

12/9/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A KNAUER as the Court Appointed)
Receiver for HEARTLAND)
FINANCIAL SERVICES, INC., JMS)
INVESTMENT GROUP, LLC,)
)
Plaintiff/Appellant,)

DISTRICT COURT
CASE NO. IP-01-1168-C T/K

vs.)

JONATHON ROBERTS FINANCIAL)
GROUP, INC., ALLIANCE CAPITAL)
MANAGEMENT CORP., ANDOVER)
SECURITIES, INC., FSC SECURITIES)
CORPORATION AND FFP SECURITIES,)
INC.,)
)
Defendants/Appellees.)

**FSC SECURITIES CORPORATION'S MOTION TO RECONSIDER AND OBJECTION
TO PLAINTIFF'S MOTION TO SUPPLEMENT THE RECORD**

FSC Securities Corporation ("FSC"), by counsel, objects to the Plaintiff's Motion to Supplement the Record pursuant to Fed. R. App. P. 10(e) and Circuit Rule 10(b). In support of this objection FSC states that:

1. Plaintiff moved on November 22, 2002 to supplement the record. Pursuant to L.R. 7.1 FSC's response is due on December 9, 2002 and thus is timely. The Court granted the Motion on December 3, 2002. To the extent necessary FSC asks that the Court treat this objection as a motion to reconsider.

2. The Plaintiff seeks to have the record supplemented with documents that were not offered into or received in evidence. The Plaintiff's Motion is untimely and is directly contrary to the transcript of the hearing.

3. At the Motion to Dismiss hearing Plaintiff's counsel had a binder of documents including paper materials of copies of case law and hard copy representation of Plaintiff's Power Point Presentation.

4. Plaintiff never moved to admit any such documents or records into evidence, did not have filed any of these documents or records and in fact did not even seek to have the Court keep a copy of any of these materials.

5. Federal Appellate Rule 10 clearly states that only the following documents constitute the record on appeal:

- (1) the original papers and exhibits filed in the District Court;
- (2) the transcript of proceedings, if any; and
- (3) a certified copy of the docket entries prepared by the District Clerk.

Fed. R. at 10(a).

6. Fed. R. App. P. 10(e) applies only when a, "difference arises about whether the record truly discloses what occurred in the District Court, the difference must submitted to and settled by that Court and the record conformed accordingly."

7. Plaintiff's counsel now argues that these documents were actually tendered as some type of Exhibit to the Trial Court and this representation is incorrect. FSC believes that a review of the transcript of the hearing will show that Plaintiff's counsel was careful never to actually to offer to admit into evidence any of the materials presented.

8. At page 61 of the transcript of the hearing Plaintiff's counsel indicated that for ease of reference the Court could have a copy of this binder for review. The Court declined and stated that Plaintiff's counsel should simply provide the citations for cases orally. (Hearing transcript p. 61). At page 81 of the transcript the Court was discussing FSC's objection to the

references to the binder material and the Court appropriately pointed out that only Plaintiff's counsels' oral representations were part of the record.

9. The record clearly shows that the proposed supplementation is for documents not tendered or received or even contemplated as being part of the record.

10. FSC believes that paragraph 4 of Plaintiff's Motion stating that the Exhibits were tendered to and received by the Court is an incorrect statement of fact. Thus, Fed. R. App. 10 does not allow the record to be supplemented with any papers or exhibits that were not actually filed in the District Court.

11. Plaintiff's backup argument is an attempt to use Circuit Rule 10 to somehow have the record supplemented with these non-exhibits.

12. Plaintiff is undoubtedly attempting to create a distinction in the Circuit Rule which does not exist. The language in question is as follows:

The Clerk of the District Court shall prepare within 14 days of filing a notice of appeal the original papers, transcripts filed in the District Court, and exhibits received or offered in evidence (with the exceptions listed below).

Circuit Rule 10(a).

13. Plaintiff appears to be making the argument that although it never offered any exhibits into evidence at the hearing the Trial Court "received" the Exhibits and therefore they are required to be made a part of the record.

14. Such a reading of the rule is inaccurate.

15. The distinction between exhibits that are received into evidence and those that are offered into evidence is that a party may offer into evidence a particular exhibit that the court refuses to admit into evidence. Thus, the distinction between "received" and "offered" is a

standing distinction between whether a trial court has admitted an exhibit or has refused to admit an exhibit.

16. It is not meant to address a situation where a litigant has purposely chosen not to offer an exhibit into evidence and simply offered to allow the Trial Court to review it as an aid to following its argument.

17. Plaintiff's counsel made a conscious decision to follow that strategy because it knew that actually offering an exhibit into evidence would have raised an objection and the court would have properly refused to receive such an exhibit at a motion to dismiss hearing.

18. Fortunately, the history and purpose of this rule does not need to be exhaustively analyzed because it does not apply to Plaintiff in this situation.

19. That portion of Circuit Rule 10 which Plaintiff's counsel chose not to include in its motion which is directly on point is as follows:

Counsel must insure that Exhibits and transcripts to be included in the record which are not in the possession of the District Court Clerk are furnished to the Clerk within ten (10) after the filing of the Notice of Appeal.

Circuit Rule 10(a).


20. The Plaintiff's Notice of Appeal was filed more than thirty (30) days ago and because Plaintiff never offered the Exhibits into evidence Plaintiff already knew that they were not a part of the District Court Clerk's record and thus Plaintiff cannot use Circuit Rule 10 to supplement the record.

21. It should also be noted that FSC raised an objection at the hearing.

WHEREFORE, FSC Securities Corporation respectfully requests that the Court deny the Plaintiff's Motion to Supplement the Record.

Respectively submitted,

DANN PECAR NEWMAN & KLEIMAN
Professional Corporation

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CERTIFICATE OF SERVICE


I hereby certify that a copy of the foregoing has been served upon the following on this 9 day of December, 2002, by first-class, United States Mail, postage prepaid:

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