UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

05-20047-CIV-JORDAN/BROWN

UNIVERSAL COMMUNICATION
SYSTEMS, INC. & MICHAEL J. ZWEBNER,

Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC.,
CABLE NEWS NETWORK, INC., WOLF
BLITZER, JOHN DOE # 1, & JOHN DOE #2,

Defendants.

_____/

MEDIA DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 60 TO VACATE AND/OR MODIFY COURT ORDER OF AUGUST 29, 2005 [D.E. 45]

Defendants Turner Broadcasting System, Inc., Cable News Network, Inc.,[1] and Wolf Blitzer ("collectively, "the Media Defendants"), by and through their undersigned counsel file this their memorandum in opposition to Plaintiffs' Rule 60 Motion [D.E. 48]. The motion lacks merit and should be denied by this Court.

I. Plaintiffs' Rule 60 Motion is Really an Untimely Rule 59 Motion and Should be Denied.

Plaintiffs seek relief from this Court's Order awarding sanctions against their counsel because they believe that the "ratification" theory of defamation supports liability against the Media Defendants and because they believe that their liability, if any, for sanctions should cease as of January 31, 2005. See Plaintiffs' Motion Under Rule 60 to Vacate and/or Modify Court Order of August 29, 2005 ("Plaintiffs' Motion"). In essence, the Plaintiffs and their counsel

[1] The proper party is Cable News Network LP, LLLP.

argue that this Court misapprehended or misapplied the law in making the sanctions award. Plaintiffs' Motion was filed on September 22, 2005, twenty-four days after the Court's Order awarding sanctions to the Media Defendants.

Plaintiffs' Motion – though titled a Rule 60 Motion – is in actuality a Motion under Rule 59 of the Federal Rules of Civil Procedure, which must be filed "no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(b); see also Lucas v. Florida Power & Light Co., 729 F.2d 1300, 1302 (11th Cir.1984) (caption of a motion is not controlling). As such, it has been filed out of time and should be denied.

Rule 60 of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceedings for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of the adverse party;
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> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60. Motions under Rule 60 need only be made within a "reasonable time" after the judgment. However, Plaintiffs' Motion argues none of these bases for relief. Rather, Plaintiffs argue that this Court wrongly decided the sanctions issue.

If the court merely wrongly decides a point of law, that is not "inadvertence, surprise, or excusable neglect," as contemplated by Rule 60. E.g., Silk v. Sandoval, 435 F.2d 1266, 1267-68

(1st Cir. 1971); United States v. Hall, 463 F. Supp. 787, 791 n.1 (W.D. Mo. 1978) (treating and denying purported Rule 60 motion as untimely motion under Rule 59). To be sure, in the Eleventh Circuit, Rule 59 applies to "motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits." Lucas, 729 F.3d at 1302; Osterneck v. E.T. Barwick Industries, 825 F.2d 1521, 1526 (11th Cir.1987). Moreover, a party cannot seek to avoid the time limitation imposed in Rule 59 by filing its motion pursuant to Rule 60. Hall, 463 F. Supp. at 791 n.1. When the moving party claims that the trial court made an error in judgment, then the proper remedy is a motion to alter or amend the judgment pursuant to Rule 59. Id.

But the filing of a Rule 59 motion on September 22, 2005 – the date Plaintiffs filed their mischaracterized Rule 60 Motion – would have been untimely as any such motion would have been due within 10 days of the Court's August 29th Order. The courts lack power to extend the time in which a party may make a Rule 59 motion, and therefore, Plaintiffs' Motion should be denied as untimely. Id.; Fed. R. Civ. P. 6(b) (Rule 6 may not be invoked to extend the time for taking action under Rule 59).

