

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GMAC BANK, a Utah Industrial Bank	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
	:	
HTFC CORPORATION,	:	
	:	
Defendant.	:	No. 06-5291

**RESPONSE OF GMAC BANK TO JOSEPH R. ZICCARDI, ESQUIRE’S
MOTION FOR RECONSIDERATION OF THIS COURT’S
FEBRUARY 29, 2008 MEMORANDUM OPINION**

I. INTRODUCTION

Despite ample notice by this Court that the conduct of Joseph R. Ziccardi, Esquire (“Ziccardi”) might warrant revocation of his pro hac vice admission, referral to the disciplinary board, and a “financial penalty”, Ziccardi claims he never had “any indication that this Court was considering imposing sanctions upon him.”¹ Yet this Court provided Ziccardi with two weeks advance notice of a hearing, an opportunity to present testimony, and an opportunity to be represented by counsel.

At the December 21, 2007 hearing, Ziccardi chose not to be separately represented by counsel, and chose not to offer any testimony or evidence on behalf of himself or HTFC Corporation (“HTFC”), even though all of the witnesses who might have testified were present in the courtroom. At the conclusion of the December 21, 2007 hearing, the Court provided another opportunity for supplemental submissions by all parties, and HTFC submitted an 18 page

¹ Memorandum of Joseph R. Ziccardi, Esquire (“Ziccardi Memo”) at p. 8.

brief of which 14 pages were devoted to why Ziccardi should not be sanctioned. Now, after this Court has imposed sanctions, Ziccardi claims he was denied procedural due process when, in fact, this Court provided Ziccardi with the precise notice he now claims was absent and multiple opportunities to be heard. Ziccardi's Motion for Reconsideration is fatally flawed as it does not seek reconsideration, but seeks to introduce facts through Affidavits that Ziccardi and HTFC chose not to present at the hearing and therefore, are not subject to cross-examination.² Moreover, even if considered, the Affidavits do not change the conduct of Aaron Wider ("Wider") and Ziccardi that was observed by this Court in hours of videotaped deposition testimony.

II. STATEMENT OF THE FACTS

On November 29, 2007, GMAC Bank ("GMAC") filed a Motion to Compel the Deposition of Aaron Wider. This Court scheduled a telephone hearing on December 7, 2007 at which time this Court clearly stated the serious nature of the matter:

"Now, this is a serious matter and I will tell you that I've been around civil proceedings for 30 years, both as a lawyer and as a judge. I've never seen anything like this. And I haven't seen the video. I understand it's a video deposition which I am anxious to see. We can disagree and I have been in many contentious situations, but the type of exchanges that the witness engaged in with counsel were certainly new to me.

So I don't want to take this matter over the telephone. We're going to set a hearing here in person to give the defendant and Mr. Wider, if he wishes to, an opportunity to explain what went on here. As I said, these are extremely serious matters. There are thousands of depositions that take place every day in our system of justice. If they were to proceed along the lines that this deposition has proceeded on, frankly I think the system would collapse."

² Ziccardi states his "Affidavit contains evidence which was unavailable as of the December 21, 2007 hearing, given that Ziccardi was counsel of record for defendant." Ziccardi Memo p. 4, footnote 6. But Ziccardi is still counsel of record. Moreover, if Ziccardi believed there was a conflict in representing HTFC and himself, he should have so advised this Court at or prior to the December 21, 2007 hearing.

Transcript of December 7, 2007 hearing at page 6.

This Court then set a hearing for December 21, 2007, a full two weeks later, and clearly placed Ziccardi on notice that he might be sanctioned as a result of his conduct. Specifically, the Court stated:

“There is one matter of further concern here in the case, Mr. Ziccardi, that really involves the conduct of counsel, and I’m not entirely sure how we should proceed in this matter. That is, under the Code of Professional Conduct, counsel has certain obligations as an officer of the Court which have to be harmonized with counsel’s obligations to provide zealous representations.

