



Not Reported in F.Supp.2d
2003 WL 21919182 (N.D.Ind.)
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[Motions, Pleadings and Filings](#)

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United States District Court,
N.D. Indiana, Fort Wayne Division.

Kevin E. SMITH, Plaintiff,
v.
John PENDERGRASS, et al., Defendants.
Kevin E. SMITH, Plaintiff,
v.
Sam I. ADAMS, et al, Defendants.

Nos. 1:02-CV-125, 1:02-CV-126.

June 17, 2003.

ORDER

[COSBEY](#), Magistrate J.

*1 Currently before the Court are several motions filed by the *pro se* Plaintiff, and a motion to strike filed by defendants Sam Adams ("Adams"), Larry Tague, Jr. ("Tague"), Douglas Haskell ("Haskell"), and Brian Martin ("Martin"). (*See* Docket Nos. 58, 59, 63, 65 & 66.) Each of these motions in some way touch on either discovery disputes or the Plaintiff's request for the Court to issue approximately 40 *subpoenas duces tecum* on his behalf. We will address these motions in turn.

I. THE PROCEDURAL BACKGROUND

The Plaintiff apparently believes that various members of the Fort Wayne Police Department ("FWPD"), as well as the prosecutors and defense attorneys involved in his state court conviction, are involved in vast conspiracy to destroy evidence and alter various photographs and videotapes he claims are helpful to his case.

It appears that the Plaintiff first began espousing this theory in his March 27, 2003, motion for a temporary restraining order ("TRO"). (Docket No. 50.) That motion asked the Court to prevent the FWPD from

destroying and tampering with evidence, and also asked the Court to order the defendants to produce various documents. Judge Lee held a hearing on this motion on April 17, 2003, but the Plaintiff failed to appear. Subsequently, Judge Lee denied the TRO, but instructed the Defendants to produce whatever materials the Plaintiff requested in his motion. (Docket No. 53.)

Apparently the Plaintiff was unhappy with Judge Lee's ruling because on May 20, 2003, he filed a "Verified Notice of Evidence Tampering and Motion for the Court to Take Immediate Possession [of the Evidence]" (the "Verified Notice and Motion"), which largely echoed his concern that the police were tampering with and destroying evidence. (*See* Docket No. 58.)

Because the Plaintiff's Verified Notice and Motion appeared to address the same concerns as his motion for a TRO, on June 4, 2003, defendants Adams, Tague, Haskell and Martin filed a motion to strike it. (Docket No. 59.)

But this did not stop the Plaintiff who, on June 9, 2001, filed a motion to reconsider the order denying the TRO, styled a "Motion for Evidentiary/Evidence Suppression/Discovery Dispute Hearing. And Rule 60 Motion on the TRO/Injunction Order Filed by Plaintiff." (Docket No. 60.)

On June 11, 2003, Judge Lee denied the motion for reconsideration, (Docket No. 61), and later that day, the Plaintiff submitted a motion for the Court to provide him with a copy of the transcript from Judge Lee's April 17, 2003, hearing on the Plaintiff's motion for a TRO. (Docket No. 63.)

On June 12, 2003, the Plaintiff filed an objection to the Defendants' motion to strike, (*see* Docket No. 64), and later that same day, he submitted a motion to supplement his Verified Notice and Motion. (Docket No. 65.)

Also on June 12, 2003, the Plaintiff filed a "Motion for Judicial Issuance of Non-Party Subpoenas," which appears to ask the Court to serve approximately 40 *subpoenas duces tecum* on his behalf. [\[FN1\]](#)

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[FN1](#). Additionally, although neither styled nor docketed as a "motion," on June 11, 2003, the Plaintiff submitted a letter to the Clerk, asking him to "sign, seal, and certify [two *subpoenas duces tecum*] and serve them for [the Plaintiff]." (See Docket No. 62.) Of course, this letter requires no judicial action, but even if it did, identical subpoenas are included in the set of 40 subpoenas, and will be addressed *infra*.

II. DISCUSSION

A. The Defendant's Motion to Strike Docket Entry 58

*2 In their motion to strike, the Defendants contend that the Plaintiff's Verified Notice and Motion should be stricken because it addresses the same issues raised in his motion for a TRO, which Judge Lee denied.

We agree. The Plaintiff's Verified Notice and Motion largely mirrors his motion for a TRO. Both challenge the authenticity of photographic evidence, charge the FWPD with spoliation of evidence, and appear to request identical discovery from the Defendants. [FN2](#) In fact, these motions are so similar that the Plaintiff, himself, claims that his motivation for filing his Verified Notice and Motion is the same that led him to file the motion for a TRO, and he even goes so far as to suggest that the Court should interpret the Verified Notice and Motion to be another motion for a TRO. (See Docket No. 58, ¶ 9) ("This [the Verified Notice and Motion], due to its severity and very nature is to be construed as a TRO.... This was the intention [behind the motion for a TRO] before").

[FN2](#). To the extent the Plaintiff seeks to challenge the admissibility of evidence at trial, such a challenge is, as Judge Lee explained in his June 11, 2003 Order, premature. (See Docket No. 61.)

Of course, it could be argued that the Plaintiff's Verified Notice and Motion is, in actuality, a motion to reconsider the order denying a TRO, after all, his objection to the motion to strike suggests that he has a right to another TRO hearing pursuant to [Fed.R.Civ.P. 60](#). However, such an interpretation fails because the Plaintiff actually filed a formal [Rule 60](#) motion for reconsideration, which Judge Lee has already denied. Thus, it appears the Plaintiff has

already had two bites at this apple, and should not be given a third, as the Defendants aptly state, by "bring[ing] the same motion worded differently." [FN3](#) (Docket No. 59.)

[FN3](#). The Plaintiff's objection to the motion to strike also suggests that his Verified Notice and Motion could be construed as a motion to compel more complete discovery responses, see [Fed.R.Civ.P. 37](#)., however, he has not filed a separate motion to compel, as required by [N.D. Ind. L.R. 7.1\(b\)](#), and in any event we cannot tell whether the materials provided comply with his request since they are not in the record.

Accordingly, the Defendant's motion to strike (Docket No. 59) the Plaintiff's Verified Notice and Motion will be granted, and the Plaintiff's Verified Notice and Motion (Docket No. 58) will be stricken. [FN4](#)

[FN4](#). Because the Plaintiff's Verified Notice and Motion will be stricken, his motion to supplement it will be deemed moot.

B. The Plaintiff's Motion for a Transcript of the April 17, 2003 Hearing

In his motion for a transcript of the Court's April 17, 2003, hearing, the Plaintiff contends that he needs the transcript "for discovery purposes and [as] evidence in the [Rule 60](#) motion concerning the denial of the April 17, 2003 TRO/Injunction hearing." (Docket No. 63.) Of course, as previously discussed, the Plaintiff's [Rule 60](#) motion for reconsideration has already been denied, so clearly the transcript will be of little value in prosecuting that motion.

Moreover, although the Plaintiff does not explicitly request it, evidently he wants the Court to order the Court Reporter to provide him with a free copy of that transcript (in actuality, a transcript at the public's expense). However, no such right exists, at least at this stage of the proceedings. See [Kot v. Hackett](#), 1993 WL 432431, *1 (E.D.Pa. Oct. 20, 1993) ("A *pro se* civil Plaintiff, proceeding *in forma pauperis*, is not entitled by law to any transcripts free of charge."). Indeed, the expenditure of public funds to pay for transcripts is appropriate when authorized by Congress. [United States v. MacCollom](#), 426 U.S. 317,

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[321 \(1976\)](#). Thus, to be entitled to a free transcript of the April 17, 2003, hearing, the Plaintiff must show that Congress expressly authorized the expenditure of public funds to pay for his transcript. Of course, the Plaintiff has not pointed to any statute entitling him to a free transcript in this case, and the Court's independent research reveals none. Indeed, it appears the closest he comes is [28 U.S.C. § 753\(f\)](#) which establishes a Court Reporter's authority to charge and collect fees for transcripts, and exceptions to that rule:

*3 Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference.... Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

[28 U.S.C. § 753\(f\)](#).

However, here, the Plaintiff is not attempting to appeal a final decision of the Court, rather he merely wants a free transcript so he can comb through it in an effort to convince the Court to reconsider its decision denying the TRO. However, since there is no Congressional authorization of public funds for such a purpose, the Plaintiff must pay (or prepay, if required by the Reporter) the entire fee charged for such a transcript.

