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NEW ORLEANS 70112

July 22, 1968

AIRMAIL

Mr. Harold Weisberg
Rte. 7
Frederick, Maryland 21701

In Re: Dr. Carlos Bringuier vs. Gambi Publications, Inc., Harold Weisberg and Dell Publishing Co., Inc. - Civil Action 68-1153 - Our file 2898

Dear Harold:

Pursuant to your request I am enclosing herewith copy of memorandum of authorities filed with the court on behalf of Gambi and Dell. Please bear in mind that you have never been served in this proceeding in any manner.

I again wish to remind you however, that there is a possibility that the plaintiff will now attempt to make service upon you there in Maryland and even more likely will attempt to make service upon you personally if he learns of your presence in New Orleans.

I know that you will advise me promptly as to any documents or papers whatsoever that are received by you in this matter. Meanwhile, rest assured that I shall continue to keep you advised.

Thanking you for your cooperation and with very best regards I am,

Yours sincerely,

William M. Lucas, Jr.

wml,jr/d
encl.
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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

DR. CARLOS BRINGUIER	:	
VS.	:	CIVIL ACTION
GAMBI PUBLICATIONS, INC. HAROLD WEISBERG, and DELL PUBLISHING CO., INC.	:	NO. 68-1153 SECTION "C"

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MEMORANDUM OF AUTHORITIES ON BEHALF OF GAMBI PUBLICATIONS, INC. AND DELL PUBLISHING CO., INC. IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Plaintiff seeks to have this Honorable Court enter an order of dismissal of the captioned proceeding without prejudice as to plaintiff, Dr. Carlos Bringuier.

Rule 41, Dismissal of Actions, of the Federal Rules of Civil Procedure relate in provision (a)(1) to voluntary dismissal by plaintiff or by stipulation and (2) to voluntary dismissal by order of court.

Counsel for defendants would not agree to stipulation of dismissal and plaintiff chose not to voluntarily dismiss: for, since there has already been one dismissal of this identical suit in the United States District Court, a second dismissal (other than by order of court) would operate as an adjudication upon the merits under the provisions of Rule 41(a).

Since plaintiff has chosen to proceed under the provisions of Rule 41(b), it is respectfully submitted that it is within the sound discretion of the court with due regard to the rights of all parties to determine whether or not this action should be dismissed on plaintiff's motion, and if so, on what terms it should be dismissed.

FACTUAL CONSIDERATIONS:

Counsel for defendants respectfully suggests that the following facts should be taken into consideration by the court in connection with plaintiff's motion to dismiss this action without prejudice.

(1) Plaintiff initially filed the same action against the same defendants on May 5, 1967 (No. 67-648, Section "F", United States District Court). The court is requested to take judicial notice of the record in that proceeding containing no less than forty-three (43) documents (including pleadings, interrogatories, motions, affidavits, memoranda, oppositions to motions, orders, minute entries and judgments). The aforesaid action appeared to culminate on August 14, 1967, when judgment of dismissal was signed by the court. However, in March, 1968, plaintiff attempted to effect service on defendant, Harold Weisberg (without summons being served) and filed a "Motion to Set Aside Judgment of Dismissal and Reinstate Suit". Pursuant to minute entry of date March 20, 1968, motion of plaintiff to set aside judgment of dismissal and reinstate suit was denied by the court in proceeding No. 67-648. In addition to the pleadings in proceeding No. 67-648, there were three (3) separate court appearances for hearings not including incidental matters such as motions for extension of time, etc.

(2) The time expended on behalf of defendants, Dell and Gambi in the aforesaid proceeding was most significant and resulted in expenses being incurred on the part of the said defendants, both in terms of costs and attorneys' fees.

(3) On April 29, 1968, the plaintiff filed the identical suit against the identical parties seeking the identical relief in the Civil District Court for the Parish of Orleans. That action was subsequently removed to this Honorable Court. The record will reflect the time and effort

that has gone into the defense of this second action on behalf of defendants, Gambi and Dell.

Now plaintiff seeks to dismiss, apparently in order that he may file the same suit again in the State Court and attempt to effect service in a proper manner. But, if plaintiff is in good faith, he can attempt to cure defective service in the instant proceeding as readily as he can in a new proceeding in the State Court (which he can be reasonably certain will be removed to the Federal Court).

Defendants, Gambi and Dell basically submit the following argument to this Honorable Court.

Pursuant to memorandum of authorities previously submitted, the judgment of the United States District Court for the Eastern District of Louisiana of date, August 14, 1967 is res judicata, since in both proceedings the parties are identical, the claim is identical, the alleged cause of action is identical and the attempted service of process is identical. The question of jurisdiction and of validity of service of process were litigated and contested between the parties in the initial action resulting in a judgment in favor of defendants dismissing plaintiff's action. The plaintiff did not appeal pursuant to Rule 73 but elected instead to file a new suit. Plaintiff seeks to have another court of original jurisdiction act in the capacity of an appellate tribunal and overrule an already existing judgment based on the same facts, involving the same parties and presenting the same issues. Thus, defendants respectfully submit that the first consideration is whether the judgment of August 14, 1967 is res judicata. If the court decides in the affirmative, then it is just as much res judicata in a State Court as in a Federal Court. The issue has been raised, briefed and is to be argued on July 17, 1968. It is respectfully submitted that plaintiff should not be allowed to dismiss his suit without prejudice to avoid a ruling on the res judicata point only to file another suit and be faced with the

issue again.

