Adelman et al v. Boy Scouts of America et al Doc. 271

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 10-CV-22236-ASG/GOODMAN

HOWARD ADELMAN et al.,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA et al.,

Defendants.

_______________________________________/

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

The Defendant's Motion is inaccurate and misleading, particularly as it relates to the events leading up to Mr. Levin's termination of the deposition at Mr. Hasty's instructions.

Mr. Conrad was selected pursuant to court order [D.E. 80] to retrieve data from May 8 and 9, 2009 from the cell phones brought by Michael Adelman and Howard Crompton on the subject hike and to provide the substance in a report to the parties. Subsequently, Mr. Conrad performed his evaluation of Michael's cell phone and following several additional motions, hearings and orders produced 6 text messages. Various delays, however, developed regarding his analysis of Crompton's phone, relating to his concern over the need for a password in order to avoid the possibility that the data might be destroyed when he attempted to download it. Eventually, the downloaded proceeded without the password and Mr. Conrad issued his report indicating that absolutely no data had been found on the phone for the May 8 to 9, 2009 time period. See Exhibit "1."

Subsequently, the Defendant Crompton subpoenaed Mr. Conrad for deposition for some reason, which is still not clear even after 6 ½ hours of deposition. Crompton's counsel questioned the witness from 1:00 p.m. until approximately 6:30 p.m., going into minute detail over everything that Mr. Conrad had done in his analysis of Michael's phone.

A portion of the Plaintiffs' relatively brief examination prior to the deposition's premature termination focused on Mr. Conrad's inability to obtain any data from Crompton's phone for May 8 and 9. Mr. Conrad was asked why his analysis did not at least reveal evidence of the phone calls which Crompton testified he made during the course of the hike to 911 (as verified by the 911

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records).[1] Mr. Conrad indicated that there were several potential explanations, including an automatic overwrite of data if the phone capacity had been exceeded, intentional erasure, equipment malfunction and potential other undefined causes.[2] The entire examination regarding Crompton's phone, pages 192-215, including colloquy of counsel is attached as Exhibit "2."

In an effort to determine the cause, Mr. Conrad was asked to explain the overwrite process to which he explained that once the capacity is reached, the new information overwrites the old information on a chronological basis. Therefore, he testified that if the data for May 8 and 9 had been overwritten because the storage capacity had been exceeded, that the data for the preceding day, May 7, 2009 would have been previously overwritten as well. Accordingly, he acknowledged that if any data was still retained from May 7 (or earlier), this would rule out exceeding the storage capacity as a cause for the lack of data on these dates.

As a result, Plaintiffs' counsel asked the witness whether he had managed to acquire any data from May 7, 2009, expressly advising him not to reveal the substance of such data, simply to indicate whether such data still existed on the phone. It was further explained that the sole purpose for this question was to determine whether data in excess of its storage capacity was responsible for the lack of data on the two days in question. Drew Levin, appearing on behalf of Crompton, objected to this inquiry on the grounds that it violated the order regarding the non-discoverability of the substance of phone calls and text messages made prior to May 8 and 9.

A break in the deposition was then taken, during which Mr. Levin asked whether undersigned counsel would agree to defer any further questioning in this area until he could apply for a Court order and in the meantime proceed with the remainder of his questions. Undersigned counsel agreed to this request. Subsequently, Mr. Levin called his boss, Frederick Hasty, and was advised not to proceed in this manner, but instead to terminate the deposition for the purposes of filing a motion for protective order.

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[1] The question, which indicated that Crompton had testified that he had made calls to 911 as verified by the 911 records, is the sole basis of Crompton's accusation that Plaintiffs' counsel "provided Mr. Conrad with information about the facts of the case," further implying in his motion that it was done to influence the witness from being "impartial and neutral." See Defendant's motion, p. 3.

[2] These questions are the basis for the accusations that Plaintiffs' counsel was "compelling Mr. Conrad to give expert opinions on Plaintiffs' behalf." Defendant's motion, p. 4. These were no different than the questions of Mr. Levin trying to establish why there were no dates associated with his download of texts on Michael's cell phone. See deposition pages 144-50, Exhibit "3."

