

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

REGSCAN, INC.,	:	NO. 02-01,152
Plaintiff	:	
	:	
vs.	:	
	:	CIVIL ACTION - EQUITY
RICHARD MARTIN and,	:	
CITATION PUBLISHING, INC.	:	
Defendants	:	Motion for Sanctions

**OPINION AND ORDER**

Before the Court is Citation Publishing's Motion for Sanctions, filed April 12, 2004. Argument on the motion was heard July 12, 2004.

Citation seeks to impose sanctions on Plaintiff's counsel, Allen Ertel, Esquire, pursuant to Pennsylvania Rule of Civil Procedure 1023.2, which provides for the filing of a motion for sanctions based on an alleged violation of Rule 1023.1.<sup>1</sup> That rule provides, in pertinent part:

...

- (c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,
- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,
  - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,
  - (3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

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<sup>1</sup> The Court notes the procedural requirements of Rule 1023.2 for filing such a motion have been fulfilled.

- (4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Pa.R.C.P. Rule 1023.1(c). Citation claims Mr. Ertel violated Rule 1023.1 when he signed, filed and then advocated a Motion to Amend,<sup>2</sup> seeking to amend RegScan's Complaint to add a federal cause of action against Citation under the Racketeer Influenced Corrupt Organization (RICO) Act, and state causes of action for abuse of process and common law fraud. The Motion to Amend was denied by this Court after argument held February 27, 2004.

A review of the background of this matter is helpful to understand the basis for the instant motion. The original Complaint in this matter asserts against Richard Martin, a former employee of RegScan who is now employed by Citation, breach of covenants not to compete and against use of proprietary information, both contained in his employment contract with RegScan.<sup>3</sup> The first amended complaint added Citation Publishing and asserts a claim of intentional interference with Martin's contract with RegScan, conspiracy (with Martin) to interfere with Martin's contract with RegScan, and a violation of the Unfair Trade Practices Act. Citation's preliminary objections to the first amended complaint challenged personal jurisdiction and venue, sought a more specific pleading of the claims for intentional interference and conspiracy, and sought dismissal of the Unfair Trade Practices Act claim for failure to state a claim upon which relief could be granted. Several hearings were held regarding the objection to personal jurisdiction but before the Court was called upon to rule on the objection, Citation withdrew such, and it is this particular aspect of the case which appears to have prompted Plaintiff to file the Motion to Amend.<sup>4</sup> In the RICO count of that motion, Plaintiff alleges Citation's president, Gary Tabbert, the vice-president, Bruce Regan, and Citation's counsel in the instant litigation, Adam Zucker, Esquire, have controlled a racketeering enterprise which "exists to defraud the plaintiff of its right to a fair trial", and conspired "to defraud the Court of Common Pleas in Pennsylvania of jurisdiction in this

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<sup>2</sup> The Motion to Amend was filed December 24, 2003.

<sup>3</sup> In proceedings held pursuant to Plaintiff's request for a preliminary injunction, the covenant not to compete was found by this Court to be unenforceable.

matter.”<sup>5</sup> Plaintiff alleges the enterprise has engaged in a “pattern of racketeering activity” “consisting of numerous acts of mail and wire fraud”, specifically the mailing of the preliminary objections referred to above, the mailing of the brief in support of the preliminary objections, the mailing of the Answers to Plaintiff’s Request for Admissions, and the use of interstate telephone calls to prepare all of the above, all of which, according to Plaintiff, were “false.” Plaintiff claims damages as a result of “delay” and increased attorney’s fees. The abuse of process claim alleges generally that Citation, through its attorneys, has “perverted the legal process to accomplish a purpose for which the process was not intended, which was to harass RegScan into settling the case and to delay said process.” The civil fraud claim alleges even more generally that “by the aforesaid acts” Citation has “committed civil fraud on Plaintiff and the Courts.” As noted above, the Motion to Amend was denied by this Court.

Analysis of the matter in light of the rule leads this Court to conclude sanctions are appropriate in this instance. First, the Motion to Amend contains accusations so scurrilous as to rise to the level of harassment of both the principals of Defendant Citation as well as counsel. Further, with respect to the purpose of the motion, at argument Mr. Ertel indicated he filed the motion because the Court had previously refused to hold a hearing on his request to have the District Attorney file perjury charges against the individuals involved in contesting jurisdiction. Thus, rather than simply addressing the actual legal issues involved in the underlying case, Mr. Ertel apparently wishes to add a layer of vilification based on his perceptions of opposing counsel’s handling of the matter. Second, the claims in the Motion to Amend are not warranted by existing law: “a number of courts have considered whether serving litigation documents by mail can constitute mail fraud and all have rejected that possibility.” Nolan v. Galaxy Scientific Corp., 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003)(quoting United States v. Pendergraft, 297 F.3d 1198, 1208 (11<sup>th</sup> Cir. 2002)). Neither does the Court find in these circumstances any nonfrivolous argument for the extension or

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<sup>4</sup> The preliminary objection seeking a more specific pleading was overruled; the demurrer to the Unfair Trade Practices Act claim was sustained and that claim was dismissed. The Court found the Act to be inapplicable to the instant case, a dispute between competitive companies regarding customer information.

