

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Chris Gregerson,

Plaintiff,

Case Type: OTHER CIVIL

Court File No.: 27-CV-09-13489

Judge: John Q. McShane

v.

[OCP]¹, Inc., a Minnesota Corporation;
[owner of OCP], Morgan Smith, Boris
Parker, and Vladimir Kazaryan; Smith &
Raver, LLP, Saliterman & Siefferman,
PC, and Bassford Remele, PA,
Minnesota Law Firms,

Defendants.

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION TO AMEND THE
COMPLAINT TO CLAIM
PUNITIVE DAMAGES AND
ALLOW DISCOVERY OF
DEFENDANTS' FINANCIAL
CONDITION**

The Plaintiff replies below to the Parker Defendants responsive memorandum.

Attorney as trier of fact

On page 11 of their brief, the Parker Defendants quote text that "...the advocate's role does not require a lawyer to act as a trier of fact...". That language appears to be contradicted by Minnesota case law in *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782 (Minn. App. 2003).

Lind Jensen argues that it is an attorney's job to be a "zealous advocate" and that to require an attorney to ensure that a denial has legal and factual support would make an attorney the "finder of fact." But this is essentially what rule 11 does: it imposes on counsel an "affirmative duty" to investigate the factual and legal underpinnings of a pleading.

1 The name of the Original Corporate Plaintiff("OCP") and it's owner("owner of OCP") has been redacted from this brief prior to publication on the web pursuant to a settlement agreement with that party. It is otherwise identical to the version filed with the court.

Support for denial of Gregerson's copyright ownership

At page 12, the Parker Defendants argue “...the sworn testimony of [Parker's] client...as well as the sworn testimony of Kazaryan” were evidence supporting the denial of Gregerson's copyright ownership. These individuals never claimed personal knowledge of who took the Skyline photo. [owner of OCP] claimed Michael Zubitskiy told him he took it, which is hearsay and not admissible to impeach Gregerson's testimony he created the photo himself. The Zubitskiy photo agreement makes no mention of Zubitskiy taking photos, only providing photos.

[OCP]'s claims against Gregerson over his web page relied upon their factual denial of Gregerson's copyright ownership

At page 13, the Parker Defendants described this contention as [OCP]'s “counterclaims” being dependent upon the factual denial of Gregerson's copyright ownership. Gregerson wrote “claims” because he includes both the counterclaims and the removed, consolidated state court defamation lawsuit. A clarification of the procedural history follows.

Morgan Smith filed the defamation claim on October 24th, 2005, and represented [OCP] in it until he withdrew on April 24th, 2006. Exhibit A, Order of Judge Wernick, May 10th, 2006, at nos. 1, 7. Boris Parker attempted to have this complaint dismissed without prejudice on April 26th, 2006. Gregerson objected. Judge Wernick ruled that [OCP] could not dismiss the case without an order from the court.

11. Rule 41.01(a) provides...“the plaintiff a brief period of time to voluntarily dismiss a case before the defendant is likely to suffer some prejudice...”

14. [OCP] has no right under Rule 41.01(a) to dismiss its defamation complaint...[OCP] now needs court approval to dismiss it's defamation complaint...this Court would still not allow [OCP] to dismiss as a matter of right because

significant proceedings had occurred.

Attached exhibit A at nos. 11, 14. On June 14th, Boris Parker removed the defamation lawsuit to federal court to be consolidated with the copyright lawsuit, based on the fact they shared the same nexus of operative facts. Gregerson's "...rights are fully preserved..." See attached exhibit B, Order of Judge Mark Wernick, June 14th, 2006.

The defamation complaint continued in federal court

Upon removal, the federal court takes the action as it stood in the state court when removed. All existing orders remain in effect until modified by the federal court. *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996). The longstanding principle is that "[a]fter removal, the federal court 'takes the case up where the State court left it off'", *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70*, 415 U.S. 423, 436, 94 S.Ct. 1113, 1122, 39 L.Ed.2d 435 (1974); *Savell v. Southern Ry. Co.*, 93 F.2d 377, 379 (5th Cir.1937) ("When a case is removed the federal court takes it as though everything done in the state court had in fact been done in the federal court").

