

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

JO ANN HOWARD AND ASSOCIATES, P.C.,)
SPECIAL DEPUTY RECEIVER OF LINCOLN)
MEMORIAL LIFE INSURANCE COMPANY,)
MEMORIAL SERVICE LIFE INSURANCE)
COMPANY, AND NATIONAL)
PREARRANGED SERVICES, INC., ET AL.,)

Plaintiffs,)

v.)

J. DOUGLAS CASSITY; RANDALL K.)
SUTTON; BRENT D. CASSITY; J. TYLER)
CASSITY; RHONDA L. CASSITY; ET AL.,)

Defendants.)

Case No. 09-CV-1252-ERW

**DEFENDANT TYLER CASSITY’S AMENDED MOTION TO SET ASIDE
OR VACATE THE DISMISSAL OF DEFENDANT J. DOUGLAS CASSITY;
TYLER CASSITY’S OPPOSITION TO J. DOUGLAS CASSITY’S MOTION
TO DISMISS WITH PREJUDICE; AND TYLER CASSITY’S JOINDER IN
DOUG CASSITY’S REQUEST TO VACATE DISMISSAL**

Defendant Tyler Cassity (“Tyler”) submits this Motion to Set Aside or Vacate the Dismissal of Defendant J. Douglas Cassity (“Doug”), entered by the Court on July 22, 2014. Tyler also opposes Doug’s Motion to Dismiss with Prejudice, but joins in Doug’s Request to Vacate the Dismissal.

I. INTRODUCTION

Tyler brings this Motion to set aside this Court’s order granting the motion filed by the Plaintiffs to dismiss, without prejudice, Doug from this action, a dismissal which was entered the day after the motion was filed without any of the defendants’ having had an opportunity to oppose it. Indeed, even Doug has

requested that this Court set aside his own dismissal, recognizing the implicit and inherent unfairness of the Plaintiffs' actions.

Doug has been a defendant in this action for more than five years, during which time he participated in a number of depositions, filed and/or opposed various motions, and otherwise has fully engaged in the litigation process. The Plaintiffs now belatedly asks this Court to dismiss Doug from the action on the specious theory that the dismissal will save money and preserve resources, and no relief could be had against Doug in any event. Both of these grounds were well known to the Plaintiffs before they even filed the instant action. The grounds were certainly known to them at all points throughout the litigation, including, but not limited to, when the restitution order was entered against Doug in November 2013. Yet, without any reason or justification, the Plaintiffs failed to take any action to dismiss Doug until now.

The Plaintiffs' motion to dismiss Doug should have been denied because the Plaintiffs have failed to meet their burden of showing that the dismissal is proper or necessary, and the dismissal is unfairly prejudicial to the remaining defendants.

II. SUMMARY OF PERTINENT FACTS

On or about July 21, 2014, the Plaintiffs filed a Motion for Dismissal Without Prejudice of Complaint Against Defendant J. Douglas Cassity pursuant to Fed. R. Civ. P. 41(a)(2) [ECF Docket # 1617]. The Plaintiffs' perfunctory motion sought to dismiss Doug on the following grounds: (1) Doug will not be able to financially pay an additional judgment; (2) challenges related to his access to case information will increase through the remainder of discovery and trial; (3) dismissal will conserve, rather than waste, judicial resources by avoiding any additional rulings or motion practice that may be prompted by Doug's continued presence in the lawsuit; (4) no prejudice will be suffered by Doug or by any of the

remaining Defendants as a result of Doug's dismissal from this lawsuit; and (5) Plaintiffs do not seek voluntary dismissal of their claims against Doug Cassity to avoid an adverse decision or to seek a more favorable forum.

The very next day, July 22, 2014, without giving an opportunity for any party to object or oppose Plaintiffs' motion, this Court granted Plaintiffs' Motion [ECF Docket # 1618].

