IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. SHAKMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 69 C 2145
v.	)	
	)	Hon. Sidney Schenkier
COUNTY OF COOK, et al.,	)	
	)	
Defendants.	)	

COOK COUNTY RECORDER OF DEEDS' RESPONSE
TO PLAINTIFFS' MOTION FOR RULE TO SHOW CAUSE

Defendant, Cook County Recorder Of Deeds ("Recorder's Office") by its attorney, Anita Alvarez, State's Attorney of Cook County, through her assistants, Lisa M. Meador and Thomas E. Nowinski, Assistant State's Attorneys, responds to Plaintiffs' Motion for Issuance of a Rule to Show Cause Why Certain Senior Staff in the Cook County Recorder of Deeds' Office Should Not Be Held in Civil Contempt and for Related Relief ("Motion for Rule to Show Cause") as follows:

On July 29, 2016, Plaintiffs filed their Motion for Rule to Show Cause asking that this Court: 1) issue a Rule to Show Cause to Chief Deputy Recorder Cedric Giles and Labor Counsel Edmund Michalowski directing that each explain why he should not be held in civil contempt for violations of the SRO and the Employment Plan; 2) permit Plaintiffs to take discovery, including, but not limited to the depositions of these individuals and other employees of the Recorder's Office; 3) permit Plaintiffs to supplement this Motion by naming other individuals in the Recorder's Office to whom rules to show cause should issue; and 4) conduct a hearing or hearings and entry of appropriate civil contempt relief. Plaintiffs' Motion for Rule to Show Cause should be denied because Plaintiffs' failed to follow this Court's standing order requiring

a meet and confer, the petition is barred by the statute of limitations and laches, the petition seeks improper relief against the individuals, and the requested relief as to the Recorder's Office is improper. Further, granting the relief requested is not in the best interests of the parties.

I. Failure to Comply With The "Meet and Confer" Requirement of Local Rules

On July 11, 2016, Plaintiffs' counsel emailed a copy of a draft Motion for Rule to Show Cause to counsel for the Recorder. Plaintiffs' counsel also requested that copies be provided to the Chief Deputy and Labor Counsel and requested that counsel for the Recorder ask them (or their counsel) to contact Plaintiffs' counsel "so that we can begin the meet and confer process as required by Judge Schenkier." Exhibit A, Draft Motion for Rule to Show Cause; Exhibit B, July 11, 2016 email from Plaintiffs' counsel. Counsel for the Recorder immediately forwarded the draft to the Chief Deputy and Labor Counsel as well as the in-house General Counsel for the Recorder. The Chief Deputy and Labor Counsel were advised of Plaintiffs' counsel's indication of a possible conflict of interest with counsel for the Recorder representing them and directed them to contact the State's Attorney's Office if they wished to be provided with counsel to represent them in their individual capacities. Upon information and belief, efforts were instituted by both the Chief Deputy and Labor Counsel to determine whether an actual conflict of interest existed and if so, obtain counsel. Exhibit B, July 11, 2016 email from counsel for the Recorder; Exhibit C, July 11, 2016 email to the Chief Deputy, Labor Counsel, and General Counsel for the Recorder.

On July 12, 2016, counsel for the Recorder contacted Plaintiffs' counsel to discuss the ultimate relief being sought and determine whether an actual conflict existed in their representation of the Chief Deputy and Labor Counsel. Plaintiffs' counsel stated that he would need to discuss that matter with his client and would respond. Upon information and belief, the

Chief Deputy and Labor Counsel contacted the State's Attorney's Office regarding representation due to this potential conflict.

Shortly thereafter, counsel for the Recorder called Plaintiffs' counsel to follow up on the prior discussion. Plaintiffs' counsel stated that they were meeting with their client to discuss the endgame and would provide information after that. Counsel for the Recorder advised him that this information was necessary to determine whether an actual conflict exists. He further stated that he was not planning on filing the Motion for Rule to Show Cause until there was a sit down meet and confer, provided that having such a meeting did not take months.

