UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT A. HEGHMANN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-336-P-H***
	)	
MARK FERMANIAN,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SANCTIONS AND PLAINTIFF'S PURPORTED DISMISSAL OF ACTION

Summary judgment has been entered for the defendant in this action on all claims in the complaint, and all counts of his counterclaim other than Count IV have been dismissed. Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 29). Count IV of the counterclaim alleges a violation of Fed. R. Civ. P. 11. Answer, Affirmative Defenses and Counterclaim, etc. (Docket No. 2) at 7-8. After a telephone conference with the plaintiff[1] and counsel for the defendant, I ordered that counsel for the defendant, if he elected to file a separate motion for sanctions pursuant to Rule 11, serve that motion on the plaintiff no later than September 18, 2000 and file it with the court no later than 28 days after service. Report of Conference of Counsel and Order (Docket No. 31) at 2. Counsel for the defendant informed the court by letter dated September 11, 2000 that the defendant would not rely on the existing pleading and intended "to pursue a separate motion

[1] The plaintiff, who appears *pro se* in this action, is an attorney admitted to practice before the federal district courts in New York and Connecticut, the federal Court of Appeals for the Second Circuit, and the United States Supreme Court. Plaintiff's Answer to Defendant's Affirmative Defenses and Counterclaim, etc. (Docket No. 3) ¶ 22.

seeking sanctions against Plaintiff." Letter from William H. Leete, Jr. to William S. Brownell, Clerk, dated September 11, 2000 (Docket No. 32). Counsel for the defendant thereafter apparently served on the plaintiff a motion for sanctions under Rule 11. Withdrawal of Complaint and Dismissal of Action ("Notice") (Docket No. 33); Defendant's Motion to Continue Deadline for Filing Rule 11 Motion (Docket No. 36) at 1. That motion has not been filed with the court, and the defendant's motion dated October 16, 2000 to extend the deadline for filing such a motion set by my September 6, 2000 order has been denied. Endorsement, Defendant's Motion to Continue Deadline for Filing Rule 11 Motion.

Apparently in response to service of the Rule 11 motion, the plaintiff filed on September 25, 2000 a one-page document entitled Withdrawal of Complaint and Dismissal of Action. On October 6, 2000 the defendant filed a motion for sanctions against the plaintiff pursuant to 28 U.S.C. § 1927.[2] Defendant's Motion for Sanctions Against Plaintiff Pursuant to 28 U.S.C. § 1927 and This Court's Inherent Authority ("Section 1927 Motion") (Docket No. 34). I strike the purported withdrawal of the complaint and grant the motion for sanctions.[3]

The plaintiff's purported withdrawal states, in its entirety:

> The Plaintiff, Robert A. Heghmann, pursuant to the provisions of Rule 11, Fed. R. Civ. P., having been served with a Motion for Sanctions under Rule 11 hereby withdraws the Complaint and all other pleadings filed by the Plaintiff and objected to by the Defendant under Rule 11 including, but not limited to, the complaint, answers, counterclaims, motions, affidavits, defenses, and any other pleading filed by the Plaintiff in this action. The Plaintiff hereby requests that the Court vacate any and all rulings in this case and dismiss the action.

[2] Sanctions may be awarded under 28 U.S.C. § 1927 when sanctions are not available under Rule 11 for procedural reasons. *Galonsky v. Williams*, 1997 WL 759445 (S.D.N.Y. Dec. 10, 1997), at *3-*4.

[3] I determine that I have the authority under 28 U.S.C. § 636(b)(1)(A) to hear and determine the issues raised in the pending motion for sanctions because it concerns underlying pretrial conduct. *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747-48 (9th Cir. 1990) (magistrate judge may decide motion for Rule 11 sanctions); *Bergeson v. Dilworth*, 749 F.Supp. 1555, 1561-62 (D.Kan. 1990) (magistrate judge may sanction any pretrial conduct). In this case, sanctions are sought based on conduct occurring before summary judgment was entered for the defendant on all of the plaintiff's claims. *See also Novelty Textile Mills, Inc. v. Stern*, 136 F.R.D. 63, 74-75 (S.D.N.Y. 1991) (magistrate judge has power to impose sanctions under 28 U.S.C. § 1927; citing cases).

