

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

UNITED STATES OF AMERICA)	Case No.: 1:06CR394
)	
Plaintiff,)	JUDGE ANN ALDRICH
)	
v.)	CATHOLIC DIOCESE OF
)	CLEVELAND’S RESPONSE TO
JOSEPH H. SMITH, <i>et al.</i> ,)	DEFENDANT SMITH’S MOTION
)	REGARDING DESTRUCTION OF
Defendants.)	EVIDENCE AND REQUEST FOR
)	EVIDENTIARY HEARING
)	
)	
)	

INTRODUCTION

Defendant Smith persists in his efforts to divert attention from his own wrongdoing by attacking others associated with the Diocese. His latest accusations -- like those that preceded them -- cannot withstand scrutiny. An examination of the facts reveals that there was no “intentional destruction of evidence” by the Diocese. Even the affidavit submitted by Smith does not support his argument.

What may have happened is that, in early 2004, long before any request for documents from defendant Smith or the government, some unofficial documents of individual Finance Council members could have been discarded. If so, the documents were not part of the official records of the Diocese and had nothing whatsoever to do with this case. Indeed, Smith himself does not point to anything in the documents that could conceivably be relevant here. Smith's Motion should be recognized for what it is: a desperate attempt to prop up a failing defense.

ARGUMENT

Smith argues that "in early 2004, the CDC destroyed Finance Council minutes." (ECF 90, at 2). While he points to a declaration of Vivian S. Gagen as support for his accusation, her declaration does not say what Smith argues it does. What it does say -- and all that it says -- is that some unidentified documents in individual Finance Council members' binders were discarded in January or early February 2004. (Declaration of Vivian S. Gagen ("Gagen Decl.") at ¶ 6). Ms. Gagen herself avers that she has no idea what documents were removed from the binders of those individuals. (Id.) She certainly does not aver that the documents that were removed constituted any part of the official records of the Diocese. Nor could she.

Rather, Kevin O'Donnell, who, in early 2004, was the chair of the Diocese's Finance Council, has a vague recollection that he may have removed some old documents from his individual binder and/or asked Ms. Gagen to do the same with other members' binders so as to keep them current and uncluttered. (Affidavit of Kevin O'Donnell ("O'Donnell Aff."), at ¶¶ 5, 7) (attached as Exhibit A). The individual binders were not the official records of the Diocese. (Id. at ¶ 6). To the contrary, they were provided to the individual Finance Council members as a convenience. (Id.)

Mr. O'Donnell never instructed or requested anyone to discard or destroy any Diocesan documents based on their content; he never instructed or requested anyone to discard or destroy documents that related to allegations against defendants Smith and Zgoznic; and he never instructed or requested anyone to discard or destroy any official minutes or official records of the Diocese. (Id. at ¶¶ 8-10).

The facts are clear: There was no “intentional destruction” of the Diocese’s Finance Council minutes and defendant Smith has offered no proof that there was.

Nor does defendant Smith provide even a hint as to what might have been in the supposed Finance Committee minutes that conceivably could be relevant here. If the minutes existed, he could easily have submitted an affidavit setting forth what relevant evidence was destroyed. He did not do so.¹ Rather, he hurled baseless accusations at yet another innocent person -- a tactic which he is using with increasing frequency as the trial date nears.

Moreover, contrary to defendant Smith’s argument, no legal basis exists for granting any type of relief. Each of the cases upon which Smith seeks to rely involves the knowing

¹ Defendant Smith has repeatedly described Diocesan documents that supposedly are not within his possession with exacting detail. (See, e.g., ECF 37 (setting forth detailed descriptions of documents that Smith argued he did not have); ECF 55, at 28 (describing the content of minutes of the November 2003 Finance Council meeting that, at the time they were being described by Smith, had not yet been produced to him)). His explanation has been that, because of his former position at the Diocese, he knows what is in the documents, including the Finance Council minutes. If that is the case, the only possible inference that can be drawn based on his failure to provide any information regarding the content of the allegedly destroyed Finance Council minutes is that, if the documents ever existed, there was nothing in them relevant to this case.

Smith has suggested that these documents could somehow support his “authorization defense.” If there was ever any doubt that this defense is a fabrication, those doubts have been put to rest by the apparent admissions of defendant Anton Zgoznic in a tape recording referenced in the Government’s Response to Defendant Joseph Smith’s Motion to Exclude Statement or to Sever Defendants filed August 1, 2007. According to the government’s pleading, the recorded admissions of Anton Zgoznic make clear that this so-called authorization defense was concocted in an attempt to help Zgoznic keep the Diocese business and to avoid the prosecution of Smith and Zgoznic.

destruction of critical evidence. (See ECF 90, at 3). That is not this case. Here, at most, some unofficial records of individual Finance Council members may have been discarded. And if they were, they were discarded long before there were any requests by defendant Smith for any documents. In these circumstances, there is no need for an evidentiary hearing.² There most assuredly is no need for any relief.

CONCLUSION

For the foregoing reasons, defendant Smith's Motion should be denied.

Respectfully submitted,

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² If, despite the lack of any factual support for defendant Smith's accusations, the Court decides that there will be have an evidentiary hearing, the Diocese submits that the burden is on defendant Smith to establish that official documents of the Diocese that were relevant to this case were discarded and that the destruction was knowing and intentional. Furthermore, in view of the allegations against the Diocese, any such hearing should provide an opportunity for the Diocese to cross-examine witnesses, including Ms. Gagen.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2007, a copy of the foregoing Catholic Diocese of Cleveland's Response to Defendant Smith's Motion Regarding Destruction of Evidence and Request for Evidentiary Hearing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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