[OCP] could not dismiss the defamation complaint without an order of the court. Fed. R. Civ. P. 41(a)(2), and Judge Wernick's express order. The amended complaint for defamation is exhibit J in the Plaintiff's Complaint in the instant action, and cites dozens of comments by Gregerson on his web page alleged to be false and defamatory. These citations refer to Zubitskiy 22 times. A typical allegation follows (from ¶ 17.16).

17.16. "His lawsuit uses a forged sales agreement..." This statement [on Gregerson's web page] is false and defamatory. No admissible evidence has been offered to prove that Plaintiff has in any way been involved in forgery.

The complaint repeatedly challenges Gregerson's statements that Zubitskiy was

fabricated, that Gregerson owns the Skyline photo, and [OCP] infringed on Gregerson's photo.

An order from the court dismissing this complaint came on August 31st, 2007. Boris Parker represented [OCP] in this complaint from April 26th, 2006, until it was dismissed on August 31st, 2007. During this 15 month period, Gregerson continued to pursue discovery, take depositions, serve subpoenas, pay for legal advice, and otherwise defend himself. Gregerson faced the court-ordered removal of his web page, which would violate his constitutional right to freedom of speech, and damages [OCP] identified as being \$1,703,726.51 for just the first three months Gregerson's web site was on line. See exhibit C, Affidavit of [owner of OCP] at no. 7. Gregerson vigorously defended himself against this suit, incurring substantial damages.

The basis of the federal counterclaims

On page 14, the Parker Defendants argue the federal counterclaims Boris Parker represented were based on comments posted on Gregerson website that "...[OCP] Defendants were thieves, members of the Russian mafia..." and on "affidavits from others noting harm to [OCP]'s business." That was not the case Boris Parker presented at trial; there was no mention of mafia or thieves or damages due to 3rd party comments. Gregerson aff. At nos. 2-4, 10.

The federal counterclaims alleged Gregerson made "false and disparaging" comments on his web page, and refer to "...the untrue statements made by Gregerson..." at ¶ 73, 74, 75 (Complaint exhibit L, page 15). The same accusation was made in the state defamation complaint, and because the two cases were consolidated based on "a common nexus of operative facts", discovery in the defamation action need not be repeated in the federal counterclaims. Specifically, if [OCP]'s position had changed about what on Gregerson's web page was false, they had a duty to amend their discovery responses. [OCP] had consistently cited Gregerson's

claim of copyright infringement by [OCP] as false and defamatory, and later challenged Gregerson's statements that Zubitskiy did not exist. This was never amended or supplemented.

3rd party comments cited as a basis for [OCP]'s counterclaims were incidental

The third-party comments on Gregerson's web page complained of in briefs were personal attacks on [owner of OCP]. None mentioned “[OCP]”, Parker never requested the comments be removed, never identified them in discovery, and never pursued claims against the authors of the comments. Judge Montgomery requested Gregerson remove any comments that refer to [owner of OCP]'s girlfriend voluntarily, and he complied. See exhibit D. If Parker believed these 3rd party comments were causing his client damages, he had a duty to identify them to Gregerson and request they be removed. He did not.

No damages were claimed due to the 3rd party comments

All of the damages alleged against Gregerson were related to Gregerson comments, beginning when he first posted his web page in September, 2005 (there were no 3rd party comments at that time). See exhibit C, affidavit of [owner of OCP]. The comments by visitors complained about appeared in 2006, yet [OCP] sought damages at trial for the entire time Gregerson's web page was on line, without regard to whether any particular 3rd party comments were there at the time or not. See affidavit of Chris Gregerson at 3.