On or about July 28, 2014, Doug filed a motion to modify the court's order to dismiss Doug with prejudice and/or to reinstate Doug as a defendant [ECF Docket # 1621]. That motion is currently pending before this Court.¹

III. PLAINTIFFS' MOTION SHOULD HAVE BEEN DENIED BECAUSE THEY FAILED TO DEMONSTRATE THE NEED FOR DISMISSAL.

A voluntary dismissal without prejudice under Fed. R. Civ. P. 41(a)(2) will not be allowed unless no other party will be prejudiced thereby. Wakefield v. Northern Telecom, Inc., 769 F.2d 109 (2nd Cir. 1994). In determining whether a defendant will suffer "plain legal prejudice," the court looks to the following factors: "[1] the plaintiff's diligence in bringing the motion; [2] any 'undue vexatiousness' on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss." D'Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2nd Cir. 2006).

The Plaintiffs have failed to satisfy any of these factors. Accordingly, their motion to dismiss should have been denied.

¹ As a matter of efficiency and judicial economy, for the reasons set forth herein, Tyler joins in Doug's motion to reinstate Doug in this action and opposes Doug's alternative motion to dismiss him, with prejudice, from this action.

A. The Plaintiffs Unreasonably Delayed In Bringing The Motion To Dismiss.

As an initial matter, the Plaintiffs waited almost five years to bring the motion to dismiss Doug. This unreasonable delay is ground in and of itself to deny the motion.

At the time the Plaintiffs filed their motion, the instant action had been pending nearly five years. The Plaintiffs gloss over this delay and do not provide any explanation whatsoever as to why they waited until now to seek to dismiss Doug. The closest that the Plaintiffs come to addressing this critical factor is by referencing a restitution order entered against Doug after the filing of the Third Amended Complaint. Specifically, by the restitution order in the parallel criminal case, Doug was ordered to pay \$435,000 in restitution, with the Special Deputy Receiver named as the primary victim to receive restitution payments. The Plaintiffs contend that, because it is unlikely Doug will be able to satisfy even the restitution amount, and any recovery in this action will be duplicative of the restitution, the costs of keeping him in the action is outweighed by any benefit.

This argument fails for a number of reasons.

First, the Plaintiffs fail to mention that the restitution order was entered on November 14, 2013 [Exhibit A to ECF Docket # 1617]. The Plaintiffs admittedly knew about the entry of the order at the time it was entered. Yet, the Plaintiffs provide no explanation as to why they waited an additional *eight months* before filing any motion to dismiss Doug. In point of fact, during that time, there have been multiple dozens of depositions taken, expert disclosures and reports exchanged, expert depositions taken, and various motion practice, in all of which Doug has participated. Fact discovery is now essentially complete. Thus, any complaint about “costs” to the Plaintiffs in having Doug participating in this action is disingenuous, at best.

Second, the restitution order is *not* duplicative of any damages the Plaintiffs seek in this action. As the Plaintiffs admit in their Opposition to Doug’s Motion to Modify Order, as a matter of law, Doug’s criminal restitution judgment is not related to civil damages. Cf. In re Palermo, No. BK07-80099-TJM, 2010 WL 1428291, at *4 (Bankr. D. Neb. Feb. 5, 2010) (“[S]tatutory civil penalties and damages are separate and distinct from the criminal penalties that were imposed.”) [ECF Docket # 1626]. Indeed, the Plaintiffs are seeking millions of dollars in damages against Doug for his wrongful conduct in connection with the civil claims asserted against him. As such, the restitution amount in no way affects the Plaintiffs’ civil damages against Doug.²

Third, Doug’s financial ability to satisfy a judgment against him is no different than any other individual defendant’s ability to satisfy a judgment against him/her. If financial ability is the criterion determinative of whether a defendant should remain a defendant, then all of the individual defendants should be dismissed from the action. By way of example, although the Plaintiffs have no evidence of Tyler’s actual knowledge or participation in any conduct complained of, and Tyler and his company, Hollywood Forever, Inc., are the only defendants who have fully repaid any and all debt owed to any Receiver Companies, the Plaintiffs seek nearly \$600 million in damages against Tyler. Should the Plaintiffs ever be able to prove any claims against Tyler, he has no way to satisfy even a fraction of that amount. Notably, however, they have not dismissed Tyler.