When Mr. Levin announced his instructions on the record after the deposition resumed, counsel for the Plaintiffs objected and reiterated his agreement with Mr. Levin's earlier suggestion to withhold any further questioning on the issue of whether any data existed for May 7, 2009 pending a ruling by the Court and to continue to complete his other areas of inquiry. It was reiterated that if the parties were allowed to complete the questioning, that it would be unnecessary to return for a second deposition, since Plaintiffs' counsel was seeking only a yes or no response as to whether any data existed on May 7 for the purposes of determining whether a storage issue was involved. Therefore, this inquiry could be resolved simply by either a written interrogatory or an extremely brief phone deposition, so as to avoid the necessity for everyone to spend the 4 hours to travel back and forth to West Palm Beach. Accordingly, Plaintiffs' counsel stated that if the Defendant persisted in terminating the deposition in such an improper manner, requiring the parties to travel back to West Palm Beach to continue the deposition, that he would ask for sanctions to compensate for such wasted time and expense, since this was completely unnecessary, unwarranted and improper. Nevertheless, Mr. Levin responded that he had his instructions and therefore proceeded to terminate the deposition.

It is obvious that the question asked by Plaintiffs' counsel was completely proper and appropriate. The essence of the Court's order limiting the analysis into the *substance* of Michael and Crompton's phone calls and/or text messages was based upon relevancy and a desire to avoid the needless intrusion into the private affairs of each. The inquiry was not only relevant, but limited in such a manner as to avoid any intrusion into Crompton's affairs. Plaintiffs' counsel made it clear that he did not want the witness to provide any information whatsoever either as to the substance, recipient or sender of any such prior text or phone calls, but simply to indicate whether or not the phone contained any data for the preceding day in order to determine whether a storage capacity issue was responsible for the lack of data on the two day period ordered by the Court.

It should be noted that counsel for Crompton and Schmidt not only asked similar questions during the course of this deposition (see deposition, pp. 100-1; 144-8, Exhibit "4."), but had repeatedly urged the Court to require the production of all 188 text messages on Michael's cell phone in order to get at the two text messages from May 8 and 9.

There was simply no valid justification for offering to let the deposition proceed on other issues and then withdrawing the offer after it was agreed to. As a result, the parties will now be required to unnecessarily make a four hour round trip to finish this deposition, regardless of the court's ruling. Since this was pointed out to the Defendant at the time and it still persisted in its improper termination of the deposition, it should bear the costs of is actions.

Certification

Pursuant to the order of the Court [D.E. 270], undersigned counsel certifies that he has spoken on two occasions with Drew Levin, counsel for the Defendant Crompton, in an effort to resolve this dispute. The first conversation occurred on Monday, August 8, 2011 and the second on Wednesday, August 10, 2011, following the receipt of the transcript of the deposition. Despite these conversations, the parties were unable to completely resolve the matters raised by the Defendant's Motion for Protective Order.

Although the Defendant agreed that the Plaintiffs had the right to inquire as to other areas once the deposition was resumed, he continued to insist that the Plaintiffs do not have the right to inquire: (1) whether there was any data in existence on the Blackberry for the time period of May 7, 2009 (or earlier) which would help determine whether the lack of information on May 8 and 9, 2010 was due to an overwrite situation caused by exceeding the Blackberry's capacity, even though Plaintiffs' counsel has made it clear that he does not intend to inquire as to the substance of such data, but merely its existence and (2) any questions relating to the potential reasons for the lack of data recovered for May 8 or 9, 2009 on the claimed grounds that such inquiry consists of improper expert inquiry. Although defense counsel indicated that he does not object to the Plaintiffs resuming the deposition as to other areas, he objects to the Plaintiffs' request for the attorneys fees and costs incurred as a result of having to travel to West Palm Beach to resume the deposition, rather than completing it as originally scheduled.

Dated: August 10, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 10, 2011**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some

other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Robert D. Peltz
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