United States Court of Appeals
for
the Second Circuit

Docket no. 03-5023

Richard Cordero,
Cross and Third party plaintiff-Appellant

v.

Kenneth Gordon,
Cross defendant-Appellee
and (no. 03-cv-6021L)

David Palmer,
Third party defendant-Appellee
(no. 03-MBK-6001L)

OPENING BRIEF OF APPELLANT PRO SE RICHARD CORDERO

(excerpt; full brief at
http://Judicial-Discipline-Reform.org/docs/DrCordero_v_Trustee_Gordon_CA2_9jul3.pdf)

VI. Statement of the Case

11. The bankruptcy case of a moving and storage company spawned an adversary proceeding in bankruptcy court, where Dr. Cordero, a former client of the company, was named, together with the trustee, Kenneth Gordon, Esq., and others, defendant. Appearing pro se, Dr. Cordero cross-claimed to recover damages from Trustee Gordon for defamation as well as negligent and reckless performance as trustee. The Trustee moved to dismiss and the court summarily dismissed the cross-claims before disclosure or discovery had taken place and although other parties' similar claims were allowed to stand. Dr. Cordero timely mailed his notice of appeal, but on the Trustee's motion, the District Court dismissed it as untimely filed. Likewise, Dr. Cordero moved the bankruptcy court to extend time to file the notice. Although Trustee Gordon himself acknowledged in his brief in opposition that the motion to extend had been timely filed on January 29, 2003, the bankruptcy court somehow found that it had been untimely filed on January 30, and dismissed it.

12. Dr. Cordero served the Debtor's owner, Mr. David Palmer, with a summons and a third party complaint, but he failed to answer. Dr. Cordero timely applied on December 26, 2002, for default judgment for a sum certain. Only belatedly and upon

Dr. Cordero's request to take action, did the bankruptcy court make a recommendation on February 4, 2003, namely, that the district court not enter default judgment because 'Cordero has failed to demonstrate any loss and upon inspection it may be determined that his property is in the same condition as when delivered for storage in 1993.' Dr. Cordero moved the district court to enter default judgment despite the bankruptcy court's prejudgment of the case. Making no reference to that motion, the district court accepted the recommendation because Dr. Cordero "must still establish his entitlement to damages since this matter does not involve a sum certain." Dr. Cordero moved the district court to correct its mistake since the application did involve a sum certain. The district court summarily denied the motion.

VII. Statement of Facts

A. In search for his property in storage, Dr. Cordero is repeatedly referred to Trustee Gordon, who provides no information and to avoid a review of his performance and fitness to serve, files false and defamatory statements about Dr. Cordero with the court and his U.S. trustee supervisor

13. A client –here Appellant Dr. Cordero- who resides in NY City, had entrusted his household and professional property, valuable in itself and cherished to him, to a Rochester, NY, moving and storage company in August 1993 and since then paid its storage and insurance fees. In early January 2002 he contacted Mr. David Palmer, the owner of the company storing his property, Premier Van Lines, to inquire about it. Mr. Palmer and his attorney assured him that his property was safe and in his warehouse at Jefferson-Henrietta, in Rochester (A-18). Only months later, after Mr. Palmer disappeared, did his assurances reveal themselves as lies, for not only had his company gone bankrupt –Debtor Premier-, but it was already in liquidation. Moreover, Dr. Cordero's property was not found in that warehouse and its whereabouts were unknown.

14. In search for his property, Dr. Cordero was referred to the Chapter 7 trustee– here Appellee Trustee Gordon– (A-39). The Trustee had failed to give Dr. Cordero notice of the liquidation although the storage contract was an income-producing asset of the Debtor. Worse still, the Trustee did not provide Dr. Cordero with any information about his property and merely bounced him back to the same parties that had referred Dr. Cordero to him (A-16,17).

15. Eventually Dr. Cordero found out from third parties (A-48, 49; 109, ftnts-5-8; 352) that Mr. Palmer had left Dr. Cordero's property at a warehouse in Avon, NY, owned by

Mr. James Pfuntner. However, the latter refused to release his property lest Trustee Gordon sue him and he too referred Dr. Cordero to the Trustee. This time not only did the Trustee fail to provide any information or assistance in retrieving his property, but even enjoined Dr. Cordero not to contact him or his office anymore (A-1).

16. Dr. Cordero applied to the bankruptcy judge in charge of the bankruptcy case, the Hon. John C. Ninfo, II, for a review of the Trustee's performance and fitness to serve (A-7). The judge took no action save to refer the application to the Trustee's supervisor, an assistant U.S. Trustee (A-29).

17. Subsequently, in October 2002, Mr. Pfuntner brought an adversary proceeding (A-21, 22) against Trustee Gordon, Dr. Cordero, and others. Dr. Cordero, appearing pro se, cross-claimed against the Trustee (A-70, 83, 88), who moved to dismiss (A-135). Before discovery had even begun or any initial disclosure had been provided by the other parties -Dr. Cordero provided numerous documents with his pleadings (A-11, 45, 62, 90, 123, 414)- and before any meeting whatsoever, the judge dismissed the cross-claims by order entered on December 30, 2002 and mailed from Rochester (SPA-1).

18. Upon its arrival in New York City after the New Year's holiday, Dr. Cordero timely mailed the notice of appeal on Thursday, January 9, 2003 (SPA-3). It was filed in the bankruptcy court the following Monday, January 13. The Trustee moved to dismiss it as untimely filed (A-156) and the district court dismissed it (SPA-6,9).

B. David Palmer abandons Dr. Cordero's property and defrauds him of the fees; then fails to answer Dr. Cordero's complaint; yet, the courts deny Dr. Cordero's application for default judgment although for a sum certain, prejudge a happy ending to his property search, and impose on him a Rule 55-extraneous duty to demonstrate loss.

19. Dr. Cordero joined as third party defendant Mr. Palmer, who lied to him about his property's safety and whereabouts while taking in his storage and insurance fees. Mr. Palmer, as Debtor (SPA-25-entry-13,12), was already under the bankruptcy court's jurisdiction, yet failed to answer the complaint of Dr. Cordero, who timely applied under Rule 55 F.R.Civ.P. for default judgment for a sum certain (SPA-12;A-294). But disregarding Rule 55, never mind the equities between the two parties, both courts denied Dr. Cordero and spared Mr. Palmer default judgment under circumstances that have created the appearance of bias and prejudice, as shown next.

C. Bankruptcy and district court officers have participated in a series of events of disregard of facts, rules, and law so consistently injurious to Dr. Cordero as to form a pattern of non-coincidental, intentional, and coordinated acts from which a reasonable person can infer their bias and prejudice and can fear their determination not to give him a fair and impartial trial

1. The bankruptcy court excused Trustee Gordon's defamatory statements as merely **"part of the Trustee just trying to resolve these issues"**

20. Trustee Gordon submitted statements, some false and others disparaging of Dr. Cordero's character, to the bankruptcy court in his attempt to dissuade it from undertaking the review of his performance and fitness as trustee requested by Dr. Cordero. The latter brought this to the court's attention (A-32, 41). Far from showing any concern for the integrity and fairness of proceedings, the court did not even try to ascertain whether Trustee Gordon had made false representations to the court in violation of Rule 9011(b)(3) F.R.Bkr.P.

21. On the contrary, it excused the Trustee in open court when at the hearing of the motion to dismiss it stated that:

> "I'm going to grant the Trustee's motion and I'm going to dismiss your cross claims. First of all, with respect to the defamation, quite frankly, these are the kind of things that happen all the time, Dr. Cordero, in Bankruptcy court…it's all part of the Trustee just trying to resolve these issues." (A-274-275)

22. When the court approves of the use of defamation by an officer of the court trying to avoid review, what will it use itself to avoid having its rulings reversed on appeal? How much fairness would an objective observer expect that court to show the appellant?

2. The court disregarded facts and the law concerning genuine issues of material fact when dismissing Dr. Cordero's cross-claims of negligence and recklessness against Trustee Gordon

23. It was Mr. Pfuntner, not Dr. Cordero, who first sued Trustee Gordon claiming that:

> "17. In August 2002, the Trustee, upon information and belief, caused his auctioneer to remove one of the trailers without notice to Plaintiff and during the nighttime for the

purpose of selling the trailer at an auction to be held by the Trustee on September 26, 2002," (A-24)

24. Does it get any more negligent and reckless than that? While the Trustee denied the allegation, it raised an issue of fact to be determined at trial. So how could the court disregard similar genuine issues of material fact raised by Dr. Cordero's cross-claims of negligence and reckless performance as trustee and before any discovery or meeting whatsoever merely dismiss them, thereby disregarding the legal standard for determining a motion to dismiss?

