

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 10 2016

David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint No. 11-16-90057

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”).

As an initial matter, after Complainant filed his Complaint, he filed a supplemental statement. The filing of the supplemental statement is approved. See 11th Cir. JCDR 6.7.

Background

The record shows that in August 2014 a plaintiff filed a lawsuit against Complainant and another defendant, raising various claims including claims of trademark infringement. 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. The order provided that the preliminary injunction was conditioned upon the plaintiff posting a sufficient bond by October 20, 2014, and it directed the parties to meet and confer regarding an appropriate bond. The defendants filed a notice of appeal as to the order granting the preliminary injunction. The Subject Judge then entered an order noting that the parties were unable to agree on a bond amount, directing them to file responses, and

reserving ruling on the plaintiff's request for a bond hearing. After the parties requested differing bond amounts, the Subject Judge set the matter for a hearing in early November 2014.

In late October 2014 the defendants filed emergency motions for a "key witness" and for their counsel to appear telephonically at the hearing. The Subject Judge denied the motion for the witness to appear telephonically but granted the motion for counsel to appear telephonically, noting that the defendants should suffer little prejudice with respect to the witness given their submission of an affidavit from the witness. The plaintiff then filed a motion to dismiss one count of the amended counterclaim and for other relief.

After the bond hearing, the Subject Judge entered an order finding that the defendants failed to present testimony or evidence, apart from an affidavit, to support its "untenable position" regarding the amount of bond, and the Subject Judge directed the plaintiff to post bond in a certain amount by November 17, 2014. On November 17, 2014, the plaintiff moved for an extension of time to post the bond, requesting until November 21, 2014. The Subject Judge granted the motion in part and denied it in part, giving the plaintiff until 5:00 p.m. on November 19, 2014 to post the bond. The record shows that the bond was posted that day.

In December 2014 the Subject Judge issued a Case Management and Scheduling Order setting out certain deadlines and providing that the trial term would begin in March 2016. The plaintiff filed a motion for clarification of the scope of the preliminary injunction, and the Subject Judge granted motion and clarified that the preliminary 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 the order finding that the preliminary injunction had extraterritorial application. In February 2015 this Court denied the petition.

Also in February 2015 the Subject Judge entered an order granting in part and denying in part the plaintiff's motion to dismiss, and dismissed without prejudice one count of the amended counterclaim. On February 13, 2015, the defendants filed an emergency motion for declaratory relief and a hearing. On the same day, the Subject Judge denied the motion without prejudice for failure to comply with a local rule, noting that counsel for both sides should be prepared for the imposition of sanctions for unreasonably and vexatiously multiplying the proceedings.

After various proceedings, the parties filed multiple motions for partial summary judgment. In November 2015 the Subject Judge entered an order finding that the motions for summary judgment did not comply with the Case Management and Scheduling Order and directing that they be stricken from the record. 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. In the order, the Subject Judge noted that the plaintiff's initial joint pretrial statement included the electronic signatures of counsel for both parties and that the defendants refuted that plaintiff's counsel had their counsel's authorization to include her electronic signature.

At a pretrial conference on February 18, 2016, 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 state why he should not be sanctioned and reported to the state bar. The Subject Judge then stated that, after defendants' counsel responded, he would make a determination as to whether further action was needed. Plaintiff's counsel then filed an explanation in which he generally set out that he believed he had authorization from defendants' counsel to file the document at issue, and defendants' counsel filed a response in which she generally argued that she did not give her permission for her electronic signature to be affixed to the document.

In April 2016 this Court issued an unpublished opinion affirming the district court's entry of the preliminary injunction in favor of the plaintiff. In June 2016 the Subject Judge held a final pretrial conference, entered an order setting phase one of the trial for July 2016, and entered an order denying the parties' motions for summary judgment. The case then proceeded to trial. On the fourth day of trial, the Subject Judge denied the defendants' oral motion for judgment as a matter of law and granted the plaintiff's oral motion for a directed verdict.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant alleges that the Subject Judge "has from the beginning—and continuing—displayed a pattern of partiality, dismissiveness toward my claims and defenses and toward my attorneys, and hostility toward me, evidenced in his writings, his in-court comments, that have deprived me of fundamental fairness and equal justice under our laws." Complainant states that the "record is replete with instances of bias and dismissiveness." He asserts that on several occasions, his attorneys considered filing a motion to recuse "for racism and biasness but, I declined for fear of retaliation and retribution by either" the Subject Judge or his colleagues. Complainant states that he is filing his Complaint because "the blatant lack of impartiality and favor toward the Plaintiffs and their attorneys, even their wrongdoing has become so patent."