Notice. In response to the defendant's objection to this document, Defendant's Objection to Plaintiff's Proposed Withdrawal of Complaint and Dismissal of Action (Docket No. 35), the plaintiff contends, without citation to authority, that "the proper interpretation of Rule 11 is that by service of the motion, the Defendant consents to the withdrawal of any challenged paper . . . and any corrective action including voluntary dismissal." Plaintiff's Memorandum in Opposition to Defendant's Motion for Sanctions Pursuant to 28 U.S.C. Sec. 1927, etc. ("Plaintiff's Opposition") (Docket No. 37) at 4. The provisions of Fed. R. Civ. P. 41(a) are not so easily overborne, however.

Rule 41(a) provides that an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment or by filing a stipulation of dismissal signed by all parties who have appeared in the action. Both an answer and a motion for summary judgment were served by the defendant in this action long before the plaintiff filed his purported withdrawal, which is not a stipulation signed by all parties. Accordingly, the plaintiff, even under his "implied consent" argument, is required to file a motion for dismissal by order of the court. His purported withdrawal of the complaint, however generously construed, cannot be deemed to be such a motion, particularly considering the fact that the document was filed by an attorney. *See generally Camacho v. Mancuso*, 53 F.3d 48, 51 (4th Cir. 1995) (notice of dismissal filed by plaintiff after filing of answer ineffective because not signed by counsel for defendants, even though defendants had agreed orally to dismissal). I recommend that the court strike the purported withdrawal of the complaint.

The plaintiff also argues that the defendant cannot bring a motion for sanctions under 28 U.S.C. § 1927 because my September 6 order allowed him only to stand on his pleadings or to serve and file a motion under Rule 11. Plaintiff's Opposition at 2-3. To the contrary, my order dealt only with the possible filing of a motion under Rule 11; it did not address, either expressly or by necessary

implication, any other means by which the defendant might seek sanctions. Section 1927 is completely separate from and independent of Rule 11. A party may, contrary to the plaintiff's next argument, Plaintiff's Opposition at 4-5, choose to seek sanctions under either or both. *See Cruz v. Savage*, 896 F.2d 626, 631 (1st Cir. 1990) (discussing different standards under Rule 11 and section 1927 in case in which sanctions were sought under both). Accordingly, an order setting a deadline for the filing of a motion under Rule 11 has and can have no effect on a party's ability to seek sanctions under section 1927, when that source of authority is not even mentioned in the order.

The plaintiff also asserts that this court is without jurisdiction to entertain a motion under Rule 11 or section 1927 due to his purported voluntary dismissal of this action. Plaintiff's Opposition at 5. The law is clearly to the contrary. The Supreme Court held in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394-98 (1990), that a court may consider the imposition of sanctions under Rule 11 after the voluntary dismissal of the underlying action. The Court's reasoning is equally applicable to claims for sanctions under section 1927. *Bolivar v. Pocklington*, 975 F.2d 28, 31 (1st Cir. 1992); *see also Ridder v. City of Springfield*, 109 F.3d 288, 297 (6th Cir. 1997). Even if the plaintiff's purported voluntary dismissal were effective, therefore, this court retains jurisdiction to address the defendant's motion under section 1927.

The statute at issue provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees incurred because of such conduct.

28 U.S.C. § 1927. Sanctions are available under this statute against an attorney who, like the plaintiff here, appears *pro se*. *Sassower v. Field*, 973 F.2d 75, 80 (2d Cir. 1992). The First Circuit has described the standard for imposition of sanctions under section 1927 as follows:

> [W]hile an attorney's bad faith will always justify sanctions under section 1927, we do not require a finding of subjective bad faith as a predicate to the imposition of sanctions. Behavior is "vexatious" when it is harassing or annoying, regardless of whether it is intended to be so. Thus, if an attorney's conduct in multiplying proceedings is unreasonable and harassing or annoying, sanctions may be imposed under section 1927. The attorney need not intend to harass or annoy by his conduct nor be guilty of conscious impropriety to be sanctioned. It is enough that an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a "serious and studied disregard for the orderly process of justice." Yet, we agree with other courts considering this question that section 1927's requirement that the multiplication of the proceedings be "vexatious" necessarily demands that the conduct sanctioned be more than mere negligence, inadvertence, or incompetence. Finally, in assessing whether an attorney acted unreasonably and vexatiously in multiplying proceedings, the district courts in this circuit should apply an objective standard.

