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United States District Court, E.D. Pennsylvania

Bruce S. MARKS, et al.
v.
William STINSON, et al.

Civ. A. No. 93–6157. | March 09, 1995.

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Opinion

MEMORANDUM

NEWCOMER, District Judge.

***1** Presently before the Court are plaintiffs' Motion for Sanctions and the responses of Attorney James Jordan, defendant Philadelphia County Board of Elections, and defendant Commissioner Margaret Tartaglione. For the reasons that follow, this Court will deny plaintiffs' Motion.

I. Background

The instant motion warrants a brief exposition of the background of this case. In November 1993, plaintiffs filed the instant action alleging massive voter fraud and civil conspiracy regarding the special 1993 election to fill a vacant Pennsylvania Senate seat. Plaintiffs consist of a group of minority voters and Bruce Marks, the Republican candidate for the vacant seat. Plaintiffs alleged that defendants William Stinson, the Philadelphia County Board of Elections and Election Commissioner Margaret Tartaglione were engaged in fraud via their illegal distribution and mishandling of absentee ballots.

After a preliminary injunction hearing and an appeal to

the Third Circuit, a final injunction hearing took place before this Court in March–April 1994. This Court ultimately ruled in plaintiffs' favor, finding that defendants had engaged in a corrupt scheme to distribute absentee ballots. Consequently, defendant William Stinson was ordered to relinquish his senatorial seat to plaintiff Bruce Marks. *See Marks v. Stinson,* 1994 WL 146113 (E.D.Pa.1994). Following the decision on the merits, this Court also granted plaintiffs' requests for attorneys' fees.

II. Discussion

Plaintiffs filed the present Motion for Sanctions against City Commissioner Margaret Tartaglione, the Philadelphia County Board of Elections, and Attorney James B. Jordan.[1] The Motion is premised on defendants' failure to produce a letter (the "Rendell letter") written on September 19, 1978 by then-District Attorney Edward Rendell to Commissioner Tartaglione.[2] The letter states in relevant part as follows:

> Our investigation has also revealed that in many cases committeemen are obtaining absentee ballots to give out to the voters in their division. Such a practice is a clear violation of the Election Code. We would strongly suggest that your employees be advised that such practices are illegal and not to be engaged in in the future.

Plaintiffs became aware of the Rendell letter's existence in January 1995, upon the public release of an Investigating Grand Jury Report regarding the 1993 election.

Plaintiffs now characterize the Rendell letter as a "smoking gun" which would have been dispositive on the issue of the Commissioners' knowledge of the illegality of their absentee ballot practices. Plaintiffs further assert that if they had known of the Rendell letter before trial, they would have called Mayor Rendell to testify at trial and his testimony "would have devastated and immediately terminated the City's bad faith defense that the distribution of absentee ballots to committee people and the Stinson Campaign was permitted under the Election Code." Plaintiffs' Memorandum at 3.

***2** In this vein, plaintiffs seek additional attorneys' fees as sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure; attorneys' fees as sanctions under this Court's inherent power to sanction parties or attorneys for bad faith; additional attorneys' fees under 28 U.S.C. § 1927; and a referral of attorney James Jordan to the Pennsylvania Disciplinary Board pursuant to the Rules of Professional Conduct.[3]

Plaintiffs' argument has two prongs. First, plaintiffs claim that the Rendell letter falls within the description of documents Tartaglione was obligated to produce at or before her deposition. Second, plaintiffs allege that Ms. Tartaglione perjured herself at her deposition by masking Rendell's knowledge of the illegal practices.

A. Document Production

Plaintiffs contend that Ms. Tartaglione deliberately defied the request for documents included in her Notices of Deposition.

The document request at issue reads as follows:

> [a]ll documents related to training and instructions given to persons involved in the ordering, distribution to voters and any other persons, receipt from voters and any other persons, time-stamping, processing, review, computer entry, and approval of absentee ballot applications and declarations, including, but not limited to, any documents which set forth the criteria by which absentee ballot declarations and ballots can be distributed to voters and any other persons;

This request was included in plaintiffs' first Notice of Deposition ("First Notice"), dated January 21, 1994. That Notice scheduled Ms. Tartaglione's deposition for January 27, 1994 and included six paragraphs of document requests. Five of the paragraphs request documents relating solely to the 1993 election. The sixth paragraph is the "training and instructions" request quoted above.

Due to an illness of Ms. Tartaglione, plaintiffs were forced to reschedule the deposition. Plaintiffs then sent out a Second Notice dated February 4, 1994 which scheduled a February 6, 1994 deposition. The Second Notice was identical to the First Notice, except for the deposition date. The February 6 deposition was postponed, also due to Ms. Tartaglione's illness.

Finally, on March 14, 1994, plaintiffs sent a Third Notice to Ms. Tartaglione scheduling her deposition for March 16, 1994. Significantly, unlike the previous Notices, the Third Notice omitted the "training and instruction" paragraph quoted above. Rather, the Third Notice

contained only four paragraphs of document requests which pertained solely to the 1993 election. That same day, plaintiffs filed with this Court a Motion to Compel Discovery, complaining that Ms. Tartaglione was attempting to avoid her deposition by claiming that she had been ill. On March 17, 1994, this Court granted the Motion to Compel Discovery and ordered Ms. Tartaglione to appear for her deposition on March 22, 1994 and "to produce all responsive documents" at her deposition. Plaintiffs deposed Ms. Tartaglione on March 22, 1994. Ms. Tartaglione did not produce the Rendell letter at her deposition.

