Appeal Nos. 10-4127, 10-4134

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN NIKOLS, Plaintiff and Appellant, v. DAVID CHESNOFF, and GOODMAN & CHESNOFF, Defendants and Appellees.	**APPELLEES' REPLY BRIEF (FOURTH BRIEF ON CROSS-APPEAL)**

Appeal from the United States District Court, District of Utah, Central Division
Honorable Ted Stewart presiding
Case No. 2:10-cv-0004

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INTRODUCTION

Appellant John Nikols ("Nikols") misstates the nature and effect of the district court's Memorandum Decision with respect to the disposition of appellees David Z. Chesnoff and Goodman & Chesnoff's (collectively, "Chesnoff") motion for sanctions under Rule 11 ("Rule 11 Motion"). The district court did not render the Rule 11 Motion moot; it denied that motion, as evidenced by the Memorandum Decision and the docket entry describing the Memorandum Decision.

Furthermore, it was not necessary for Chesnoff to place the Rule 11 Motion, with its corresponding memoranda of law, before this court in an appendix. Chesnoff is not asking this court to address the substance of the Rule 11 Motion. He simply asserts that he filed the motion and that the district court denied the motion by applying the wrong standard. However, in an abundance of caution, and in case this court would like to review the Rule 11 Motion, Chesnoff has filed a motion, concurrently herewith, requesting that he be allowed to file a supplemental appendix with the court. Chesnoff's supplemental appendix includes the Rule 11 Motion and the corresponding memoranda and exhibits attached thereto.

ARGUMENT

I. CHESNOFF'S RULE 11 MOTION WAS DENIED ON THE MERITS, NOT FOUND MOOT.

Nikols claims the district court did not deny Chesnoff's Rule 11 Motion, but dismissed it as moot. A brief review of the Memorandum Decision and district court docket clearly shows that Nikols' claim is incorrect.

In the Conclusion section of the district court's Memorandum Decision, the district court explicitly denied Chesnoff's Rule 11 Motion by stating: "It is therefore…ORDERED that Defendant's Motion for Sanctions is DENIED." App. 156. The district court docket further clarifies the issue by stating as follows: "MEMORANDUM DECISION…denying 22 Motion for Sanctions…" App. 5, docket no. 40. Docket number 22 is Chesnoff's Rule 11 Motion. App. 3.

The district court did rule that "all other pending motions are moot." App. 156. However, these "other pending motions" were (1) Nikols' motion for summary judgment quieting title, docket no. 14, and (2) Chesnoff's Rule 56(f) motion to continue, docket no. 32. App. 3-4. This interpretation is also supported by the district court docket which states "MEMORANDUM DECISION…finding as moot 32 Motion to Continue; finding as moot 14 Motion for Summary Judgment…" App. 5. The docket does not state that the Rule 11 Motion was found moot.

The district court denied Chesnoff's Rule 11 Motion by applying the Utah bad faith statute standard. The district court did not apply the Rule 11 standard. Therefore, the district court's decision on that issue should be reversed and remanded for further consideration under the appropriate standard.

II. CHESNOFF WAS NOT REQUIRED TO INCLUDE IN THE APPENDIX THE RULE 11 MOTION OR CORRESPONDING MEMORANDA.

Nikols argues that Chesnoff's only possible objection on appeal was that the district court erred in finding Chesnoff's Rule 11 Motion moot. Nikols states that in order to appeal such a ruling, Chesnoff was required to place the Rule 11 Motion and corresponding memoranda in the appendix, pursuant to 10th Cir. R. 10.3(D)(2). However, as argued above, the district court did not rule that the Rule 11 Motion was moot—it denied that motion.

Fed. R. App. P. 31(a)(2) states that "memoranda of law in the district court should not be included in the appendix unless they have independent relevance." Chesnoff is not asking this Court to address the merits or substance of the Rule 11 Motion. Rather, Chesnoff indicates that he filed a Rule 11 Motion (evidenced by the docket no. 22) and that the district court erroneously denied that motion in its Memorandum Decision by applying the Utah law standard, which Chesnoff briefed in his motion to dismiss. That is, Chesnoff filed a motion to dismiss and included a section in his motion requesting attorney fees under the Utah bad faith statute.

App. 35-36. Chesnoff also filed a separate Rule 11 motion. App. 3. The district court granted Chesnoff's motion to dismiss and denied Chesnoff's Rule 11 motion. App. 156. In denying the Rule 11 Motion, the district court applied the bad faith statute standard, not the Rule 11 standard. App. 155-156. The only issue before this court is whether the district court applied the correct standard when it denied the Rule 11 Motion.

Furthermore, Fed R. App. P. 30(a)(2) states that "[p]arts of the record may be relied on by the court or the parties even though not included in the appendix." *See also Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2*, 523 F.3d 1219, 1231 (10th Cir. 2008) ("we retain the authority to go beyond the appendix if we wish, because all of the transcripts…and documents and exhibits filed in district court remain in the record regardless of what the parties put in the appendix"). Therefore, because Chesnoff's Rule 11 Motion is part of the record in the district court, this court can consider and rely upon that motion, and its corresponding memoranda, even if it is not in the appendix.

In an abundance of caution, Chesnoff has filed a motion, concurrently herewith, requesting that he be allowed to file a supplemental appendix with the court, including the Rule 11 Motion and the corresponding memoranda and exhibits attached thereto. This motion is pursuant to Fed. R. App. P. 10(e)(2),

which provides: "If anything material to either party is omitted from the record by error or accident, the omission may be corrected[.]"

CONCLUSION

Based on the foregoing arguments, this Court should remand the issue of Chesnoff's Rule 11 Motion to the District Court for review under the Rule 11 standard.

DATED this 30th day of December, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,567 words.

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DATED this 30th day of December, 2010.

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CERTIFICATE OF SERVICE

I, Scott O. Mercer, hereby certify that on this 30th day of December, 2010, I sent a copy of the foregoing **Appellees' Reply Brief** to the individuals listed below by the method indicated below:

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