Cruz, 896 F.2d at 631-32 (citations omitted). Here, the plaintiff failed repeatedly to comply with the procedural rules of this court, as set forth in my earlier decision. Memorandum Decision on Defendant's Motions to Strike and Recommended Decision on Defendant's Motion for Summary Judgment (Docket No. 25) at 2-4. He presented no evidence whatsoever to substantiate the claims for abuse of process and malicious prosecution set out in his complaint. *Id*. at 5. The remaining claims in his complaint are either factually incorrect or without legal basis, or both. *Id*. at 6-9. Any objectively reasonable lawyer would have realized this if he had merely reviewed the Maine statutes and court rules governing small claims procedures.

The conclusion that the plaintiff filed this action primarily to delay resolution of the small claims action brought against him by the defendant in state court is virtually inescapable. Indeed, the plaintiff remarked to me at the final pretrial conference held on June 8, 2000 that he did not particularly care whether this action went forward, as he had by then obtained the discovery relative to the state-court small claims case that was his only purpose in filing this action. Yet he thereafter filed an objection to my recommendation that the defendant's motion for summary judgment be granted, repeating the baseless arguments that he had put forward in his untimely objection to the motion for

summary judgment and adding equally baseless allegations of prejudice on the part of the court. Plaintiffs' [sic] Memorandum in Support of Objections to the Recommended Ruling of Magistrate Judge Cohen (Docket No. 26).

The plaintiff's claims in this action were without merit from the beginning and would have been perceived as such by any objectively reasonable attorney. He was informed that the defendant took this position in the answer and counterclaim, filed in December 1999, yet he continued to attempt to prosecute this action through June 2000, when he filed an objection to the recommended decision on the defendant's motion for summary judgment. The filing and prosecution of this action can only be characterized as unreasonable and vexatious. *See generally Bolivar*, 975 F.2d at 31-34. This action was without "a plausible legal or factual basis." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984). While it is not necessary that the plaintiff's conduct constitute bad faith, the plaintiff in this case maintained an unfounded action without any reasonable hope of prevailing on the merits, the very definition of bad faith adopted by the First Circuit. *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 14 (1st Cir. 1995). Throughout this case, the plaintiff demonstrated a serious and studied disregard for the orderly process of justice. Under the circumstances, the excessive costs caused by this conduct are all of the defendant's costs and reasonable attorney fees incurred since the filing of the complaint. *Ridder*, 109 F.3d at 299.

Conclusion

For the foregoing reasons, the defendant's motion for sanctions is **GRANTED** and the plaintiff's notice of withdrawal of the complaint and voluntary dismissal is **STRICKEN**.[4] The

[4] Count IV of the defendant's counterclaim remained active after the court entered summary judgment for the defendant on all of the plaintiff's claims and dismissed all other counts of the counterclaim. Order Affirming Recommended Decision of the Magistrate Judge. That count purports to raise a claim for violation of Rule 11. Answer and Counterclaim at 7-8. The Rule 11 claim asserted in the counterclaim was not presented as required by the terms of that rule, and the defendant's motion for an extension of time in which to file a properly presented Rule 11 motion has been denied. Endorsement, Defendant's Motion to Continue Deadline for Filing Rule 11 (*continued on next page*)

defendant shall submit an itemized statement of his costs and fees for the court's consideration within 10 days following the entry of this order and the plaintiff shall file within 10 days following the filing of that statement any objection thereto and a supporting memorandum. The court will then determine the appropriate amount of an award of monetary sanctions.

Date this 27th day of November, 2000.

David M. Cohen
United States Magistrate Judge

ROBERT A HEGHMANN
plaintiff

ROBERT A HEGHMANN
[COR LD NTC] [PRO SE]
P.O. Box 2110
York Beach, ME 03910-2110
985-1626

v.

MARK FERMANIAN
defendant

WILLIAM H. LEETE, JR., ESQ.
[COR LD NTC]
LEETE & LEMIEUX, P.A.
95 EXCHANGE STREET
PO BOX 7740
PORTLAND, ME 04101
879-9440

Motion. Accordingly, Count IV of the counterclaim must be deemed to be moot.