

FILED  
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U. S. DISTRICT COURT E.D. N.Y.



SEP 24 1974

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

Plaintiff,

-against-

FRED C. TRUMP, et al.,

Defendants.  
-----X

TIME 11.....

P.M.....

Civil Action

No. 73 C 1529

MEMORANDUM OF LAW

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorney for Plaintiff  
225 Cadman Plaza East  
Brooklyn, New York 11201

FRANK E. SCHWELB, Chief  
NORMAN P. GOLDBERG, Attorney  
Housing Section  
Civil Rights Division  
Department of Justice  
Washington, D. C.  
(Of Counsel)

(52)

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 73 C 1529
	)	
v.	)	
	)	
FRED C. TRUMP, et al.,	)	<u>MEMORANDUM OF UNITED STATES IN</u>
	)	<u>SUPPORT OF ITS APPLICATION TO</u>
	)	<u>DENY DEFENDANTS' MOTION FOR</u>
Defendants.	)	<u>CONTEMPT WITH PREJUDICE, FOR AN</u>
	)	<u>EARLY HEARING, AND TO STRIKE</u>

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On July 26, 1974, defendants filed with this Court a "Notice of Motion" seeking an adjudication of contempt against Donna F. Goldstein, a Department of Justice attorney assigned to this litigation, and a "cease and desist" order against the United States. In affidavits filed with Defendant's Notice of Motion, including that of defense counsel Roy M. Cohn, Ms. Goldstein was alleged to have threatened prospective witnesses and to have attempted by other improper means to influence their testimony in the forthcoming trial of this case. Ms. Goldstein and other representatives of the United States were also accused of conducting themselves in an unprofessional manner while in the process of attempting to conduct a records inspection at the offices of the defendants. The United States filed a response, together with affidavits by three of plaintiff's counsel, denying each and every allegation of improper conduct as false and

scurrilous and requested expedited discovery and an early hearing on the issue. On August 8, 1974, this Court granted plaintiff's request for expedited discovery in connection with this issue and directed that Magistrate Catoggio supervise the taking of the scheduled depositions.

Subsequent to the hearing on August 8, 1974, Magistrate Catoggio met with attorneys for both parties for the purpose of scheduling the proposed discovery. At that meeting, defendants withdrew their request for a hearing on the contempt charges, but refused to withdraw the underlying pleadings, which contain the allegations of misconduct by Ms. Goldstein.

Even though defendants' pleadings lie dormant in the file, plaintiff believes that the charges contained therein continue to hang over Ms. Goldstein. They can be resurrected at any time at defense counsel's caprice, and leave a shadow over her reputation which will remain there until removed by adjudication or withdrawal with prejudice. The accusations also interfere, practically as well as psychologically, with plaintiff's preparation of the case and impose unwarranted burdens on Ms. Goldstein's ability to participate fully and effectively at the forthcoming trial. Plaintiff has accordingly taken discovery depositions of Ms. Goldstein's principal accusers and now requests that this Court schedule a hearing on the

merits of defendants' motion and at the conclusion of that hearing deny defendants' motions as sham and false. Plaintiff asks that this matter be resolved promptly, and in advance of trial. If it is established, as we believe it will be, that the allegations of misconduct are false and were filed with reckless and malicious disregard of the truth, then that fact is admissible against defendants on the merits as an indication of defendants' consciousness that their case, if truthfully presented, is weak. See pp. 17-18, infra.

### DISCUSSION

#### I. THE FACTS

##### A. Counsel for Plaintiff Did Not Threaten or Harass Prospective Witnesses

The two persons who have made serious allegations of unprofessional conduct against Ms. Goldstein are Mr. Thomas Miranda and Ms. Carol Falcone,<sup>\*/</sup> both former employees of defendants.

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<sup>\*/</sup> Two other persons, Mr. & Mrs. Paul Ziselman, submitted affidavits, but neither of the affidavits in our opinion contained allegations of unprofessional misconduct against Ms. Goldstein. We do wish, however, to preserve our right to call them to testify at any hearing on this matter if we believe that such action is necessary to resolve this controversy.

They allege in separate affidavits that Ms. Goldstein threatened and harassed them in an effort to induce them to testify against their former employer, Trump Management Co. While neither has yet been subjected to cross-examination by plaintiff, the testimony that they have given on deposition, combined with other evidence already in the record, seriously discredits their allegations.