3. The court disregarded the Trustee's admission that Dr. Cordero's motion to extend time to file notice of appeal had been timely filed, and surprisingly finding that it had been untimely filed, denied it

25. After Dr. Cordero timely mailed his notice of appeal and Trustee Gordon moved to dismiss it as untimely filed, Dr. Cordero timely mailed a motion to extend time to file the notice. Although Trustee Gordon himself acknowledged in his brief in apposition that the motion had been timely filed on January 29 (A-235), the judge surprisingly found that it had been untimely filed on January 30. Trustee Gordon checked the filing date of the motion to extend just as he had checked that of the notice of appeal: to escape accountability through a timely-mailed/untimely-filed technical gap. He would hardly make a mistake on such a critical matter. Thus, who changed the filing date and on whose orders?[1] Why did the court disregard the factual discrepancy and rush to deny the motion? Do court officers manipulate the docket to attain their objectives? There is evidence that they do (paras.36 below).

4. The court reporter tries to avoid submitting the transcript

26. To appeal from the court's dismissal of his cross-claims, Dr. Cordero contacted Court Reporter Mary Dianetti on January 8, 2003, to request the transcript of the hearing. After checking her notes, she called back and told Dr. Cordero that there could be some 27 pages and take 10 days to be ready. Dr. Cordero agreed and requested the transcript (A-261).

27. It was March 10 when Court Reporter Dianetti finally picked up the phone and answered a call from Dr. Cordero asking for the transcript. After telling an untenable excuse, she said that she would have the 15 pages ready for…"You said that it would

[1] Dr. Cordero stands ready to submit to the Court of Appeals upon its request an affidavit containing more facts and analysis on this issue.

be around 27?!" She told another implausible excuse after which she promised to have everything in two days 'and you want it from the moment you came in on the phone.' What an extraordinary comment! She implied that there had been an exchange between the court and Trustee Gordon before Dr. Cordero had been put on speakerphone and she was not supposed to include it in the transcript (A-283, 286).

28. The confirmation that she was not acting on her own was provided by the fact that the transcript was not sent on March 12, the date on her certificate (A-282). Indeed, it reached Dr. Cordero only on March 28 and was filed only on March 26 (SPA-45, entry 71), a significant date, namely, that of the hearing of one of Dr. Cordero's motions concerning Trustee Gordon. Somebody wanted to know what Dr. Cordero had to say before allowing the transcript to be sent.

29. The Court Reporter never explained why she failed to comply with her obligations under either 28 U.S.C. §753(b) (SPA-86) on "promptly" delivering the transcript "to the party or judge" –certainly she did not send it to the party- or Rule 8007(a) F.R.Bkr.P. (SPA-65) on asking for an extension.

30. Reporter Dianetti also claims that because Dr. Cordero was on speakerphone, she had difficulty understanding what he said. As a result, the transcription of his speech has many "unintelligible" spots and it is difficult to make out what he said. If she or the court speakerphone regularly garbled what the person on speakerphone said, would either last long in use? Or was she told to disregard Dr. Cordero's request for the transcript; and when she could no longer do so, to garble his speech and submit her transcript for vetting by a higher-up court officer before mailing a final version to Dr. Cordero? Do you trust court officers that so handle, or allow such handling of, transcripts? Does this give you the appearance of fairness and impartiality?

5. The bankruptcy court disregarded facts and prejudged issues to deny Dr. Cordero's application for default judgment

31. The bankruptcy court recommended denial of the default judgment application by prejudging that upon inspection Dr. Cordero would find his property in the same condition as he had delivered it for storage 10 years earlier in 1993 (SPA-13). For that bold assumption it not only totally lacked evidentiary support, but it also disregarded contradicting evidence available. Indeed, as shown in subsection 2 above, Mr. Pfuntner had written that property had been removed without his authorization and at night from his warehouse premises. Moreover, the warehouse had been closed down and remained out of business for about a year. Nobody was there paying to control temperature, humidity, pests, or thieves. Thus, Dr. Cordero' property could also have been stolen or damaged. Forming an opinion without sufficient knowledge or examination, let alone disregarding the only evidence available, is called prejudice.

