

JAN 26 2017

David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-16-90110

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. District Judge for
the U.S. District Court for the _____ District of _____, under the Judicial
Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States
District Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28
U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of
the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in August 2014 a plaintiff filed a lawsuit against
Complainant and another defendant, alleging trademark infringement and various other
claims. The plaintiff also filed a motion for a temporary restraining order (TRO) and
preliminary injunction, seeking to bar the defendants from using the plaintiff’s trademark.
The Subject Judge denied the motion for a TRO, but converted it to a motion for a
preliminary injunction and took it under advisement. In September 2014 the defendants
filed counterclaims against the plaintiff, and they later filed amended counterclaims. In
October 2014 the defendants filed an amended third party complaint raising various
claims against the plaintiff and others. In mid-October 2014 the Subject Judge granted
the plaintiff’s motion for a preliminary injunction and enjoined Complainant from using
the marks at issue.

In December 2014 the plaintiff filed a motion for clarification of the scope of the
preliminary injunction, and the Subject Judge granted the motion and clarified that the
injunction had extraterritorial application. The defendants filed an amended notice of
appeal as to that order. They also filed a petition for writ of mandamus with this Court
seeking an order directing the Subject Judge to vacate that order, which this Court denied
in February 2015. Also in February 2015 the Subject Judge dismissed without prejudice
one count of the amended counterclaim. Months later, the plaintiff filed a motion to
strike the defendants’ expert witness, _____, arguing that his report was “rife with
case citations and conclusory statements.”

After various proceedings, in late November 2015 the parties filed cross motions for summary judgment. In February 2016 the Subject Judge entered an order striking various filings and providing that the trial would be separated into two phases. At a pretrial conference that same month, counsel for the defendants stated that her signature had been included on a joint pretrial statement without her authority, and counsel for the plaintiff stated that it was a “misunderstanding” and a “mistake.” The Subject Judge gave plaintiff’s counsel 14 days to submit an explanation and to set out why he should not be sanctioned and reported to the state bar. The Subject Judge stated that after defendants’ counsel responded, he would make a determination about whether further action was needed. In March 2016 the Subject Judge entered an order granting in part the plaintiff’s motion to strike the defendants’ expert witness to the extent that the plaintiff sought to preclude the defendants from eliciting testimony from _____ at trial concerning any legal conclusions or opinions concerning the law.

In April 2016 this Court affirmed the district court’s entry of the preliminary injunction in favor of the plaintiff. A couple of months later, the Subject Judge entered an order setting phase one of the trial for July 2016 and an order denying the parties’ motions for summary judgment. The case proceeded to trial. On the fourth day of trial, counsel for the defendants stated that she had a videotaped deposition of a witness, and the following exchange took place:

[Counsel for Defendants]: That’s as loud as I can get it.

[The Subject Judge]: If you can’t get the video to work, you can just read the questions and answers from the transcript.

[Counsel for Defendants]: Okay. Let me just try. I just had it on. I don’t have the transcript in front of me.

(Playing video deposition of [the witness].)

[The Subject Judge]: This is obviously not going to work, [Counsel]. Just read the questions and the answers.

[Counsel for Defendants]: I need to get a copy of the transcript, Your Honor. . . .

Counsel then read from the transcript of the deposition. At the close of the evidence, the defense renewed its “Rule 50 motions,” and the court denied them. The plaintiff moved for judgment as a matter of law and made arguments in support. The Subject Judge then

discussed his findings and concluded that he would grant the plaintiff's motion for judgment as a matter of law.

After that, the Subject Judge entered an order finding that the plaintiff was entitled to judgment as a matter of law because no reasonable jury could conclude that: (1) the plaintiff did not own or have rights to the trademarks at issue; or (2) Complainant owned or had rights to the trademarks. The Subject Judge converted the preliminary injunction into a permanent injunction in favor of the plaintiff and concluded that the case would proceed to the second phase to determine the plaintiff's damages. The Subject Judge issued a separate order entering a final judgment pursuant to Fed. R. Civ. P. 54(b).

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant contends that the "record is replete with instances of bias and prejudice by" the Subject Judge, and that "[t]his has been made evident through his comments, his violations of his own rules and court orders, and inexplicable biasness against [Complainant], [his] defenses and attorneys." Complainant then takes issue with the following statement the Subject Judge made on the first day of trial:

It's also been my experience that almost always agreements that the parties reach between themselves are better than the one that comes out at the end for one of you. I don't know who that's going to be. But one of you is going to be wishing you had worked this out before this thing is over.

Complainant states that he was the only one on his side for the defendants and that he felt the Subject Judge "was prophesying my inevitable fate - his predetermined result." Complainant states, "Along with a general disapproving disposition toward the Defendants and their counsels, the Defendants were at several instances urged to rush through their case, despite having used less time than the Plaintiff to present its case." He states that the Subject Judge "made several comments in front of the jury to this effect." He complains that, when a video of the favorable deposition of the defendants' last witness malfunctioned in court, the Subject Judge "forced" their counsel to read the transcript into the record instead of giving them extra time to fix the malfunction, which caused the witness' testimony to have "much less dramatic effect."

Complainant states that the Subject Judge exhibited "disrespect and dismissiveness toward the Defendants" throughout the trial. As an example, Complainant notes that the parties were called to a sidebar after the Subject Judge had admonished the plaintiff's counsel about making frivolous evidentiary objections. He states that, during the sidebar, the Subject Judge "accused the Defendants of having filed frivolous motions," which was "not true" and "defamatory." Complainant asserts that "comments such as those" and the Subject Judge's "general demeanor and behavior"

indicated that he believed the defendants had no right to defend themselves in court and “no rights he should be bound to respect.”

Complainant complains that, before trial, the Subject Judge ruled that _____ would not be excluded as an expert witness, but during trial, on oral motion of the plaintiff’s counsel, the Subject Judge ruled that _____ testimony would not be permitted. Complainant states this ruling was “an unprecedented move by the court to exclude” the expert witness who was prepared to testify, and that the Subject Judge, “without notice, without due process, without reason . . . cripple[d] and prejudice[d]” Complainant’s case. He states that the Subject Judge’s “bias” involved the same attorney that the Subject Judge “failed or refused to sanction nor report” for engaging in misconduct. Complainant then states that the court “violated its own orders” by directing defense counsel to make no new motions and by giving plaintiff’s counsel “continued preferential treatment to make motions.” He contends that the court’s actions “were extremely prejudicial to the Defendants, and indicated an insurmountable bias.”

Complainant complains that at the end of trial, the Subject Judge granted the plaintiff’s oral motion for judgment as a matter of law without taking it under advisement and “began reading his already prepared opinion from the bench,” which showed he had determined “he would already be dismissing the Defendants’ claims and defenses regardless of what would be said.” Complainant states, “Far beyond the appearance of impropriety is a clear lack of due process designed to support a predetermined result.” Complainant attached various documents to his Complaint.

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, findings, rulings, and orders entered in the case, the allegations

are directly related to the merits of the Subject Judge's decisions or procedural rulings. Apart from the decisions or procedural rulings that Complainant challenges, he provides no credible facts or evidence in support of his allegations that the Subject Judge was biased or prejudiced against him or his attorneys, treated him in a demonstrably egregious and hostile manner, gave preferential treatment to the plaintiff or its counsel, violated Complainant's due process rights, or otherwise engaged in misconduct.

The allegations of this Complaint are "directly related to the merits of a decision or procedural ruling," JCDR 11(c)(1)(B), and the Complaint "is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists," JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge