UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' RESPONSE TO PAUL ARGENTIERI'S "SUR REBUTTAL" DECLARATIONS

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PRELIMINARY STATEMENT

On November 9, 2012, Defendants filed their reply memorandum in support of their Motion to Dismiss. Doc. No. 588. As of that date, Defendants' Motion was fully briefed, and this Court had not authorized any additional filings on the Motion. *See* Doc. Nos. 348, 566. Nevertheless, on November 26, 2012, and again on December 5, 2012, Paul Argentieri filed declarations in "Sur Rebuttal" of Defendants' Motion. Doc. Nos. 610, 623.

These declarations are Ceglia's latest desperate attempts to deny what has been established by overwhelming objective evidence: that Ceglia—perhaps working in concert with others—fabricated the Work for Hire document, created fake "emails" to bolster his fraudulent claims, and crossed his fingers for a quick payout from the world's most popular social networking website. But Defendants refused to negotiate with criminals. Now, Ceglia faces federal prosecution for his fraudulent lawsuit and is frantically trying to salvage the civil action. Ceglia is perpetrating a fraud on the Court, Defendants, and the public. The Court should exercise its inherent authority and dismiss this lawsuit with prejudice.

ARGUMENT

The two unauthorized declarations violate Local Rule 7(a)(3), which directs that "[a]n affidavit must not contain legal arguments." Such a violation "may constitute grounds for resolving the motion against the non-complying party." *Id.* In any event, the declarations grossly misstate the law and cannot be credited.

I. The Declarations' Discussion Of "New" Case Law Is Riddled With Error.

A. This Court's Inherent Power To Dismiss Is Well-Established.

Ceglia claims the declarations address "new" authority. But most of the cited cases were decided decades ago. *See* Doc. Nos. 610, ¶¶5-9 (citing cases from 1972, 1988, 1994, and 1995). The only purportedly "new" Second Circuit cases are *Space Hunters Inc. v. United States*, 2012

WL 4903254 (2d Cir. Oct. 17, 2012), and *Harris v. City of New York*, 2012 WL 5464576 (S.D.N.Y. Nov. 9, 2012). *See id.*, ¶¶5, 9. But those cases simply quote decades-old standards that this Court has already ruled are irrelevant to Defendants' Motion. *See id.* ¶5 (citing *Space Hunters, Inc.*, 2012 WL 4903254, at *1 (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988)), ¶9 (citing *Harris*, 2012 WL 5464576, at *6 (same)). Like the decisions on which Ceglia relied in his unsuccessful Motion to Vacate (Doc. No. 427), *Space Hunters* and *Harris* concern attempts to set aside a final judgment from a prior case on the basis of fraud. Defendants previously explained that Ceglia's reliance on such cases was unfounded because the standard for reopening a final judgment is considerably stricter than the standard governing dismissal for an ongoing fraud. *See* Doc. No. 433 at 4; *see also, e.g.*, *Freedom, N.Y., Inc. v. United States*, 438 F. Supp. 2d 457, 462 (S.D.N.Y. 2006). This Court agreed with Defendants in holding that cases involving "collateral attacks seeking relief from final judgments" are not relevant; the Court looked instead to cases addressing motions to dismiss prior to judgment, such as *Shangold v. Walt Disney Co.*, 275 Fed. App'x 72 (2d Cir. 2008). Doc. No. 457 at 29-31.

Ceglia's reliance on *Impeva Labs, Inc. v. System Planning Corp.*, 2012 WL 3647716 (N.D. Cal. Aug. 23, 2012), is baseless. That case also involved a collateral attack—the plaintiff filed a complaint alleging that the defendant had committed a "fraud on the court" in a different case. *Id.* at *8. Although the district court observed that the Ninth Circuit has a high standard for such complaints, *id.*, it did not remotely suggest that the same standard applies when, as here, the defendant moves to dismiss a complaint that is itself a fraud on the court.

