CONCEDED ISSUES FROM DEFENDANTS' RESPONSE, DOC. NO. 433

Defendants' response Doc. No. 433 concedes the following:

1. This court is sitting in diversity; and
2. This court must apply substantive New York law; and
3. New York substantive law recognizes a distinction between intrinsic and extrinsic fraud; and
4. New York law prohibits attacks on judgments based upon intrinsic fraud; and
5. Defendants' fraud allegations, perjury and fabricated evidence, are intrinsic fraud allegations; and
6. Perjury and fabricated evidence are evils that can and should be exposed **at trial**; and
7. Secondary sources recognize the intrinsic/extrinsic fraud distinction; and
8. There are no New York state cases holding that a party can obtain a dismissal based upon allegations of intrinsic fraud; and
9. There are no federal cases holding that a federal court may ignore substantive state law and dismiss a case based upon allegations of intrinsic fraud.

DEFENDANTS' ALLEGATIONS ARE NOT A FRAUD ON THE COURT

Defendants' use of the phrase "fraud on the court" mislead the court. Defendants' facts supporting their "fraud on the court" allegation only support an **intrinsic fraud** argument.[1] No court or secondary source defines intrinsic fraud as a "fraud on the court."

[1] Plaintiff has rebutted all of Defendants intrinsic fraud allegations with expert reports containing undisputed facts establishing the authenticity of the Facebook Contract.

The doctrine of *Erie Railroad Co. v. Tompkins*, 304 US 64 (1938) discourages forum shopping and avoids unfairness. "[T]he outcome of the litigation in the federal court should be substantially the same...as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York*, supra, 326 US at 109, 65 S.Ct. at 1470). Litigants able to select a federal forum (as Defendants did here) gain no advantage over litigants unable to do so (e.g. Plaintiff, a forum resident), thus avoiding inequitable administration of the laws. "The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of [a diversity case to] differ because the suit had been brought in a federal court." *Hanna v. Plumer* (1965) 380 US 460, 467, 85 S.Ct. 1136, 1141.

FEDERAL COURTS' INTRINSIC AND EXTRINSIC FRAUD DISTINCTION

New York state law applies to the court's analysis of Plaintiff's pending motion. In addition, Defendants ignore that federal law mirrors state law regarding these two definitions of fraud. "As opposed to a fraud against an adverse party, a fraud upon the court will only be found where the misconduct at issue 'seriously affects the integrity of the normal process of adjudication.'" *Sanchez v. Litzenberger*, No. 09 Civ. 7207(THK), 2011 U.S. Dist. LEXIS 18528, at *9 (S.D.N.Y. Feb. 24, 2011) (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988)). "Perjury alone does not constitute fraud upon the court." Id.

Only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Defendants do not allege judicial bribery or implicate an attorney in evidence fabrication or perjury.

THE DISMANTLING OF DEFENDANTS' ARGUMENT

Defendants' motion to dismiss, Doc. No. 319, relies on nineteen cases supporting their "fraud on the court"[2] argument. The majority of those cases are not diversity cases. The few diversity cases Defendants' cite do not discuss the relationship of substantive state law and intrinsic fraud. None of those cases involve allegations of fraud **refuted by expert witnesses**. None of those nineteen cases support Defendants' novel theory at all. The breakdown of those cases is as follows:

A. TWELVE INAPPLICABLE FEDERAL QUESTION CASES

Twelve of Defendants' nineteen cases are **federal questions**, i.e. the court does not consider the application of substantive state law:

1. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) is a patent dispute.
2. *Corto v. Nat'l Scenery Studios*, No. 95-50880, 1997 WL 225124 (2nd Cir. May 5, 1997) is a Bankruptcy case. (**Note**: Re-argued in Defendants' response, Doc. No. 433).
3. *Martina Theater Corp. v. Schine Chain Theaters, Inc.*, 278 F.2d 798 is an anti-trust case brought by the government.
4. *Nat'l Hockey League v. Metro Hockey Club Inc.*, 427 U.S. 639 (1976) is a private, federal anti-trust suit. The dismissal here relied upon **lawyer misconduct**.
5. *Shangold v. Walt Disney Co.*, 275 F. App'x 72, (2d Cir. 2008). Federal question under Lanham Act. (**Note**: Re-argued in Defendants' response, Doc. No. 433)
6. *Vargas v. Peltz*, 901 F. Supp. 1572 (S.D. Fla. 1995), is a sexual harassment suit under Title VII.
7. *Jimenez v. Madison Area Technical Coll.*, 321 F.3d 652 (7th Cir. 2003). is a federal case under 18 U.S.C. § 1981 and § 1983.
8. *Pope v. Fed. Express Corp*., 974 F.2d 982 (8th Cir. 1992) is a federal question brought under Title VII.
9. *Combs v. Rockwell Int'l Corp.,* 927 F.2d 486 (9th Cir. 1991) is an employee versus employer case alleging violations of a collective bargaining agreement and breach of duty under ERISA, a federal statute 29 U.S.C. § 1001.
10. *Cerutti 1881 S.A. v. Cerutti, Inc.*, 169 F.R.D. 573 (S.D.N.Y 1996) is a trademark suit under the Lanham Act, 15 U.S.C. § 1125(a). (**Note**: Re-argued in Defendants' response, Doc. No. 433).
11. *Brady v. United States*, 877 F. Supp 444 (C.D. Ill. 1994) is a taxpayer lawsuit against the United States seeking return of allegedly overpaid federal taxes.

[2] For clarity, Plaintiff refers to Defendants argument as "fraud on the court" despite the reality that their allegation is a fraud by Plaintiff against Defendant, i.e. intrinsic fraud. They have not alleged extrinsic fraud or anything that can be properly defined as a "fraud on the court."

12. Sentis Grp., Inc. v. Shell Oil Co., 559 F.3d 888 (8th Cir. 2009) is a case involving claims of the violation of the federal statute known as the Petroleum Marketing Practices Act, 15 U.S.C. §2801-2806.

B. ONE INAPPLICABLE CASE OF EXTRINSIC FRAUD – ADMITTED ATTORNEY MISCONDUCT

One of Defendants' cases is an **extrinsic fraud** case involving **admitted attorney misconduct**. Defendants rely on *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) in their argument in Doc. No. 319 and their reply, Doc. No. 433.

The procedural history of *Chambers* is important. In *Chambers* the Defendant, Chambers, appealed an order of specific performance against him which had ended the case. The appellate court sanctioned Chambers for filing a frivolous appeal and remanded to the district court for the determination of sanctions against *Chambers* and his lawyer, *Gray* for conduct at the district court level occurring before the order of specific performance was entered. Back at the district court, the court sanctioned Chambers including an order that he pay the opposing side's attorneys fees in contravention of the "American Rule." Chambers appealed those sanctions and the U.S. Supreme Court eventually accepted the appeal regarding the sanctions issue only.

Defendants' misleadingly stated the holding of *Chambers* as follows:

"In *Chambers v. NASCO, Inc*., 501 U.S. 32, 51-53 (1991), the Supreme Court held that a federal court sitting in diversity has the inherent power to dismiss lawsuits for fraud, regardless of any state-law limitations on the power to sanction." Doc. No. 433 at 1.

This quote is intentionally false in how it characterizes the *Chambers* holding.

The district court in *Chambers* **did not dismiss the case**. Neither party sought dismissal of the case for fraud on the court. NASCO, the plaintiff, was granted specific performance in a decision that ended the case. The case was over at the time that sanctions were imposed and

was, in fact, back at the district court level solely for a determination of sanctions, i.e. no substantive legal issues remained. The Supreme Court was only evaluating the propriety of sanctions imposed post-appeal, not sanctions imposed during or even at the conclusion of the trial.

Chambers involved **admitted misconduct** by the client, Chambers, **and his lawyer**, Gray. *Chambers* contains **no discussion** about whether a federal court sitting in diversity can ignore substantive state law. The *Chambers* court specifically notes that its decision is **not about substantive law**. *Chambers* at *34. Defendants intentionally mislead the court by omitting the following quote from the case: "[F]ee shifting here **is not a matter of substantive remedy....**" Id. Emphasis added. In addition, attorney-client collusion in fraud is an **extrinsic fraud claim**. The extrinsic fraud in *Chambers* included Chambers' attorney intentionally withholding information from the court, Id. at *37, the court warning lawyer and client their conduct was unethical, Id., and a finding by the district court that the attorney and client "continued to abuse the judicial process." Id. at *38. The U.S. Supreme Court and 2nd Circuit in decisions after *Chambers* **do not** interpret it the way Defendants urge.

