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January 28, 2022

Judge Eric R. Komitee
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 10011

RE: Zarda v. Altitude Express., 10-cv-04334-ERK-AYS

Dear Judge Komitee:

Thank you for affording the parties a thorough conference on January 27. I have since discussed the remaining issues with my clients; I also chatted with defense counsel. Based on what they know now, plaintiffs have decided that it would not be cost-effective to proceed with the underlying litigation. We, therefore, ask for leave to dispense with the briefing we contemplated at the conference, due in a week. However, plaintiffs still insist on moving forward with reimbursement for awarded costs. We also ask for counsel fees for having to litigate the issue.

My clients' reasons are as follows: First, the case you mentioned decided by the late Judge Patterson is on point. *Williams v. Greendolf, Inc.*, 735 F. Supp. 137 (S.D.N.Y. 1990). Based on *Greendolf*, the Estate could proceed against Raymond Maynard and (if there were money) obtain a judgment against him:

[A]ny liability of the individuals will be based on successor liability to a dissolved corporation, not on personal involvement in § 1981 or Title VII violations, there was no need for plaintiff to name them in the EEOC charge, and his failure to do so is not fatal to this court's jurisdiction.

Id. at 141. That language encapsulates what we have argued all along.

Second, given *Greendolf*, the Zarda Estate does not think it necessary to amend the complaint to bring in a defunct corporation. In the Second Amended Complaint, plaintiffs named Maynard a defendant in his corporate capacity (shareholder) and as a predecessor in interest to Altitude Express, Inc. (dba Skydive Long Island).¹ The Second Amended Complaint outlines Maynard's corporate status in the caption and text, putting the defense on notice that the remnants of Skydive Long Island – including assets from its sale – are what these plaintiffs seek.

¹ There is only one Second Amended complaint. Mr. Zabell alluded to a “second Second Amended Complaint.” The story is boring, but, eight years ago, Judge Bianco allowed an amendment for a fuller statement about the amount in controversy. Then I realized it was unnecessary and Judge Bianco agreed, striking the Second Amended Complaint as inoperative. *See* docket entries 153, April 3-9, 2014. So, the first Second Amended Complaint is null.

Third, though I have never seen the sales contract, I asked to see it more than once, starting in 2018. *See* transcript, May 28, 2018, pp.12-14, docket entry 268. The Estate’s team on certiorari attached that transcript to its Brief in Opposition to Certiorari. Accepting what you said at face value – confirmed, if vaguely, by Mr. Zabell – plaintiffs have no reason to doubt that the amount the purchaser paid for the remnants of Altitude Express was not extravagant. This seemingly small amount is probably the limit to what plaintiffs could collect if not eaten by counsel fees. Therefore, it would be too expensive to pursue a trial under Title VII.²

However, plaintiffs continue to seek costs awarded by the Second Circuit and the U.S. Supreme Court. (The Circuit and Supreme Court cost awards I attached as Exhibits C and D to docket entry 296; they amount to approximately \$6,100.) The costs issue is ripe and unresolved, and we ask the Court to grant the motion to enforce payment on these costs plus counsel fees. When the defense named Mr. Maynard a party at the Supreme Court, it confused. The *Zarda* team tried to sow that confusion into the denial of certiorari. We were unsuccessful at the outset, but we won in the end, including costs. Those costs are almost two years overdue.³

The suggestion that Mr. Maynard was not a party to the en banc rehearing is frivolous. Mr. Zabell noticed his appearance for Mr. Maynard (attached as Exhibit A) and never amended it.

Then Mr. Maynard was a party at the Supreme Court – unnecessarily – notwithstanding that he was a party at the Circuit. Mr. Zabell stated at the argument two contradictory things: First that Maynard was not a party at the Circuit because of the corporate sale *and* that he was a party at the Circuit and therefore had to be a party at Supreme Court. Contradictions aside, Maynard was a party at the Circuit. On the other hand, that does not mean he *needed* to be a petitioner at the Supreme Court. Indeed, Supreme Court Rule 12.6 makes it permissive – not necessary – to name a party from a proceeding below as a petitioner. Maynard’s appearance as petitioner perplexed the *Zarda* team, so our brief in opposition to the grant of certiorari asked one question:

Should certiorari be granted on a petition involving construction of Title VII of the Civil Rights Act of 1964 when one petitioner faces no liability under that statute and the other is a defunct corporation whose only known assets have been acquired by a successor that is not seeking review?

Plaintiff’s Brief in Opposition to Certiorari, page i. (The pertinent portion I attach hereto as “Exhibit B.”)

² For my part, I needed to know this to satisfy me and my clients. I suggested at the conference engaging in some confidential discovery, but I am satisfied I know what I need to know. My clients are satisfied as well.

³ Indeed, the final judgment for costs awards them to the Estate and against “Altitude Express, *et al.*” We know *et al.* means “and others.” Here the only “other” is Raymond Maynard. Therefore, he is jointly and severally liable for paying the judgment of costs.

