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Honorable Marco Hernandez

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MAX ZWEIZIG,

Plaintiff,

vs.

TIMOTHY C. ROTE, *et al.*,

Defendants.

Case No.: 3:15-CV-2401-HZ

DEFENDANT'S MOTION FOR SANCTIONS
AGAINST PLAINTIFF AND COUNSEL
CHRISTIANSEN

MOTION FOR SANCTIONS

Defendant offers his Motion for Sanctions against Plaintiff and Plaintiff Counsel for continuing to ask the court for preferential treatment because of the Kugler and Jones documents (transcripts, motions, etc.). Local Rule 7 requires a separate Motion and it is provided herein. Plaintiff was noticed years ago to stop this behavior. Both the defendant and the court have warned plaintiff counsel against filing Docs #243-12 and #243-13 and intimating in those filings that the court would act partially.

FACTS

Plaintiff counsel Christiansen has repeatedly filed transcripts of hearings or motions related to hearing which defendant will refer to as the Kugler matter (Doc #243-12) and the Jones matter (Doc #243-13). Early on in this case Judge Hernandez told Christiansen that he did not care what happened in another case and to stop bringing it up. Christiansen, however, has filed these documents in this case multiple times and each time it is a call for the court to act prejudicially. Each time Christiansen files these documents he commits a felony by attempting to compromise the integrity of the court or as a threat to the court.

Zweizig initially filed his lawsuit in New Jersey State Court in March of 2004 against former employer NDT and Defendant Rote. Defendant would ask the court to take note that Sandra Ware secured a copy of the Jones transcript on February 4, 2004, as indicated on the document fax receipt stamped at the top of Doc #243-13. The firm of Blumberg and Lindner LLC employed Sandra Ware at the time.

Defendant transferred the case to New Jersey State Court under diversification and took further steps to compel arbitration. The case was assigned to Magistrate Robert Kugler. Sandra Ware then met with the law clerk of Judge Kugler surreptitiously and handed over to him a copy of the Jones Transcript. The law clerk and Sandra Ware attended Rutgers Law together and Judge Kugler typically hired his law clerks from Rutgers Law.

Kugler thereafter removed the case with prejudice remanding the case back to the New Jersey State Court citing a deficient Notice of Transfer.

After the Kugler court removed the case, Rote informed Kugler of the ex-parte contact between his clerk and Sandra Ware. Judge Kugler then demanded that Rote appear for a motion

for contempt. Rote's counsel argued that a letter to Judge did not justify this action, that Kugler would have to recuse himself from the matter. Kugler pressed the U.S. Attorneys office to press charges against Rote and the U.S. Attorneys Office declined noting that the letter constituted free speech.

At the same time a complaint was filed with the Third Circuit against Judge Kugler and the clerk citing abuse of office. After the hearing, counsel for Rote met Judge Kugler in Chambers where the parties agreed that Rote would not press the complaint against Kugler and Kugler would agree to no longer abuse his office to protect a clerk. While the clerk made a mistake, Sandra Ware knew she was in fact engaging in ex-parte contact and that the contact was unlawful. Sandra Ware was at that time an attorney, lived with Zweizig and was then his fiancée.

LEGAL STANDARD

Federal courts generally have three sources of power from which to impose sanctions:

1. Rule 11 of the Federal Rules of Civil Procedure;
2. 28 U.S.C. § 1927; and
3. The inherent power of the court.

A. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 authorizes federal courts to issue sanctions against parties or their attorneys who file pleadings, motions, or other papers that are filed for an improper purpose or lack a required level of evidentiary or legal support. Rule 11 sanctions are not available for other sorts of misconduct, like discovery abuse or actions during a trial. The aim of Rule 11 is to deter frivolous filings, to "curb abuses of the judicial system, and to require

litigants to refrain from conduct that frustrates Rule 11's goal of the "just, speedy, and inexpensive determination of every action."

Rule 11(b) provides that, by presenting to the court a pleading, written motion, or *other paper*--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the material presented is not filed for an improper purpose and has the requisite degree of evidentiary and legal support. This language raises two interpretive questions: what "later advocating" means and what "a reasonable inquiry under the circumstances" entails.

