

Ex. A

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-10-90001

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: MAY 24, 2010

Complainants, pro se litigants, filed a complaint of judicial misconduct, under 28 U.S.C. § 351(a), against a First Circuit district judge. The complainants allege that the judge engaged in misconduct while presiding over a trademark infringement proceeding filed against them.

The complainants charge that the judge was inappropriately influenced in his handling of the case by a prior professional association with the plaintiffs' local counsel. The complainants contend that, as a result of this relationship and the judge's subsequent desire to protect this attorney from the complainants' valid claims of malicious prosecution, the judge was biased against them. The complainants charge that the judge exhibited bias by: 1. improperly relying on this attorney for legal advice; 2. telling the complainants not to attend a hearing; 3. issuing rulings without having reviewed the complainants' pleadings; 4. failing to accurately record and execute verbal orders; and 5. withholding evidence from the complainants and from the appellate record.

My staff and I have reviewed the record, including the transcripts of the relevant hearings,

and find no basis for the complaint. I dismiss the complaint because complainant has not provided any facts suggesting misconduct on the part of the judge.

I.

The complainants contend there was the purported relationship between the judge and plaintiffs' local counsel which led to bias. The claim is based on prior employment in different cities and states of United States Attorneys' of the judge and the attorney.

The claim is also based on purportedly biased conduct by the judge. As evidence of the alleged inappropriate relationship between the judge and plaintiffs' local counsel, the complainants state that, during a status conference, the judge twice improperly asked the attorney for "advice on the rules," thus indicating "that a camaraderie exists between them."

The complainants next contend that the judge was predisposed to allow the plaintiffs' motion to voluntarily dismiss the case. The complainants assert that the transcript of the relevant hearing demonstrates that the judge intended to dismiss the case, and was "unaware that the [complainants] had filed an objection." The complainants infer that the judge wrongfully dismissed the case without prejudice and without having read the complainants' opposition, in order to "shield [plaintiffs' local counsel] and his fellow attorneys from liability for malicious prosecution."

The complainants levy the related charge that one of the complainants had planned to appear in person at the hearing on the motion to dismiss but "was told not to" by the judge's clerk. As a result, the telephonic conference was allegedly held in chambers with only plaintiffs' local counsel physically present.

The complainants' next allegation about conduct is that the judge failed to read other

pleadings filed by the complainants, in addition to the complainants' opposition to the plaintiffs' motion to dismiss. They contend that the judge had not read the complainants' motion to file documents under seal, before ruling on a related motion for costs. In a similar vein, the complainants contend that the judge made a statement in an order (indicating that certain documents should have been returned to the plaintiffs in accordance with a previously issued confidentiality order) that demonstrated that he had not reviewed the complainants' numerous submissions (showing that the "confidentiality order to did not require parties to return any documents").

Fourth, the complainants contend that the judge neglected to accurately record "key orders," thereby undermining the "effective and expeditious administration of the business of the courts." The complainants state that a verbal order was incompletely transcribed into the electronic notes for the proceeding on the motion to dismiss, thereby "falsely suggesting that the return of the documents had been ordered regardless of what the confidentiality order stated." The complainants continue that a scheduling order omitted a statement from the judge's verbal order that the issue of the number of permissible depositions would be revisited at a later time. The complainants point out that the judge personally signed only two orders during the pendency of the proceeding, while the magistrate judge signed five.

Lastly, the complainants charge the judge with "withholding evidence." The complainants state that bank documents, requested by the magistrate judge for *in camera* review, were delivered to the courthouse from another federal district court in which related litigation was pending. The complainants note that they had subpoenaed the records and say they had and paid over \$3000 in associated costs. They state that the clerk wrongfully failed to docket the

receipt of these records and told the complainants that they were "lost." The complainants from this infer that the judge withheld the records from the complainants "without a legal basis for doing so," and wrongfully authorized the release of the records to the plaintiffs in a "profound expropriation of defendants' property without due process." The complainants further contend that the judge intentionally delayed the docketing of this receipt (indicating that the plaintiffs had taken possession of the records), in order to keep the documents out of the appellate record.

II.

As part of an inquiry, undertaken pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(b), my staff and I have reviewed the complaint, the case records, and the transcripts of each of the cited hearings. The essence of the complaint -- that the judge had some improper personal or professional relationship with plaintiffs' local counsel that caused him to be biased against the complainants -- lacks any factual foundation.

As an initial matter, a prior professional association, if there had been any, between the judge and plaintiffs' local counsel, as alleged, did not alone necessitate the judge's recusal from the matter. See Code of Conduct for United States Judges (Code of Conduct), Canon 3(C)(1). Our inquiry reveals that both the judge and the attorney worked in different United States Attorneys' offices for several years, in different locations and under different U.S. Attorneys, some years before the judge's appointment to the federal bench. There is no evidence that the two had any relationship whatsoever. This does not cause the judge's impartiality to reasonably be in question. See Code of Conduct, Canon 3(C)(1).

