

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

filed
U.S. DISTRICT COURT
DISTRICT OF KANSAS
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SAMUEL K. LIPARI)
(Assignee of Disso lved)
Medical Supply Chain, Inc.)
Plaintiff,)

v.) Case No. 07-CV-02146-CMoD1W

US BANCORP and)
US BANK NATIONAL ASSOCIATION)
Defendants.)

**REPLY MEMORANDUM SUPPORTING
STRIKING DEFENDANTS' MOTION TO DISMISS**

Comes now the plaintiff Samuel K. Lipari and makes the following reply memorandum supporting his motion to strike the defendants' second or fifth motion to dismiss this case matter because it is prohibited under the rules. Samuel K. Lipari respectfully reserves his right to answer the motion to dismiss should the court not strike the motion.

STATEMENT OF FACTS

- I. The defendants' answer "memorandum" spuriously suggests Rule 8 pleading standards were not met by the plaintiff and justified dismissal of the state claims on the merits in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 despite the express dismissal without prejudice by this court which did not evaluate or rule on the plaintiffs state claims.
2. This court is without jurisdiction to expand upon the judgment dismissing the plaintiffs state law claims while the matter is on appeal in *Medical Supply Chain, Inc. v. Novation, et ai*, 10th Cir. case no. 06-3331.
3. The court may only enforce its dismissal without prejudice judgment in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299.
4. Enforcement of the dismissal without prejudice judgment is by remanding the matter to the 16th Circuit Missouri State Court.
5. The defendants have not sought relief from this court's order dismissing the plaintiffs claims without prejudice in *Medical Supply Chain, Inc. v. Novation. et ai*, KS Dist. Court case no.05-2299.

6. The defendants did not cross appeal and therefore cannot expect an appeals court outcome altering this court's judgment except for reinstatement of plaintiff's federal claims.

7. The transferring federal court was required by transfer under 28 U.S.C. § 1406(a) to dismiss or transfer this action.

8. The transferring court did not grant the dismissal.

MEMORANDUM IN SUPPORT

Transfer is denial of dismissal. The transferring court was required to dismiss or transfer under 28 U.S.C. § 1406(a):

"Section 1406(a), under which the Pennsylvania District Court transferred this case, provides:

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Goldlawr, Inc v. Heiman, 369 U.S. 463 at 465, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962).

Obviously the transferring court was under a duty to preserve the economy of justice and dismiss the action if it was dismissible. An argument could be made that the misconduct that so permeates this case was visible in the clearly erroneous rulings in other cases the defendants were attempting to use inapplicably as the law of the case was on its face bad faith misconduct, not to mention the bold face erroneous argument that a dismissal without prejudice was a res judicata bar that the transferring judge had to deviate from normal procedures. Understandably the defendants have not made this argument.

Transfers are denials of Dismissals

The meaning of the transfer is that the dismissal was considered and denied: See *Ferguson v. Beverly Enterprises, Inc.* at \-2 (M,D.N.c., 2003) "Therefore, in the interests of justice, defendants' motion should be denied to the extent that it seeks to dismiss this action and granted to the extent that it seeks to transfer the matter ..."; *A.J. Taft Coal Company, Inc. v. Barnhart*, Case No. CV 03-P-1390-S (N.D. Ala. 11/14/2003) (N.D. Ala" 2003) "The court TRANSFERS this case to the District of Maryland under 28 USC. § 1404(a). Accordingly, the court DENIES the defendants' motions to dismiss and GRANTS IN PART the defendants' motions to transfer."

This is the normal procedure in the Western District of Missouri: *Kansas City Power & Light v. Kansas Gas and Elec.*, 747 F.Supp. 567 (W.D. Mo., 1990) "Accordingly, it is ORDERED that defendant KG & E's motion to dismiss is denied. It is further ORDERED that defendant KG & E's motion to transfer to the United States District Court for the District of Kansas is denied."

This Court Lacks Jurisdiction to Grant the Dismissal

With the matter being on appeal in the Tenth Circuit over the same issues argued by the defendant, this court cannot entertain the defendants' motion for dismissal. *Brasier v. United States*, 229 F.2d 176 (10th Cir.1955), (per curiam) (trial court lacked jurisdiction to allow amendments to pleadings while appeal was pending), cert. denied, 351 U.S. 925, 76 S.Ct. 783, 100 L.Ed. 1455 (1956); *Martin v. Martin*, 5 Kan.App.2d 670, 623 P.2d 527 (1981) (trial court may not modify judgment while appeal is pending); See *Willoughby v. Sinclair Oil & Gas Co.*, 10 Cir., 188 F.2d 902.

CONCLUSION

Whereas for the above reasons the plaintiff respectfully requires that the motion to strike the defendants' motion to dismiss be granted. In the alternative the plaintiff requests time to respond at law to the dismissal if it is determined by external events that jurisdiction over this matter is returned to this court.

Respectfully submitted,

~ ~ ~
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Pro se

CERTIFICATE OF SERVICE

I certify I have served a copy of this reply memorandum to the opposing counsel listed below via U.S. Mail on May 29th, 2007,

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Email: molthoff@stklaw.com

A handwritten signature in black ink, appearing to read "Scott A. Molthoff". The signature is written in a cursive style with a large initial "S" and a distinct "A" and "M".

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 07 MAY 29 PM 5:24

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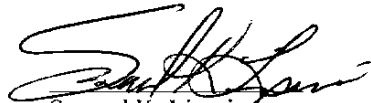
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Pro se

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I certify I have served a copy of this reply memorandum to the opposing counsel listed below via U.S. Mail on May 29th, 2007.

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