Nor are the witnesses the only persons at fault. While defense counsel saw fit to file his own affidavit attesting to the truth of the allegations made against Ms. Goldstein by Mr. Miranda and Ms. Falcone, each of these witnesses testified on depositions that counsel never met, spoke, or otherwise communicated with him or her until the day of their depositions. The filing of such inflammatory charges by counsel against another attorney without any inquiry into their truth or falsity is, at least, unusual.

(1) Ms. Carol Falcone

In her affidavit of July 19, 1974,<sup>\*/</sup> Ms. Falcone charged that Ms. Goldstein had engaged in unprofessional conduct in a number of

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<sup>\*/</sup> Although the affidavit bears a date of July 19, 1974, Ms. Falcone swore that she, in fact, wrote it several days later. She also swore that every word in it was her own, and that it was written without assistance in spite of some striking similarities in language to earlier submissions on behalf of defendants.

significant ways. In the deposition that followed, however, Ms. Falcone withdrew or substantially modified many of the allegations that she had previously leveled at Ms. Goldstein. While even the "softened" accusations will be shown to be false, and while a full airing of Ms. Falcone's charges must await the hearing and adversary cross-examination (which we carefully avoided on deposition), a comparison of her affidavit and deposition<sup>\*/</sup> is instructive at this juncture to enable the Court to make a preliminary appraisal of Ms. Falcone's testimony.

1. Affidavit - 'Ms. Goldstein harassed and accused me of lying and withholding information and then threatened that I would be held for perjury and thrown into jail.'

Deposition - Ms. Falcone testified that Ms. Goldstein never directly accused her of lying nor did she, in fact, threaten to have her thrown into jail. Ms. Falcone did testify that Ms. Goldstein asked her whether she knew what the penalty for perjury was, and that Ms. Falcone construed this question, in the

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<sup>\*/</sup> Counsel have not yet been furnished with copies of the depositions, but we believe that the transcripts thereof will fully support our references here.

context in which it was asked, as an accusation of perjury and a threat to be sent to jail.

Ms. Goldstein will testify that the subject of perjury was never mentioned.

Ms. Falcone also testified that the interview ended amicably. Even if Ms. Goldstein had mentioned the penalties for perjury - and she did not - the filing of an affidavit that Ms. Goldstein threatened Ms. Falcone with imprisonment, when the affiant will testify to no more than she did, is at least reckless disregard of the truth.

2. Affidavit - "[Ms. Goldstein] accused me of not legitimately owning my own business and stated that the money I used for its purchase was illegally obtained, which it was not. "

Deposition - Ms. Falcone acknowledged that Ms. Goldstein never accused her of obtaining funds for her business in an illegal manner. She stated that Ms. Goldstein remarked during the interview about the fact that Ms. Falcone owned her own establishment even though she was young and had apparently earned low wages from Trump. Ms. Falcone inferred from this, and from nothing else, that she was being charged with having illegally obtained money to finance her business.

3. Affidavit - "I was interviewed by a Ms. Donna Goldstein, attorney for the Civil Rights Division of the Justice Department and by another attorney on the morning of July 19, 1974, at my place of business in connection with the Civil Rights suit against my former employer, Trump Management." She also referred later in the affidavit to her interrogators in the plural.

Deposition - Ms. Falcone testified that only Ms. Goldstein interviewed her about the suit and that no other attorney was present. Ms. Falcone did say that another attorney had called her several days beforehand for the purpose of arranging an interview.

The foregoing description of some of the discrepancies in Ms. Falcone's testimony, given under oath\*/ on two separate occasions, is not intended to be exhaustive or necessarily dispositive of the matter. We believe, however, that this discussion does shed light on the insubstantial basis for the serious charges made against Ms. Goldstein. At the hearing on our motion, we expect to establish that none of the accusations directed at Ms. Goldstein are true and that the entire affidavit should be stricken as sham

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\*/ On deposition, Ms. Falcone was unwilling to answer, clearly and unambiguously, whether or not she knew she was under oath when she signed the affidavit.



and false. We will also ask that the appropriate inferences be drawn against defendants for the use of such tactics.

