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PLAINTIFFS District of Illinois/Chicago(0752/1) DEFENDANTS
86 C 8726

DIANE F. PETERSON

THOMAS STEPHENS RUE

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1354 - Action between citizens claiming land - grants from different states

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Case set:	_____
On Merits:	_____
IPTC:	_____
Status:	_____
On Motion:	_____
FPTC:	_____

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BENCHMEMO: PETERSON v. RUE, 87-0375-R, Hearing and Pretrial Conference, Wednesday, 8 July 87 at 2:30

ATTORNEYS: Plaintiff -- Benjamin Hyink (Chicago counsel)
(Drugas, Morgan & Hyink)
John Dozier (local counsel)
(Dozier, McEntee & Calbaugh)

Defendant -- Sandy Tucker (Williams, Mullen)

Judge, this heart-balm matter is before you for a pretrial conference and on plaintiff's motion to dismiss count I of defendant's counterclaim.

Background

Plaintiff (an Illinois resident) and defendant (a Richmond resident) were honeys at one time. Apparently, in contemplation of marriage, she gave him money to invest for her and he gave her a diamond ring, etc., etc.. Well, things turned sour for one reason or another, and now she is suing him and he is counter-suing her.

Plaintiff filed a three count complaint in the northern district of Illinois in November 1986. In count I, she prays for an accounting of all the money she gave Rue, a declaration that Rue holds property at 2500 Hanover Avenue in Richmond in constructive trust for her, and a declaration that all cash and securities held in any joint account in the name of Peterson and Rue is the sole property of Peterson. Count II states a claim in conversion. And, count III states that Rue breached fiduciary duties towards her. She asks for \$100,000 in compensatory

damages and \$200,000 in punitive damages. The parties entered into a TRO by consent in November 1986, which restrained Rue from transferring any assets.

Rue filed his answer and counterclaim on January 20, 1987 (and an amended answer and counterclaim on March 11, 1987). Among the various defenses he raises are: failure to state a claim; the Illinois court's lack of jurisdiction to try title to Virginia property; statute of limitations; laches; waiver and estoppel; plaintiff gave him money to buy the Hanover Avenue property for himself. In Count I of his counterclaim, defendant prays for an order, in the event of an accounting, awarding him one-half the value of securities held in joint accounts and sole interest in the Hanover Avenue property. In Count II, defendant claims that he bought the diamond ring anticipating a proposal of marriage, that plaintiff turned him down, that the ring was held in a joint safe deposit box in Richmond and that plaintiff stole the ring from there.

Plaintiff answered (on March 13, 1987) the counterclaim with a motion to dismiss Count I and by claiming in response to Count II that the ring was an outright gift. Her motion to dismiss was unaccompanied by a memorandum, in violation of the local rules in the northern district of Illinois.

The matter was transferred to you by order dated April 30, 1987. Even though plaintiff's motion to dismiss was ripe for

denial because it was filed in violation of the local rules, the Illinois court did not rule on it before transferring the action. On 3 June 1987, you wrote to all counsel directing plaintiff to file a memorandum within ten days of the date of your letter. (A memo was thus due on 17 June 1987.) Although plaintiff federal expressed a memorandum to chambers on June 15th -- probably arriving on June 16th -- apparently she had some problems getting local counsel and the memorandum was not filed with the Clerk's office until 2 July 1987. The copy sent to chambers was not signed by local counsel -- also in violation of our local rule 7.

Because of these continuous violations of the local rules both here and out in Illinois, defendant argues that the motion to dismiss should be stricken. I tend to agree. I spoke with plaintiff's counsel on June 12 or 15 and was assured that they would have local counsel by the 17th. I told them that I had no idea how the Court would take to this violation of the local rules and their failure to comply with the Court's letter of June 3. Still the memorandum was not actually filed until two weeks after that! Plaintiff had six weeks from the transfer order to secure local counsel.

Motion to Dismiss -- the Merits

In any case, the motion has no real merit. Plaintiff claims that count I of defendant's counterclaim fails to state a claim upon which relief can be granted. She says that defendant

is not entitled to an accounting because he has not alleged that plaintiff controlled the accounts and invested the money in dispute. She says that Rue has mistakenly characterized a defensive position to her Count I as a claim against Peterson.

Rue argues that there is nothing improper about denying in the answer that an accounting should be had at all and in asserting in a counterclaim that if an accounting is ordered, over the objection of Rue, the accounting should result in certain affirmative relief for Rue. That affirmative relief can be requested only in a counterclaim. Therefore, count I of the counterclaim states a claim upon which relief can be granted.

If you decide to address the merits of the motion to dismiss, you should DENY it.

LAF

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