***3** Plaintiffs now argue that, because the Rendell letter falls within the description listed in the January 21, 1994 Notice, it follows that defendants' failure to produce the document at Ms. Tartaglione's deposition constitutes willful concealment. This Court disagrees, albeit with some hesitation.

The Third Notice, not the First Notice, was the only Notice that applied to Ms. Tartaglione's actual deposition (March 22, 1994). Therefore, the documents requested in the Third Notice were the only documents Ms. Tartaglione was required to produce. For some inexplicable reason, plaintiffs' counsel deleted the "training and instruction" paragraph from the Third Notice. Therefore, the Rendell letter simply did not fall within the scope of the documents requested in the Third Notice. It follows that defendants were not obligated to produce the letter.

This Court notes for the record, however, that it is primarily due to the omission of the "training and instruction" paragraph from the Third Notice that Ms. Tartaglione and Mr. Jordan escape the imposition of sanctions. The Federal Rules of Civil Procedure are designed to promote a spirit of cooperation in discovery and to foster full disclosure of facts relevant to the case. The behavior of Ms. Tartaglione and Mr. Jordan, while within the letter of the law, was contrary to this spirit. It is therefore with reluctance that this Court must rely on a technicality in declining to impose sanctions.

B. Alleged Perjury

Plaintiffs' second argument is that Ms. Tartaglione perjured herself during her deposition. The alleged perjury relates to Ms. Tartaglione's answer to the following question posed by plaintiffs' counsel:

> Q. I want you to tell me, when I read off these names to you, whether these people are aware of the practice of delivery of absentee ballots to the voters and the receipt of absentee ballots from the voters by persons other than the voters themselves.

(emphasis added). When plaintiffs' counsel read the name "Ed Rendell" to Ms. Tartaglione, she responded, "I don't know." From this, plaintiffs conclude that Ms. Tartaglione committed perjury. This Court finds plaintiffs' argument to be without merit.

Perjury is defined as the willful telling of a lie while under oath to tell the truth in a matter material to the point of inquiry. 18 U.S.C.A. § 1621; Webster's New World Dictionary, College Edition 1968. Because of the seriousness of the accusation, this Court will decline to impose the harsh punishment of sanctions unless plaintiffs can show without any ambiguity that Ms. Tartaglione willfully deceived plaintiffs' counsel.

The context in which the question was posed indicates that the question was significantly less than crystal clear. The deposition transcript shows that, between the question and answer, a colloquy took place among counsel for plaintiffs, counsel for Ms. Tartaglione, and Ms. Tartaglione. During this colloquy, Ms. Tartaglione's counsel objected to this question on the grounds that Ms. Tartaglione could not testify as to what other individuals did or did not know. (Tartaglione dep. at 318). In response, plaintiffs' counsel instructed Ms. Tartaglione, "If you don't know that they're aware of it, you'll tell me you don't know they're aware of it. It's that simple."

***4** Given such an instruction by plaintiffs' counsel, Ms. Tartaglione's answer cannot be categorized as perjury. The question was posed in the present tense, not in the past tense. Hence, any affirmative answer by Ms. Tartaglione regarding Mayor Rendell's 1993 knowledge would have been, to some extent, speculative. Such conjecture would have been in violation of plaintiffs' counsel's instructions. While Ms. Tartaglione could easily have volunteered that Rendell was aware of such practices in 1978, the adversarial system of litigation does not require a deponent to offer any information other than that specifically requested.

The other question posed by plaintiffs' counsel was whether any employee of the City Solicitor's office had informed Ms. Tartaglione that the absentee ballot practices were illegal. Ms. Tartaglione responded in the negative. Plaintiffs' counsel now contends that Ms. Tartaglione should have mentioned the Rendell letter. Again, this Court disagrees.

In 1978, Rendell was District Attorney, not City Solicitor. Therefore, Ms. Tartaglione truthfully answered that nobody from the City Solicitor's office had categorized the practices as illegal.[4] Ms. Tartaglione, the deponent, was not required to compensate for plaintiffs' counsel's inartful phrasing of his deposition question. Her negative

response to the question was therefore not perjurious.[5]

For the foregoing reasons, plaintiffs' Motion will be denied.

An appropriate Order follows.

ORDER

AND NOW, this 9th day of March, 1995, upon consideration of plaintiffs' Motion for Sanctions, and the responses of Attorney James Jordan, defendant Philadelphia County Board of Elections, and defendant Commissioner Margaret Tartaglione, it is hereby ORDERED that said Motion is DENIED.

IT IS FURTHER ORDERED, upon consideration of the Motions of James Jordan and Margaret Tartaglione to Enforce this Court's Order of March 23, 1994 to Enter a Protective Order Precluding Discovery and to Dismiss Plaintiffs' Motion for Sanctions, and plaintiffs' response thereto, that said motions are DENIED as moot.

AND IT IS SO ORDERED.

[1] James B. Jordan, Deputy City Solicitor, represented the Board of Elections and Commissioner Tartaglione during the proceedings in this Court.

[2] Edward Rendell was elected Mayor of Philadelphia in 1991 and has served as Mayor since then.

[3] It should be noted that this Court has previously rejected plaintiffs' second request for attorneys' fees. *See* Memorandum and Order of January 5, 1995.

[4] In fact, the City Solicitor's office had expressed the opinion to Ms. Tartaglione that the practices were legal.

[5] While Ms. Tartaglione's answer does not rise to the level of perjury, this Court notes that the Rendell letter raises serious inconsistencies between the opinion expressed in the letter and Mayor Rendell's publicly expressed support of the Commissioners' absentee ballot practices in the 1993 election.