From one who forms anticipatory judgments, would you expect to receive fair treatment or rather rationalizing statements that he was right?

32. Moreover, the court dispensed with even the appearance of impartiality by casting doubt on the recoverability of "moving, storage, and insurance fees …especially since a portion of [those] fees were [sic] paid prior to when Premier became responsible for the storage of the Cordero Property," (SPA-14). How can the court prejudge the issue of responsibility, which is at the heart of the liability of other parties to Dr. Cordero, since it has never requested disclosure of, let alone held an evidentiary hearing on, the storage contract, or the terms of succession or acquisition between storage companies, or storage industry practices, or regulatory requirements on that industry? Such a leaning of the mind before considering pertinent evidence is called bias. Would you expect impartiality if appearing as a pro se litigant in Dr. Cordero's shoes before a biased court?

33. The court also protected itself by excusing its delay in making its recommendation to the district court. So it stated in paragraph "10. The Bankruptcy Court suggested to Cordero that the Default Judgment be held until after the opening of the Avon Containers…" (SPA-14). But that suggestion was never made and Dr. Cordero would have had absolutely no motive to accept it if ever made. What else would the court dare say to avoid review on appeal?

6. The Bankruptcy Clerk and the Case Administrator disregarded their obligations in the handling of the default application

34. Clerk Paul Warren had an unconditional obligation under Rule 55 F.R.Civ.P.: "**the clerk shall enter** the party's default," (emphasis added; SPA-76 upon receiving Dr. Cordero's application of December 26, 2002 (SPA-10). Yet, it was only on February 4, 41 later and only at Dr. Cordero's instigation (SPA-15), that the clerk entered default, that is, certified a fact that was such when he received the application, namely, that Mr. Palmer had been served but had failed to answer. The Clerk lacked any legal justification for his delay.

35. It is not by coincidence that he entered default on February 4, when the bankruptcy court made its recommendation to the district court. Thereby the recommendation appeared to have been made as soon as default had been entered.[2] It also gave the appearance that Clerk Warren was taking orders in disregard of his duty.

36. Likewise, his deputy, Case Administrator Karen Tacy (kt), failed to enter on the docket (EOD) Dr. Cordero's application upon receiving it. Where did she keep it until

[2]. See footnote 1.

entering it out of sequence on "EOD 02/04/03" (SPA-42-entry-51; 43-entries-46, 49, 50, 52, 53). Until then, the docket gave no legal notice to the world that Dr. Cordero had applied for default judgment against Mr. Palmer.[3] Does the docket, with its arbitrary entry placement, numbering, and untimeliness, give the appearance of manipulation or rather the evidence of it? (25 above).

37. It is highly unlikely that Clerk Warren, Case Administrator Tacy, and Court Reporter Dianetti were acting on their own. Who coordinated their acts in detriment of Dr. Cordero and for what benefit?

7. The district court repeatedly disregarded an outcome-determinative fact and the rules to deny the application for default judgment

38. The district court accepted the recommendation and in its March 11 order denied entry of default judgment on the grounds that it did not involve a sum certain (SPA-16). To do so, it disregarded five papers stating that it did involve a sum certain:

    1) the Affidavit of Amount Due (A-294);

    2) the Order to Transmit Record and Recommendation (SPA-12);

    3) the Attachment to the Recommendation (SPA-14);

    4) the March 2 motion to enter default judgment (A-314,327), and

    5) the motion for rehearing re implied denial of the earlier motion (A-342, 344-para.6).

39. Dr. Cordero moved the district court to enter default judgment notwithstanding such prejudgment of the outcome of a still sine die inspection (A-314). The district court did not acknowledge that motion in any way whatsoever, but instead accepted the bankruptcy court's recommendation. Moreover, it stated that Dr. Cordero "must still establish his entitlement to damages since the matter does not involve a sum certain [so that] it may be necessary for [sic] an inquest concerning damages before judgment is appropriate…the Bankruptcy Court is the proper forum for conducting [that] inquest," (SPA-16).

