

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-1300-CIV-HIGHSMITH

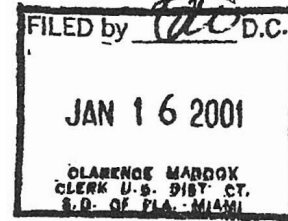
BANCO LATINO INTERNATIONAL,

Plaintiff,

v.

GUSTAVO A. GOMEZ LOPEZ, et al.,

Defendants.



ORDER

THIS CAUSE is before the Court for review of United States Magistrate Judge Barry L. Garber's report and recommendation (the "R & R"). The R & R advises that both Plaintiff Banco Latino International ("BLI") and the law firm that represented it throughout this litigation, Cleary, Gottlieb, Steen & Hamilton ("CGSH"), be sanctioned. Also before the Court are two motions to strike, relating to a March 25, 2000 memorandum (the "FOGADE memorandum") from Alfredo Vetencourt De Lima, BLI's corporate representative, to the board of directors of Fondo De Garantia De Depositos Y Proteccion Banacaria ("FOGADE"), the Venezuelan government's deposit insurance agency. The FOGADE memorandum was submitted as an exhibit during the sanction proceedings before Magistrate Judge Garber. For the reasons that follow, the Court adopts the R & R.

aug
hr

I. BACKGROUND

On April 20, 2000, the undersigned entered an order and memorandum opinion granting the remaining defendants summary judgment, in this long-running litigation arising out of the collapse of the Venezuelan banking industry in the 1990's. See Banco Latino Int'l v. Gomez Lopez, 95 F. Supp. 2d 1327 (S.D. Fla. 2000). While that order disposed of all of the substantive legal claims in the case, considerable litigation was still in the offing over the issue sanctions. Defendant Gustavo A. Gomez Lopez ("Lopez") filed a motion for sanctions and costs against BLI and CGSH,¹ and BLI and CGSH reciprocated with a cross-motion for sanctions against Lopez. The matter was referred to Magistrate Judge Garber, who after holding a hearing issued the R & R.²

Attached as an exhibit to Lopez's reply in support of his sanctions motion was the FOGADE memorandum. In 1994, FOGADE intervened and placed BLI's parent bank in Venezuela into receivership. Both FOGADE and BLI's parent bank were originally plaintiffs in this action; however, they were dismissed from the case in 1998, on the basis that their claims should be adjudicated in

¹ Lopez's motion was also directed at BLI's local counsel the law firm of Akerman, Senterfit & Eidson. Lopez later withdrew the motion with respect to Akerman, Senterfit & Eidson.

Prior to the hearing, BLI and CGSH retained the law firm of Shook, Hardy & Bacon to represent them for purposes of the sanction proceedings. After Magistrate Judge Garber issued the R & R advising that sanctions be imposed against both BLI and CGSH, BLI retained the law firm of Hunton & Williams to represent it in the remainder of the sanction proceedings. Thus, at this juncture, Shook, Hardy & Bacon represents only CGSH and BLI is represented by Hunton & Williams. BLI's former local Counsel Akerman, Senterfit & Eidson retained the law firm of Podhurst, Orseck, Josefsberg, et al., to represent it with concern to the sanction proceedings.

Venezuela.³ See 17 F. Supp. 2d 1327 (S.D. Fla. 1998). The FOGADE memorandum addresses the legal viability of BLI's claims as of March 25, 2000.

The R & R does not rely upon the FOGADE memorandum. Nonetheless, Magistrate Judge Garber concluded that BLI and CGSH continued to prosecute this case after it had become evident that there was no evidentiary basis supporting BLI's claims. See R & R at 4. Magistrate Judge Garber also recommended that BLI and CGSH's cross-motion for sanctions be denied. BLI and CGSH vigorously object to Magistrate Judge Garber's findings with regard to Lopez's motion for sanctions, asserting that they had a good faith basis in law and fact for all of the claims asserted in this action.⁴ In addition to its objections to the R & R, BLI has moved to strike the FOGADE memorandum, arguing that it is a privileged communication. Lopez, in turn, has filed a motion to strike BLI's motion to strike.