Alternatively, should this Honorable Court conclude that plaintiff can dismiss his action despite the previous history thereof and despite the clear legal implications of what is taking place, then at the very least, he should not be permitted to do so at defendants' expense. Under Rule 41(a)(2) the court has the right to dismiss an action "upon such terms and conditions as the court deems proper". Accordingly, the court is urged to consider the expense to which defendants have been exposed by the proceedings thus far and if plaintiff persists in his desire to dismiss without prejudice and if the court is inclined to grant plaintiff's motion, then plaintiff should be caused to bear the expenses involved therein and incurred by defendants.

AUTHORITIES:

In the case of Engelhardt v. Bell & Howell Company 299 F. 2d. 480 (1962), the initial suit brought in a Circuit Court in the City of St. Louis was removed to the United States District Court and subsequently, the plaintiff voluntarily dismissed the action. Two days prior to the dismissal the plaintiff filed a second action in the Circuit Court of the City of St. Louis. Thereafter this second action was removed and thereafter plaintiff dismissed the suit. Dismissal of the second case was made prior to the District Court's ruling on defendant's motion to dismiss on jurisdictional grounds and insufficiency of service of process. A third suit was filed through new counsel, no attempt being made to withdraw the dismissal of the second action and to reinstate it. Defendant again removed to the Federal Court. The court reviewed the purpose of Rule 41 as well as the two dismissal exception contained in the rule. The court held:

> "Professor Moore has stated the purposes of Rule 41 in 5 Moore's Federal Practice, (2d Ed.), § 41.02, p. 1007:

> 'The purpose of the first sentence of Rule 41(a)(1) is to facilitate the voluntary dismissal of an action, but safeguard abuse of the right by limiting its application to an early stage of the proceedings.* * *'
>
> As to the purpose of the two dismissal exception, he states at § 41.04, pp. 1014-1015:
>
> '* * * The principle of that exception is found in some statutes, and was applied in law actions by the federal courts under the Conformity Act. The ease with which a voluntary dismissal may be secured in the early stage of an action under Rule 41(a)(1) made this provision practically necessary to prevent an unreasonable use of dismissal.'
>
> * * * * *
>
> Had the plaintiff proceeded in the second suit under (a) (2), the court, if it thought plaintiff should have been allowed to dismiss without prejudice, would have granted dismissal upon such terms and conditions as it thought proper. The court might have based such terms on the expense to which defendant had been put by plaintiff's actions. 5 Moore's Federal Practice, (2d Ed.), § 41.06, p. 1025. Defendant must have been put to substantial expense in the first suit and very probably incurred a greater expense in the second suit. The District Court, in passing on a motion for dismissal of the second suit without prejudice, might well have taken into consideration, in fixing the terms and conditions, the matter of reimbursement to the defendant for the defendant's forced expenditures in the two suits." (Emphasis supplied).

In the case of American Cyanamid Company v. McGhee, 317 F. 2d. 295 (1963), appellant, the defendant below, sought review of the trial court's order fixing the terms and conditions of dismissal of a negligence action. While holding that a voluntary dismissal by Order of court after an initial voluntary dismissal of the same suit by Notice does not bar the filing of a third suit, the lower court's award of expenses and attorney's fees was upheld. The court held:

> "It does not follow that there is no limit at all on the number of such dismissals even by court order. While there is no precise digital answer, the mere repetition of such occurrence may, in and of itself, become so oppressively prejudicial as to require the sound conclusion that even once more is too much. This along with countless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, goes into the process of sound discretion of the trial court, as 41(a) (2) says, 'as the court deems proper.'
>
> Here the trial judge deemed it proper that plaintiff bear the cost of the cancellation by paying his adversary's expenses plus a reasonable

> attorney's fee, but he also deemed it proper that plaintiff be allowed to bring yet another suit upon making such payment." (Emphasis supplied)

CONCLUSIONS:

On the basis of the foregoing authorities, it is respectfully submitted that plaintiff should not be permitted to dismiss without prejudice the action now pending. It is within the sound discretion of the court to refuse to grant plaintiff's motion. It would appear that it is plaintiff's intention to merely file another suit for the avowed purpose of curing a defect which can be as easily cured in the proceeding presently pending as by the filing of a new suit. Since judgment of July 14, 1967 is res judicata as to the issues here presented and since that judgment should be given effect by both State and Federal Courts, no useful purpose will be served by not adjudicating that issue in the present proceeding.

This case is not in an early stage of the proceeding but rather has been extensively argued and the legal issues have been extensively briefed. Plaintiff should not, with complete immunity, be permitted to continue the litigation in the face of a prior existing judgment by dismissing the current litigation and proceeding with additional litigation without bearing the cost and expenses of the litigation presently pending. Accordingly, it is respectfully submitted that this Honorable Court should deny plaintiff's motion to dismiss without prejudice, or alternatively, should cast plaintiff for costs and attorneys' fees incurred by it in the defense of the litigation which plaintiff now seeks to dismiss.

Respectfully submitted,

DUFOUR, LEVY, MARX & LUCAS

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1006 Nat'l Bank of Commerce Bldg.
New Orleans, Louisiana 70112
Telephone 523-5551
Attorneys for Casbi Publications, Inc. and Dell Publishing Co., Inc.

C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing memorandum of authorities has been served on Nestor Marquez-Diaz, Esq. and Herbert C. Parker, III, Esq., Counsel of Record for Plaintiff, by delivering same by hand to their office, 539 Gravier Street, New Orleans, Louisiana.

New Orleans, Louisiana, July 16th, 1968.

WILLIAM M. LUCAS, JR.