Ceglia misleads the Court in relying on the non-binding, two-page memorandum opinion in *Weaver v. Bellsouth Telecommunications, Inc.*, 2012 U.S. Dist. LEXIS 113611 (W.D. Ky. Aug. 13, 2012). That opinion recognized that federal courts have the inherent legal authority to

order dismissal for fraud on the court. *Id.* at *2 (citing *Chambers*, 501 U.S. at 41). The court denied the defendant's motion to dismiss only because it had failed to make the necessary factual showing—the defendant failed to introduce any expert evidence that the plaintiff had fabricated an email (which was tangential to the issues in the case in any event). *See id.* Here, in contrast, Defendants have introduced overwhelming objective evidence that the documents at the core of Ceglia's case are fraudulent, and constitute an "avalanche of evidence pointing toward the conclusion . . . that the document on which [Ceglia] is suing is a fake." Doc. No. 350 at 2.

The second unauthorized declaration discusses 18 U.S.C. § 1001, which criminalizes making false statements to a government official, but not if those false statements are made to a court by a party or counsel. 18 U.S.C. § 1001(b). This criminal statute and its "judicial function exception" have nothing to do with the court's well-established inherent power to dismiss for fraud. *See* Doc. No. 319 at 20-24; Doc. No. 588 at 4-5. As the case law and legislative history make clear, the purpose of the exception is to exclude misconduct, such as perjury and obstruction of justice, that is "already covered by other statutes," H.R. Rep. No. 104-680, at 1 n.6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3935, 3935, and to avoid criminalizing "conduct that falls well within the bounds of responsible advocacy," *Hubbard v. United States*, 514 U.S. 695, 709 (1995). Congress certainly did not intend this exception to undermine the integrity of the legal system by allowing parties to bring fraudulent lawsuits based on fabricated documents.

B. Ceglia Misstates The "Clear And Convincing" Evidence Standard.

The Supreme Court and this Court have held that clear and convincing evidence is equivalent to a "highly probable" standard of proof. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Miller v. Racette*, No. 11-cv-0426(MAT), 2012 WL 1999490, at *8 (W.D.N.Y. June 4, 2012). The Second Circuit is in accord. *See United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (proof "with a high degree of certainty").

Ceglia falsely asserts, however, that "newer Second Circuit cases all defin[e] 'clear and convincing' consistent with Plaintiff's definition advanced in his papers," Doc. No. 610, ¶14, namely, "evidence such that no reasonable jury could find in favor of the non-moving party." Doc. No. 481 at 8. But Ceglia does not cite any Second Circuit decision that post-dates the authorities cited by Defendants. Furthermore, the decades-old cases that Ceglia discusses are either irrelevant or support Defendants. For example, *Sawyer v. Whitley*, 505 U.S. 333 (1992), and *Schlup v. Delo*, 513 U.S. 298 (1995), define the "actual innocence" standard that governs a federal habeas challenge to a death sentence—not the clear and convincing evidence standard by which actual innocence must be proven. Nor does the Supreme Court's discussion of the "function of a standard of proof" define the quantum of proof required to meet that standard. Doc. No. 610, ¶15 (emphasis added) (citing *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990)). In *United States v. Goba*, moreover, the district court reviewed various formulations of the clear and convincing evidence standard, none of which reflect the 'no reasonable juror' standard advanced by Ceglia, and all of which are satisfied by the objective evidence of Ceglia's fraud. 220 F. Supp. 2d 182, 188-189 (W.D.N.Y. 2002).

C. Dismissal For Fraud Does Not Implicate Seventh Amendment Rights.

Ceglia accuses Defendants of "attempt[ing] to mislead" the Court in explaining that a dismissal for fraud does not violate the Seventh Amendment right to a jury trial. Doc. No. 610, ¶20. But Ceglia has already conceded that, if Defendants prove fraud by clear and convincing evidence, there is no Seventh Amendment concern. Doc. No. 481 at 8.

Ceglia mischaracterizes the authorities cited in Defendants' reply brief. Doc. No. 610, ¶¶ 21-22. In *Pope v. Fed. Express Corp.*, the court rejected the argument that dismissal for fraud violates the Seventh Amendment. 974 F.2d 982, 984 (8th Cir. 1992). Although the wrongdoer in *Pope* conceded that evidence had been fabricated, such a concession is not a prerequisite for

dismissal. Indeed, the court in *REP MCR Realty, LLC v. Lynch*—a case involving "flagrant bad faith misconduct that began with document fabrication and concluded with multiple instances of perjury and the provision of willfully false testimony in federal court"—refused to take such a "counter-intuitive" approach. 363 F.Supp.2d 984, 1015 (N.D.Ill. 2005). In dismissing the complaint, the court observed that any argument that dismissal would conflict with the Seventh Amendment "would be unavailing under the caselaw." *Id*. at 1015 (citing cases).