II. DISCUSSION

A. BLI's Motion to Strike

As noted above, BLI moved, after Magistrate Judge Garber issued the R & R, to strike the FOGADE memorandum. The FOGADE memorandum, however, was part of the record before Magistrate Judge Garber. Therefore, it is not appropriate, at this juncture (i.e., the review of

³ It now appears that BLI assigned its interests in this litigation to FOGADE sometime after FOGADE was dismissed from the case. FOGADE, however, was never substituted as the real party in interest. See Fed. R. Civ. P. 17(a).

⁴ BLI and CGSH filed separate objections to the R & R through their respective counsel. See supra Note 1. Lopez filed a separate response to each set of objections.

Magistrate Judge Garber's findings), to strike it from the record. See Application of Kingsley, 802 F.2d 571, 577 (1st Cir. 1986) ("It was part of the record before the magistrate, and is, therefore, now properly before us."). Accordingly, BLI's motion to strike is denied and Lopez's motion to strike the motion to strike is denied as moot.

B. The Conduct of BLI and CGSH Warrants Sanctions Under Rule 11(b)(3)⁵

Magistrate Judge Garber found that sanctions were appropriate because: "1) BLI failed to conduct the adequate factual and legal inquiry required by Rule 11; 2) no factual basis existed from which BLI could base its claims; and 3) no legal basis existed to support BLI's claim against Mr. Lopez." R & R at 3-4. After a careful *de novo* review of the R & R, the pertinent portions of the record, and the parties' objections, the Court concurs with Magistrate Judge Garber's factual findings and his conclusion that no factual basis existed to support BLI's claims.⁶ The Court notes, for purposes of clarification, that it was not until the filing of the summary judgment motions that BLI & CGSH had (1) notice of the lack of a factual basis supporting BLI's claims and (2) an opportunity

The R & R also advises that sanctions are appropriate against CGSH under 28 U.S.C. § 1927 for vexatious litigation. The Court limits the authority for its imposition of sanctions to Rule 11 of the Federal Rules of Civil Procedure.

⁶ The Court disagrees with Magistrate Judge Garber's conclusion that there was no arguable legal basis for BLI's RICO claims. As the Court noted in its summary judgment order, BLI's theory of a pattern of racketeering may have been viable in other jurisdictions. See Banco Latino Int'l, 95 F. Supp. 2d at 1334 n7. Thus, to the extent that the R & R finds there was no arguable legal basis for BLI's claims the Court declines to adopt the R & R. Nonetheless, the undisputed facts, adduced at the summary judgment stage, established that there was no factual basis to support BLI's claim that it was defrauded by the "triangular transaction" scheme at issue in this case. See id. at 1334, 1336.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

to withdraw the claims. Therefore, it was on March 24, 2000, when BLI filed its response to the motions for summary judgment, that BLI and CGSH engaged in sanctionable conduct, by continuing to prosecute the case despite the absence of a factual basis supporting BLI's claims. See Univ. Creek Ass'n v. Boston Am. Fin. Group, Ltd., 101 F. Supp. 2d 1370, 1373 (S.D. Fla. 2000) (Rule 11(c) provides for the imposition of sanctions upon attorneys, law firms or parties who violate subsection (b), after notice and a reasonable opportunity to respond.") (emphasis supplied). Accordingly, the R & R's conclusion that sanctions should be imposed is adopted.

III. CONCLUSION

For the reasons set forth above, it is ORDERED that:

- (1) BLI's motion to strike is DENIED;
- (2) Lopez's motion to strike the motion to strike is DENIED AS MOOT;
- (3) the R & R's conclusion that sanctions should be imposed against BLI and CGSH pursuant to Rule 11 is ADOPTED;
- (4) Lopez's motion for sanctions against BLI and CGSH is GRANTED;
- (5) BLI and CGSH's cross-motion for sanctions is DENIED; and
- (6) the case is RE-REFERRED to Magistrate Judge Garber for determination of the appropriate sanctions against BLI and CGSH for continuing to prosecute

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

this action after March 24, 2000.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of January, 2001


SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge Barry L. Garber
Peter Homer
Luis Delgado
David Gelfand
Thomas Scott
Michael Tein
Marty Steinberg