40. Dr. Cordero moved the district court for a rehearing (A-342) of his motion, denied by implication, so that it would correct its outcome-determinative error because the matter did involve a sum certain and because when Mr. Palmer failed to appear and Dr. Cordero applied for default judgment for a sum certain his entitlement to it became perfect pursuant to the plain language of Rule 55. Likewise, a bankruptcy court that

[3] See footnote 1.

showed such prejudgment could not be the "proper forum" to conduct any inquest (A-342). The district court curtly denied the motion "in all respects," (SPA-19). From a district court that merely rubberstamps the bankruptcy court's recommendation without paying attention to its facts, let alone reading papers submitted by a pro se litigant who spent countless hours researching, writing, and revising, would you expect the painstaking effort necessary to deliver justice?

8. The bankruptcy court disregarded Mr. Pfuntner's and his attorney's contempt for two orders, reversed its order on their ex-parte approach, showed again no concern for disingenuous submissions to it, but targeted Dr. Cordero for strict discovery orders

41. At the only meeting ever held in the adversary proceeding, the pre-trial conference on January 10, 2003, the court orally issued only one onerous discovery order: Dr. Cordero must travel from New York City to Rochester and to Avon to inspect at Plaintiff Pfuntner's warehouse the storage containers that bear labels with his name. Dr. Cordero had to submit three dates therefor. The court stated that within two days of receiving them, it would inform him of the most convenient date for the other parties. Dr. Cordero submitted not three, but rather six by letter of January 29 to the court and the parties (A-365, 368). Nonetheless, the court never answered it or informed Dr. Cordero of the most convenient date.

42. Dr. Cordero asked why at a hearing on February 12, 2003. The court said that it was waiting to hear from Mr. Pfuntner's attorney, David MacKnight, Esq., who had attended the pre-trial conference and agreed to the inspection. The court took no action and the six dates elapsed.

43. However, when Mr. Pfuntner wanted to get the inspection over with to clear and sell his warehouse and be in Florida worry-free, Mr. MacKnight contacted the court on March 25 or 26 ex parte –in violation of Rule 9003(a) F.R.Bkr.P. (A-372). Reportedly the court stated that it would not be available for the inspection and that setting it up was a matter for Dr. Cordero and Mr. Pfuntner to agree mutually.

44. Dr. Cordero raised a motion on April 3 to ascertain this reversal of the court's position and insure that the necessary transportation and inspection measures were taken (A-378). On April 7, the same day of receiving the motion (SPA-46-entries-75,76) and thus, without even waiting for a responsive brief from Mr. MacKnight, the court wrote to Dr. Cordero denying his request to appear by telephone at the hearing–as he had on four previous occasions- and requiring that Dr. Cordero travel to Rochester to attend a hearing in person to discuss measures to travel to Rochester (A-386).

45. Then Mr. MacKnight raised a motion (A-389). It was so disingenuous that, for example, it was titled "Motion to Discharge Plaintiff from Any Liability…" and asked for relief under Rule 56 F.R.Civ.P. without ever stating that it wanted summary judgment while pretending that "as an accommodation to the parties" Plaintiff had not brought that motion before. Yet, it was Plaintiff who sued parties even without knowing whether they had any property in his warehouse, nothing more than their names on labels (A-364). Dr. Cordero analyzed in detail the motion's mendacity and lack of candor (A-400). Despite its obligations under Rule 56(g) (SPA-78) to sanction a party proceeding in bad faith, the court disregarded Mr. MacKnight's disingenuousness, just as it had shown no concern for Trustee Gordon's false statements submitted to it. How much commitment to fairness and impartiality would you expect from a court that exhibits such 'anything goes' standard for the admission of dishonest statements? If that is what it allows outside officers of the court to get away with, what will it allow or ask in-house court officers to engage in?

46. Nor did the court impose on Plaintiff Pfuntner and Mr. MacKnight any sanctions, as requested by Dr. Cordero, for having disobeyed the first discovery order. On the contrary, as Mr. Pfuntner wanted, the court ordered Dr. Cordero to carry out the inspection within four weeks or it would order the containers bearing labels with his name removed at his expense to any other warehouse anywhere in Ontario, that is, whether in another county or another country.

9. The bankruptcy court's determination not to move the case forward

47. Although the adversary proceeding was filed on September 27, 2002, the court has failed to comply with Rule 16(b) F.R.Civ.P., (SPA-75) which provides that it "shall…enter a scheduling order…" When the court disregard its procedural obligations and allows a case to linger for lack of management, would you expect it to care much for your rights as a pro se litigant who lives hundreds of miles away?

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