II. Plaintiffs' Rule 60 Motion is Meritless and Should be Denied.

Even if this Court were to consider Plaintiffs' Motion a proper motion under Rule 60, the motion should be denied. Plaintiffs advance two, equally frivolous, grounds in support of their motion. First, Plaintiffs assert this Court improperly decided the sanctions issue because the "ratification" theory of defamation supports their claims. Second, Plaintiffs assert this Court erred in awarding sanctions because Plaintiffs sent a January 31, 2005 letter to counsel for the Media Defendants asking them to step aside while they pursued discovery against non-party

Lycos. Neither of these arguments is a basis for altering this Court's prior award of sanctions and both arguments are, in and of themselves, frivolous.

A. The Ratification Theory of Defamation Does not Support a Claim Against the Media Defendants Here.

Plaintiffs' Motion confirms their complete lack of understanding of the law of defamation. Now that the Court has rejected their theory that the Media Defendants have an affirmative obligation under the law of defamation to take steps to prevent other, unaffiliated individuals from using the screen name "wolfblitzer0" on a website unaffiliated with the Media Defendants, they posit the theory that the Media Defendants have somehow "ratified" these allegedly defamatory postings made by third parties on third party websites. This is, frankly not surprisingly, a mangled and strained invocation of the concept of ratification.

Under the law of defamation, a corporation is liable for the statements of its employees acting within the scope of their employment if the corporation either directed or authorized the allegedly defamatory remarks or later took affirmative steps to ratify the defamation. E.g., Ray v. Amer. Legion Auxiliary, 481 S.E.2d 266, 267-68 (Ct. App. Ga. 1997); See also Edwards v. Kentucky Util. Co., 158 S.W.2d 935, 936-37 (Ky. Ct. App. 1942) ("The master must do something more than merely stand by and let the servant act. Nonintervention is not ratification"). So, for example, in Franklin Life Insurance Company v. Davy, the case cited by Plaintiffs in their Motion, the plaintiffs sought to hold the defendant corporation liable in defamation for the statements of its agent acting within the scope of his employment on the theory that the defendant corporation ratified the agent's defamation by sending letters and placing phone calls to the recipients of the defamatory communication. 753 So. 2d 581, 588 (Fla. 1st DCA 1999). The jury expressly found that the defendant corporation did not ratify the defamatory communication by this conduct. Id.

Here, of course, there is no contention that "wolfblittzer0" is an agent of the Media Defendants. To the contrary, Plaintiffs have repeatedly admitted that the Media Defendants are not in any way affiliated with the anonymous poster. See Plaintiffs' Motion at p. 2 (referring to poster as an "impersonator"); D.E. 8 at ¶¶ 18, 27 (alleging that individual posting under "wolfbittzer0" screen name is not the Media Defendants and failing to allege that this individual is anyone acting under their control or at their direction). There is also no contention that the Media Defendants took affirmative steps (such as the letters and phone calls in Franklin Life) to ratify the unaffiliated poster's comments. For either reason, Plaintiffs' new assertion that the Media Defendants "ratified" the anonymous statements of an unrelated third party is as frivolous as its initial filing and now vigorous pursuit of this case.

The baselessness of Plaintiffs' position is perhaps best illustrated by way of an example. Plaintiffs, in their warped interpretation of the doctrine of ratification, suggest that any time a complete stranger uses a name similar to that of another, the person whose name has been appropriated must take steps to stop the allegedly defamatory communications or face liability for the defamatory content published by a third person over whom the individual has no control. So for example, if someone adopts as his screen name the Chairman of the Federal Reserve Board, Alan Greenspan, and begins to post defamatory statements concerning the undersigned on a website over which Alan Greenspan has no control, under Plaintiffs' theory, Alan Greenspan and the Federal Reserve Board had better take steps to determine the identity of the poster and to prevent further publication lest they be liable to the undersigned in defamation.

This is, of course, an enormously twisted and strained misuse of the tort of defamation. It would eliminate the element of publication from the tort and would impose liability without fault, neither of which find support in the law and both of which would seriously undermine the

constitutional guarantees of the First Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (rejecting notion that liability for defamation can be imposed without fault). "Ratification" simply does not exist on the facts of this case, and Plaintiffs have not, and cannot, allege any such facts.