On July 20, 2016, Plaintiffs' Counsel emailed counsel for the Recorder asking whether the Chief Deputy and Labor Counsel had retained counsel, and further stating that if no agreement was reached between the parties he intended to file the Motion for Rule to Show Cause on July 26th. Exhibit D, July 20, 2016 email from Plaintiffs' counsel to counsel for the Recorder. Recorder's Counsel responded by reminding Plaintiff's Counsel that she had requested information from them to: 1) understand the relief being sought in preparation for the meet and confer required by the Court and 2) determine whether a conflict existed but that Plaintiffs' Counsel, but that no information had yet been provided to allow for such decisions to be made. Exhibit D, July 20, 2016 emails from counsel for the Recorder to Plaintiffs' counsel; Exhibit E, July 20, 2016 emails from counsel for the Recorder to Plaintiffs' counsel. Until this information was provided, no substantive discussions could occur. Accordingly, counsel for the Recorder confirmed with Plaintiffs' counsel that these discussions were preliminary and not to be considered the entirety of the meet and confer process. Exhibit E, July 20, 2016 emails between counsel for the Recorder and Plaintiffs' counsel. Despite failing to provide counsel for the Recorder with information sufficient to determine whether a conflict existed, Plaintiffs' counsel

emailed the Chief Deputy and Labor Counsel asking whether they had retained counsel to represent them in the matter. Exhibit F, July 20, 2016 email from Plaintiffs' counsel to the Chief Deputy and Labor Counsel. The Chief Deputy advised Plaintiffs' counsel that the State's Attorney's Office was working on that issue. Exhibit F, July 20, 2016 email from the Chief Deputy to Plaintiffs' counsel.

On July 21, 2016, counsel for the Recorder finally obtained the requisite information from Plaintiffs' Counsel to determine whether an actual conflict existed and obtained an understanding as to the relief being sought against the Recorder's Office, the Chief Deputy, and Labor Counsel. Counsel for the Recorder advised Plaintiffs' counsel that based upon the information provided, a conflict existed in her representation of the Chief Deputy and Labor Counsel and that efforts would need to be made to obtain outside counsel to represent them. Recorder's Counsel explained to Plaintiffs' Counsel that the State's Attorney's Office is statutorily required to provide counsel to employees of the County and the County elected officials and that the representation required that the counsel be appointed through a state court proceeding. Counsel for the Recorder further advised that obtaining counsel and the appointments would take at least a week, if not longer. Plaintiffs' counsel stated that he did not have authority to push back the July 26th intended filing date, but to report to him on July 25th or 26th as to the additional time required. Upon information and belief, the State's Attorney's Office immediately made arrangements to have counsel appointed for the Chief Deputy and Labor Counsel and filed the necessary petitions in state court for the appointment. As such, the appointed counsel would not be expected to be in a position to engage in the meet and confer process until after that appointment. Exhibit G, July 29, 2016 email from counsel for the Recorder to Plaintiffs' counsel.

Counsel for the Recorder attempted to discuss this further on July 26th with Plaintiffs' counsel as agreed, but did not speak with him until July 27, 2016. At that time, counsel for the Recorder advised Plaintiffs' Counsel that the motions to have counsel appointed for the Labor Counsel and Chief Deputy were scheduled for July 29th and August 1st, respectively and that the appointment and resulting representation was not effective until entry of that order. Exhibit G, July 29, 2016 email from counsel for the Recorder to Plaintiffs' counsel. Plaintiffs' counsel advised counsel for the Recorder that a finding of contempt was only being sought against the Deputy Chief and Labor Counsel in their individual capacities but was not being sought against the Recorder's Office; therefore, the only issue for consideration by the Recorder's Office was whether it would agree to the discovery sought in the motion. Counsel for the Recorder asked Plaintiffs' counsel whether they wanted to have a global meet and confer involving the various counsel for the Recorder, Chief Deputy, and Labor Counsel or individual meetings. Plaintiffs' counsel said he would let counsel for the Recorder know their preference.