As to the allegedly biased conduct, my review of each of the complainants' charges in turn demonstrates that there was no violation of the Code of Conduct.

Improper "Camaraderie"

The charge of camaraderie is refuted by the record. The transcript of the telephonic conference indicates that the out-of-state lead counsel for the plaintiffs (not local counsel) presented the issues relevant to his clients, and both complainants responded in turn.¹ The judge endeavored to assist the complainants, as pro se litigants, with the discovery process by asking both counsel and his clerk for the benefit of complainants about specific discovery rules which he did not have before him. This claim is dismissed as without factual foundation pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 11(c)(1)(d).

Predisposition in Favor of Plaintiffs' Motion for Voluntary Dismissal

The complainants next contend that the judge exhibited a predisposition in favor of the plaintiffs' motion to dismiss (without prejudice) in order to "shield [plaintiffs' local counsel] and his fellow attorneys from liability for malicious prosecution." The transcript demonstrates that, at the relevant hearing, the judge heard from both parties in full. The judge stated that he had seen the complainants' opposition to the motion, and there is no evidence to the contrary. Even if there were, the claim is not a basis for misconduct. See Order, Judicial Council of the First

¹In addressing the discovery deadlines, the judge stated that, for a number of reasons, including their pro se status, he would allow the complainants "some slack" and extend some deadlines. During the course of this discussion, the judge stated: "[y]ou should also be aware that there's a presumptive limit in terms of number of depositions, which is ten. Is that right, Mr. . . .?" (directing the question to plaintiffs' local counsel). Further dialogue ensued during which the judge asked his clerk a question, and asked local counsel if he had the rule "handy," to which counsel responded "I don't, but I recall it being ten per side."

Circuit, In Re: Complaint No. 406, December 22, 2005, at 4 (Court's allowance of motion to dismiss prior to receiving opposition does not, standing alone, constitute judicial misconduct.)

There is also no evidence supporting the complainants' assertion that the judge allowed the motion to dismiss (without prejudice) in order to undermine the complainants' ability to file a malicious prosecution claim against the plaintiffs. The court stated that it was dismissing the case "principally based on the representation by the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can . . . achieve any meaningful relief based on the facts . . . as they now exist, including . . . the bankruptcy of one of the defendants." In response to the complainants' concern about costs, the court allowed the complainants to file a motion for reasonable attorneys' fees and expenses. The court also responded to a concern that the plaintiffs could refile their claims in another forum by imposing a condition that any related action by the plaintiffs be brought in the same court. As there is no evidence suggesting that the judge was predisposed in favor of a party, indeed, was careful to protect complainants, the charge is likewise dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(d).

As to the related claim that the judge's clerk told one of the complainants not to attend the hearing in person, the clerk states that, at the parties' request, the judge had, earlier in the proceeding, authorized both complainants to appear by telephone. He reports no recollection of telling either complainant anything specific about this hearing. Regardless, however, any such statement by the clerk would not itself suggest judicial wrongdoing. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A). See Order, Boudin, C.C.J., In Re: Complaint No. 406, September 9, 2005, at 3 (Clerical error does not alone suggest

judicial misconduct.)

Neglect of Complainants' Pleadings

The complainants charge that the judge wrongfully failed to read the complainants' pleadings before ruling on key issues. As noted, they levied this charge in connection with their opposition to the plaintiffs' motion to dismiss. They additionally contend that the judge had not read the complainants' motion to file documents under seal, and failed to thoroughly review the complainants' submissions demonstrating that an earlier "confidentiality order did not require parties to return any documents."

First, a judge is not necessarily required, either legally or ethically, to review a party's opposition to a motion before ruling on it. See Order, supra, In Re: Complaint No. 406, December 22, 2005. Second, the claim is untrue. The transcript of the hearing addressing the motion to dismiss incontrovertibly demonstrates that the judge heard from both parties in full before issuing a ruling on the pending motion; there was no evidence of bias in connection with his review of the issue. Thus, whether the judge had read the opposing papers is not determinative of any issue of misconduct.

As to the other matters, the record indicates that the complainants submitted a motion to file documents under seal in support of their motion for costs. In denying the motion for costs, the judge outlined the governing law before determining that costs and attorneys' fees were not warranted under the circumstances. The judge explained that while he was "sympathetic to the time and money expended by the defendants in preparing their defense, the Court addressed any potential legal prejudice when the dismissal was conditioned upon the fact that any renewed claims brought by plaintiff shall be brought in this Court." The Court further noted that, as

there "is nothing in the record to suggest that the plaintiffs filed this suit simply to harass, embarrass, or abuse the defendants or that they sought to increase their costs," attorneys' fees were also not justified. Complainants' disagreement with the merits of a ruling is not a basis for a misconduct finding.

The same holds true for the other order at issue. In this order, the judge denied the complainants' pending motion and explained that the complainants are "not entitled to argue the same matter twice simply because they are unhappy with the result." The court further denied the complainants' request for leave to file documents under seal and stated that, "to the extent that the materials are subject to the Confidentiality and Protective Order . . . , they should have been returned to the plaintiffs some time ago." There is no information in this order or elsewhere in the reviewed record suggesting that the judge had neglected to review any of the complainants' submissions, including those that allegedly demonstrated that the "confidentiality order did not require parties to return any documents." During the hearing on the motion to dismiss, the judge ordered that "all materials produced in discovery that were designated as confidential under the confidentiality and protective order issued in this case . . . will be returned, as set forth in that order." Further, despite the complainants' assertion to the contrary, the Stipulation to the Confidentiality Order provided for the return of "all Confidential Information and all copies thereof, to the person or party from whom" it was received. There is, therefore, no evidence that the judge neglected to review or consider the complainants' pleadings, including those pertaining to the confidentiality order or to any other matter. See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(d).

Failure to Record and Execute Verbal Orders

The complainants' next charge also concerns the confidentiality order. The complainants contend that, by omitting the phrase "as set forth in that order," the clerk's electronic notes "falsely suggest[ed] that the return of the documents had been ordered regardless of what the confidentiality order stated." The clerk's notes are a summary of the proceedings before the court; they do not have either the specificity or the weight of a court order. The omission of the cited phrase from the clerk's notes does not change or undermine the court's order, as recited from the bench, let alone suggest judicial wrongdoing.

The complainants similarly assert that a scheduling order omitted the judge's verbal statement that the issue of the number of permissible depositions would be revisited. The scheduling order is a pre-printed timetable for discovery and motion practice into which deadline dates are inserted. The absence of such a verbal specification from the scheduling order would not be remotely indicative of judicial misconduct. Regardless, the issue was addressed at a subsequent status conference.² Any claim that the judge undermined the "effective and expeditious administration of the business of the courts" by neglecting to accurately record "key orders" is utterly baseless. See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(d).

The complainants' related observation that the judge personally signed two orders while the magistrate judge signed five, is both irrelevant and not indicative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

²It was on this issue that the complainants contended that the court improperly consulted with plaintiffs' counsel. See supra, at 5-6.

Withholding Evidence

The complainants' final charge that the judge withheld evidence is equally unfounded. The documents at issue were, as alleged, delivered from a bank to the court from another federal district court in which related litigation was pending. The record reflects that they were received by clerk's office staff and forwarded directly to the magistrate judge for *in camera* review. In accordance with clerk's office practice, discovery documents delivered under seal are not docketed. At the subsequent hearing on the motion to dismiss, the judge ordered the return of "any records that were delivered under seal and that are in the custody of the magistrate judge [to be] returned to the party that produced [them]." In accordance with this order, the documents were retrieved by a representative of the plaintiffs' local counsel, and the receipt indicating this appears on the docket. There is no information suggesting that the judge wrongfully released these documents, much less any evidence that he improperly retained, concealed, or withheld them - either from the complainants or from the appellate record.³ See 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(d). Furthermore, if there was a clerical error made in connection with the management of these documents -- of which there is no evidence -- it would not be attributable to the judge. See Order, In Re: Complaint No. 406, supra.

In sum, the alleged prior professional association between the judge and the plaintiffs' local counsel did not mandate the judge's automatic recusal under the Code of Conduct. Moreover, a thorough inquiry demonstrates that the allegations that the judge was biased against

³It appears from the record that the complainants had been directed by the other federal district court to pay the costs associated with the reproduction of the documents although the records were those of the plaintiffs.

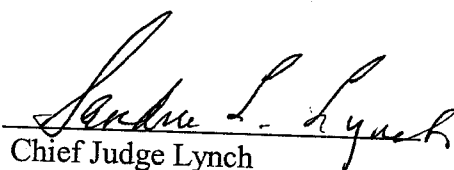
the complainants -- either as a result of the judge's alleged relationship with plaintiffs' local counsel or for any other reason -- lack any factual foundation. The transcripts of the relevant hearings fail to support the complainants' claims of an inappropriate alliance between the judge and counsel, or of an other illicit judicial animus, including the alleged desire to protect the plaintiffs' counsel from claims of malicious prosecution. Nor is there any evidence in the record that the judge neglected the complainants' pleadings, failed to record or execute the court's orders, or withheld evidence. Accordingly, the complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(d).

The claim that the judge issued orders prior to reviewing each of the relevant pleadings is also dismissed as not indicative of misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A). Finally, absent evidence of bias, of which there is none, the complainants' disagreement with the substance of the court's rulings does not constitute a cognizable complaint of misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

For the reasons stated, Judicial Misconduct Complaint No.01-10-90001 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

Date

5/24/10


 Chief Judge Lynch