Rule 11(b) enumerates four standards to which litigants and counsel must adhere when presenting materials to the court. First, Rule 11(b)(1) requires that the papers not be presented for an improper purpose. Prohibited improper purposes include harassment, unnecessary delay, and the needless increase in the cost of litigation.²³ Despite the subjective connotation of "improper purpose," most courts agree that the test is an objective one based upon a totality of the circumstances at the time the paper is filed.²⁴ Courts adhering to the objective test will look to "objective indicators of purpose from which to infer improper purpose" and will not consider or attempt to divine an individual litigant's subjective purpose. Frivolousness alone is not a basis for inferring improper purpose. Courts using this test must identify specific "unusual circumstances" that show an improper purpose, such as excessive filing of motions that are substantially similar to earlier, unsuccessful motions. While most circuits addressing the issue agree that finding an improper purpose is a purely objective task, a few courts disagree, leaving unresolved the question of whether, and to what extent, subjective intent should be considered as a factor in determining the litigant's purpose.

Second, Rule 11(b)(2) states that any claims, defenses, or legal contentions presented to the court must be grounded in existing law, asserted to extend, modify, or reverse existing law, or establish new law. This requires attorneys to make an objectively reasonable inquiry under the circumstances into the state of the law. The standard is not met when the legal assertion is (1) objectively baseless and (2) the attorney has not made a “reasonable and competent inquiry” before making it. The notion is that sanctions are warranted when a reasonable inquiry would reveal frivolousness to a competent attorney. A court need not find bad faith to issue sanctions; good faith is no defense. Thus, an “empty head, pure heart” defense to a motion for sanctions must fail. A legal position will be sanctionable only when it can be said that a “reasonable attorney in like circumstances could not have believed his actions to be legally justified.”

Third, Rule 11(b)(3) requires that any factual allegation either have evidentiary support or, if identified as such, be “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Evidentiary support can include reasonable inferences from facts or circumstantial evidence.

Fourth, Rule 11(b)(4) states that any denials of factual contentions must be either “warranted on the evidence” or, if identified as such, “reasonably based on a lack of information or belief.” Thus, denials of fact are treated like factual assertions and must be objectively reasonable.

Rule 11 authorizes the court to sanction both attorneys and their clients. Rule 11(c)(1)(A) further provides that, “absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.”

A court may also levy sanctions sua sponte but may do so only after issuing a specific order describing the perceived misconduct and allowing the possible offender an opportunity to

show cause why the sanction should not be issued. The rule incorporates a measure of due process protection. However, because a sua sponte order to show cause does not allow an attorney the opportunity to withdraw the offending filing, courts are cautioned to “reserve such sanctions for situations that are akin to a contempt of court.”

B. 28 U.S.C. § 1927

Another basis for sanctions lies in 28 U.S.C. § 1927, which serves “to deter unnecessary delays in litigation.” The statute authorizes sanctions in the form of “excess costs, expenses, and attorneys fees” against any attorney who “multiplies the proceedings in any case unreasonably and vexatiously.”

The scope of authority to sanction under § 1927 is both broader and narrower than Rule 11. Section 1927 is broader in that the attorney’s behavior is examined throughout the entire litigation, as a “course of conduct,” while Rule 11 applies to individual filings. The filing of a frivolous complaint, alone, may violate Rule 11, but not § 1927 because such a complaint does not “multiply” the proceedings. Conversely, a course of conduct can be sanctionable under § 1927 even though the individual filings during that conduct comport with Rule 11 standards.

Section 1927 is narrower because, unlike Rule 11 requirement of objective reasonableness, § 1927 generally requires subjective bad faith. Some courts, however, interpret § 1927 as authorizing sanctions when attorney conduct falls short of bad faith: “viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court.” For these courts, malicious intent or bad purpose is not required. Thus, the “circuits are split as to whether § 1927 requires a showing of subjective bad faith or whether mere recklessness is sufficient.

Since Rule 11 and § 1927 have different standards, courts deciding whether to issue sanctions under both may conduct a separate inquiry into § 1927 and Rule 11, but a court proceeding sua sponte under either rule must give the subject attorney notice and an opportunity to respond. The resulting findings must detail the basis for the sanctions, link the conduct to the sanctions awarded, and distinguish among sanctions awarded under different theories. Sanctions under § 1927 serve both deterrence and compensatory functions. As a result, the amount awarded need not be the least amount necessary to deter subsequent misconduct and is appropriately payable to the opposing party. The circuits are divided on whether it is not an abuse of discretion for a trial court to reduce a fee award to account for the sanctioned attorney's ability to pay it.

C. The Inherent Power of the Court

The sanctioning power of the federal courts "is not limited to what is enumerated in statutes or in the rules of civil procedure." Federal courts have the inherent power to punish persons who abuse the judicial process. The inherent power of the court is an "implied power squeezed from the need to make the courts function." Rule 11 and § 1927 do not displace the court's inherent power, but instead they exist concurrently.