Prior to appointment of those counsel and without engaging in the meet and confer process required, on July 29, 2016, Plaintiffs' counsel unexpectedly advised counsel for the Recorder, counsel for the Chief Deputy, and counsel for the Labor Counsel that they would be filing the Motion for Rule to Show Cause that day. In an odd turn of events and contrary to their position heretofore, Plaintiffs' counsel now claimed that Plaintiffs were not required to engage in the meet and confer process with the Chief Deputy and Labor Counsel because they were not "parties" to the litigation. Exhibit H, July 29, 2016 emails from Plaintiffs' counsel. Plaintiffs' counsel refused to engage in the meet and confer process and filed the Motion for Rule to Show Cause on July 29, 2016. Exhibit H emails between counsel for the Recorder, counsel for the

Chief Deputy, counsel for the Labor Counsel, and Plaintiffs' counsel. Plaintiffs' counsel filed the Motion for Rule to Show Cause on July 29, 2016.

This Court has instituted a meet and confer requirement prior to the filing of all motions. This requirement is rooted in the meet and confer requirement established by Local Rule 37.2. Local Rule 37.2 states, in part, that:

> "… this court shall hereafter refuse to hear any and all motions… unless the motion includes a statement (1) that after consultation in person or by telephone and good faith attempts to resolve differences they are unable to reach an accord, or (2) counsel's attempts to engage in such consultation were unsuccessful due to no fault of counsel's. Where the consultation occurred, the statement shall recite, in addition, the date, time, and place of such conference, and the names of all parties participating therein. Where counsel was unsuccessful in engaging in such consultation, the statement shall recite the efforts made by counsel to engage in consultation."
>
> U.S. Dist. Ct., N.D. Ill., L.R.37.2.

This Court's meeting requirement extends the meet and confer requirement of Local Rule 37.2 to all motions that a party wishes to file. *See* Judge Schenkier's Standing Order: Meeting Requirement on Motions. Pursuant to this Court's directive, "[a] candid discussion between the parties prior to filing motions… can limit the scope of such motions or eliminate the need for them to be filed at all." *Id*.

The court has broad discretion to determine how and when to enforce local rules. *Waldridge v*. *American Hoechst Corp*., 24 F.3d 918, 923 (7th Cir. 1994). As it pertains to the "meet and confer" requirement established by Local Rule 37.2, several courts have dismissed motions due to the failure to comply with this requirement. *See Jagla v*. *LaSalle Bank,* 05 C 6460, 2006 U.S. Dist. LEXIS 73834 at 36 (N.D. Ill. 2006) (Motion to Compel denied because it fails to include a Local Rule 37.2 statement of effort to reach an accord); *Chamberlain Group v*. *Lear Corp*., 05 C 3449, 2010 U.S. Dist. LEXIS 71103 at 6-7 (N.D. Ill. 2010) (Motion seeking the

deposition of a corporate representative denied because of a failure to make good faith, in person attempts to resolve the dispute); *Slaven v. Great American Ins. Co.*, 13 C 1370, 2014 U.S. Dist. LEXIS 128551 at 7-8 (N.D. Ill. 2014) (Plaintiff's discovery motions are denied partly due to failure to attempt to meet with their opposing parties, failure to contact them by phone, and a failure to provide a certification of their meet and confer efforts). Emails and letters are not enough to satisfy the "meet and confer" requirement. *See Infowhyse Gmbh v. Fleetwood Grp.,* 2016 U.S. Dist LEXIS 99217, *2 (N.D. Ill 2016).

In this case, Plaintiffs' Motion for Rule to Show Cause seeks a contempt order against the Chief Deputy and Labor Counsel in their individual capacities as well as relief from the Recorder's Office. Prior to filing the motion, however, Plaintiffs' counsel failed to "meet and confer" with the counsel for the individuals or the office, claiming rather that the individuals were not parties requiring a "meet and confer" and that no relief was being sought as to the Recorder's Office so a "meet and confer" was unnecessary. All of Plaintiffs' counsel's communications from the initial presentation of the issue on July 11, 2016 until the day before the motion was filed, exhibit the contrary. *See*, Exhibits B-G. Further, Plaintiffs' counsel refused to even allow counsel for the Chief Deputy and Labor Counsel to be appointed and begin their representation of them, let alone conduct a proper "meet and confer" as required by this Court. The course of action followed by the Plaintiffs does not constitute a good faith effort to resolve the dispute as required by this Court's standing order. Rather, counsel's actions exhibit a complete disregard for this Court's standing order. As such, the Motion for Rule to Show Cause should be denied.

