
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JEFFREY VERNON MERKEY,

Plaintiff,

vs.

BRUCE PERENS, et al.,

Defendants.

**REPORT AND RECOMMENDATION
AND ORDER GRANTING MOTION TO
AMEND COMPLAINT**

Case No. 2:05CV521 DAK

Judge Dale A. Kimball

Magistrate Paul M. Warner

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Dale A. Kimball pursuant to 28 U.S.C. § 636(b)(1)(B). Before the court is pro se Plaintiff Jeffrey Vernon Merkey's ("Plaintiff") Motions (1) for Order to Show Cause, (2) for Default Judgment as to Defendant Alan P. Petrofsky, and (3) to Amend Complaint for Damages. Pursuant to District of Utah local rule 7-1(f), the court elects to determine the motion on the basis of the written memoranda and finds that oral argument would not be helpful or necessary. *See* DUCivR 7-1(f).

On June 21, 2005, Plaintiff brought the underlying action against various Defendants. Attached to Plaintiff's Verified Complaint as Exhibit 2 was a confidential settlement agreement between Plaintiff and his former employer, Novell, Inc. ("Novell Settlement Agreement"). While Plaintiff failed to follow the local rules for filing documents under seal, he asserts that when he filed his Verified Complaint in the clerk's office, he informed the individual assisting him that Exhibit 2 needed to be filed under seal. Exhibit 2, however, was not filed under seal,

and it appeared on the court's public electronic docket. The following day, June 22, 2005, the district court ordered Exhibit 2 of the Verified Complaint to be sealed and directed the Clerk of Court to remove it from the court's public electronic docket.

On September 27, 2005, Plaintiff voluntarily dismissed all Defendants and the case was closed. On October 21, 2005, Plaintiff filed a Motion for Order to Show Cause against Petrofsky for violating the court's June 22, 2005 order sealing Exhibit 2 ("Settlement Agreement Order"). Specifically, Plaintiff asserts that for the short period of time that the Novell Settlement Agreement appeared on the court's electronic docket, Petrofsky downloaded and posted it to a server in Czechoslovakia and to his own website scofacts.org. Plaintiff further contends that while Petrofsky has notice of the Settlement Agreement Order, he nonetheless continues to post the Novell Settlement Agreement on scofacts.org.

On October 27, 2005, the court granted Plaintiff's Motion to Reopen for Enforcement Proceedings to enforce the Settlement Agreement Order. While the court noted that the Settlement Agreement Order was directed at the Clerk of Court and not at third parties, it granted Plaintiff's motion and reopened the case in order to address the issue of whether the Settlement Agreement Order should also apply to third parties.

On December 8, 2005, Defendant Al Petrofsky ("Petrofsky") was served with a summons and copy of Plaintiff's Second Amended Complaint. Petrofsky had until December 28, 2005 to serve and file a responsive pleading. To date, Petrofsky has failed to do so. On January 23, 2006, Plaintiff filed a Motion for Default Judgment as to Alan P. Petrofsky. Having determined that Petrofsky has failed to file a responsive pleading, it is RECOMMENDED that Plaintiff's Motion for Default Judgment be GRANTED and judgment entered against Petrofsky. Because the Novell Settlement Agreement appeared on the court's public electronic docket in error, it is

also RECOMMENDED that Petrofsky be ordered to remove the Novell Settlement Agreement from scofacts.org and any other websites owned by Petrofsky. The court further grants Plaintiff's Motion to Amend Complaint for Damages and thus incorporates the pleading styled "Motion to Ammend [sic] Complaint for Damages" into Plaintiff's Second Amended Complaint.

DATED this 30th day of June, 2006.

BY THE COURT:

A handwritten signature in cursive script that reads "Paul M. Warner". The signature is written in black ink and is positioned above a horizontal line.

Paul M. Warner
United States Magistrate Judge