II. Ceglia's Attempts To Rehabilitate His Discredited Experts Are Unavailing.

Desperate to rehabilitate his so-called "experts" Jim Blanco and Larry Stewart, Ceglia belatedly offers mischaracterizations and half-truths. First, Ceglia asserts that Blanco did not admit in deposition that he accepts Defendants' expert Peter Tytell's first-hand observations about the condition of the Work for Hire document on July 14, 2011. Doc. No. 610 at 8. The transcript of Blanco's deposition belies this assertion. *See* Southwell Decl., Ex. A at 117:21–25 (Blanco testifying that "there could have been faded ink on the morning of July 14th, as Mr. Tytell put in his declaration"), 119:3–4 (Blanco testifying that he has "no reason to believe [Tytell was] lying").

Ceglia's attempts to bolster Blanco's credentials are based on misrepresentation. Ceglia boasts that Blanco's "zero personal examiner error rate," as determined by Collaborative Testing Services ("CTS") tests, prove Blanco's "accuracy." Doc. No. 610 at 8. But CTS itself warns that the "proficiency test[s]" "are not intended to be an overview of the quality of work performed in the profession and cannot be interpreted as such." *See* Southwell Decl., Ex. B at 1. Instead, "CTS forensic proficiency tests are designed exclusively to assess laboratory proficiency," and the results from a CTS test "should not be used"—as Ceglia attempts to do here—"to determine forensic science discipline error rates." *Id.* at 2 (emphasis added).

Ceglia also claims that Blanco "successfully sued" the American Academy of Forensics Sciences ("AAFS") after his expulsion for damages and an order reinstating his membership. That is knowingly false. Blanco himself testified that he entered into a settlement agreement whereby the AAFS agreed to vacate his expulsion—but not to rescind, overturn, or retract the factual findings of the Ethics Committee against him—in exchange for Blanco's promise never to reapply for membership. The AAFS also refused to provide Blanco with any monetary compensation for his alleged losses. *See* Southwell Decl., Ex. A at 297:9–298:6; 121:14–24.

Ceglia's attempts to rehabilitate his expert Larry Stewart are similarly bankrupt. Although Ceglia asserts that Stewart has "remained a proponent of the proper use of the [GC/MS] technique by reporting . . . the necessity for addressing concerns," Doc. No. 610 at 10, he provides no reason for Stewart's failure to conduct any GC/MS testing in this case. Moreover, Ceglia's assertion that "[i]t is clear the U.S. Government agrees with Stewart that no one within the federal laboratory system utilizes the LaPorte approach," fails for lack of evidence—Ceglia cites to no case, article, speech, or other publication supporting this claim. Defendants have presented many examples of governments around the world using GC/MS to measure the levels of phenoxyethanol for the purposes of ink dating. *See* Doc. No. 326 at 8. And Ceglia's effort to bolster Stewart's scholarship is misplaced: Stewart has not published a single article in an academic journal since he was indicted for perjury in 2004; the "publications" Ceglia cites are to non-academic sources, including expert witness directories, many of them self-published.[1]

[1] Ceglia's reliance on *People v. Williams* as a basis for excluding information concerning Stewart's indictment from briefing to the court is misplaced. First, that California state court decision is not binding here. Second, *Williams* addressed only the admission in a criminal trial of evidence of prior indictments. 170 Cal. Rptr. 3d 401 (Cal. App. 2009). Because Stewart is not a criminal defendant in this case, *Williams* is irrelevant.