II. The Petition Is Barred By The Statute Of Limitations

Shakman is a judicial decree; contempt of court is the appropriate relief for a violation of that decree. *Smith v*. *Chicago,* 769 F.2d 408, 411 (7th Cir. 1985). There is no fixed statutory period for prosecuting civil contempts, but federal courts may borrow suitable periods of limitations from other statutes as a matter of federal law. *Smith,* 769 F.2d at 411. The Seventh Circuit has held that the 180-day period of limitations established by Title VII of the Civil Rights Act of 1964 applies to contempt proceedings for violations of *Shakman* decree. *Smith*, at 413. Plaintiffs' filed the instant motion seeking to hold Chief Deputy and Labor Counsel in civil contempt for violating the *Shakman* decree on July 29, 2016. As such, any alleged violations must have occurred no earlier than January 31, 2016.

The allegations that Plaintiffs cite as the bases for holding Giles and Michalowski in civil contempt all occurred well outside the limitations periods established by *Smith*. Accordingly, Plaintiffs' Motion for Rule to Show Cause is untimely and should be denied.

Plaintiffs may attempt to argue that a two year statute of limitations should be applied. Even assuming *arguendo* that the statute of limitations for a *Shakman* contempt proceeding is two years, all of the bases for Plaintiffs' Motion are still beyond the statute of limitations except for one basis against Labor Counsel Edmund Michalowski. Therefore, even applying a 2 year statute of limitations, the Motion as related to the Chief Deputy should be denied in its entirety as discussed below, and the Motion as related to the Labor Counsel would only have one timely basis.

1. Allegations against the Chief Deputy

Plaintiffs allege that the Chief Deputy violated the Employment Plan and/or the Recorder's SRO in relation to: 1) the hiring of Mr. Giles' Executive Assistant; 2) the termination of the former Concourse Manager; and 3) processes established for investigating violations of

Recorder's Office policy by the Director of Security. Each of these allegations relate to events that took place several years ago, and well before January 31, 2016. Additionally, as noted by Plaintiffs, the issues pertaining to the allegations were raised in reports issued by the OIIG or the RCA over two years ago. Specifically, the alleged violation in the hiring of the Executive Assistant was reported by the OIIG in IG#13-403 that was issued on February 26, 2014, 884 days before the filing of the Motion; the alleged violation regarding the termination of the Concourse Manager was reported by the OIIG in IG#13-176 that was issued on June 19, 2014, 771 days before filing of the Motion; and the alleged violation regarding investigations by the Director of Security was reported by the RCA in her Ninth Report of the RCA that was issued on December 3, 2013, 969 days before filing of the Motion.

2. Allegations against the Labor Counsel

The Plaintiffs allege that Labor Counsel Michalowski violated the Employment Plan and/or the SRO in relation to: 1) "protecting" the former Director of HRD from discipline; 2) "protecting" the Executive Assistant to the Director of HRD from discipline; 3) "protecting" the Director of Satellites from discipline; and 4) Labor Counsel's issuance of an Office Incident Report to his Executive Assistant. Each of these allegations relate to events that took place over 180 days ago. In addition, the Plaintiffs were aware of the facts underlying these allegations over 180 days ago through various reports issued by the OIIG, RCA and/or the DOC. Specifically, the alleged violation in "protecting" the former HR Director were reported by the OIIG in IG#13-292 issued on February 26, 2014, 884 days before filing of the motion, and IG# 14-408 issued on September 18, 2015, 315 days before filing of the motion; the alleged violation of "protecting" the Executive Assistant to the former HR Director was reported by the OIIG in IG#13-292 that was issued on February 26, 2014, 884 days before filing of the Motion; the alleged violation of

"protecting" the Director of Satellites was reported by the OIIG in IG#13-289 that was issued on February 26, 2014, 884 days before the filing of the Motion; and the alleged violation of issuing incident reports to his Executive Assistant was reported by the Director of Compliance in DOC Incident Report #15-009 that was issued on November 6, 2015, 266 days before filing of the motion.