(2) Mr. Thomas Miranda

The principal accusation of misconduct made by Mr. Miranda against Ms. Goldstein is contained in his affidavit in which he states the following:

"[Goldstein] stated that if I did not cooperate with her and in effect 'lie' in order to help her in her ambitions and winning her case, 'I will be thrown into jail.'"

On deposition, Mr. Miranda reaffirmed this allegation. He acknowledged that his dealings with Ms. Goldstein were friendly, but he described her as "tough" on the job.

In this litigation, both parties have at different times sought to rely on Miranda's ability to tell the truth and it is necessary to explain Miranda's role in this litigation in order to assess the validity of his recent charges against Ms. Goldstein.

About one year ago, attorney Elyse Goldweber, who was then employed by the Department of Justice and assigned to this case, interviewed Mr. Miranda as part of plaintiff's preparation of this litigation. The nature and substance of that interview are described in an affidavit submitted by Ms. Goldweber in connection with these

proceedings. According to Ms. Goldweber, Mr. Miranda provided information to the effect that defendants engaged in racially discriminatory practices. He also indicated that he was deeply concerned that he might be physically harmed by the defendants if they became aware that he had furnished damaging information to the Department of Justice. Subsequent to that interview, plaintiff, as part of its obligations under the rules of discovery, furnished defendants, in response to their interrogatories, with the information provided by Mr. Miranda including his identity. Mr. Miranda was notified by letter that this had been done. A copy of that letter is attached to Ms. Goldweber's affidavit.

During July of this year, Ms. Goldstein reinterviewed Mr. Miranda, since he was considered to be an important witness in this litigation and had not been contacted in several months. During that interview, Mr. Miranda, while expressing apprehension about becoming a witness in this action, provided additional information about defendants' discriminatory practices. A few days later, however, Mr. Miranda reversed direction and executed an affidavit effectively retracting the statements he had previously furnished to the two government attorneys, and accusing Ms. Goldstein of improper conduct.

In his recent deposition, Mr. Miranda flatly denied that he had furnished to plaintiff any information unfavorable to defendants'

position in this litigation despite affidavits to the contrary by Ms. Goldweber and Ms. Goldstein. In this connection it is noteworthy that defense counsel does not challenge Ms. Goldweber's veracity. Mr. Cohn's affidavit states that "At all times that she was in charge of the said investigation, Miss Goldweber pursued her duties with diligence, but observed legal and ethical strictures."

The positions taken by Mr. Miranda and the two government counsel are, of course, irreconcilable. Obviously, if Mr. Miranda initially told Ms. Goldweber about racially discriminatory practices engaged in by the defendants, then the statements in his affidavit and deposition are false, and Ms. Goldstein did not make alleged threats designed to induce false testimony. The determination of whether Mr. Miranda made these statements turns largely on an assessment of the credibility of the witnesses.

In view of the requirements of Rule 11 of the Federal Rules of Civil Procedures, relating to the signing of pleadings, one would ordinarily assume that defense counsel had reason to believe that Mr. Miranda was telling the truth and that counsel for the United States were lying. As previously stated, however, defense counsel never interviewed Mr. Miranda, and had never met him until August 26, 1974, more than a month after the affidavit was filed.

The only information which defense counsel had as to Mr. Miranda's veracity was the following excerpt from the deposition of defendant Fred Trump, at which counsel was present:

Q. Do you have any knowledge of instructions that were given to any of your managers to attach a piece of paper in order to flag the main office that the prospective tenant was a black person?

A. That is such a lie, and by our friend, Mr. Miranda, who has been lying to us since we hired him, has taken home money, but hasn't produced . . . (Fred Trump Dep. p. 37)

B. Counsel for Plaintiff did not Engage  
In Unprofessional Conduct During a  
Records Inspection

In his affidavit of July 29, 1974, defense counsel asserts that

On or about June 12, 1974, Miss Goldstein by-passing counsel, literally descended upon the defendants with representatives of the Civil Rights Division and Student Interns demanding entry into the offices of Mr. Donald Trump, officer of the defendants' corporation, and production of defendants' records. (emphasis added) \*/

His affidavit further asserts that Ms. Goldstein and her colleagues ignored requests to contact the offices of defense counsel and that defendants were unsuccessful in getting plaintiff's representatives to leave their offices until defendants contacted the United States Attorney for the Eastern District.

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\*/ The affidavit also refers to a letter addressed to Assistant United States Attorney Henry Bracht1 from Mr. Scott Manley, co-counsel for defendants, which accuses plaintiff's representatives of "descending upon the Trump offices with five storm troopers ....banging on the doors and demanding to be allowed to swarm haphazardly through all the Trump files and to totally disrupt their daily business routine."

These allegations against Ms. Goldstein, as well as against other representatives of plaintiff, in fact, bear virtually no resemblance to what actually took place on the morning of June 12th or the events leading up to that morning. The fact that neither counsel for defendants was present at the offices of defendants or accessible by telephone at the time when plaintiff's counsel arrived to inspect records may, in large part, explain the inaccuracies of the charges, but it does not excuse them.

Even though plaintiff has previously described in its report of the United States to the Court on the Status of Discovery its position on these allegations, we take the opportunity again to set forth briefly, together with supporting documentary proof, the actual sequence of the events involving the proposed records inspection of June 12th.

On May 6, 1974, plaintiff served and filed a Rule 34 Request for Production of Documents on defense counsel Roy Cohn. (See letter of May 6, 1974, addressed to defense counsel and signed by Ms. Goldweber, attached as Appendix A). Another copy of the request was mailed to defense counsel Scott Manley by Ms. Goldweber pursuant to his telephone request on May 15, 1974. A third copy of the request was sent to Mr. Manley on May 28, 1974, following a telephone conversation between him and Ms. Goldstein

in which Mr. Manley stated that he knew nothing about the proposed inspection. (See letter of May 28, 1974, addressed to Mr. Manley and signed by Ms. Goldstein, attached as Appendix B.) Ms. Goldstein, in the course of two additional telephone conversations between May 28 and June 3, reminded Mr. Manley that plaintiff was planning to inspect records on June 12 at defendants' offices. At no time during these conversations did Mr. Manley express any objection to the inspection or indicate that the records would not be made available at the designated time and place. Moreover, defendants filed no objection to the records inspection, and did not suggest any alternative site or date, or any limitation on what plaintiff would be permitted to inspect.

Plaintiff's representatives arrived at the offices of defendants on June 12th at the designated hour for inspection and were met by a group of Trump employees who expressed surprise at plaintiff's visit. Initially, Mr. Stuart Hyman, controller of Trump Management, met solely with Mr. Henry Brachtl, Assistant United States Attorney. Ten to fifteen minutes later, Mr. Hyman met with the other representatives of plaintiff, including attorneys Norman P. Goldberg and Ms. Goldstein, and informed them that he was unaware of the scheduled records inspection and that no records could be produced until he contacted defense counsel.

Ms. Goldstein attempted, without success, to reach Mr. Manley by telephone and left a message for him to contact her at the United States Attorney's office. Plaintiff's representatives then left the Trump offices and returned to the United States Attorney's office.

About one hour later, Mr. Manley telephoned Ms. Goldstein at the office of the United States Attorney to inform her for the first time that he had objection to the inspection. Mr. Manley stated that these objections had previously been made to plaintiff whereupon Ms. Goldstein responded that no such objection had been transmitted and that, if defendants would not permit the inspection to proceed, plaintiff would file an appropriate motion. After some negotiations, defendants agreed to allow the inspection to begin on June 14, 1974, at the offices of defense counsel.

It is apparent even from this brief discussion, and the attached documentation, that plaintiff did not bypass defense counsel in its efforts to inspect defendants' records pursuant to a properly noticed request. Moreover, contrary to the affidavit and letter of defense counsel, there was no banging on doors, overreaching or other improper conduct by any of plaintiff's representatives. No calls were made to the United States Attorney's office by defendants or their counsel complaining about the conduct of representatives of the plaintiff.



We are prepared to call at the hearing on this matter each of the representatives of plaintiff who has some knowledge of these events in order to refute defendants' charges.

## II. THE LAW

While defendants' motion may simply be denied on the grounds that there are insubstantial facts to support it, there is additional authority under Rule 11 of the Federal Rules of Civil Procedure for the striking of pleadings which are found to be sham and false. Rule 11 states:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or it is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

That Rule is to be construed as imposing an affirmative obligation on the attorney filing the documents that he has in good faith made the determination that there is good ground to support the facts contained in the pleadings. Freeman v. Kirby, 27 F.R.D. 395, 397 (S.D.N.Y. 1961). The evidence suggests that this obligation was not fulfilled. Counsel who disregard this Rule

are to be held "strictly accountable." United States for the Benefit of Foster Wheeler Corp. v. American Surety, 25 F. Supp. 225 (E.D.N.Y. 1938). The sanctions provided in the Rule provide not only for the striking of a pleading found to be sham and false but also for such disciplinary or other action as may be appropriate.

\* \* \* \*

If the Court finds, after hearing, that defendants' allegations of unprofessional conduct against plaintiff's counsel are sham and false, plaintiff will ask not only that this Court strike those pleadings containing such allegations but that it draw appropriate unfavorable inferences against defendants at the time of the presentation of their cases on the merits. To quote Professor Wigmore

[A] party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth or merit. The

inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. Wigmore on Evidence, §278 (3rd Ed. 1940) \*/

That principle set forth, in Wilson v. United States, 162 U.S. 613, 620 (1886), has been consistently followed by federal courts. See e.g. Holt v. United States 272 F.2d (9th Cir. 1959) Andrews v. United States, 57 F.2d 723 (5th Cir. 1946). Accordingly, if the Court concludes that defendants made spurious claims against plaintiff's counsel which disrupted plaintiff's preparation of its case and misled the Court, as well, we submit that the propriety of drawing an inference as to the weakness of the defendants' case would be particularly appropriate.

#### CONCLUSION

Fore the foregoing reasons, we respectfully request that this matter be set down for hearing in advance of the trial,

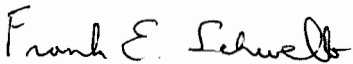
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\*/ This episode is merely the most striking example of conduct by the defense of the kind condemned by Wigmore, and not the first. In that connection, plaintiff invites the Court's attention to our Memorandum of the United States in Response to the Affidavits of Donald Trump and Roy Cohn, filed on January 7, 1974, and to the Report of the United States to the Court on the Status of Discovery, filed on August 25, 1974.

that the defendants' motion be dismissed with prejudice as sham and false, and that appropriate sanctions be ordered as the Court deems just and proper.

Respectfully submitted,

JAMES PORTER, Chief  
HENRY A. BRACHTL, Attorney  
United States Attorney's  
Office for the Eastern  
District  
Civil Division

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FRANK E. SCHWELB, Chief  
NORMAN P. GOLDBERG, Attorney  
Housing Section  
Civil Rights Division  
Department of Justice  
Washington, D. C.

APPENDIX A

T. 5-6-74

MAY 6 1974

JSP:FES:MSG:cmk  
DJ 179-52-28

Roy M. Cohn, Esq.  
Saxe, Bacon, Bolan and Manley  
39 East 63th Street  
New York, New York 10021

Re: United States v. Fred C. Trump, et al.,  
Civil Action No. 73 C 1529

Dear Roy:

Please find enclosed two copies of Plaintiff's  
Request for Production of Documents.

Sincerely,

J. STANLEY POTTINGER  
Assistant Attorney General  
Civil Rights Division

cc: Records  
Chrono  
Goldweber  
Trial File  
Hold

By:  
ELYSE S. GOLDWEBER  
Attorney  
Housing Section

APPENDIX B

T. 5/28/74  
JSP:EG:mlp  
DJ-175-52-28

MAY 28 1974

Scott Hanley, Esq.  
Saxe, Bacon, Dolan & Hanley  
39 East 68th Street  
New York, New York 10021

Re: United States v. Fred C. Trump, et.al.  
Civil Action No. 73 C 1529

Dear Mr. Hanley:

In response to our telephone conversation of May 28, 1974, please find enclosed a copy of Plaintiff's Request for Production of Documents, scheduled to commence on June 12, 1974. Also, please note the attached proposed schedule for continuing depositions of the agents and employees of Trump Management, Inc. Formal notice will be forthcoming. These depositions had been previously scheduled for April 18 - April 22, 1974.

Thank you for your cooperation in this matter. I look forward to hearing from you soon to confirm the attached discovery schedule.

Sincerely,

J. STANLEY POTTINGER  
Assistant Attorney General  
Civil Rights Division

By:

DONNA GOLDSTEIN  
Attorney  
Housing Section

cc: Records  
Chrono  
Ms. Goldstein  
Trial File  
Henry Bracht