None of the reasons given by the Plaintiffs for their delay in bringing the motion holds water.

² Notably, the claims asserted against Doug in this action are not the same as the claims asserted against Doug in the criminal action. Doug’s rights and interests in this action are wholly separate and independent of his rights and interests in the criminal action.

B. The Plaintiffs' Dismissal Of Doug From The Action Is Mere Game-Playing.

As set forth above, the reason the Plaintiffs seek to dismiss Doug has nothing to do with his financial ability to satisfy a judgment; it is simply tactical.

The Plaintiffs are seeking to dismiss the only defendant who all of the parties, other than Doug, agree is the mastermind behind the entire scheme and conspiracy alleged in the complaint, who profited the most from such schemes, and who, along with the help of his puppets, Howard Wittner, Randall Sutton, and David Wulf, single-handedly caused the damages being sought by the Plaintiffs in this action. They are seeking to dismiss the only defendant who has the full history and narrative of the activities at issue, and has the information and evidence relating to the Plaintiffs' predicate allegations that form the basis of their claims against the remaining defendants.

In doing so, they seek to obtain a strategic advantage against the remaining defendants. In short, the Plaintiffs seek to avoid having at trial a defendant who is actually culpable and responsible for the conduct complained of so that they can shift focus and blame to the remaining defendants who, in large part, were victims themselves of Doug's scheme and conduct.

The Plaintiffs' strategy is made evident by the fact that the main actors in the scheme and conspiracy have all been voluntarily dismissed from the case, *e.g.*, Doug, Howard Wittner, David Wulf. Meanwhile, the Plaintiffs vehemently oppose the dismissal of other defendants even though every reason given for Doug's dismissal applies with equal force to the remaining defendants.

The Plaintiffs' improper and vexatious tactics are amply demonstrated by the Plaintiffs' opposition to the Motion filed by Brent Cassity ("Brent") to dismiss him from the action.

In that motion, Brent asserts the same or substantially-same factors set forth by the Plaintiffs for dismissal of Doug as the grounds for why Brent should likewise be dismissed from the action. Incredibly, in direct contradiction to the reasons given for dismissing Doug, the Plaintiffs oppose Brent's dismissal on the grounds that:

- The challenges of providing Brent with access to case information are not the Plaintiffs' problem and do *not* constitute grounds for dismissal of the defendant. [ECF Docket # 1627, at 3-4.]
- The difficulties and costs to Brent in participating in the litigation are not the Plaintiffs' problem and do *not* constitute grounds for dismissal of the defendant. [ECF Docket # 1627, at 2-3.]
- The civil case is not needlessly duplicative of and a waste of judicial resources because civil damages are *not* duplicative of the criminal restitution award. [ECF Docket # 1627, at 4.]
- The Plaintiffs are "entitled to proceed to trial seeking these [civil] damages." [ECF Docket # 1627, at 4.]

There is no discernible difference between the reasons given by the Plaintiffs for dismissal of Doug from the action and the reasons given by Brent for why he should be dismissed. The only difference is that Doug is a bigger problem for the Plaintiffs in putting on and proving their claims against the remaining defendants because, as noted by Doug in his motion, he is the only person who can refute the Plaintiffs' allegations in the complaint.

As evident by the Plaintiffs' own papers, the reason for their dismissal of Doug is gamesmanship, pure and simple, to prejudice and harm the remaining defendants. It is not a legitimate basis for dismissing a defendant as important as Doug is to this action. Both Doug and Brent must remain defendants in this action.

C. Doug Already Has Expended Considerable Money And Time To Defend This Action.

The Court must also look to the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial. This factor also weights in favor of denying the motion to dismiss.