Gregerson was not liable for 3rd party comments as a matter of law

Boris Parker did not cite any case law supporting a website operator being liable for “deceptive trade practices” or “interference with contractual relations” based on comments posted by visitors to his web site. Gregerson cited the Communications Decency Act, 47 U.S.C. §§ 230(c)(1) and (e)(3), which the court agreed immunized Gregerson from any claims based on comments posted by others. This was a question of law that should properly have been decided

very careful. Winning the case may not mean \$\$ for you.

This comment was posted by [owner of OCP] anonymously in an apparent attempt to intimidate Gregerson. This was made known to Boris Parker (and the public) in a page Gregerson wrote and published on January 21st, 2007, which was heavily linked to from the original [OCP] page. See exhibit E, Comments posted anonymously that are linked to [owner of OCP]. Gregerson wrote a technical explanation of the server log records showing the connection between this comment and [owner of OCP], and posted it on the web page cited above, and also used it as Plaintiff's trial exhibit P45. See Exhibit F. This issue is mentioned in the Complaint at ¶ 88, “[owner of OCP]...post[ed] malicious comments (under his own name and anonymously) on Gregerson's web page”.

This threat prompted Gregerson to provide [owner of OCP]'s photo to the New Richmond Police, and take other measures to insure the security of his family. That Boris Parker would, as a “zealous advocate”, convert intimidation and threats by his client (which he was informed of) into fodder for legal claims against the victim of those threats is highly offensive. Parker's knowledge that his client posted this “mafia” comment is perhaps why he abandoned this claim at trial, as there was no mention of any “mafia” comment. Gregerson affidavit at 10.

Parker would not stipulate to Zubitskiy being excluded from [OCP]'s counterclaims prior to trial

The Parker defendants argue, at page 14, the federal counterclaims were “...not based on Zubitskiy”. Prior to trial, Gregerson put that issue to Boris Parker, asking him to stipulate to that. Below is an email from Gregerson to Parker making that request.

Dear Mr. Parker,

The notice of assignment of cases for trial recommends we confer prior to trial to stipulate

uncontested facts and matters not in controversy...If you do not consider Michael Zubitskiy relevant to this case, please confirm if the following matters are not in controversy:

1. My statement on my webpage that [OCP] forged the Zubitskiy photo agreement is either true or is at least not being challenged in [OCP]'s counterclaims.

See exhibit G, Gregerson email to Parker of Oct. 24th, 2007. Parker did agree or otherwise make the requested stipulation.

Parker Defendant's claim that Parker acted in good faith

At page 16, the Parker defendants allege “Gregerson has no evidence that Parker acted in bad faith...”, and question whether Parker “...successfully misled the [federal] court” (Id., p. 5).

Parker could have obtained removal of Gregerson's web page, and dismissal of all claims against his client, if he acquired *any* evidence that Zubitskiy was a real person. See exhibit D, Gregerson's Oct. 31st, 2006, letter to Judge Montgomery. As a zealous advocate, he ought have pursued this. The only explanation for the absence of any effort on his part to locate Zubitskiy is that he knew Zubitskiy didn't exist.

This bad faith is also shown graphically in Parker's representation that his client obtained the second infringing photo (the Kenwood photo) from the images Zubitskiy shot in early to mid March of 2004. Attached exhibit H has photos Gregerson took March 5th, 2004, in Minneapolis, showing our typical snowy weather. Next to those is the Kenwood photo, showing typical August weather (the Kenwood photo was taken in August, 2002). Boris Parker asked the federal court to believe that he, in good faith, did not consider it an *obvious falsehood* that these winter and summer photos were taken in the same month.

Punitive damages against attorneys and law firms for malicious prosecution

On page 17 of their brief, the Parker Defendants note “Gregerson has not cited a single case where a punitive damage claim was allowed against an opposing attorney for his alleged malicious prosecution of a case while representing his clients”. Gregerson replies by citing *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007), which upheld punitive damages for malicious prosecution against an attorney(Gladwell) for \$150,000.00 and against Gladwell's firm (Gibson, Dunn & Crutcher, or GDC) for \$9.9 million (reduced from \$20 million). Portions of the opinion follow.