B. Plaintiffs' January 31, 2005 Letter Does Not Prevent or Cut-off Plaintiffs' Liability for Fees and Costs Incurred by the Media Defendants in Defending this Lawsuit Thereafter.

Plaintiffs also argue that this Court should alter its judgment based upon a January 31, 2005 letter that Plaintiffs claim demonstrates that the legal fees incurred by the Media Defendants were a result of the Media Defendants' failure to mitigate their damages and were therefore "self-inflicted." Plaintiffs' Motion at p. 8. The disingenuousness of Plaintiffs' argument has been more fully analyzed in the Media Defendants' Reply Memorandum in Support of their Rule 7.3.B. Motion for Fees [D.E. 54], which the Media Defendants adopt and incorporate here. Importantly, the Media Defendants did attempt to mitigate their damages by serving upon Plaintiffs a motion for sanctions before engaging in any further defense of the case and by filing a motion to dismiss the frivolous claims. Moreover, the January 31, 2005 simply illustrates that Plaintiffs refused to drop their frivolous action because their real intent in filing and pursuing this action was to obtain discovery from a third party – Lycos – because Plaintiffs had been unsuccessful in obtaining that discovery in litigation directly against the internet service provider. The evidentiary value of this letter is in highlighting for the Court another example of Plaintiffs' attempts to coerce the Media Defendants into exercising control over parties they are not related to by holding the threat of litigation over their heads. This case has been a complete waste of not only the Media Defendants' time and money, but also a waste of this Court's precious resources as well. Plaintiffs' conduct is, without question, frivolous,

improper, harassing, and, indeed, sanctionable. Accordingly, this Court should not alter its sanctions award except to further incorporate this evidence of Plaintiffs' sanctionable conduct.

III. Plaintiffs' Notice of Appeal Does Not Affect this Court's Ability to Consider the Rule 60 Motion.

Though not mentioned in their Rule 60 Motion, Plaintiffs' Opposition to Media Defendants' Verified Motion for Attorney Fees [D.E. 51] suggests that this Court lacks jurisdiction to consider and decide the Rule 60 Motion by virtue of Plaintiffs' filing of a notice of appeal from the Court's August 29, 2005 Order [D.E. 45]. This is incorrect for two reasons. First, that notice of appeal was untimely and improper under the rules governing jurisdiction of the appellate courts and binding precedent in this Circuit. 12 U.S.C. § 1291 (giving the federal appellate courts jurisdiction over "final" orders); Williams v. Ezell, 531 F.2d 1261 (Former 5th Cir. 1976) (holding that order entering award of attorneys' fees is not a final order for purposes of appellate review until the court enters an order as to the amount).[2]

Second, and more importantly, the filing of a notice of appeal does not deprive the court of jurisdiction to entertain and deny a Rule 60 motion. Mahone v. Ray, 326 F.3d 1176 (11th Cir. 2003). The district court may consider on the merits and deny a Rule 60 motion because "the court's action is in furtherance of the appeal." Parks v. U.S. Life & Credit Corp., 677 F.2d 838, 840 (11th Cir. 1982) (quoting Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976)). For the reasons discussed elsewhere in this memorandum, Plaintiffs' Rule 60 Motion is meritless and should be denied, which this Court has jurisdiction to do.

Accordingly, for the foregoing reasons, the Court should deny Plaintiffs' Rule 60 Motion.

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[2] See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)(en banc)(Eleventh Circuit adopts as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 7th day of October, 2005, a true and correct copy of the foregoing was furnished by U.S. mail to John H. Faro, Esq., Attorney for Plaintiffs, Faro & Associates, 44 West Flagler Street, Suite 1100, Miami, Florida 33130-1808.

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