Only one U.S. Supreme Court case after *Chambers* mentions diversity and substantive state law. *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999), held that "Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law" (quoting *Guaranty Trust Co,* supra).

Seven years after *Chambers* this court held that "it is incumbent upon a federal district court sitting on a diversity action to apply substantive state law." *Rowe v. Wal-Mart Stores, Inc.*, 11 F. Supp.2d 265. Neither the U.S. Supreme Court nor this court nor any federal court regard *Chambers* as support for the novel notion advanced by Defendants - that a federal court sitting in

diversity can ignore substantive state law merely upon the allegation of intrinsic fraud by one party against another - a clear substantive law issue.

As *Chambers* points out, the imposition of attorney fee sanctions **is not a substantive law issue**. Therefore, the Erie-Tompkins doctrine is not triggered.

No federal court interprets *Chambers* in the contorted way Defendants' urge in their response, Doc. No. 433. No federal court discusses the ability to dismiss a diversity case amidst intrinsic fraud claims - logically - because it cannot be done. Such circumstances are what jury trials are designed for.

C. TWO INAPPLICABLE ADMITTED FRAUD CASES

Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989) is a case involving **admitted fraud** before the court. See *Aoude* at 1117. *Sun World, Inc. v. Lizarazu Olivarria*, 144 FRD 384 (E.D. Cal. 1992) is a case of **admitted fraud**. See *Sun World* at *389.

Cases of admitted fraud are distinguishable and inapplicable on that basis alone. Neither of these two cases raise state substantive law in opposition.

D. INAPPLICABLE FAILURE TO PROSECUTE CASE

One of Defendants' cases is a dismissal for "failure to prosecute." *Link v. Wabash R.R. Co*. 370 U.S. 626 (1962). This is also inapplicable to Defendants' intrinsic fraud allegations.

E. THREE INAPPLICABLE DIVERSITY CASES FAILING TO RAISE SUBSTANTIVE STATE LAW ISSUE

Three other cases in Doc. No. 319 are diversity cases which never considered the application of substantive state law. Defendants' cannot rely on cases as precedent for holdings they claim are implied by their decisions.

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having so decided as to constitute precedents."

Webster v. Fall, 266 U.S. 507, 511 (1925); see also *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37-38 (1952).

One of those three diversity cases not discussing the substantive law issue is *DAG Jewish Directories, Inc. v. Y & R Media, LLC*, No. 09-7802, 2010 WL 3219292. The **facts** of that case differ from those **alleged** by Defendants here. See *Dag Jewish Directories* at *2.

In *DAG Jewish Directories* a party offered the copy of a document as authentic. The court ruled that the original of the document trumped the copy and regarded the original as proof that the 'copy' was fabricated.

Only one case has ever cited to *DAG Jewish Directories.* See *Zimmerman v. Poly Prep Country Day Sch*., 09 CV 4586 FB, 2012 WL 2049493 (E.D.N.Y. June 6, 2012). *Zimmerman* did not discuss the substantive law issue either because it is a federal question case.

The second of the three diversity cases in Defendants' motion is *Jensen v. Phillips Screw Co*., 546 F. 3d 59 (1st Cir. 2008). *Jensen* is a First Circuit class action case and not a dismissal, but an award of attorneys fees against an attorney for a violation of 28 U.S.C. § 1927 - abuse of the judicial process. Defendants have not alleged attorney misconduct.

The final case of the three diversity cases in Defendants' motion to dismiss, Doc. No. 319, is *Cook v. American S.S. Co*.134 F.3d 771 (6th Cir. 1998). The *Cook* court imposed attorney sanctions for "vexatiously" multiplying proceedings after the attorney's physical assault of opposing counsel causing a mistrial. No substantive law argument was made or discussed in the opinion.

The bottom line question is what would a New York state court do when faced with **Defendants'** claim of intrinsic fraud? Likewise, what would a New York state court do when faced with **Plaintiff's** claims of intrinsic fraud? Common sense dictates that if a judgment

cannot be reversed merely upon an allegation of intrinsic fraud, neither can a case be prevented from proceeding to judgment based upon intrinsic fraud allegations. "Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials." *Tarter v. United States*, 17 F. Supp. 691, 692-93 (W.D. Ky. 1937).

The rationale under New York law that prohibits judgment reversals upon allegations of intrinsic fraud is simple - the litigant had their opportunity to root out that alleged intrinsic fraud at trial. Likewise, here, Defendants have a remedy for the alleged intrinsic fraud - a jury trial.

Defendants' concede that parties cannot **re-litigate** judgments obtained by intrinsic fraud. But their theory in Doc. No. 319 is that case law somehow permits the **pre-litigation** of cases based upon intrinsic fraud. Defendants' argument, if accepted by this court, opens the floodgate for every party to attempt to obtain a non-jury trial with the court and if unsuccessful make a second attempt to prevail with a jury. This court would undoubtedly find many litigants willing to take advantage of this new loophole around the 7th Amendment.

ADDITIONAL INAPPLICABLE CASES IN DEFENDANTS' RESPONSE, DOC. NO. 433

Defendants' cite to five additional inapplicable cases in their response. *Corto v. Nat'l Scenery Studios*, 1997 WL 225124 is a federal bankruptcy case not discussing the applicability of substantive state law. *Schwarz v. FedEx Kinko's Office*, 2009 WL 3459217 is cited by Defendants for a comment in a footnote. Doc. No. 433 at 3. *Schwarz* discusses a federal court's ability to impose **spoliation sanctions** and notes that those sanctions are **not substantive**. Id. at *6 n.4. *Freedom, N.Y., Inc., v. United States* 438 F.Supp 2d 457 is not a diversity case. *People v. Terry* 45 F.3d 17 is not a diversity case. It discusses a federal court's authority to punish litigants for contempt.

NASCO, Inc. v. Calcasieu Television & Radio, Inc. 894 F.2d 696 is another name for the *Chambers* case discussed above which held that "in diversity cases, *Erie* required issues **significantly affecting the outcome of the litigation to be decided under state law**." Id. at *704. Emphasis added.

DEFENDANTS' ADMISSION THAT DOC. NO. 319 IS NOT WARRANTED BY EXISTING LAW

Defendants' argue that post-judgment reversal cases "simply have no bearing on a court's power to dismiss an ongoing case as a sanction for fraud or other litigation misconduct." Doc. 433, at 5. In contradiction to this contention, Defendants' Doc. No. 319 and Doc. No. 433 rely on the holdings in post judgment reversal cases, while misstating the holdings of those cases and selectively quoting from them as Plaintiff has exposed above.

CONCLUSION

Defendants reliance on *Chambers* is false and misleading. The remaining cases they offer in their response, Doc. No. 433, are likewise unavailing. No federal or state cases have held that dismissals for allegations of intrinsic fraud are permitted. No federal case sitting in diversity has held that allegations of intrinsic fraud can support dismissal of a case regardless of contrary authority under substantive state law. The dismissal remedy Defendants seek is unavailable under New York state law. Therefore, the limited expert discovery ordered in Doc. No. 348 is premised on Defendants' groundless legal arguments and should be vacated. Once vacated, Defendants cannot show good cause why a 16(b) conference should not be held placing the case into orderly and regular discovery. The court has seen Plaintiff's expert reports which overwhelming establish the authenticity of the Facebook Contract.

Defendants' inaccurately claim that Plaintiff argues the "court is powerless" to confront fraud by litigants. Doc. No. 433 at 2. In reality it is Defendants who are powerless to co-opt the

court's authority to violate Plaintiff's Constitutional rights. Defendants' palpable outrage is their shock that their usual power and influence over individual citizens outside the court is ineffective within it. This court's power ensures that Defendants have no more rights or privileges than any average American citizen.

For the reasons set forth in Plaintiff's memorandum, Doc. No. 427 and this reply, Plaintiff respectfully requests this court vacate its order, Doc. No. 348 and schedule a 16(b) discovery conference at its earliest convenience.

Respectfully submitted,

/s/Dean Boland

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