Since the filing of the Complaint, Doug has fully and meaningfully participated in this proceeding, engaging in motion practice, attending numerous conferences and hearings, and attending dozens of percipient witness depositions. Doug has spent five years defending himself. After the conclusion of fact discovery, and on the eve of the most important expert discovery, the Plaintiffs dismissed Doug on the theory that the "dismissal will conserve, rather than waste, judicial resources by avoiding any additional rulings or motion practice that may be prompted by [Doug's] continued presence in this lawsuit. Dismissing Cassity will simplify matters before the Court and the presence of fewer defendants will streamline the case for both pretrial and trial purposes" [ECF Docket # 1617].

The Plaintiffs also argue that Doug "will benefit from not having to expend time, costs, and resources to prepare for trial...."

Of course, by this reasoning, all defendants can and should be dismissed from the action.

The Plaintiffs have not provided any explanation or basis for why dismissing *Doug*, as opposed to dismissing any other individual defendant, would accomplish such objectives. Moreover, other than such perfunctory and conclusory statements, the Plaintiffs have not set forth a single factual basis for their theory. What additional motions will Doug file or is anticipated to file? How much money or resources is expected to be expended by virtue of Doug's presence – versus any other defendant's presence – in the case?

The Plaintiffs' reasons ring especially hollow in light of their conduct in this case.

Doug has been incarcerated since January 2014. In April 2014, the Plaintiffs vehemently opposed Doug's Motion to Dismiss or Sever Trial [ECF Docket # 1461]. The Plaintiffs argued, and the Court agreed, that the Plaintiffs' counsel and the Department of Justice have made good-faith efforts to facilitate Doug's ability to participate in the depositions and other proceedings and thus there was no reason to dismiss Doug [EFC Docket # 1501]. Four months later, when all fact discovery has concluded, but before expert discovery as to damages can commence, the Plaintiffs are singing a different tune. The Plaintiffs now believe – without giving any reason therefor – that Doug should be dismissed so as to save cost and time granting him access to case information.

Having Doug dismissed from the case in no way will streamline the case, the allegations, or the issues to be tried. The only thing that his dismissal will accomplish is that the Plaintiffs will not have Doug there to defend himself against the allegations they intend to make regarding the underlying scheme and conspiracy. Without anyone there to dispute the predicate and underlying allegations that comprise the basis of the RICO and other claims against the remaining defendants, the Plaintiffs seek to save themselves the hassle and trouble of proving their case. They can simply assert as “fact” the matter of Doug's wrongful conduct, and impute to the remaining defendants and seek to impose liability to them merely from the taint caused by Doug's wrongdoing.

This is the true reason behind the Plaintiffs' dismissal of Doug.

D. The Remaining Defendants Will Be Prejudiced By The Dismissal.

A dismissal under Rule 41(a)(2) cannot be permitted if any other party will be prejudiced by the dismissal. Versa Prods., Inc. v. Home Depot, USA, Inc., 387

F.3d 1325, 1327 (11th Cir. 2004) (quoting LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976).

For the reasons set forth above, the remaining defendants, including Tyler, will be prejudiced by Doug's dismissal.

The effect of a Rule 41(a)(2) voluntary dismissal without prejudice is as if suit against Doug never been brought. Curtis v. United Transportation Union, 648 F.2d 492, 495 (8th Cir. 1981). Because the Plaintiffs named Doug as a co-defendant, Tyler did not assert any counterclaims against Doug for, among other things, equitable indemnity, fraud, misrepresentation, and did not file any joinder motions to include Doug as an indispensable party.³ Having filed the motion to dismiss at this late date, Tyler has been robbed of the opportunity to have Doug, the mastermind behind all of the actions and real perpetrator of the conduct, named as a critical defendant in this case. As Doug argued in his Motion to Modify the Court Order, he is the only defendant that is able to provide a narrative as to the events that occurred. Without Doug, Tyler and the other defendants will not be able to fully defend their positions.