Ceglia also filed, unattached to any motion or responsive paper, the transcript of Stewart's July 11, 2012 deposition along with a purported errata sheet. Doc. Nos. 611, 611-1. This errata sheet is ineffectual because it violates Federal Rule of Civil Procedure 30(e), which requires a deponent or party to request an opportunity to review and make changes to a deposition transcript "before the deposition is completed." At no time prior to the completion of Stewart's July 11, 2012 deposition did Stewart or counsel for Ceglia make such a request. Moreover, under the Rule, changes must be submitted 30 days after notification that the transcript is available to review, and the deponent must "sign a statement listing the changes" and "state the reasons for making them." Stewart's purported errata sheet is untimely, unsigned, and does not state reasons for the changes he makes—it merely reports the original wording and the desired new wording, in many instances re-wording questions and answers in further effort to reverse Stewart's false testimony and cover Stewart's misconduct. Incredibly, Stewart changed his answers to three questions about his sampling of the ink on the Work for Hire document from the singular "I" to the plural "we"—shocking alterations of his sworn testimony that effectively confirm that Stewart lied about having personally sampled that ink, just as Defendants explained in their Motion for Production (Doc. No. 554). *See* Doc. No. 611-1 at 1. Because "there is no debate that the procedural requirements of Rule 30(e) must be adhered to," Stewart's non-compliant and abusive errata sheet must be rejected. *See Winston v. Marriott Int'l, Inc.*, 2006 WL 1229111, at *6 (E.D.N.Y. May 8, 2006) (excluding deposition errata sheet for untimeliness) (internal citation omitted).

To avoid redundancy, Defendants do not address in this brief Ceglia's "Dueling Expert Table," Doc. No. 610-1, which merely recycles misleading assertions regarding the evidence. Defendants have already demonstrated that these arguments are meritless. *See* Doc. No. 588.

III. Rantanen's Re-Testing Is A Concession Of Error.

Ceglia purports to have "retested" the paper of the Work for Hire document in an attempt to cover up the now-obvious mistake of his purported expert, Larry Stewart, who initially sent samples from the wrong document for testing and then lied about it in deposition. Doc. No. 610 ¶¶ 38-41; *see also* Doc. Nos. 554, 578, 588 at 19. Ceglia's paper expert, Walter Rantanen, reports the results of this re-testing in a November 15, 2012 supplemental report—a report that is remarkably less detailed than his first and does not include any information on the specific fiber types contained in each paper sample. Compare Doc. No. 610-2 at 6-7 with Doc. No. 42. Ceglia thus effectively concedes that Stewart tested paper samples from the wrong document, the six-page Specifications Document, and then inaccurately reported that the testing supported the authenticity of the fraudulent Work for Hire document in both his expert report and deposition.

Rantanen's analysis remains irrelevant. Even if, as Stewart claims, Rantanen has now actually tested the Work for Hire document, Rantanen's findings—that the paper samples were "consistent with . . . being from the same source and manufacturing facility" (Doc. No. 610-2 at 7)—do not support Ceglia's discredited claim that the document is authentic. As Defendants explained in their Reply, and Rantanen himself confirmed at his deposition (Doc. No. 589-15 at 149:10-16), this finding is equally "consistent with" the paper having come from different sources or time periods. Doc. No. 588 at 19. In any event, it ultimately does not matter whether the paper of pages 1 and 2 of the Work for Hire document are the same or different. Either way, the evidence establishes that both pages of the Work for Hire document are recently-created fabrications. *See* Doc. No. 588 at 20-21.

IV. The Emails Ceglia Submits Confirm That The Work For Hire Document Is A Fraud And The StreetFax Contract Is Authentic.

In addition to the second unauthorized declaration, Ceglia submitted two emails, dated March 1, 2004 and March 5, 2004, between Jim Kole, Ceglia, and another employee associated with StreetFax. Ceglia claims these emails were "found in the emails produced by Sidley Austin pursuant to the Court ordered subpoena" and "received" by Defendants. Doc. No. 623 ¶ 13. This is false. Before Ceglia's December 5 filing, Defendants had never received these emails. Although Defendants subpoenaed Sidley Austin LLP pursuant to the Court's August 18, 2011 Order, Doc. No. 117 ¶ 8, that subpoena was narrowly tailored to seek only the native format March 3, 2004 emails from Ceglia to Kole attaching the StreetFax Contract, which the Court had determined were neither privileged nor confidential. *See* Doc. No. 117 ¶ 10. Defendants did not broadly subpoena Ceglia's entire file from Sidley Austin, for which privilege determinations had not been made.[2] Ceglia knew the narrow scope of Defendants' subpoena because Defendants provided him with a copy of the subpoena at the time of service and provided him with the resulting production from Sidley Austin. *See* Southwell Decl., Exs. C, D. His representations that Defendants received these emails are knowingly false.