But in this particular case, once a witness deponent conducts himself or herself in the manner which is designating to obstruct the proceedings, I don’t think counsel can just sit idly by and do nothing. I would equate it to a situation where a witness is providing false and perjurious testimony and counsel is aware of it, and under the Rules it requires that counsel discuss the matter with his client and if the client refuses to correct and remedy the testimony, then counsel has an obligation to correct it and/or withdraw from the proceedings. And I think that at least at first glance, Mr. Ziccardi, I think your conduct implicates the Rules of Professional Conduct 3.4, 3.5 and 8.4. And it is with regret that I must conclude that. It doesn’t mean you have violated, but they have been implicated and I think they need to be explored.

I will issue a rule to show cause why your pro hoc vice admission should not be revoked or whether this matter should be referred to a disciplinary board, and whether or not financial penalty should also be imposed, and that rule will also be returnable on the 21st day of December at 9:00 a.m.”

Id. at page 7-8. [Emphasis Added.]

Finally, this Court clearly advised that the parties, and their counsel, would have an opportunity to present evidence at the hearing:

“Parties, witnesses, counsel obviously will have an opportunity to present evidence and to be represented by counsel if so wished at the hearing...and we will explore that and give the parties an opportunity then to present a contrary point of view at a full hearing on the merits.”

Id. at page 8. [Emphasis Added.]

Present in the courtroom at the hearing on December 21, 2007, were: (1) Ziccardi, (2) Wider, (3) Raymond Vuolo, Esquire, and (4) Wider's physician, Oscar Calderon, M.D. Each had an opportunity to testify and be cross-examined, but HTFC, Wider and Ziccardi chose not to call any witnesses. Neither Wider nor Ziccardi apologized or offered any explanation for their conduct. Instead, Ziccardi presented a disingenuous argument that showed little remorse and aggravated, rather than mitigated, the severity of Wider's and Ziccardi's conduct. Now, unhappy with the result of its ill-advised strategy, Ziccardi seeks a "do-over" by offering new evidence and Affidavits without the opportunity for cross-examination.

Even if the Affidavits were considered by this Court, they do little to advance Ziccardi's arguments. While the video record may be unclear as to whether it was Ziccardi and/or his co-counsel, Raymond Vuolo³ who "snickered", both Ziccardi and Vuolo acted as a team in representing Wider throughout his depositions. Moreover, it was Ziccardi who instructed Wider not to answer the clearly proper questions about HTFC's Counterclaim that preceded the "snickering":

MR. BODZIN:

Q. Now, during the time period from let's say the beginning of 2006 through March of 2007, what other institutions do you have correspondent agreements with?

THE WITNESS:

A. Many, it's on as-need to know basis and you don't need to know.

Q. You need to tell me that.

A. No, I don't.

³ Mr. Vuolo is not counsel of record and was not admitted to represent either HTFC or Wider in this matter.

Q. You need to tell me.

A. Bob, your company --

Q. You need to tell me.

A. Your representation of your company willfully went out and tried to fuck up my life. You don't need to know anything about this company.

MR. ZICCARDI: Let's take a break.

MR. BODZIN: We can take a break but we're not going to do this over and over again. If Mr. Wider simply does not want to answer questions or answers questions in this manner we're not going to have a conference every time it happens.

Hopefully, you will be able to speak with him and persuade him that's not an appropriate response to my questions.

THE WITNESS: We're having a conference tomorrow, Bob. Why don't you get a Motion from the Judge because he's going to give you an ass licking.

MR. ZICCARDI: Let's go.

THE WITNESS: Don't ask questions that have nothing to do with this.

THE VIDEOGRAPHER: The time is 11:31 a.m. and we're off the record.

(Short recess).

THE VIDEOGRAPHER: The time is now 11:35 a.m. and we're back on the record.

MR. BODZIN: Mr. Wider, what other banks did HTFC have correspondent agreements with in the time period of January 2006 through March of 2007?

MR. ZICCARDI: I'm going to object to that just on the basis, one, that I don't believe it's relevant. Two, I think it

seeks the confidentiality proprietary business information of HTFC which HTFC is not going to disclose.

MR. BODZIN: So you're instructing your witness not to answer the question?

MR. ZICCARDI: He is not going to answer the question.

MR. BODZIN: If the claim of HTFC is that during the time period of January 2006 through March of 2007 it was unable to sell certain loans to Deutsche Bank and Nomura Securities, it is certainly highly relevant and discoverable as to whether or not HTFC had other options for selling loans.