Complainant then describes the proceedings and sets out that opposing counsel admitting "e-signing defendant's attorney[']s name" to a joint pretrial statement "without

authorization and failing to report this to the court.” He states that the “Canons of Judicial Conduct, provide that a judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a lawyer violated” a rule of professional conduct. Complainant then states that the Subject Judge “has not sanctioned, nor to my knowledge independently reported this conduct to the Florida bar.”

Complainant contends that “[a]nother glaring example of misconduct by [the Subject Judge] by the appearance of impropriety that raised even greater concerns about [the Subject Judge’s] bias and/or racially discriminatory treatment” was when he announced during the February 2016 pretrial conference “that he would be sitting as a visiting judge” on this Court the week of March 7 to 11, 2016, which was when the case had been set for trial since December 2014. Complainant notes that he had a pending appeal of the Subject Judge’s order granting a preliminary injunction, and he states, “The question became why he would compromise a fair decision by sitting on the appellate bench the week of my trial[,] while I had an appeal pending in that same court? It appears that such dubious conduct was to influence the decision makers and undermine my appeal to affirm his decision.” He states that an appellate decision was rendered “exactly 5 weeks” from the date the Subject Judge sat as a visiting judge. Complainant asserts that this conduct gave rise to an appearance of impropriety, and that it is “not unreasonable to believe” that interacting with judges of this Court would influence them not to rule against the Subject Judge.

Complainant takes issue with the Subject Judge’s rulings at the “injunction bond hearing,” stating that he denied the telephonic participation of a witness, “ignored the detailed affidavits submitted by the Defendants, and falsely claimed in his opinion establishing the bond amount that he had not received any guidance from either of the parties.” Complainant takes issue with the bond amount and states that the Subject Judge exhibited a “dismissive attitude” by implying that Complainant could not possibly generate the revenue stated in the affidavits. He states that the Subject Judge eventually allowed him to be “placed under a worldwide injunction based entirely on affidavits for evidence, but refused to even consider the Defendants’ affidavits and the telephonic testimony when setting the bond amount. This is not at all even-handed justice.”

Complainant also complains that the Subject Judge did not require the plaintiff to post bond until more than a month after imposition of an injunction, and he notes that the Subject Judge gave the plaintiff two extra days to post the bond. Complainant states, “I have been told this is unheard of special treatment for Plaintiff’s counsel.” He also states that the district court’s clerk’s office “was held open beyond the 4:00 p.m. official closing time to allow Plaintiffs to get the bond into the court by 5:00 p.m. with no notice to my attorney of this special exception.”

Complainant then sets out what he states are “[n]otable time discrepancies in the rendering of decisions.” First, he states that the Subject Judge did not rule on a motion

for reconsideration his counsel filed for 6 months, while “any matter brought forth by Plaintiff’s counsel asking for relief or court action is ruled upon by this judge with immediacy.” He also takes issue with the Subject Judge’s orders on motions to show cause filed by the plaintiff and with his February 2015 order denying Complainant’s emergency motion, which “was a same day denial and an admonishment citing the rules of professional conduct violations that obviously applies to only” Complainant. Complainant then states, “In what can only be seen as an extreme posture,” the Subject Judge ordered that the parties could not file any more motions, which prevented Complainant’s attorney from filing a motion to recuse. In conclusion, Complainant states that he has “listed only some of the egregious and hostile conduct by [the Subject Judge] in his discriminatory treatment of me and my attorneys.” He attached to his Complaint an excerpt of the transcript of the February 2016 final pretrial conference.

Supplement

In Complainant’s supplemental statement, titled “*Corrected/Amended Judicial Complaint*,” he generally reiterates his allegations. He also “question[s] the motive behind” this Court’s decision to make its opinion unpublished, stating, “This was circumstantially suspect. This was a decision of value to only the Plaintiffs in this matter- again.”

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, rulings, findings, 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 claims that the Subject Judge was biased

against Complainant or his attorneys or in favor of the plaintiff or the plaintiff's attorneys, was racially biased or engaged in racial discrimination, treated Complainant in a demonstrably egregious and hostile manner, sought to influence a decision of this Court, or otherwise engaged in misconduct. Furthermore, sitting as a visiting judge on another court in no way violates any of the canons or rules governing judicial conduct and is expressly provided for by statute. See, e.g., 28 U.S.C. § 292(a).

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