These emails confirm that the StreetFax Contract is authentic and that Ceglia's Work for Hire document is fraudulent. In the March 1, 2004 email, StreetFax employee Karin Petersen wrote to Kole, seeking advice on how to proceed in the dispute that had arisen under the agreement with Zuckerberg because StreetFax could not keep up with payments: "Unfortunately we have been unable to meet our end of the contract regarding payment. . . . [Zuckerberg] is further threatening to take down the entire site if we do not pay him according to the contract.

[2] If Sidley Austin produced additional documents to Ceglia in response to Defendants' subpoena, all of them should be provided to Defendants. With the filing of the March 1 and March 5 emails (Doc. Nos. 623-1 and 623-2), privilege has clearly been waived over communications with Sidley Austin and Jim Kole.

[W]e have certainly violated our agreement, but have begged for more time." Doc. No. 623-1 at 1.[3] But according to Ceglia's Amended Complaint, Ceglia had purportedly already paid Zuckerberg everything owed under the Work for Hire document (and then some) by November 2003. Doc. No. 39 ¶¶ 29-35. Petersen's email thus further undermines Ceglia's fairy tale.

Not surprisingly, Petersen's email is consistent with the StreetFax Contract and authentic emails from the Harvard account. Specifically, it aligns with the $18,000 payment terms of the StreetFax Contract and the Harvard emails documenting Zuckerberg's efforts to obtain overdue payment under that agreement from Ceglia. *See* Doc. No. 319 at 35-38.

The second email appears to be the complete March 5, 2004 email chain from Ceglia to Kole, a portion of which had been produced to Defendants in the form of a photographed print-out. *See* Stroz Friedberg Report (Doc. No. 325) at 16-17. This March 5 email, especially when viewed alongside the March 1 email from Petersen, shows the context in which Ceglia emailed the authentic StreetFax Contract to Kole on March 3, 2004: Ceglia had consulted Kole to determine how to resolve Zuckerberg's demands for overdue payment from Ceglia under the terms of their authentic agreement. In producing this email, Ceglia admits the authenticity of the March 5, 2004 chain between himself and Kole. The photographed print-out of a portion of this email chain produced to Defendants contains a hand-written note in the margin, which says in part, "PLEASE PLEASE fax me the contract as I can't read the one sent earlier to understand his or your breach." *Id*. at 17. And as Defendants explained in their Motion, this chain and the

[3] Ceglia produces this email in attempt to support his argument that Zuckerberg or his agents purportedly deleted emails from the Harvard account that Defendants were obligated to produce. Doc. No. 623 ¶¶ 10-23. This is not the first time Ceglia has advanced this frivolous theory; each time, the Court has rejected Ceglia's unsupported accusations. *See* Doc. No. 413 at 11-16 (noting the numerous occasions on which Ceglia had made, and the Court had rejected, this very argument); Doc. No. 457 at 23-27 (the Court rejecting Ceglia's unsupported accusations of deletion yet again). As Defendants have stated many times, and as Ceglia himself has accepted, Doc. No. 397 at 7, Defendants fully complied with this Court's orders by producing "all emails in their original, native and hard-copy form between Defendant Zuckerberg and Plaintiff and/or other persons associated with StreetFax that were captured from Zuckerberg's Harvard email account," Doc. No. 83 at 2-3.

accompanying handwritten note confirm that Ceglia sent Kole a low-quality, difficult to read copy of the authentic StreetFax Contract just days before, on March 3, 2004. Doc. No. 319 at 34.

CONCLUSION

The Court should dismiss the Amended Complaint with prejudice, award Defendants their reasonable costs and attorneys' fees, and award all other relief to which Defendants may be justly entitled.

Dated: New York, New York
December 14, 2012

Respectfully submitted,

/s/ Orin Snyder

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