

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HON. STEPHEN V. WILSON, JUDGE PRESIDING

5

6 QED PRODUCTIONS, LLC., et al.,)
7 Plaintiffs,)
8 vs.) No. CV 07-225-SVW
9 JAMES NESFIELD, et al.,) No. CV 07-4438-SVW
10 Defendants.)
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Los Angeles, California

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1 LOS ANGELES, CA.; FRIDAY, JANUARY 9, 2009; 1:47 P.M.

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3 THE CLERK: Item 3, CV 07-225-SVW, QED Productions
4 v. James Nesfield and CV 07-4438-SVW, Stan Lee Media Inc. v.
5 Stan Lee, et al. Counsel, please state your appearances.

6 MR. WILLIAMS: Good afternoon, Your Honor, Mark
7 Williams appearing on behalf of plaintiff Stan Lee, QED
8 Productions and Pow! Entertainment. With me is Les Werlin,
9 also co-counsel.

10 MR. CAIRL: Good afternoon, Your Honor, Jack Cairl
11 appearing for defendants Nesfield, Galloway and Cogan.

12 MR. GARBUS: Martin Garbus co-counsel with
13 Mr. Cairl appearing for those defendants.

14 MS. SASAKI: Good afternoon, Your Honor, Judith
15 Sasaki on behalf of defendants Chris Belland and John
16 Petrovitz.

17 MR. PASH: Good afternoon, Your Honor, David Pash
18 co-counsel for Mr. Belland and Mr. Petrovitz.

19 | THE COURT: You may be seated.

20 THE CLERK: Gentlemen, state your appearances.

21 MR. SHEPPARD: This is Sean Sheppard, Your Honor,
22 for the Anderson Firm on the behalf of Nesfield, Galloway
23 and Coqan and Stan Lee Media.

24 MR. PAUL: This is Peter Paul, Your Honor, acting
25 pro se. I can't hear very much because apparently the

1 parties aren't talking into the microphone.

2 THE COURT: Well, we will do the best we can,
3 Mr. Paul.

4 MR. PAUL: Thank you.

5 THE COURT: I'm sorry that you are in that
6 situation but we can't turn the hearing upside down to
7 accommodate you. We will do the best we can.

8 MR. PAUL: Thank you very much.

9 THE COURT: Let me make some preliminary
10 observations and the rulings. First, I find that the
11 transfer or purported transfer to QED was never accomplished
12 because the bankruptcy order specifically said that the
13 transfer had to be to SLC and it wasn't, but before I
14 finalize that inclination let me ask the parties to provide
15 some information on one or two points.

16 Did QED make any payments to the creditors of SLMI
17 in the bankruptcy proceeding? Do the parties have an answer
18 to that?

19 MR. WILLIAMS: Your Honor, if I may address, Mark
20 Williams. My understanding, and I can look at the
21 declaration of Junko Kobayashi, but I believe approximately
22 \$7,500 was paid.

23 THE COURT: And what was the amount owed to the
24 creditors in total?

25 MR. WILLIAMS: It was many hundreds of thousands

1 of dollars. The issue however was that -- and there are
2 declarations by Gill Champion, Stan Lee and Junko Kobayashi
3 of the efforts that were made by QED to realize on the
4 assets and they weren't able to do so and so the full amount
5 they were able to realize was approximately \$7,500 and that
6 was paid over it's my understanding. I'd have to look at
7 the affidavit at what it says.

8 THE COURT: You say there are declarations in
9 which the plaintiffs have demonstrated efforts to exploit
10 the copyrights unsuccessfully and that the -- but the
11 payments to the creditors were in the amount of about
12 \$7,500?

13 MR. WILLIAMS: Yes. It was a negligible amount
14 relatively speaking.

15 THE COURT: I see.

16 MR. WILLIAMS: And the declarations that are in
17 the court file by Mr. Champion and Ms. Kobayashi detail the
18 efforts that were made to exploit these assets --

19 THE COURT: All right.

20 MR. WILLIAMS: -- after the assignment was made.

21 THE COURT: Do the defendants have any different
22 information on that question?

23 MR. CAIRL: Yes, Your Honor, I would just look at
24 paragraph six of the Kobayashi declaration which says that
25 \$7,500 was paid to SLMI, not the creditors, so in terms of

1 what the evidence shows I don't believe the creditors ever
2 received anything.