Plaintiffs were provided with copies of, and had access to, all these reports at the time that they were issued, most of which are well over two years ago. Indeed, the Plaintiffs cited to each of the OIIG/RCA reports referenced above in support of their instant motion. As a result, Plaintiffs knew or should have known of the alleged violations long before January 31, 2016 and were required to have filed a contempt petition related to those alleged violations within 180 days. However, it is abundantly clear that Plaintiffs failed to so. As such, the instant Motion is untimely and must be denied.

III. The Petition Should Be Barred By Laches

Laches is principally a question of the inequity of permitting a claim to be enforced. *Lingenfelter v. Keystone Consol. Industries, Inc.*, 691 F.2d 339, 340 (7th Cir. 1982). It is unlike limitation, which is based merely on time. *Id*. Rather, laches is based upon changes of conditions or relationships involved with the claim. *Id*. For laches to apply in a particular case, the party asserting the defense must demonstrate: 1) an unreasonable lack of diligence by the party against whom the defense is asserted and 2) prejudice arising therefrom. *Hot Wax, Inc. v. Turtle Wax, Inc*. 191 F.3d 813, 820 (7th Cir. 1999). Plaintiffs bear the burden of explaining the delay in bringing suit. *Lingenfelter* 691 F.2d at 340. If the delay is inexcusable, then the defendant must show prejudice. *Id*.

In this case, Plaintiffs' delay in bringing the instant motion is unreasonable. As discussed above, every single basis for the motion with the exception of one occurred over two years ago. Plaintiffs have not offered any explanation for the delay in bringing this motion after such a lengthy passage of time. As this Court is well aware, Plaintiff Shakman and his counsel are fully involved and aware of all aspects of this case including the various reports of the RCA and OIIG. As such, there is no sufficient explanation for this complete lack of diligence. Since the issuance many months and years ago of the reports cited by Plaintiffs in their motion, the Recorder's Office has made great efforts and strides to address gaps in processes, reinforce the provisions of the Employment Plan, and insure employees and policies are in place to achieve substantial compliance. As a question of equity, Plaintiffs cannot be allowed to sit on their hands, implicitly or directly accepting the affirmative actions by the Recorder's Office to institute the necessary changes, only to lay in wait to years later spring a contempt proceeding as to the very same issues the office had been lead to believe it acted to remedy. This is not equitable and substantially prejudices the Recorder's Office. Further, Plaintiffs cannot now turn a blind eye to their own actions over the past 2 years and ignore the months-long negotiations between the parties to resolve these issues. Should Plaintiffs be allowed to proceed with the requested relief, the Recorder's Office would seek to evidence Plaintiffs' actions through discovery sought by the Recorder's Office, namely requests to admit and the depositions of Michael Shakman and his counsel.

While this course of action is clearly not in the best interests of the parties, the Recorder's Office must be allowed to defend itself. The Motion for Rule to Show Cause unreasonably stunts the progress of the Recorder's Office to reach substantial compliance with the Recorder's SRO. Any cooperative momentum will be stalled while the Recorder's Office engages in adversarial

litigation of claims stemming from events that took place long in the past, some of which were previously settled with individual claimants over a year ago. The lack of diligence by Plaintiffs and the prejudice to the Recorder's Office is clear. Accordingly, the Motion should be denied based on the theory of laches.