The defense wanted to keep the question open. It noted in response to the issue:

There is no riddle nor ruse in Maynard seeking review of the decision below; he was a Defendant-Appellee. Pursuant to the Rules of the Court, Maynard is entitled to seek review of the Second Circuit decision. Whether he may ultimately face personal liability under Title VII of the Civil Rights Act of 1964 . . . has no relevance to the question presented by Petitioners or the Court's review of the same. Notably, it has not yet been decided whether Maynard may face Title VII liability for the acts of his company. . . . [T]he Second Circuit actually held that "Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation" without specifying which defendant or defendants could be held liable.

Defendants' Reply Brief in support of certiorari, p.2. (Page attached as "Exhibit C") (cleaned up).

These words denote that Maynard's liability is an open question subject to litigation. Perhaps Maynard's liability was once a riddle, but Judge Patterson's decision in *Greendolf* puts that suggestion to rest. Or (as we discussed at the argument), there is a New York mechanism to pursue Maynard to claw back corporate assets. But, again, if there is no (or negligible) money for plaintiffs to collect through more litigation, there's no benefit to proceeding further.

But the issue about enforcement of costs remains. No litigant may ignore a judgment of the Supreme Court. The defense has remained obstinate in its quiet dispute of this obvious point. The obstinance continued even after alerting the defense and the Court to *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021). That case held that "lower courts were correct to hold that the District Court lacked the authority to entertain San Antonio's broad, equitable arguments." *Id.*, 141 S. Ct. at 1637. (I noted the decision in a June 11, 2021 letter, docket entry 302.)

That lower courts may not tinker with appellate court orders seems obvious. But had there been any confusion, *Hotels.com* clarified the law. Mr. Zabell did not respond to *Hotels.com*. He barely reacted to the motion to enforce costs except to incorporate the points he made in his motion to dismiss. The arguments on dismissal do not duplicate any on costs – even assuming plaintiffs had no remedy at law, which they do. Since the defense position on costs was frivolous – especially after *Hotels.com* – plaintiffs ask that the Court award reasonable fees for having to enforce unappealable, final appellate orders.

For these reasons, plaintiffs ask that the Court enforce the motion for costs and sanctions. For the sole reason that there are no assets to collect upon, we ask you to discontinue the underlying case and cancel the briefing schedule. Thank you for your consideration and insights.

Sincerely,



Gregory Antollino

Cc: Saul Zabell (by ECF)

ACKNOWLEDGMENT AND NOTICE OF APPEARANCE

Short Title: Estate of Donald Zarda v. Altitude Express, Inc., et al. Docket No.: 15-3775

Lead Counsel of Record (name/firm) or Pro se Party (name): Saul D. Zabell, Esq., Zabell & Associates, P.C., 1 Corporate Drive, Bohemia, NY 11716

Appearance for (party/designation): Defendants: Altitude Express, Inc. and Raymond Maynard

DOCKET SHEET ACKNOWLEDGMENT/AMENDMENTS

Caption as indicated is:

- Correct
Incorrect. See attached caption page with corrections.

Appellate Designation is:

- Correct
Incorrect. The following parties do not wish to participate in this appeal:

Parties:

- Incorrect. Please change the following parties' designations:

Party Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:

- Correct
Incorrect or Incomplete, and should be amended as follows:

Name: Saul D. Zabell, Esq.
Firm: Zabell & Associates, P.C.
Address: 1 Corporate Drive, Suite 103, Bohemia, NY 11716
Telephone: (631) 589-7242 Fax: (631) 563-7475
Email: szabell@laborlawsny.com

RELATED CASES

- This case has not been before this Court previously.
This case has been before this Court previously. The short title, docket number, and citation are:

Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are:

CERTIFICATION

I certify that I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on 12/28/2011 OR that I applied for admission on or renewal on. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record:
Type or Print Name: Saul D. Zabell, Esq.

OR

Signature of pro se litigant:
Type or Print Name:

- I am a pro se litigant who is not an attorney.
I am an incarcerated pro se litigant.

QUESTION PRESENTED

Should certiorari be granted on a petition involving construction of Title VII of the Civil Rights Act of 1964 when one petitioner faces no liability under that statute and the other is a defunct corporation whose only known assets have been acquired by a successor that is not seeking review?

1. Respondents first contend that the Court has no jurisdiction to hear a petition on behalf of Petitioner Ray Maynard, the owner of Petitioner Altitude Express. Br. in Opp. 12-13. Not so. Maynard's inclusion as a Petitioner comes directly from Supreme Court Rule 12(6), "Review on Certiorari: How Sought; Parties," which provides in relevant part:

All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.

There is no riddle nor ruse in Maynard seeking review of the decision below; he was a Defendant-Appellee. *See generally* Pet. App. 1. Pursuant to the Rules of the Court, Maynard is entitled to seek review of the Second Circuit decision. Whether he may ultimately face personal liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), has no relevance to the question presented by Petitioners or the Court's review of the same.

Notably, it has not yet been decided whether Maynard may face Title VII liability for the acts of his company. Respondents assert that the Second Circuit's decision "permit[ed] respondents to sue the corporation." Br. in Opp. 13. But the Second Circuit actually held that "Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation" without specifying which defendant or defendants could be held liable. Pet. App. 61a. Nowhere in the