3 MR. WILLIAMS: That is an accurate statement, Your
4 Honor. That's why I said I would look at the Kobayashi
5 affidavit. Whatever the Kobayashi affidavit says was
6 accurate about the SLMI whether it was distributed to --

7 THE COURT: Wasn't my original question, and
8 correct me if I'm wrong, regarding what payments were made
9 to the creditors?

10 MR. WILLIAMS: It was.

11 THE COURT: And so you didn't answer in a straight
12 forward way.

13 MR. WILLIAMS: I apologize, Your Honor.

14 THE COURT: You know something, I must say this
15 without sounding personal, but when this happens I think
16 it's appropriate for the court to not let it slip by. I get
17 the impression that you are somewhat deceptive with the
18 court. That's my impression and I hope it's an erroneous
19 impression, but on more than one occasion when we've had
20 hearings you've done or said things which leave me with that
21 impression. That doesn't help your client.

22 MR. WILLIAMS: I apologize, Your Honor.

23 THE COURT: Don't let those slip-ups happen again.

24 MR. WILLIAMS: Yes, Your Honor.

25 THE COURT: Please be seated.

1 So the court's statement that the transfer to QED
2 will not be respected in light of the bankruptcy court's
3 order is the ruling.

4 Now with regard to where we are now, the plaintiff
5 does have other theories as to why they have standing to
6 assert the copyright and trademark violations. And the two
7 principal theories as I understand them are, one, that
8 Stan Lee terminated his employment contract with SLMI
9 approximately five days prior to the bankruptcy; and the
10 second theory is that the employment contract itself is void
11 because as a matter of public policy it violates California
12 law. And those matters are related to each other in the
13 sense that they're merits related and that they are related
14 to the question of standing. So the standing question as I
15 read the authorities can't be decided without deciding the
16 merits question. They are intertwined.

17 So if there is a disputed issue of fact that
18 requires a jury determination there would have to be a jury
19 determination on that issue of fact and the court would be
20 obliged to follow that jury determination whether it liked
21 it or not in determining standing. And the authority for
22 that procedural approach is a case in the Ninth Circuit.
23 There may be other cases. It's not a standing case. It's
24 actually a personal-jurisdiction case, but I think the
25 thought process is similar, and the case is *Data Disc* and

1 it's reported in the Ninth Circuit at 557 F.2d.

2 Now turning to the issues, whether or not the
3 employment contract violates public policy as the plaintiff
4 alleges seems to the court to be a question of law and so
5 that ought to be the subject of a summary judgment
6 disposition one way or the other. With regard to whether
7 the contract was terminated, that too could be resolved on
8 summary judgment but maybe not so if certain preliminary
9 findings were made.

10 Let me make that clearer. Whether the plaintiff
11 had the right to unilaterally terminate the contract could
12 be a question of law. Whether -- assuming the defendant had
13 that right, the question could arise as to whether that
14 constitutes a preference in the bankruptcy code. I'm
15 raising these questions, not attempting to answer them
16 because I don't know and I really haven't researched it.

17 There could be a question, although it's somewhat
18 convoluted, as to whether the plaintiff's agreement to
19 transfer the assets as per the bankruptcy order even though
20 unsuccessful amounted to some form of waiver. And assuming
21 the plaintiff prevails on those or other roadblocks, then
22 there may be an issue of fact regarding the construction of
23 the employment agreement. In other words, the court would
24 have to then consider whether extraneous evidence ought to
25 be considered in construing the contract and whether that

1 evidence is conflicting and then and only then do I foresee
2 a trial. So I will reduce the thoughts expressed today to
3 an order, but I am inviting the parties to at least give
4 some attention to what I have outlined and I will set a
5 trial date, but actually I have gotten ahead of myself
6 somewhat.