The inherent power to sanction is broad. The scope of the power reaches "any abuse" of the judicial process. This includes the authority to sanction for conduct that occurs outside of the courtroom and is not limited to attorneys or parties. Courts also have broad discretion to determine the appropriate sanction to be imposed.

One such sanction, "limited to those cases where the litigant has engaged in bad-faith conduct or willful disobedience" is attorney fees. Those fees, however, must be compensatory in nature, rather than punitive. Thus the attorney fee award is limited to the amount of fees expended because of the misconduct at issue. That is, the court may generally award fees only

for legal work that would not have been necessary but for the misconduct. Where appropriate, courts may impose attorney fees representing the entire cost of litigation or the entire cost after some point in time. But such a case is "exceptional" and occurs when all of the expenses were caused by the sanctioned behavior.

ARGUMENT

All three opportunities to impose sanctions on the plaintiff and plaintiff counsel are available. Christiansen has filed to the Kugler and Jones documents multiple times in this case after Judge Hernandez told him to stop the infusion from other cases.

A. Requests By Christiansen Constitute a Felony

Commercial Bribery, Corrupt Influence, Illegal Gratuity, Misuse of Office and RICO are all implicated by Christiansen asking the court to help him conceal the lies he told in this action, his perjury in the Clackamas case and the favor he sought from the court for contacting Judge Jones deputy clerk.

Plaintiff is asking the court to engage in extra-judicial and non-immune activity because of the Kugler and Jones documents.

Christiansen can be prosecuted under 18 USC 201, 18 USC 1951, 18 USC 1343, 18 USC 1962 and State and Local Criminal Statutes for asking the court to set the facts aside and reward him and the court with some benefit.

Doc #243-12 has been filed by Christiansen in this case some 5 times or so. It is tantamount to an admission that because of this exhibit the defendant did not receive a fair and independent trial on the merits of this case.

Doc #243-13 has been filed several times and is tantamount to an admission that because of this exhibit the defendant did not receive a fair and independent trial on the merits of

this case. This however is particularly disturbing to the defendant. Defendant Rote decided to go see Judge Robert Jones and make sure he understood that Rote was sorry for that hearing and more importantly was not a threat to him or his family. Rote has published that Judge Jones is one of his favorite Judges. Rote went to Judge Jones home and Judge Jones talked with him as old friends that day, in Judge Jones' home, with his wife Pearl present. And the next day Rote brought over a Traeger roasted pork dinner as a gesture of friendship which Judge Jones accepted warmly.

The filing of these transcripts by opposing counsel is a horrible testimony that attorneys believe the court has and will abuse its office and that a judge is a recipient of some benefit in doing so. The public statement by the attorney challenges the credibility of the judiciary.

B. The Kugler and Jones documents filed by Christiansen seek partiality of the court and are a specific violation of ORPC 3.5:

“RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment;
- (d) engage in conduct intended to disrupt a tribunal; or
- (e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.”

Marshall represented Zweizig in an arbitration and filed the Kugler and Jones documents. The arbitrator was influenced by them as the transcript so reveals.

Christiansen has filed the Kugler and Jones transcripts in Clackamas County. Judge Herndon acknowledged the influence the transcripts had on his decision to dismiss the original case, confirmed ex-parte contact with the PLF, confirmed another request asking for dismissal from an unidentified Judge, recognizes there are criminal statutes in play and has responded further by reminding Rote of his judicial immunity.

There is another possible interpretation of the plaintiff bringing up the Kugler and Jones documents and that it is a form of a threat to expose something about the court. If so, defendant would ask the court to stand strong and deny him the attempt to extort favorable decisions.

CONCLUSION

The only way to curb the abuses of counsel is to sanction counsel in some form. The truth is that the attorney misconduct during the trial will likely force a new trial. Plaintiff has arguably compromised a jury trial at great economic cost to the public.

Even still, plaintiff counsel asking the court to join his felonious activity must be stopped for the good of our community and to restore confidence in the judiciary. In a broader sense it is an endemic issue interfering with court efficiency.

To the extent the court believes it can remain in the case on this issue, defendant asks the court to sanction the plaintiff and plaintiff counsel in an amount the court finds appropriate. The most appropriate sanction would be to vacate the judgment; however, defendant recognizes that the court may have divested itself of this opportunity. A financial sanction against plaintiff counsel and plaintiff equal to the judgment is therefore requested.

Dated: December 3, 2018

s/ Timothy C. Rote

Timothy C. Rote
Pro Se Defendant

Certificate of Service

I hereby certify that on December 3, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Joel Christiansen

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

s/ Timothy C. Rote
Timothy C. Rote
Pro Se Defendant
E-Mail: Timothy.Rote@gmail.com