

**United States Court of Appeals
For the First Circuit**

No. 17-1593

SEXUAL MINORITIES UGANDA

Plaintiff - Appellee

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries

Defendant - Appellant

**PLAINTIFF-APPELLEE SEXUAL MINORITIES UGANDA'S
OPPOSITION TO DEFENDANT-APPELLANT SCOTT LIVELY'S
MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO SET
ORAL ARGUMENT AND TO EXCLUDE APPELLEE FROM ORAL
ARGUMENT FOR DEFAULT IN FILING BRIEF**

Pursuant to Fed. R. App. P. 27, Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”), by and through the undersigned counsel, submits its Opposition to the Motion for Reconsideration of Denial of Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief submitted by Defendant-Appellant Scott Lively (“Lively”) on December 21, 2017 (EID No. 6140152) (the “Reconsideration Motion”). In support thereof, SMUG states as follows:

1. On June 8, 2017, after prevailing below, Lively filed his Notice of Appeal with the United States District Court for the District of Massachusetts, and the instant appeal was docketed on June 14, 2017.

2. On July 3, 2017, SMUG filed a Motion to Dismiss the instant appeal (the “Motion to Dismiss”), primarily on the grounds that, as the prevailing party below, Lively had no standing to appeal a judgment in his favor, and a Motion to Stay Proceedings Pending Resolution of its Motion to Dismiss (the “Motion to Stay”).

3. On July 10, 2017, this Court issued a Briefing Notice (the “Scheduling Order”) requiring Lively’s merits brief to be filed by August 21, 2017, and stating that the deadline for SMUG’s response brief would be set in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0.

4. On July 24, 2017, Lively filed his opposition briefs to the Motion to Dismiss and the Motion to Stay.

5. On July 31, 2017, SMUG filed its replies in further support of the Motion to Dismiss and the Motion to Stay.

6. As of the date of the filing of this Opposition, this Court has not ruled upon the Motion to Dismiss or the Motion to Stay.

7. On September 27, 2017, and October 2, 2017, Pamela C. Spees, counsel for SMUG, spoke with Gerry Claude, Case Manager in the Clerk’s Office

of the First Circuit, to inquire about the effect of the still-pending Motion to Dismiss and Motion to Stay on the deadlines and briefing schedule in the Scheduling Order. Declaration of Pamela C. Spees, dated January 1, 2018 (“Spees Decl.”), ¶ 2.

8. During those conversations, Mr. Claude informed Ms. Spees that because the Motion to Dismiss and the Motion to Stay were pending, the parties would not be defaulted for not filing briefs by the deadlines set out in the Scheduling Order. *Id.*, ¶ 3.

9. In Ms. Spees’ conversation with Mr. Claude on Monday, October 2, 2017, Ms. Spees further requested clarification that SMUG would not be defaulted if it did not file a brief in opposition by the deadline in the Scheduling Order even if Lively filed his opening merits brief by the deadline, and Mr. Claude confirmed this was the case. *Id.*, ¶ 4.

10. Mr. Claude further informed Ms. Spees that if the Motion to Dismiss and Motion to Stay were denied, meaning that the appeal would be heard, the Court would then reset a briefing schedule. *Id.*, ¶ 5.

11. After seeking and being granted two extensions of the deadline to file his brief, on October 3, 2017, Lively filed his opening brief on the merits.

12. On the same day, Horatio Mihet, counsel for Lively, sent an email to Kaleb McNeely of Dorsey & Whitney LLP, co-counsel for SMUG, requesting

SMUG’s consent to a motion Lively intended to file for an extension of the deadline, *nunc pro tunc*, for Lively’s merits brief.¹ Declaration of Kaleb McNeely, dated December 27, 2017 (“McNeely Decl.”), ¶ 2.

13. In response to Mr. Mihet, Mr. McNeely stated, *inter alia*, that “[i]t is our understanding that, in light of the pending motion to dismiss and motion to stay, there are currently no deadlines for the parties to file their briefs on the merits.” *Id.*, ¶ 3, Exhibit A.

14. On October 5, 2017, Joshua Colangelo-Bryan of Dorsey & Whitney LLP, co-counsel for SMUG, spoke on the telephone with Mr. Claude to confirm SMUG’s understanding of the effect of the Motion to Dismiss and the Motion to Stay on the deadlines and briefing schedule in the Scheduling Order. Declaration of Joshua Colangelo-Bryan, dated January 2, 2018 (“Colangelo-Bryan Decl.”), ¶ 2.

