

STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

2009 NOV 17 AM 11:49 FOURTH JUDICIAL DISTRICT

Chris Gregerson,

BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

Plaintiff,

Court File No. 27-CV-09-13489

vs.

**ORDER AND MEMORANDUM
DENYING PLAINTIFF'S MOTION TO
AMEND**

████████████████████
Morgan Smith, Boris Parker, and Vladimir
Kazaryan, Smith & Raver, LLP, Saliterman &
Siefferman, PC and Bassford Remele, PA

Defendants.

The above-entitled case came on for a hearing before the undersigned Judge of District Court on November 3, 2009, on Plaintiff's Motion to Amend the Complaint to add a claim for punitive damages.

Appearances:

Chris Gregerson appeared pro se.

Paul C. Peterson, Esq., appeared on behalf of Defendants Boris Parker, Bassford & Remele PA, and Saliterman & Siefferman PC.

Morgan G. Smith, Esq., appeared on behalf of himself and Smith & Raver, LLP.

Based upon all the files, records, and proceedings herein, including the arguments of counsel, the Court makes the following **ORDER**:

1. Plaintiff's motion to amend the Complaint to add a claim for punitive damages is **DENIED**.
2. The attached memorandum is incorporated herein as if set forth in full.

DATED: 11/16/2009

BY THE COURT:



John Q. McShane
Judge of District Court

MEMORANDUM

This matter came before the Court on Plaintiff's Motion for Leave to Amend the Complaint to add a claim for punitive damages. Plaintiff seeks to add a claim for punitive damages against defendants Morgan Smith, Boris Parker, Bassford Remele, Saliterman & Siefferman, and Smith & Raver under Minn. Stat. §§ 549.191 and 549.20.

FACTS

In 2005, Plaintiff sued Defendant [REDACTED] and his business, [REDACTED] in state court. The matter was removed to federal court. Plaintiff alleged that the defendants took a copyrighted photograph off Plaintiff's web site, misappropriated it, and refused to compensate Plaintiff for it despite his demands. [REDACTED] justified his refusal to pay on the grounds that he had already paid a man named "Michael Zubitskiy" ("Zubitskiy") for the photograph.

The federal court found for Gregerson on all counts. Judge Montgomery found that there was no credible evidence to support the belief Zubitskiy was the source of the photos, no genuine dispute as to Gregerson's ownership of the photos, and that [REDACTED] showed a flagrant disregard for Gregerson's rights as a copyright holder. Plaintiff settled with [REDACTED] and [REDACTED].

Defendants Morgan Smith and Smith & Raver, LLP ("Smith Defendants") originally represented [REDACTED] and [REDACTED]. Defendants Boris Parker, Saliterman & Siefferman, PC and Bassford Remele ("Parker Defendants") took over representation in March, 2006. Plaintiff accuses these Defendants of knowingly or recklessly asserting fraudulent defenses and false counterclaims, along with submitting false evidence and testimony to the court regarding the existence of and dealings between [REDACTED], [REDACTED] and Michael Zubitskiy.

LAW

A motion to amend to add a claim for punitive damages is governed by Minn. Stat. § 549.191. The motion must allege a specific legal basis under Minn. Stat. § 549.20. If the Court finds prima facie evidence that the moving party has made a sufficient showing under § 549.20, a court may grant permission to amend pleadings to add a claim for punitive damages. Minn. Stat. § 549.20 states in relevant part:

Subd. 1. **Standard**

Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

ANALYSIS

Plaintiff claims that the Smith and Parker Defendants either knowingly or recklessly disregarded the truth about Zubitskiy and how ██████ obtained Gregerson's copyrighted photo. Additionally, Plaintiff argues that both the Smith and Parker Defendants had an obligation to conduct a reasonable inquiry into the claim that the photo was purchased from Zubitskiy, but failed to do so. Plaintiff claims that the Defendants' willful ignorance with respect to Zubitskiy's existence and the origins of the photograph coupled with their assertion of erroneous defenses and counterclaims against Plaintiff based on these facts makes them liable for statutory punitive damages in this case.

Defendants reply that Plaintiff has failed to meet his high burden of providing *prima facie* evidence that the Defendants acted with deliberate disregard for the rights of Plaintiff. A plaintiff is permitted to assert a punitive damage claim only if he established a *prima facie* case for such damages by clear and convincing evidence. *Swanlund v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). Clear and convincing evidence is evidence that leads the trier of fact to conclude that it is “highly probable” that the defendant acted with deliberate disregard for the plaintiff’s rights. *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 659 (Minn. 1987).

Defendants do not deny that ██████████ may have been lying regarding the existence of Zubitskiy and the deal between him and ██████████ to purchase the copyrighted photo. However, they claim that there is no clear and convincing evidence demonstrating that Defendants deliberately disregarded the truth or that they knowingly authorized false evidence to be submitted in the prior litigation. Instead, Defendants insist they believed ██████████’s statements were true when made, and that they were entitled to rely on their client’s representations when exercising their legal judgment. *See Hoppe v. Klapperich*, 28 N.W.2d 780, 792 (1947) (“[The] rule is that the attorney may rely on [a client’s] statements as a basis for exercising judgment and providing advice, unless the client’s representations are known to be false.”)

Plaintiff noted numerous pieces of circumstantial evidence and the absence of physical evidence of Zubitskiy’s existence that tends to show that ██████████’s representations regarding the existence of Zubitskiy and ██████████’s dealings with him were untrue.

But the issue before the Court is not whether [REDACTED] lied about Zubitskiy. The question before this Court is whether Plaintiff has established by “clear and convincing evidence” that [REDACTED]’s lawyers knew he was lying or are guilty of such willful ignorance on the subject as to classify their assertions of defenses and counterclaims as a deliberate disregard for Plaintiff’s rights.

That is simply not the case. The Defendants had [REDACTED]’s sworn testimony to rely on when asserting their defenses and counterclaims against Plaintiff in the prior action. This fact, coupled with a lack of evidence as to Defendants’ actual knowledge of the falsity of [REDACTED]’s claims, is sufficient to defeat Plaintiff’s motion. In the absence of such evidence, the Defendants were not only justified in believing their client’s testimony, but were entitled to rely on it when advocating on their client’s behalf. See Hoppe, 28 N.W.2d at 792.

Since Plaintiff’s motion to amend is denied, this Court need not reach Plaintiff’s motion to allow “discovery of Defendant’s financial condition”.

A handwritten signature in black ink, appearing to be the initials 'JL' followed by a horizontal line.