7 There is the other question of whether the --
8 whether SLMI has been legally revived. At this point it's
9 my view that SLMI has no one to speak for it. At the last
10 meeting or last hearing I understood the parties to say that
11 SLMI was in the process of procedurally reviving itself.
12 Can the parties tell me where that is at this point?

13 MR. GARBUS: They have not yet succeeded in
14 reviving themselves.

15 THE COURT: Where are they on that road?

16 MR. GARBUS: There is a -- a special master will
17 come down with a decision on or about January 13th to
18 determine whether or not a quorum has existed so that
19 ultimately a board of directors can be appointed and that
20 board of directors can affirm the previous lawsuit. That
21 has not yet happened.

22 The special master has sent out the proxies. The
23 votes have come back. It seems that there will be a
24 determination that there is a quorum. It seems that there
25 will be a determination that an appropriate board of

1 directors will come in. I would doubt very much that that
2 will happen before the end of the month, but I do think it
3 will happen. It seems to me, if I may say --

4 THE COURT: Yes.

5 MR. GARBUS: -- it seems to me that Judge Crotty's
6 decision that he rendered a good while ago would also be
7 appropriate here until such time as the question of the
8 authority of the corporation to ratify the suit or the legal
9 process actually occurs. Mainly I think that SLMI Inc.
10 ought to be dismissed in this case with leave to renew in
11 the same way that Judge Crotty did it.

12 THE COURT: What I'm going to do then is this:
13 I'm going to stay all proceedings until there is some
14 finality to the reviving of SLMI. The parties are ordered
15 to notify the court when that has been done one way or the
16 other, and once that is done I will issue a scheduling order
17 and the parties can proceed on a litigation course. My hope
18 would be that some of these legal questions that I outlined
19 are dealt with first.

20 MR. GARBUS: Thank you.

21 THE COURT: All right. That's the hearing. Thank
22 you.

23 There are some motions to withdraw that I haven't
24 addressed. Are those motions opposed?

25 MR. CAIRL: Jack Cairl appearing for O'Donnell and

1 Associates. Your Honor, no, no opposition has been received
2 to that.

3 THE COURT: Who are you representing now?

4 MR. CAIRL: Representing defendants Nesfield,
5 Cogan and Galloway.

6 THE COURT: Is there any substitution?

7 MR. CAIRL: No, Your Honor, there isn't.

8 THE COURT: So they would be representing
9 themselves?

10 MR. CAIRL: That is correct, Your Honor.

11 MR. GARBUS: Excuse me, Mr. Cogan is here. He did
12 not identify himself, opposing the motion. He should be
13 identified and he should be allowed to speak I think.

14 THE COURT: I see.

15 MR. CAIRL: I believe Mr. Cogan is opposing the
16 motion of Mr. Sheppard, not the motion brought by my firm.

17 THE COURT: Who is Mr. Sheppard seeking -- who are
18 you representing, Mr. Sheppard?

19 MR. SHEPPARD: The same as Mr. Cairl. I represent
20 the individual defendants Nesfield, Galloway and Cogan as
21 well as Stan Lee Media on the related case.

22 THE COURT: I see. Why are you seeking leave to
23 withdraw?

24 MR. SHEPPARD: Judge, we were -- the Anderson
25 Firm, being the counsel that contracted with Jack Cairl and

1 O'Donnell and Associates to be local counsel, we were
2 terminated by James Nesfield and advised not to do anything
3 else on the case. We were originally retained by Stan Lee
4 Media to represent it and its purported principles who were
5 Nesfield, Galloway and Cogan.

6 THE COURT: As local counsel?

7 MR. SHEPPARD: Not as local counsel. We are in
8 Florida, Judge. We actually contacted O'Donnell and
9 Associates to act as local counsel for us.