IV. The Petition Seeks Improper Relief

A. The relief sought against the individuals is improper

The Motion for Rule to Show Cause seeks a contempt order against the Chief Deputy and Labor Counsel in their individual capacities. The allegations that support the Plaintiff's Motion for RTSC involve violations of the Recorder's Consent Decree and SRO. *See Plaintiff's Motion for RTSC* at 3-4. The SRO and Recorder's Consent Decree are injunction orders pursuant to Federal Rule of Civil Procedure 65. *See Id*. at 3; *See also Recorder's Consent Decree*, May 22, 1992. Federal Rule of Civil Procedure 65(d), which allows injunctive relief against successors in office, does not create personal (as opposed to official) liability. *Hernandez v. O'Malley*, 98 F.3d 293, 294 (7th Cir. 1996). Many courts have held that individual defendants cannot be held liable in their personal capacities for alleged violations of the *Shakman* Decree. *See Id*., 98 F.3d at 294; *Plotkin v*. *Ryan*, 1999 U.S. Dist. LEXIS 16214 at 23-24 (N.D. Ill. 1999); *McDonough v*. *City of Chicago*, 2008 U.S. Dist. LEXIS 44706 at 17 (N.D. Ill 2008). Recorder Yarbrough was not in office at the time that the Consent Decree and SRO were entered. Rather, Recorder Carol Moseley-Braun (Consent Decree) and Recorder Eugene Moore (SRO) held office when the injunction orders went into effect. With the entry of the Consent Decree and SRO, Moseley-Braun and Moore were only able to bind their successors in their official capacities. *See Hernandez* 98 F.3d at 294. The 7th Circuit has stated that it "cannot fathom why a person suing to enforce the *Shakman* decree might want to pursue the officeholders in their personal

capacities, except for the purposes of harassment, which is hardly a reason the court should approve." *Hernandez,* 98 F.3d at 295.

B. The relief sought against the Recorder's Office is improper

The Motion for Rule to Show Cause seeks various relief against the Recorder's Office, including: 1) that the Court permit the Plaintiffs to take discovery, including, but not limited to the depositions of these individuals and other employees of the Recorder's Office; and 2) that the Court permit Plaintiffs to supplement this motion by naming other individuals in the Recorder's Office to whom rules to show cause should issue (presumably after discovery has been completed).

Sanctions in a civil contempt proceeding are designed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Local 28 of Sheet Metal Workers' Int'l Assn v. EEOC,* 478 U.S. 421, 443 (1986); *United States v*. *United Mine Workers*, 330 U.S. 258, 303-304 (1947). Where compensation is intended, a fine is imposed, payable to the complainant. *United Mine Workers,* 330 U.S. at 304. Such fine must be based upon evidence of a complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy. *Id*. Where the purpose is to make the defendant comply, the court's discretion is otherwise exercised and it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. *Id*.

Allowing discovery would do nothing to cure the alleged violations of, or coerce compliance with, the Recorder's SRO. A request for further discovery is counterintuitive considering that Plaintiff's Motion for Rule to Show Cause relies on investigations already

conducted by the RCA and OIIG. Essentially, Plaintiffs' allege that investigations have resulted in findings that the Employment Plan and/or SRO have been violated yet ask this Court to allow them to investigate those same incidents to determine if violations have occurred. To be sure, Plaintiffs' motion seeks to supplant the RCA and OIIG by conducting their own investigation. Such is not the intent of a rule to show cause.

Plaintiffs' seek improper relief as to the individuals and Recorder's Office. As such, the motion should be denied.

V. Granting the Relief Requested Is Not In The Best Interests Of The Parties

Granting Plaintiffs' Motion for Rule to Show Cause is not in the best interests of the parties. The Recorder's Office has made steady significant progress toward achieving substantial compliance. The Recorder of Deeds has spearheaded these efforts, new policies and procedures have been drafted and implemented, an internal independent Director of Compliance has been hired and works diligently to audit the Office's internal procedures to insure compliance with the Employment Plan, a new Chief of Human Resources has been hired and works tirelessly to address the gaps in processes identified by the Recorder Compliance Administrator and Director of Compliance while bolstering the existing procedures, and complaints to the RCA and OIIG have been significantly reduced. Plaintiffs' motion not only ignores all of this significant progress, but also seeks to upend it. All cooperative efforts and spirit will be removed from this matter and replaced with adversarial posturing. Once that door is closed, it may never reopen. Surely this is not in the best interest of the parties.

It is clear that Plaintiffs' Motion for Rule to Show Cause should be denied because Plaintiffs' failed to follow this Court's standing order requiring a meet and confer, the petition is barred by the statute of limitations and laches, the petition seeks improper relief against the

individuals, and the requested relief as to the Recorder's Office is improper. Further, granting the relief requested is not in the best interests of the parties.

CONCLUSION

WHEREFORE, based on the foregoing, Defendant Cook County Recorder of Deeds asks this Court to deny Plaintiffs' Motion for Rule to Show Cause and to grant any other relief it deems proper.

Respectfully submitted,

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