If you are instructing the witness not to answer the question; then, we will simply ask the Court to preclude HTFC from seeking damages with respect to that claim.

So you may want to reconsider that.

MR. ZICCARDI: You can file whatever Motion you want to file. The reality, though, is that the confidential information of HTFC following the last deposition there were a number of items that had gotten out and for some reason are now in the press --

November 8, 2007 Deposition of Aaron Wider ("Wider dep.") p. 362-364.

Moreover, Ziccardi failed to avail himself of many opportunities presented to address Wider's outrageous conduct. For example, Ziccardi actually suggests that Wider's flippant comments were responsive:

MR. BODZIN: Sir, during the time period of January 2006 through March 2007, can you identify any specific loans that you wanted to sell into the market place that you were unable to sell?

A. Hundred. How can I identify hundreds?

Q. Identify those loans for me?

A. I don't carry them in my head, Bob.

Q. Where is the information that would describe those loans?

A. Can you spell your name backwards, Bob? That's what you're asking. Everything is done electronically. Everything's in files. Can you spell your name backwards, Bob? Tell me.

MR. BODZIN: If you want to instruct your client to act in a civilized manner; otherwise, we're going to adjourn this deposition.

MR. ZICCARDI: Take whatever action you want to take. I mean, he is trying to answer the questions and he is answering the questions and he will continue to answer the questions.

Id. at 366-367.

III. **ARGUMENT**

A. **Applicable Legal Standing**

Since the Federal Rules of Civil Procedure do not technically recognize a Motion for Reconsideration, such a Motion filed within ten days after entering an Order is ordinarily treated as a Motion to Alter or Amend. Reconsideration should only be entertained when there is: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available [when the Order was entered]; (3) the need to correct a clear error of law or fact to prevent manifest injustice.” *North River Ins. Co. v. CIGNA Insurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). [Emphasis Added]. None of these factors are presented by Ziccardi's Motion.

B. **The Inherent Power to Sanction**

“Among the implied and incidental powers of a Federal Court, is the power is discipline attorneys who appear before it.” *Fellheimer v. Charter Technologies*, 57 F.3rd 1215 (1995); citing *Chambers v. NASCO, Inc.*, 501 US 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). “A

primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Id.* at p. 12.

C. Procedural Due Process

GMAC agrees that fundamental notions of due process require “fair notice and an opportunity for a hearing on the record.” *Roadway Express, Inc. v. Piper*, 447 US 757, 767, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d (1980). But here, it is undeniable that Ziccardi had ample notice of the precise conduct at issue, two weeks advance notice of a hearing, an opportunity to present witnesses, and an opportunity to be represented by counsel. *See, Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995). The notion that Ziccardi was denied procedural due process is clearly contradicted by the record.

D. The Award of Sanctions Was Supported by the Record

The Court’s award of sanctions was supported by the Affidavits of GMAC’s counsel that were specific as to: (1) the time spent on the matters involved; (2) the rates of each billing lawyer; (3) and the reasonableness of the legal fees. Moreover, Ziccardi and HTFC had ample opportunity to question any aspect of the fees, but chose not to. In the 57 days between GMAC’s submission of its January 3, 2008 Supplemental Memorandum of Law neither Ziccardi nor HTFC ever: (1) requesting any billing information from GMAC; (2) requested an opportunity to respond to the requests for counsel fees, or (3) asked this Court to take any action on the claim for fees. The award of sanctions was neither harsh nor inappropriate. To the contrary, the Court tempered the sanctions by awarding only 75% of the costs incurred by GMAC.

IV. CONCLUSION

For each and all of the foregoing reasons, the Motion for Reconsideration of Joseph R. Ziccardi should be denied.

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CERTIFICATE OF SERVICE

I, MELISSA C. PRINCE, hereby certify that on the 28th day of March, 2008, a true and correct copy of the foregoing Reply of GMAC Bank to Joseph R. Ziccardi's Motion for Reconsideration of this Court's February 29, 2008 Memorandum Opinion has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that I caused a true and correct copy of the same to be served upon the following counsel via electronic filing:

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