10 THE COURT: I see. And what may I ask have you
11 been paid so far?

12 MR. SHEPPARD: Nothing.

13 THE COURT: I see. What's your basis for opposing
14 withdrawal?

15 MR. GARBUS: Your Honor, may I?

16 THE COURT: No, no, no. Aren't you opposing?

17 MR. COGAN: I'm Douglas Cogan, Your Honor.

18 THE COURT: Yes. You are a defendant in the case?

19 MR. COGAN: I am, sir.

20 THE COURT: Why are you opposing their motion to
21 withdraw?

22 MR. COGAN: I have asked on multiple occasions for
23 Mr. Sheppard to provide me with all of my records.

24 Mr. Sheppard has gone through corporate records in Colorado
25 and other records. I don't know exactly what he's gone

1 through, Your Honor, but he extensively went through
2 corporate records of Stan Lee Media. He categorized them,
3 gathered all of the information, put them in files and put
4 them on computer discs. I really need all of my
5 information. Mr. Cairl has provided me with all of the
6 pleadings and other things, but I believe that Mr. Sheppard
7 has information that's critical not only to my defense but
8 also any additional action I seek to take in the damages
9 that have been caused me, Your Honor.

10 THE COURT: What was your fee arrangement with
11 Mr. Sheppard? He says you have not paid him anything.

12 MR. COGAN: I have never signed an agreement with
13 Mr. Sheppard. Mr. Nesfield, acting on behalf of Stan Lee
14 Media, and I don't even know if he had the authority to do
15 that.

16 THE COURT: You are saying that Mr. Sheppard is
17 not your lawyer?

18 MR. COGAN: He has acted as my lawyer. He and I
19 don't have an agreement. I've never signed any agreement
20 that I have to pay him any money, Your Honor.

21 THE COURT: So you think that he's a public legal
22 aid society?

23 MR. COGAN: I don't think that at all, Your Honor.

24 THE COURT: Why should you get the benefits of his
25 efforts if you have not paid him? He must have spent some

1 time doing what you say he did. Why should he give you the
2 benefit of his labors if he hasn't been compensated pursuant
3 to some agreement?

4 Mr. Sheppard, did you have a fee arrangement with
5 the defendants?

6 MR. SHEPPARD: I had an arrangement with Stan Lee
7 Media, Your Honor, and Stan Lee Media asked us as a benefit
8 to their purported principals to represent the individuals
9 who had acted on its behalf.

10 THE COURT: What was the fee arrangement?

11 MR. SHEPPARD: It was a contingency arrangement,
12 Judge, with the entity.

13 THE COURT: And so in other words you weren't to
14 be paid on any hourly rate; is that it?

15 MR. SHEPPARD: That's it, Your Honor, but there
16 was also another aspect to it. There were costs of the
17 litigation that were to be split between the Anderson Firm
18 and Stan Lee Media and Stan Lee Media has not paid what they
19 were suppose to pay toward those costs and that's the
20 reason.

21 THE COURT: What were the costs?

22 MR. SHEPPARD: We had about -- and I'm talking a
23 ballpark number, Judge, about \$600,000 we had paid in costs
24 and Stan Lee Media was suppose to put in the next portion of
25 the cost and did not do that.

1 THE COURT: So how much of the 600,000 was
2 Stan Lee Media suppose to contribute?

3 MR. SHEPPARD: None of that. We agreed to put
4 that in and then Stan Lee Media was to put in 200,000 after
5 that and they did not do that.

6 THE COURT: And have you done the type of research
7 and cataloging that Mr. Cogan says you did?

8 MR. SHEPPARD: The index that was submitted to the
9 court. I saw that document. I did not prepare that
10 document. I would suspect that, that came from New York
11 counsel in a separate case. I did not prepare that.

12 THE COURT: So you are saying that you are not
13 agreeing then with what Mr. Cogan says you did and what you
14 possess?

15 MR. SHEPPARD: Not entirely, Judge. I have
16 obviously worked on the case. There has been a separate
17 case in Colorado I've worked on and a separate case in New
18 York I've worked on against Marvel and I have documents
19 obviously from all three case files and I have scanned some
20 documents to discs for discovery in New York for instance
21 and otherwise.

22 THE COURT: Are you now refusing to share that
23 with Mr. Cogan and others?

24 MR. SHEPPARD: Yes, Your Honor. We have a lien
25 against the file in New York because obviously we have a

1 dispute in New York.