15. During that conversation, Mr. Claude told Mr. Colangelo-Bryan that, even if Lively’s then-recently filed merits brief were to be accepted by the Court, the filing of SMUG’s Motion to Dismiss and Motion to Stay meant that SMUG would not be required to file a substantive opposition until its motions were decided. Moreover, Mr. Claude said, the filing of the Motion to Dismiss and

¹ According to the Lively Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief (EID No. 6134651), Lively had intended to file his merits brief on October 2, 2017, but due to technical difficulties that brief was not filed until approximately 12:24 a.m. on October 3, 2017. Lively Motion to Set Oral Argument at 3 n. 1.

Motion to Stay would preclude any default if SMUG did not file a merits brief.

Mr. Claude further stated that the Court's internal systems indicated that SMUG's Motion to Dismiss and Motion to Stay were pending and that he would add another note for the benefit of the personnel who handle briefing schedules. *Id.*, ¶ 3.

16. Shortly after this conversation ended, Mr. Claude called Mr. Colangelo-Bryan, reporting that he had conferred with his supervisor and wished to clarify that it was the filing of the Motion to Stay, rather than the Motion to Dismiss, that would preclude any default by SMUG. *Id.*, ¶ 4.

17. On October 6, 2017, the Court issued an Order granting Lively's motion for an extension of the deadline, *nunc pro tunc*, for Lively's merits brief, and accepting the filing of that brief.

18. On October 12, 2017, Mr. Colangelo-Bryan spoke with Mr. Claude once again. At that time, Mr. Claude confirmed that the pending Motion to Stay would preclude any default on SMUG's part, and stated, "I have no problem if you use my name," in the event that any argument was made later that not filing a merits opposition constituted a default by SMUG. *Id.*, ¶ 6.

19. On November 9, 2017, Mr. McNeely (counsel for SMUG) received a telephone call from Roger Gannam, counsel for Lively, inquiring about SMUG's understanding of the merits briefing schedule in this appeal and, specifically, SMUG's understanding of whether its response to Lively's merits brief was due.

Mr. McNeely informed Mr. Gannam that, based on conversations that had taken place with the Clerk's Office, it was SMUG's understanding that, because SMUG's Motion to Stay was still pending, there was no deadline for SMUG's response. McNeely Decl., ¶ 4.

20. On November 29, 2017, Lively filed his Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief (EID No. 6134651) (the "Motion to Exclude"). In the Motion to Exclude, Lively argued that SMUG should be excluded from oral argument on the merits of this appeal because SMUG did not file its merits brief by November 2, 2017. Counsel for Lively made no mention of the explanations SMUG's counsel had provided as to why SMUG's merits brief had not actually been due.

21. On December 11, 2017, before SMUG had submitted an opposition to the Motion to Exclude, this Court denied the Motion to Exclude (EID 6137382) (the "Order"), holding that "the deadline for [SMUG]'s brief was issued in error as its motion to stay remains pending before the court."

22. On December 21, 2017, Lively then filed the Reconsideration Motion. The Reconsideration Motion simply asserts that the Order is invalid because, according to Lively, the Clerk of this Court "has no express authority. . . to grant a motion to stay, and no discretion. . . not to notice appellee's briefing deadline." Reconsideration Motion, ¶ 5.

23. Lively also argues that he is “prejudiced by the Clerk’s apparently unauthorized granting of a stay to SMUG while holding Lively to the Court’s rules and procedures.” *Id.* at ¶ 7.

24. Lively cannot point to any actual prejudice. Moreover, Lively was well aware of the statements made by the Clerk of this Court regarding the fact that there were no deadlines for SMUG’s merits brief. In this regard, Lively simply ignores the obvious and most significant prejudice SMUG would suffer if the Reconsideration Motion were granted.

25. Motions for reconsideration are granted sparingly and are appropriate only in a limited number of circumstances: (a) if the moving party presents newly discovered evidence; (b) if there has been an intervening change in the law; or (c) if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust. *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005).

26. The Reconsideration Motion, however, fails to present newly discovered evidence, does not claim that there has been an intervening change in law, and cannot establish that the Order was based on a manifest error of law or was clearly unjust.

