

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS, et al.,

Plaintiffs,

vs.

Civil Action No. 1:06cv-01207-JDB-egb

WALTER MCGILL d/b/a CREATION
SEVENTH DAY ADVENTIST CHURCH, et al.,

Defendant.

OBJECTION TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(C), Defendant, Walter McGill, individually and through counsel,¹ objects to the Magistrate Judge's Order (D.E. 160), on the following grounds:

I. BACKGROUND

This Court held the Defendant in contempt in January 2010 for, among other things, failing to remove signs subject to the Court's previously-entered injunction. (D.E. 112). In February 2010,

¹ The undersigned filed a motion to withdraw on April 6, 2010, after Plaintiffs' second motion for sanctions. (D.E. 119). After a hearing, Magistrate Judge Bryant denied the motion on July 16, 2010. The undersigned filed a timely objection to the order on July 30, 2010. (D.E. 120). The matter is currently pending before Judge Breen. Because the Defendant has discharged the undersigned, but the Court has not granted his motion to withdraw, the Tennessee Rules of Professional Conduct require the undersigned to represent the Defendant without compensation until such time as the Court grants the motion or the Defendant orders the undersigned not to take action for him. The Defendant has not communicated such an order to the undersigned but has requested that his objections to the Magistrate's Report be included. Thus, given the status of the representation, the Defendant's objections are attached as Exhibit A and submitted to the Court in his individual capacity. The undersigned makes no representations to the Court regarding the objections contained in Exhibit A.

Plaintiffs removed the signs and infringing materials located in Guys, Tennessee. (D.E. 148, p. 3). Lucan Chartier repainted the signs in early March 2010. (D.E. 148, p. 3). Plaintiffs filed a motion later that month requesting sanctions and a show cause hearing requiring the Defendant to appear and show cause why he should not be held in contempt of the Court's orders for failing to cooperate in discovery. (D.E. 117). Plaintiffs also filed a companion motion against Mr. Chartier for his conduct in repainting the signs. (D.E. 116). The motions were referred to the Magistrate Judge for a report and recommendation. (D.E. 118). The Magistrate Judge issued a Notice of Setting for the motions, but no order was entered requiring the Defendant to appear. (D.E. 128). The Magistrate Judge held a hearing on May 25, 2010, and submitted his Report and Recommendation to this Court on June 24, 2010. (D.E. 136). This Court took no action on the Magistrate's June 2010 Report.

In early October 2010, Plaintiffs again removed the signs from the Guys, Tennessee location. (D.E. 148, p. 4). Chartier re-painted the signs shortly thereafter, and Plaintiffs notified the court of these additional violations and moved for a show cause hearing specifically requiring Mr. Chartier to appear and show cause why he should not be held in contempt for wilfully violating court orders. (D.E. 148). Plaintiffs' motion did not seek sanctions against the Defendant. (D.E. 148).

The motion was referred to the Magistrate Judge for a "determination and/or report and recommendation and for a hearing and order and/or report and recommendation as to sanctions, if he makes a finding/recommendation that they are warranted." (D.E. 149). The Magistrate issued a Notice of Setting in November 2010, which scheduled a hearing on Plaintiffs' motion for December 16, 2010, but made no mention of the Defendant, and no order was issued requiring him to appear.

At the hearing on December 16, 2010, Mr. Chartier again testified about his actions.

Although he admitted having some contact with the Defendant, on cross-examination by the Defendant's attorney, he specifically denied that the Defendant directed, coerced, or encouraged him to repaint the signs.

The Magistrate Judge issued a Report and Recommendation on December 23, 2010, in which he recommended imposing a \$500 fine and 30 days in jail on Mr. Chartier. The Magistrate Judge also, *sua sponte*, recommended a \$500 fine and 30 days in jail for the Defendant, and he ordered that the Defendant be required to reimburse "Plaintiff [sic] for its attorneys' fees associated with the filing of this current motion and appearing in Court on December 16, 2010." (D.E. 160, p. 5). Defendant timely filed this objection.²

II. LAW AND ARGUMENT

1. The Defendant's Conduct was Not Before the Court

Plaintiffs' most recent motion asked for an "order setting an evidentiary show cause hearing requiring Mr. Chartier to appear and show cause as to why he should not be held in contempt of Court for again violating the terms of the orders issued by this Court." (D.E. 148, p. 5). It did not allege contempt by the Defendant. The matter was set for a hearing in front of Magistrate Judge Bryant by notice. Defendant received no notice that he might be held in contempt at the hearing, and

² In an effort to stem any possible confusion or disagreement, Defendant states that he calculated the deadline for filing an objection as follows: Defendant was served via ECF on Dec. 23, 2010. Title 28 U.S.C. § 636(b)(1)(C) requires that the Magistrate's Report be "served" thus triggering the three-day extension under FRCP 6(d). The seventeen-day period expired on Jan. 9, 2011, a Sunday, which pushed the deadline to Monday, according to FRCP 6(a)(1)(C). The Clerk's office was closed on Monday, Jan. 10, 2011, due to inclement weather. Because the period to respond to the Report is stated in days, FRCP 6(a)(3)(A) provides that when the Clerk's office is inaccessible, the time is extended to the first accessible day, which is today, Tuesday, Jan. 11, 2011.

no order was issued requiring the Defendant's attendance.