³ Should the Court deny this Motion, Tyler intends to file an action for, among other actions, an equitable indemnity and contribution action against Doug. SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP 128 S.W.3d 534 (Mo.App.2003) (When a person, who without any fault on his part is exposed to liability and compelled to pay damages...that person has a right of action against the active tortfeasor on the theory of an implied contract of indemnity.) Such legal actions will require similar fact-finding procedures, discovery, witness testimonies and will increase the burden on the court system. To avoid such multiplicity of action, the Court should grant the Motion.

E. The Plaintiffs' Reasons For Dismissing Doug Are Without Merit.

The Plaintiffs set forth five alleged grounds for their belated motion to dismiss Doug from this action, as follows: (1) Doug will not be able to financially pay an additional judgment; (2) challenges related to his access to case information will increase through the remainder of discovery and trial; (3) dismissal will conserve, rather than waste, judicial resources by avoiding any additional rulings or motion practice that may be prompted by Doug's continued presence in the lawsuit; (4) no prejudice will be suffered by Doug or by any of the remaining Defendants as a result of Doug's dismissal from this lawsuit; and (5) Plaintiffs do not seek voluntary dismissal of their claims against Doug Cassity to avoid an adverse decision or to seek a more favorable forum.

As set forth above, none of these reasons provide a basis for dismissing Doug. To the contrary, they establish that Doug should *not* be dismissed from this action as it will cause grave and substantial prejudice to the remaining defendants.

F. The Motion Should Be Granted Because Defendants Did Not Have An Opportunity To Oppose The Plaintiff's Motion To Dismiss Doug.

Merely one day subsequent to the filing of Plaintiffs' Motion, this Court granted the Motion to Dismiss. Fed. R. Civ. P. 27 allows an opposing party to file a response within 10 days after service of the motion. In light of the Court's immediate ruling on the Motion, Tyler Cassity did not have an opportunity to oppose Plaintiffs' Motion to Dismiss. Based on all the arguments made herein, in fairness, the defendants should have been given the chance to oppose Plaintiffs' Motion. In Plaintiffs' opposition to Doug's Motion to Modify Order, Plaintiffs argue that "none of the defendants have complained of the dismissal" [ECF Docket # 1626]. Plaintiffs are fully aware that the other defendants did not have the

opportunity to oppose their Motion. As a matter of fairness, the lack of opportunity to oppose this Motion alone warrants this Court to vacate or set aside the dismissal of Doug Cassity.

IV. THE COURT SHOULD ORDER TRANSPORT OF DOUG FOR TRIAL.

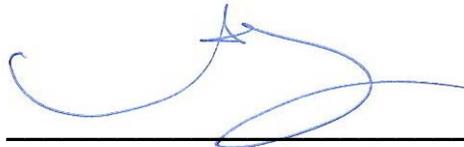
For the reasons set forth herein, should the Court deny the Order and permit Doug to remain dismissed from this action as a defendant, Tyler requests, at a minimum, that the Court issue a Writ requiring that Doug be transported to trial as a material witness for Defendants.

V. CONCLUSION

For the foregoing reasons, Tyler Cassity respectfully requests the Court to grant his Motion to Set Aside or Vacate the Dismissal of Doug Cassity.

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2014, the foregoing **DEFENDANT TYLER CASSITY'S AMENDED MOTION TO SET ASIDE OR VACATE THE DISMISSAL OF DEFENDANT J. DOUGLAS CASSITY; TYLER CASSITY'S OPPOSITION TO J. DOUGLAS CASSITY'S MOTION TO DISMISS WITH PREJUDICE; AND TYLER CASSITY'S JOINDER IN DOUG CASSITY'S REQUEST TO VACATE DISMISSAL** was served via the Court's electronic service upon the following:

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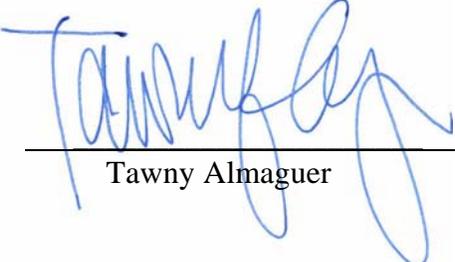
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