27. Moreover, granting the Reconsideration Motion and excluding SMUG from oral argument would cause enormous prejudice to SMUG. SMUG

should not be excluded from oral argument simply because it relied upon the instructions of the Clerk of this Court regarding the briefing schedule.

28. In addition, the Motion to Stay is still under consideration by this Court. Lively's position – that SMUG should have filed its merits brief by November 2, 2017 – in essence seeks to force SMUG to moot its own Motion to Stay by filing a merits brief.

29. For all of these reasons, contrary to the claims made in the Motion to Exclude and the Reconsideration Motion, SMUG is not in default and should not be excluded from oral argument.

WHEREFORE, for good cause shown, SMUG respectfully requests that this Court deny Lively's Motion for Reconsideration of Denial of Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief.

Dated: January 2, 2018

Respectfully submitted,

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/s/ Pamela C. Spees
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Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically, that it will be served electronically upon all parties of record who are registered CM/ECF participants via the NEF, and that paper copies will be sent to any parties indicated on the NEF as non-registered participants on January 2, 2018.

/s/ Pamela Spees
Pamela Spees
Counsel for Plaintiff-Appellee

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(s) Pamela C. Spees

Attorney for Sexual Minorities I

Dated: January 2, 2018

**United States Court of Appeals
For the First Circuit**

No. 17-1593

SEXUAL MINORITIES UGANDA

Plaintiff - Appellee

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries

Defendant - Appellant

Declaration of Pamela C. Spees

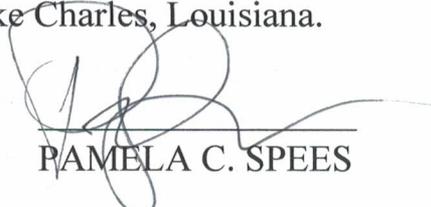
I, PAMELA C. SPEES, declare pursuant to 28 U.S.C. § 1746:

1. I am an attorney with the Center for Constitutional Rights and represent Plaintiff-Appellee Sexual Minorities Uganda in the above captioned-matter.
2. On September 27, 2017, and October 2, 2017, I spoke with Mr. Gerry Claude, Case Manager in the Clerk's office of the First Circuit Court of Appeals, to inquire about the effect of the still-pending Motion to Dismiss Defendant-Appellant's Appeal and Motion to Stay Proceedings Pending Resolution of Plaintiff-Appellee's Motion to Dismiss on the deadlines and briefing schedule issued by the Court.

3. Mr. Claude advised me that because the motions were pending, the parties would not be defaulted for not filing briefs by the deadlines set out in the scheduling order.
4. In my conversation with Mr. Claude on Monday, October 2, 2017, I further clarified that Plaintiff-Appellee would not be defaulted if it did not file a brief in opposition by the deadline in the scheduling order even if Defendant-Appellant filed his opening appeal brief by the deadline, and Mr. Claude confirmed this was the case.
5. Mr. Claude further advised that if the result of rulings on the motions meant that the appeal briefing should proceed, the Court would then reset a schedule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 1, 2018, at Lake Charles, Louisiana.



PAMELA C. SPEES

United States Court of Appeals For the First Circuit

No. 17-1593

SEXUAL MINORITIES UGANDA

Plaintiff - Appellee

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries

Defendant - Appellant

Declaration of Kaleb McNeely

I, Kaleb McNeely, declare pursuant to 28 U.S.C. § 1746:

1. I am an associate with Dorsey & Whitney LLP, which represents Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”) in the above captioned-matter.
2. On October 3, 2017, Horatio Mihet, counsel for Defendant-Appellant Scott Lively (“Lively”), sent me an email requesting SMUG’s consent to a motion Lively intended to file for an extension, *nunc pro tunc*, of Lively’s merits brief in this appeal.
3. In response, I stated, *inter alia*, that “[i]t is our understanding that, in light of the pending motion to dismiss and motion to stay, there are currently no deadlines for the parties to file their briefs on the merits.” A true and correct

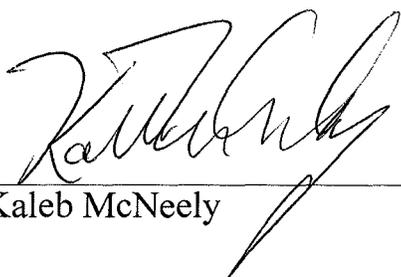
copy of my email exchange with Lively counsel is attached hereto as Exhibit

A.