Title 28 U.S.C. § 636(e) governs a magistrate judge's authority regarding contempts outside the court's presence but related to proceedings before the magistrate judge. *United States v. Ivie*, 2005 U.S. Dist. LEXIS 13592 at *4 - *5 (W.D. Tenn. 2005) (attached). Where a magistrate judge believes that a person has committed contemptible behavior, the magistrate judge shall:

forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified.

28 U.S.C. 636(e)(6)(B)(iii); *Ivie*, 2005 U.S. Dist. LEXIS 13592 at *4 - *5.

Here, the Magistrate's Report and Recommendation contains no facts certified to the district judge and no order has been issued requiring the Defendant to appear for a show cause hearing. If the Defendant is to be held in contempt for conduct other than that already found by this Court, the facts supporting such conduct must be certified to the district judge and the Court must issue an order requiring him to appear and show cause why he should not be held in contempt. The Magistrate's Report is, therefore, contrary to law and should be rejected.

2. The Proposed Sanctions are Inappropriate

In the alternative, the sanctions recommended by the Magistrate Judge are inappropriate. Contempt proceedings are either civil or criminal in nature. "Civil contempt is remedial and intended 'to benefit the complainant either by coercing the defendant to comply with the Court's order via a conditional fine or sentence or by compensating the complainant for any injury caused by the defendant's disobedience.' The conditional nature of a sanction renders an action one for civil contempt." *United States v. Dye*, 2009 U.S. Dist. LEXIS 73173 at *10 - *11 (W.D. Tenn. 2009)

(attached).

Here, the hearing was conducted in a civil manner, with the Plaintiffs presenting proof of the alleged violations, but Magistrate Judge Bryant's Report recommended criminal sanctions. The nature of the proposed sanctions is clear from the Report's language that it is time to hold Mr. Chartier "accountable" for his "contemptible acts," and that the Court "can no longer ignore the continuing and contemptible violations of the District Court Orders by both Defendant McGill and Mr. Chartier." Additionally, the sanctions against the Defendant—a \$500 fine, 30 days in jail, and assessment of the Plaintiffs' costs for the motion and hearing—are not coercive or conditional, but punitive. The Report provides no suggestion that the Defendant can avoid the punishment by taking or refraining from some action.

If the Magistrate Judge intended to impose and/or recommend criminal contempt sanctions for conduct that occurred outside his presence, the proceedings would have had to comply with Rule 42(b) of the Federal Rules of Criminal Procedure. *In re Smothers*, 322 F.3d 438, 441 (6th Cir. 2003). Criminal contempt also normally is prosecuted by the United States and not private party. The proposed sanctions, then, are inappropriate and should be rejected.

3. The Proof was Inadequate

Finally, assuming that the Defendant was properly on notice of the charges against him and subject to civil or criminal sanctions, the proof at the hearing was inadequate to find contempt against the Defendant. If characterized as a civil contempt hearing, Plaintiffs bore the burden of proving by clear and convincing evidence that the Defendant violated the Court's order and was involved in repainting the sign. *Dye*, 2009 U.S. Dist. LEXIS 73173 at *11.

The proof adduced at the trial did not reach this burden as to the Defendant. The only

evidence Plaintiffs' introduced was a picture of the sign and Mr. Chartier's testimony. While Mr. Chartier admitted to speaking with the Defendant after the fact, he further testified on cross-examination that the Defendant had not coerced, directed, or induced him to take the actions he took. Assuming Magistrate Judge Bryant disbelieved Mr. Chartier, that would mean that the Plaintiffs presented no proof of the Defendant's involvement. This fails to satisfy Plaintiffs' burden of proof, either under the clear and convincing standard for civil contempt, or the beyond a reasonable doubt standard for criminal contempt.

III. CONCLUSION

Plaintiffs sought sanctions against Mr. Chartier for his continued conduct in violating this Court's orders. The motion was set for a hearing before the Magistrate Judge. Mr Chartier appeared and testified about his actions, but he made clear that he was not acting at the Defendant's behest, direction, or invitation. Yet, despite a lack of notice that he was facing contempt charges, a lack of evidence that he was involved in the contemptible conduct at issue, and the absence of the protections required by the Federal Rules of Criminal Procedure, the Magistrate Judge found the Defendant in criminal contempt and recommended a punitive fine, jail time, and that Defendant be taxed the costs for a hearing he simply attended through counsel. For these reasons, the Magistrate's Report is contrary to law and should be rejected. The Defendant cannot be held responsible for Mr. Chartier's actions without an order requiring him to appear before the district judge and show cause why he should not be held in contempt.

Respectfully submitted,

SPRAGINS, BARNETT & COBB, PLC

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CERTIFICATE OF SERVICE

I, Charles L. Holliday, hereby certify that on January 11, 2011 I electronically filed the foregoing with the Clerk of the Court for the Western District of Tennessee via the Electronic Filing System with notice by e-mail to Plaintiffs' attorneys, Emily C. Taube and Joel Galanter, and separate service by e-mail to the Defendant, Walter McGill at sda_trademark_lawsuit@yahoo.com.

s/ Charles L. Holliday
CHARLES L. HOLLIDAY