¶13 Seltzer is, among other things, a professional appraiser and authenticator of Western American artwork...at the request of an art auction house, he rendered his opinion as to the authenticity of a watercolor painting that Morton owned. Morton subsequently demanded that Seltzer recant his opinion. When he refused to do so, GDC filed a multi-count lawsuit against Seltzer. That lawsuit, which was eventually dismissed with prejudice, is the subject of this litigation.

¶41 ...Gladwell sent a demand letter to Ginger Renner and Seltzer, stating ...”Mr. Morton gave you every chance to withdraw your damaging comments...We expect immediate cooperation...or litigation will be filed without any further discussion....”

¶44 ...Gladwell...under the caption and authority of GDC...filed a Complaint against Seltzer...(1) Defamation...(2) Declaratory Relief...(3) Injunctive Relief...(4) Intentional Interference With Business Relations and Prospective Economic Advantage...(5) Negligence...(6) Punitive Damages.

¶49 ...the U.S. District Court dismissed the suit against Seltzer with prejudice...Seltzer incurred over \$45,000.00 in legal fees.

¶143 ...As the District Court stated in its post-verdict order reviewing punitive damages, GDC

“presented no evidence at trial that Dennis Gladwell was not its authorized agent at all times pertinent.”

¶168 ...The court found that clear and convincing evidence established the Defendants knew that:...it was highly probable that Seltzer was correct in his opinion that the subject painting was not an authentic work of C. M. Russell...Seltzer had not knowingly published false statements...

¶169 The court further found that the Defendants knew or intentionally disregarded the fact that...making such allegations against Seltzer in a lawsuit would...cause him to incur substantial defense costs.

¶173 ...GDC’s conduct was highly reprehensible...compensatory damages...as sought in the underlying Complaint, would have forced Seltzer into bankruptcy...Seltzer had a “relative lack of resources to defend himself.”

¶179 ...The “essence” of our judicial system is not simply the resolution of disputes; rather, it is the resolution of *legitimate* disputes. Baseless lawsuits prosecuted in furtherance of ulterior motives have no place in our courts...For the ordinary citizens who are the victims of such a lawsuit, it may be the most horrific experience of their lives.

¶180 In short, GDC’s use of the judicial system amounts to legal thuggery. This behavior is truly repugnant to Montana’s foundational notions of justice and is therefore highly reprehensible.

Punitive damages claims against the Saliterman and Bassford Firms

The Parker defendants argue Boris Parker did not have managerial capacity for purposes of punitive damages against the firms. Gregerson asked Parker in discovery who at either firm authorized him to represent [OCP], and if any authorization was necessary. He replied that “...no one authorized him to represent [OCP] and [owner of OCP], and no authorization was

necessary”. See exhibit I at interrogatory 12. Parker thus had authority to make decisions about who the firm would represent, without any higher authority reviewing his decisions.

If the Bassford firm authorized Parker's conduct while aware of the character and consequences of it, it would create liability for a master or principal under § 549.20 Subd. 2(d).

(d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

It appears Bassford Remele's director(s) were aware of Boris Parker's conduct in representing [owner of OCP]'s false claims. See defendants memorandum at affidavit of Rebecca Egge Moos, page 4. See also exhibit J, Answers of defendant Bassford Remele, P.A., to Plaintiff's interrogatories, set 1, at no. 4 (pp. 2-3); also exhibit K, Response of Bassford Remele, P.A. to Plaintiff's request for the production of documents, set 1 (excerpt).

Intent to harm/malice

On page 15, the Parker Defendants claim “Gregerson has offered no evidence that Parker intended to harm Gregerson, or...was aware of [OCP]'s alleged goal of harming Gregerson.” Gregerson has alleged Parker showed overt hostility towards Gregerson (Complaint at ¶ 89) and was aware of [owner of OCP]'s malice. See Gregerson affidavit at nos. 5-9.

Respectfully submitted,

Dated: _____

Chris Gregerson
Plaintiff, *pro se*
150 N Green Ave.
New Richmond, WI 54017
Telephone: 612-245-4306