4. On November 9, 2017, I received a telephone call from Roger Gannam, counsel for Lively, inquiring about SMUG's understanding of the merits briefing schedule in this appeal and, specifically, SMUG's understanding of whether its response to Lively's merits brief ("SMUG's Response") was due. I informed Mr. Gannam that, based on conversations that had taken place with the Clerk of this Court, it was SMUG's understanding that because SMUG's motion to stay merits briefing was still pending, SMUG's Response was not yet due.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
December 27, 2017



Kaleb McNeely

Exhibit A

McNeely, Kaleb

From: McNeely, Kaleb
Sent: Tuesday, October 3, 2017 1:52 PM
To: 'Horatio Mihet'
Cc: Roger Gannam; pspees@ccrjustice.org
Subject: RE: SMUG v. Lively - motion for extension of time nunc pro tunc

Harry,

It is our understanding that, in light of the pending motion to dismiss and motion to stay, there are currently no deadlines for the parties to file their briefs on the merits. Given that, if Lively nevertheless intends to file the motion referenced below for an extension of time *nunc pro tunc*, SMUG does not oppose said motion.

Regards,

Kaleb McNeely

Associate



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From: Horatio Mihet [mailto:hmihet@lc.org]
Sent: Tuesday, October 3, 2017 10:39 AM
To: McNeely, Kaleb <mcneely.kaleb@dorsey.com>; pspees@ccrjustice.org
Cc: Roger Gannam <rgannam@lc.org>
Subject: SMUG v. Lively - motion for extension of time nunc pro tunc
Importance: High

Kaleb or Pam – we encountered technical difficulties in filing Lively’s brief last night, and missed the midnight deadline by 23 minutes. Out of an abundance of caution, we are filing a quick motion asking the First Circuit for an extension, nunc pro tunc. We would like to file it in the next couple hours. May we have your quick confirmation that SMUG does not oppose the relief?

Thanks.

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs &
Chief Litigation Counsel*
Liberty Counsel
PO Box 540774

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Defendant - Appellant

Declaration of Joshua Colangelo-Bryan

I, Joshua Colangelo-Bryan, declare pursuant to 28 U.S.C. § 1746:

1. I am Of Counsel with Dorsey & Whitney LLP, which represents Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”) in the above captioned-matter.
2. On October 5, 2017, I spoke on the telephone with Mr. Gerry Claude, Case Manager in the Clerk’s Office of this Court, regarding the effect of SMUG’s then-pending Motion to Dismiss Defendant-Appellant’s Appeal (“Motion to Dismiss”) and Motion to Stay Proceedings Pending Resolution of Plaintiff-

Appellee's Motion to Dismiss ("Motion to Stay")¹ on the deadlines and any briefing schedule issued by the Court.

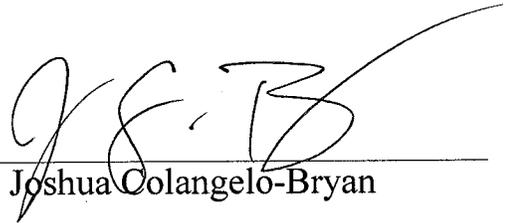
3. Mr. Claude told me that, even if Plaintiff's then-recently filed merits brief were to be accepted by the Court, the filing of SMUG's motions meant that SMUG would not be required to file a substantive opposition until its motions were decided. Moreover, Mr. Claude said, the filing of the motions would preclude any default if SMUG did not file a merits brief. He stated that the Court's internal systems indicated SMUG's motions were pending and that he would add another note for the benefit of the personnel who handle briefing schedules.
4. Shortly after this conversation ended, Mr. Claude called me. He told me that he had conferred with his supervisor and wished to clarify that it was the filing of the Motion to Stay, rather than the Motion to Dismiss, that would preclude any default.
5. On October 6, 2017, Plaintiff filed a second copy of his merits brief, seeking to cure an issue of untimeliness in connection with the merits brief he had filed earlier.
6. I spoke with Mr. Claude again on October 12, 2017 in perhaps an overabundance of caution. Mr. Claude confirmed again that the Motion to

¹ These motions remain pending.

Stay would preclude any default on the part of SMUG. He said, "I have no problem if you use my name," in the event that any argument was made later that not filing a merits opposition brief constituted a default by SMUG.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
January 2, 2018



Joshua Colangelo-Bryan