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 OBJECTION TO MAGISTRATE'S ASSESSMENT OF ATTORNEYS AND EXPERT FEES

CLEARLY ERRONEOUS FINDINGS

Defendants claimed that, "Ceglia's Objections to the November 29 Order (Doc. No. 633) do not offer any basis for finding that Judge Foschio's ruling was clearly erroneous or contrary to law under Rule 72(a)." Doc. No. 640 at 2. "Federal Rules should be given their plain meaning." *Walker v. Armco Steel Corp*., 446 U.S. 740, 747. Federal Rule 30 (g) Clearly states "A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: (1) attend and proceed with the deposition;

Judge Foschio clearly erred in not giving Rule 30(g) it's plain meaning when he states "courts have allowed the recovery of expert witness and attorney fees regardless of Rule 30(g)(1)." Doc. No. 615 at 12.

Just because a prior court has evaded the rules does not mean that case law trumps federal rules. It is clearly error for this court to fail to follow the plain meaning of the civil rules. Merely relying on another court's failure to follow those rules is insufficient justification for this court to fail to follow those rules.

The following are a few additional examples of erroneous rulings that Plaintiff objected to:

1 Judge Foschio's ruling that Plaintiff should be ordered to double pay for depositions never taken (Doc. No. 633 at 8 and Doc. No. 551 at 8) must be erroneous.

2 Judge Foschio's ruling that Plaintiff should be ordered to pay unreasonable expert fees of more than $1,800 per hour must be erroneous.

3 Judge Foschio's disregarding Plaintiff's attorney's illness is as a legitimate basis to reschedule expert depositions was also erroneous.

4 Judge Foschio's statement that "Plaintiff eventually canceled seven of the depositions with less than 48 hours' notice." Doc. No. 615 at 3, is erroneous. The cancellation of the depositions of Friedberg and Novak were given with more than 48 hours notice and were accepted without complaint by Defendants.

ASSESSMENT OF ATTORNEYS FEES IN DISCOVERY IS RARE EXCEPTION TO RULES

Judge Foschio's ruling is clearly erroneous when compared to Supreme Court "American Rule" precedent. The Supreme Court has outlined three categories that

allow the shifting of attorney fees against the “American Rule” in *Chambers v. Nasco, Inc.*, 501 US 32.

The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, see *Sprague v. Ticonic National Bank*, 307 U. S. 161, 164 (1939), and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U. S., at 257-258. Second, a court may assess attorney's fees as a sanction for the "`willful disobedience of a court order.'" Id., at 258 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 718 (1967)). Thus, a court's discretion to determine "[t]he degree of punishment for contempt" permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 428 (1923). Third, and most relevant here, a court may assess attorney's fees when a party has "`acted in bad faith, vexatiously, 46*46 wantonly, or for oppressive reasons.'" *Alyeska*, supra, at 258-259 (quoting *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129 (1974)). See also *Hall v. Cole*, 412 U. S. 1, 5 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 4 (1968) (per curiam). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party.” Id.

The award of attorneys fees here is not justified under any of these three rules. A federal court’s use of inherent power is the exception, not the rule.

Awarding attorneys fees in contravention of the American Rule is the exception, not the rule. The assertion of inherent power to award attorneys fees here requires special justification which the Magistrate did not identify and is not evident from the record. The exercise of inherent power to sanction bad-faith litigation practices can only be exercised to preserve the court's authority.

DEFENDANT'S ATTEMPT TO BANKRUPT PLAINTIFF AS LITIGATION STRATEGY

Defendants requested the Court order that reimbursement of the attorneys fees be ordered to be made within ten days. Doc. No. 640 at 18. The Defendants have read the Plaintiff's publicly available financial affidavit filed in connection with his criminal case. They are fully aware that Plaintiff has no financial means to comply with such an order currently. Therefore, the only basis for requesting that order is the ability to make further arguments that the case ought to be dismissed for Plaintiff's failure to comply with this order.

CONCLUSION

Facebook's response is filled with more sensationalized commentary for media consumption rather than the court. A careful reading of all of the forensic reports generated in this case will make one thing clear, that far from there being clear and convincing evidence of fraud (See Exhibit A, aka Doc. 610-1), there is clear and convincing evidence of authenticity and of the sham defense that Zuckerberg has created to attempt to refute his contractual obligations. In their response on an issue of expert deposition fees and attorneys fees related thereto, Gibson Dunn

exposed the weakness of their case. One of the most glaring omissions in their defense, is that their own client, Defendant Zuckerberg, **never authenticated the Streetfax smoking gun images as the authentic contract between the parties,** despite Snyder's assertion that it would be easy for him to do that and he was willing to do that.[1]

They rant about Mr. Ceglia's arrest by their former colleagues demonstrating their disrespect for this court's ability to focus on the issue of this objection. Plaintiff has plenty to say in response to his arrest by Snyder and Southwell's former colleagues at their former office of the Manhattan U.S. Attorney. This objection is not the appropriate time for Gibson Dunn to have trumpeted the work of their former colleagues nor the place for Plaintiff to lay out his overwhelming evidence of the contracts authenticity.

Respectfully submitted,

/s/ Paul A. Argentieri

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[1] THE COURT: But the point is that [Zuckerberg] -- did [Zuckerberg] also go on to say at some point that the StreetFax contract is the correct contract?
[1]MR. SNYDER: [Zuckerberg] hasn't, **but certainly that would be easy to do**.
[1]THE COURT: **But [Zuckerberg]'s willing to**, you're sure?
[1]MR. SNYDER: **Oh, for sure.** Hearing Transcript, April 4, 2012 at 165. Emphasis added.
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