<sup>5</sup> According to the motion, the enterprise seeks to accomplish three goals: (1) to deceive this Court from finding jurisdiction over this case and having the case dismissed, (2) to cost plaintiff considerable expense by forcing plaintiff to sue defendant in another state, and (3) to preserve defendant’s assets by preventing this Court from assessing damages in this case.

modification of existing law. Third, Mr. Ertel provided the Court with no basis on which to find he had evidentiary support for the factual allegations made in the Motion to Amend, such as the allegations of knowingly making false statements<sup>6</sup> and having employees lie under oath.

The Explanatory Comment to the Rule provides further guidance with respect to other factors to be considered in determining whether to impose sanctions, including several which the Court finds applicable herein, specifically whether the improper conduct was willful or negligent, whether it was part of a pattern of activity or an isolated event, and whether the responsible person is trained in the law. Pa.R.C.P. Rule 1023.1 (Explanatory Comment – 2003). Consideration of these factors also supports the imposition of sanctions. The filing of the Motion to Amend was certainly willful, and Mr. Ertel is, as a licensed attorney, “trained in the law.” As far as a “pattern of activity”, the Court notes the following:

1. Mr. Ertel’s Petition for Contempt against Richard Martin for engaging as his counsel the attorney who represents another entity in a different suit filed against it by RegScan, which petition was denied by the Court after argument on November 25, 2002.
2. Mr. Ertel’s Motion for Sanctions against Citation for the failure of Citation’s President to appear for a deposition unilaterally scheduled by Mr. Ertel at a time already indicated by Citation’s counsel to be unacceptable, which motion was denied by the Court after a hearing on March 24, 2003.
3. Mr. Ertel’s Motion for Sanctions against Citation for failure to answer to his satisfaction a Request for Production of Documents, which motion was treated by the Court as a Motion to Compel in its Scheduling Order dated April 2, 2003, instructing counsel “that since there has not yet been an Order to Compel Answers, a Motion for Sanctions is inappropriate. See Rule of Civil Procedure 4019(g)(1). However, in the interest of time we will treat this motion as a Motion to Compel Answers.”

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<sup>6</sup> The Court notes that while Mr. Ertel continuously refers to the “falsity of the claim that this Court lacked jurisdiction” based on evidence that Citation has had some contacts with Pennsylvania, counsel for Citation has pointed out to Mr. Ertel his position that some contacts in Pennsylvania does not provide jurisdiction, but, rather, “minimum contacts”, a legal term with a specific meaning, are required, and such do not exist in this case. The Court agrees that “jurisdiction” is not something that can be true or false, as it is a legal conclusion to be drawn, not a fact to be found.

4. Mr. Ertel's Motion for Sanctions and to Cite CPI for Perjury and Violations of the Canons of Ethics filed against "certain of Defendant's corporate employees" based on the filing of the preliminary objections to personal jurisdiction, which was in effect denied by Order dated July 14, 2003, the Court refusing to schedule a separate hearing thereon, noting the motion "raises basic claims of the honesty and credibility of Citation officials' claims in their Preliminary Objections" and that "Plaintiff seems to be requesting that the Court rule on these credibility issues before it completes the hearing in progress."
5. The Protective Order entered by the Court on September 10, 2003, in response to Mr. Ertel's unilateral scheduling of depositions which the Court found "inconsistent with the Court's stated intention to take testimony of witnesses at the hearing before the Court and not by depositions", and in which the Court also "warned" Mr. Ertel "that if he continues to schedule depositions on the jurisdictional issue, without prior approval of the Court, he will be held in contempt."
6. Mr. Ertel's Motion for a Preliminary Injunction against Citation claiming Citation's "unfair and wrongful" use of RegScan's confidential information, which motion was withdrawn by Mr. Ertel at the time scheduled for hearing thereon, October 10, 2003, Mr. Ertel indicating to the Court and counsel he had no evidence Citation was using confidential information.

The Court believes the history of this matter shows a pattern of activity which the Court cannot help but conclude is designed to harass and needlessly increase the cost of litigation for Defendant Citation.<sup>7</sup> It does not go unnoticed by the Court that Mr. Ertel persists in his abuse of litigation in spite of warnings and admonitions from the Court regarding the propriety of his filings. Sanctions will be imposed in an attempt to prevent further abuse.

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<sup>7</sup> It is worthy of mention that Plaintiff herein, RegScan, Inc., is owned by Mr. Ertel and its cost for attorney's fees is not measured with the same yardstick (or, as is more likely by this time, odometer) as is the cost for Citation.

**ORDER**

AND NOW, this 31<sup>st</sup> day of August, 2004, for the foregoing reasons, the Motion for Sanctions is hereby GRANTED. It appearing an award of the attorney's fees incurred by Citation in defending the Motion to Amend and in pursuing the Motion for Sanctions would be appropriate, the Court will schedule a hearing immediately following trial at which Citation may present evidence in support of such an award.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Nancy Borgess, Court Scheduling Technician  
Allen E. Ertel, Esq.  
J. David Smith, Esq.  
Adam D. Zucker, Esq., One Montgomery Plaza, Suite 702, Norristown, PA 19401  
Bret J. Southard, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson