

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 00-P-1005

WILLIAM SILVERSTEIN

vs.

MICROSYSTEMS SOFTWARE, INC. & others.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

[Signature], Clerk

Date March 26, 2003.

NOTE:

The original of this writin receipt
will issue in due course, pursuant
to M.R.A. P29

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-1005

WILLIAM SILVERSTEIN

vs.

MICROSYSTEMS SOFTWARE, INC. & others.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In September, 1998, William Silverstein, a software engineer, filed suit against his former employers, Microsystems Software, Inc., and The Learning Company, Inc. (together, employers), as well as against two officers of Microsystems Software, Inc., and the director of engineering who was Silverstein's direct supervisor. (A.136-161) Silverstein's complaint sought redress in eight counts relating to the defendants' responses to disabilities he claimed to have acquired while working at the software company. After an unsuccessful attempt to remove the case to Federal court (A.3), the defendants answered, and the employers counterclaimed against Silverstein for remarks he published on his website setting forth his grievances against his former employers. (A.32-49)

On August 27, 1999, the parties filed cross motions to compel discovery. (A.4) Four days later, the defendants served Silverstein with an offer of judgment pursuant to Mass.R.Civ.P. 68, 365 Mass. 835 (1974). (A.4, 55-56, 59-60) Silverstein

accepted the next day. (A.57) On September 7, 1999, the Superior Court sent notices to the parties that a Superior Court judge had allowed the defendants' motion to compel discovery and denied without prejudice the plaintiff's motion to compel discovery.

(A.4)

On September 13, six days after the rulings on discovery, a second Superior Court judge entered the agreed-upon rule 68 judgment for Silverstein, \$125,000 plus prejudgment interest of \$14,547.95. (A.4, 100-101) On September 22, 1999, in the face of the employers' insistence that Silverstein respond to their request for discovery on the counterclaim, the same judge who entered the judgment denied Silverstein's emergency motion for a declaration that further discovery was moot. (A.5)

Later in the fall of 1999, Silverstein filed a motion for summary judgment on the employers' counterclaim together with a request for a hearing pursuant to Superior Court Rule 9A, and a memorandum in support of the motion. (A.5, 83-97) The employers filed their opposition to Silverstein's motion (A. 303). Silverstein then moved for leave to respond to the employers' opposition. (A. 355) According to Silverstein, during a hearing on his motion for summary judgment in January 2000, the employers filed a motion for voluntary dismissal pursuant to Mass.R.Civ.P. 41(a)(2), 365 Mass. 803 (1974). (A.399-401, 408) Silverstein filed an opposition to the rule 41 motion. (A.403-414) In March

of 2000, a third Superior Court judge, apparently the same judge who had presided at the January hearing (A.399), granted the employers' motion and dismissed the counterclaim without prejudice, pursuant to Mass.R.Civ.P. 41(a)(2), by endorsement, over Silverstein's objection. (A.454-457)

On appeal, Silverstein argues that (1) the first judge should not have denied his emergency request for a declaration that further discovery was moot following the entry of judgment; (2) the third judge should have allowed his motion for summary judgment given the intention of the employers to dismiss the counterclaim without prejudice; and (3) the third judge should not have allowed the rule 41 dismissal of the counterclaim without prejudice.

"Whether, and on what terms, a dismissal without prejudice may be granted, is a matter left initially to the trial court's discretion." Alamance Indus., Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir.), cert. denied, 368 U.S. 831 (1961). Puerto Rico Maritime Shipping Authy. v. Leith, 668 F.2d 46, 49 (1st Cir. 1981). "In assessing whether a judge has abused his discretion, we do not simply substitute our judgment for that of the judge, rather, we ask whether the decision in question "rest[s] on whimsy, caprice, or arbitrary or idiosyncratic notions.'" Boulter-Hedley v. Boulter, 429 Mass. 808, 811 (1999). "Massachusetts Assoc. of Minority Law Enforcement Officers v.

Abban, 434 Mass. 256, 266 (2001). See United States v. Outboard Marine Corp., 789 F.2d 497, 502 (7th Cir. 1986), quoting from Kern v. TXO Production Corp., 738 F.2d 968, 971 (8th Cir. 1984) ("the very concept of discretion supposes a zone of choice within which the trial court may go either way [in granting or denying the motion]") (brackets in original).

It is the plaintiff's burden to show an abuse of discretion. United States v. Outboard Marine Corp., *supra* at 502. Although there is no dispute that the judge's endorsement was limited to "Allowed. The counterclaim is hereby dismissed without prejudice" (A.454), there is nothing in the record before us, other than fragments of the arguments of the parties, revealing the content of the hearing. The plaintiff did not provide a transcript of the January hearing. That a hearing is not evidentiary does not make it irrelevant. At the least, Silverstein's briefs suggest that the judge was engaged in the substance of the dispute. In this context, Silverstein's assertion that the standard governing review of this case is plain error rather than abuse of discretion because the judge failed to decide his motion for summary judgment is not persuasive. There is no basis for departing from the abuse of discretion standard.

"Rule 41(a) expressly contemplates situations in which the district court may, in its discretion, dismiss an action without

prejudice even after the [opposing party] has moved for summary judgment." Pontenberg v. Boston Scientific Corp., 252 F.3d 1253, 1258 (11th Cir. 2001) (holding that the defendant had failed to show that the motion judge abused his discretion by granting the plaintiff's motion for voluntary dismissal without prejudice, despite the defendant's outstanding summary judgment motion). Contrast Doe v. Urohealth Sys., Inc., 216 F.3d 157, 160 (1st Cir. 2000). "An abuse of discretion is found only where the defendant would suffer 'plain legal prejudice' as a result of a dismissal without prejudice, as opposed to facing the mere prospect of a second law suit." Doe v. Urohealth Sys., Inc., supra at 160-161, quoting from Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994). See Puerto Rico Maritime Shipping Authy. v. Leith, 668 F.2d at 50.

In deciding whether to grant a rule 41(a)(2) motion, courts typically look to "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that the motion for summary judgment has been filed by the defendant." Doe v. Urohealth Sys., Inc., supra at 160, quoting from Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969). See United States v. Outboard Marine Corp., 789 F.2d at 502 (factors as set out above are a guide for the trial judge). Again because

Silverstein has not supplied a transcript of the hearing before the judge who allowed the voluntary dismissal, it is difficult to evaluate these factors. At a minimum, the facts that The Learning Company, Inc., acquired the assets of Microsystems Software, Inc., in 1997 (A.48) and that the plaintiff had collected his judgment and moved to Texas, suggest reasons that the employers concluded that they "wish[ed] to spare the parties the additional inconvenience and expense of continued litigation." (A.454)

Silverstein's allegations of harm to him in the allowance of dismissal without prejudice are limited. First he claims that if the counterclaim plaintiffs attempt to sue him somewhere else he "would have to find new counsel and bring counsel up to speed on [the] case" because present counsel was handling the counterclaim "as the wind up of a contingency fee case." (A.412 n.8) He apparently did not raise the issue of the imposition of costs and fees before the Superior Court judge, and we express no opinion as to the imposition of costs and fees in any future action.

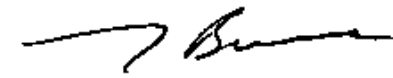
Next he contends that "the libel counterclaim was already dismissed with prejudice by the Rule 68 offer and judgment" (emphasis in original). (A.413) This claim is simply incorrect. There is no question of Silverstein forgoing a defense of res judicata on the counterclaim. The rule 68 judgment applied to the case with the caption Silverstein as the plaintiff versus all

the defendants. The rule 68 costs go only to the party defending against the claim underlying the rule 68 proffer, which in this case was all the defendants. Smith & Zobel, 8A Rules Practice § 68.1 (2002). See Wright, Miller, & Marcus, 12 Federal Practice and Procedure § 3001 (1997). There was no reference to the employers' counterclaim against Silverstein.

Finally, Silverstein's assertion that the counterclaim plaintiffs are conducting an in terrorem campaign to silence him (A.412) appears to be a two-sided dispute and, in any case, according to Silverstein's account, has not worked. A litigant does not prevail on a motion for summary judgment simply because defamation and libel actions are disfavored. For the reasons set out above, the judgment is affirmed.

So ordered.

By the Court (Greenberg, Beck
& Grasso, JJ.),


Asst. Clerk

Entered: March 26, 2003.