2 THE COURT: Regarding fees?

3 MR. SHEPPARD: Yes.

4 THE COURT: I see.

5 MR. SHEPPARD: And for that reason obviously all
6 of the work in New York we have a lien against that file.
7 The file in California is really limited to the pleadings in
8 the case which I understand Mr. Cogan has copies of all of
9 those from Mr. Cairl.

10 THE COURT: Well, at this point I'm not going to
11 compel Mr. Sheppard to turn over anything because that
12 would --

13 MR. PAUL: Your Honor, before you make a decision
14 could I make a comment as a party to all of this?

15 THE COURT: Who are you?

16 MR. PAUL: Peter Paul.

17 THE COURT: Tell me your position briefly. Last
18 time you spoke at length and in the court's view not too
19 productively, so tell me your position briefly.

20 MR. PAUL: In short because of the contingency fee
21 agreement and the control that the Anderson firm had over
22 the global strategy of the case, Mr. Cogan was subject to
23 all decisions that were made not necessarily in his interest
24 by the Anderson Firm because of their prospect of
25 participating in a substantial way in any recovery. As a

1 result the work product that was produced globally should be
2 available --

3 THE COURT: I understand your position, Mr. Paul.
4 And, Mr. Cogan, if you wish to pursue it the court is
5 receptive to any written motion so the matter can be more
6 fully digested.

7 At this point, Mr. Sheppard, his motion to
8 withdraw is granted. And anything else?

9 MR. GARBUS: Your Honor, may I speak briefly on
10 behalf of SLMI Inc. recognizing the limitations?

11 THE COURT: I don't want to hear anything further
12 on that because at this point SLMI isn't a lawful entity.

13 MR. GARBUS: But he is seeking to withdraw from
14 that representation.

15 THE COURT: Who is seeking to withdraw?

16 MR. GARBUS: Mr. Sheppard.

17 THE COURT: Why shouldn't he be allowed to
18 withdraw?

19 MR. GARBUS: Because there are certain documents
20 that he has that are the corporate documents of SLMI Inc. in
21 other words the corporate records.

22 THE COURT: Actually, on this motion to withdraw I
23 must confess that I'm not as prepared as I am on the other
24 questions. Did you file a formal opposition?

25 MR. GARBUS: I did, Your Honor, on behalf of SLMI

1 Inc. indicating some of the past history but also indicating
2 the status of SLMI.

3 THE COURT: I will consider that further and not
4 rule on that until I have a chance to review the briefs.
5 So, Mr. Sheppard, your motion to withdraw from SLMI is not
6 granted at this time but it is -- what was your motion? You
7 sought to withdraw in representing the individuals, right?

8 MR. SHEPPARD: Yes, Your Honor.

9 THE COURT: And I did grant that, correct.

10 MR. SHEPPARD: As I understand Your Honor, yes.

11 THE COURT: Are the arguments related or
12 different?

13 MR. GARBUS: They are related.

14 THE COURT: All right. Then I will hold in
15 abeyance my earlier ruling and not allow you to withdraw
16 until I consider the arguments and if necessary schedule
17 further briefs.

18 MR. CAIRL: Our motion to withdraw is unopposed,
19 Your Honor.

20 THE COURT: I will allow you to withdraw.

21 MR. CAIRL: Thank you, Your Honor.

22 MS. SASAKI: I'm sorry. There is one more motion.
23 I just want to clarify that my understanding now is that
24 that motion on behalf of my client which was a motion to
25 dismiss, my clients being defendants Belland and Petrovitz,

1 would be part of the stay and would also be subject to the
2 new scheduling order.

3 THE COURT: Yes.

4 MS. SASAKI: Thank you, Your Honor.

5 THE COURT: Then you will have to notify me when
6 SLMI is revived if that happens. Thank you.

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8 (At 2:16 p.m. proceedings were adjourned.)

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CERTIFICATE

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5 I hereby certify that pursuant to Section 753,
6 Title 28, United States Code, the foregoing is a true and
7 correct transcript of the stenographically reported
8 proceedings held in the above-entitled matter and that the
9 transcript page format is in conformance with the
10 regulations of the Judicial Conference of the United States.

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Date: January 20, 2009

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Wil S. Wilcox

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WIL S. WILCOX
U.S. COURT REPORTER
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