Accordingly, the Plaintiff's motion for a transcript of the Court's April 17, 2003, hearing will be denied.

C. Plaintiff's "Motion for Judicial Issuance of Non-Party Subpoenas"

Finally, the Plaintiff asks the Court to issue an expansive set of about 40 *subpoenas duces tecum* on his behalf, seeking volumes of documentary evidence, ostensibly from non-parties and party-opponents alike. (See Docket No. 66.)

Turning first to the subpoenas the Plaintiff wants to serve on defendants Adams, Haskell, Tague, and Martin, we begin with the observation that under [Fed.R.Civ.P. 45](#), *subpoenas duces tecum* generally apply to non-parties (i.e., "persons") as opposed to parties, like the Defendants. See [Fed.R.Civ.P. 45\(a\)](#); [C. Wright & A. Miller, Federal Practice and](#)

[Procedure § 2107](#) ("Though the rules do not say so expressly, a subpoena is not necessary if the person [from whom documents are sought] is a party"). Indeed, the Federal Rules of Civil Procedure specifically provide a separate mechanism for obtaining document discovery from other parties by serving a document request on them. See [Fed.R.Civ.P. 34](#); [Hasbro, Inc. v. Serafino](#), 168 F.R.D. 99, 100 (D.Mass.1996) ("[Rule 45](#), to the extent it concerns discovery, is ... directed at non-parties [while] [Rule 34](#) governs the discovery of documents in the possession or control of the parties themselves"). Here, the Plaintiff wants to serve his subpoenas on parties to this suit; however, he should properly obtain such discovery through [Rule 34](#) document requests. Thus we can simply ignore his request that the Court issue these [Rule 45](#) subpoenas.

As for the remaining subpoenas, we note that they would subject the subpoenaed persons to a "significant expense" and an "undue burden." See [Fed.R.Civ.P. 45\(c\)\(2\)\(B\) and \(c\)\(3\)\(A\)\(iv\)](#). After all, while a *pro se* prisoner in a § 1983 suit may utilize any of the discovery methods prescribed by the Federal Rules of Civil Procedure, he is subject to the same terms and conditions as any other civil litigant, including paying for his own discovery costs, like the cost of copying documents requested in a *subpoena duces tecum*. See, e.g., [Windsor v. Martingale](#), 175 F.R.D. 665, 672 (D.Colo.1997); [Gregg v. Clerk of United States District Court](#), 160 F.R.D. 653, 654 (N.D.Fla.1995).

*4 On that score, requiring each individual subpoenaed to shoulder the rather significant cost of paying for the virtual mountain of documentary evidence the Plaintiff seeks would certainly subject them to a significant expense or an undue burden. After all, the entire tenor of [Fed.R.Civ.P. 45](#) is to prohibit a party from simply shifting his significant litigation expenses to a non-party, see, e.g., [Urshel v. Mosey](#), 1:01-CV-462 (Sept. 19, 2002) (Cosbey, Magis.J.) (unpublished order), yet this is precisely what the Plaintiff is attempting to do in this case.

Accordingly the Plaintiff's motion for judicial issuance of some 40 *subpoenas duces tecum* (Docket No. 66) will be denied. [\[FN5\]](#)

[FN5](#). Of course, once the Plaintiff has made the showing that he has the necessary funds to pay for the costs of copying the documents requested, he may then seek the issuance of his subpoenas because at that

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point the non-parties will no longer be subject to the significant expense involved in complying with the subpoenas.

CONCLUSION

For the foregoing reasons, the Defendants' motion to strike the Plaintiff's Verified Notice and Motion (Docket No. 59) is GRANTED, and the Plaintiff's Verified Notice and Motion (Docket No. 58) is STRICKEN, his motion to supplement the Verified Notice and Motion (Docket No. 65) is deemed MOOT, his motion for a Court ordered transcript (Docket No. 63) is DENIED, and his motion for judicial issuance of some 40 *subpoenas duces tecum* (Docket No. 66) is DENIED. SO ORDERED.

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• [1:02CV00125](#) (Docket)
(Apr. 09, 2002)

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