Toffoloni v. LFP Publishing Group, LLC
Doc. 198 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. LFP PUBLISHING GROUP, LLC, d/b/a *Hustler* Magazine, et al., Defendant.	CASE NO. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF PLAINTIFF'S WITNESSES AT TRIAL

NOW COMES Defendant LFP Publishing Group LLC, d/b/a *Hustler* Magazine ("LFP"), and respectfully submits this brief in support of its Motion *In Limine* to exclude the trial testimony of two of Plaintiff Maureen Toffoloni's ("Plaintiff") fact witnesses.

I. Introduction

LFP's motion asks the Court to exclude the trial testimony of Plaintiff's husband, Paul Toffoloni, and her daughter, Sandra Toffoloni (collectively, the "Witnesses"). First, the Court should exclude the Witnesses pursuant to Fed. R. Civ. P. 26(a)(1), 26(e), and 37(c), because Plaintiff did not provide the Witnesses'

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names in her Initial Disclosures (*see* Docket Index ("D.I.") 46) and did not supplement the Initial Disclosures to include the Witnesses' identities. Indeed, Plaintiff disclosed the Witnesses for the first time in the Pretrial Order (D.I. 187 at Attachment F-1), filed well after the discovery period had closed. Thus, LFP had no opportunity to depose the Witnesses or otherwise gain knowledge of the nature of, or prepare for the rebuttal of, their testimony.

In the alternative, the Court should exclude the Witnesses pursuant to Fed. R. Evid. 401, 402 and 403. LFP respectfully shows that any testimony to be provided by the Witnesses would be irrelevant to the limited issues requiring the consideration of the jury in this case. Moreover, any probative value their testimony might have – and LFP submits that it could have none – is outweighed by the danger of unfair prejudice.

LFP respectfully moves this Court to exclude the Witnesses because neither was timely disclosed; neither can offer relevant testimony; and because whatever probative value their testimony could possibly have is substantially outweighed by the substantial likelihood of unfair prejudice to LFP.

II. Argument

A. <u>The Witnesses Should be Excluded Because They Were Not Timely Disclosed</u>

The Federal Rules of Civil Procedure (the "Rules") require a party to provide through initial disclosures, "the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1). The Rules recognize that it is unrealistic for parties always to know in advance of discovery whom they may rely on for testimony at trial, and therefore require a party to supplement their initial disclosures in the event they later become aware of a witness:

> A party who has made a disclosure under Rule 26(a) ... must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing...

Fed. R. Civ. P. 26(e).

The Rules also set out the consequences of a party's failure to properly disclose a witness under Fed. R. Civ. P. 26(a) or (e):

> If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1).

This rule has recently and often been enforced by this Court. In *Nance v. Ricoh Electronics, Inc*., 2008 WL 926662, at *2-3 (N.D. Ga. 2008) (Story, J.), the plaintiff failed to disclose the names of the seven witnesses in his initial disclosures and did not supplement his disclosures during the discovery period. This Court held that under those facts, it must "determine whether the 'self-executing' exclusionary sanction of Rule 37(c)(1) applies" by examining whether plaintiff's omission was "substantially justified" or "harmless." *Nance*, 2008 WL 926662 at *3.

The Court found that because the plaintiff failed to offer any justification for his failure to timely identify witnesses, his noncompliance with Rule 26(a) was not substantially justified. *Id*. It then determined that because of plaintiff's failure to disclose, the defendant did not have "the opportunity, during the discovery period, to depose the witnesses upon whom Plaintiff now relies," and therefore, the plaintiff's failure was not harmless. *Id*. The Court excluded the witnesses' testimony. *See also Manning v. Wilson*, 2007 WL 3090969, at *1 (N.D. Ga. 2007)

(Vining, Jr., J.) ("Because none of the plaintiff's additional witnesses were identified during the discovery period, because the plaintiff has given no legal justification for not naming these witnesses until the pretrial order, and because the case is scheduled for trial to begin on November 5, 2007, the court concludes that the late additional of these witnesses is untimely and that the defendants would be unfairly prejudiced by allowing these new witnesses to testify."); *Carolina Cas. Ins. Co. v. R.L. Brown & Assocs., Inc.*, 2007 WL 174171, at *4 (N.D. Ga. 2007) (Tidwell, J.) (granting motion to exclude plaintiff's fact witnesses not disclosed until the day discovery closed); c*f. Leathers v. Pfizer, Inc*., 233 F.R.D. 687, 699 (N.D. Ga. 2006) (Evans, J.) (granting defendants' motion to exclude expert witness not properly disclosed because defendants did not have opportunity to take witness' declaration prior to Court's stay of discovery).

Here, Plaintiff neither disclosed the Witnesses in her Initial Disclosures as required by Civ. P. 26(a)(1), nor supplemented her Initial Disclosures with the Witnesses' identities as required by Fed. R. Civ. P. 26(e); indeed, she did not reveal her intent to offer the Witnesses at trial until the Pretrial Order, long after the close of discovery. There is no justification for Plaintiff's failure to timely identify the Witnesses: she has been aware of any relevant information her husband and daughter could possibly have about this case since before it was filed.

Moreover, the harm to LFP is clear: it has had no opportunity to examine or, if appropriate, contest the Witnesses' testimony. As a result, the "self-executing exclusionary sanction of Rule 37(c)(1) applies," and the Court should exclude the testimony of the Witnesses.

B. The Witnesses Should be Excluded Because They Cannot Offer Relevant Testimony on the Issues of Damages and Their Testimony Would be Prejudicial to LFP

Alternatively, the Witnesses should be excluded because their testimony is not relevant to the issues in this case, and will probably be offered for the purpose of inflaming the passions of the jury against LFP.

The Federal Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). Only relevant evidence may be admitted into the record: "[e]vidence which is not relevant is not admissible." (Fed. R. Evid. 402.)

The Federal Rules of Evidence also prohibit the introduction of material that, while relevant and otherwise admissible, is of such a nature that any probative value it has is substantially outweighed by the possibility of unfair prejudice. Specifically, Fed. R. Evid. 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403 (emphasis added). In the context of Rule 403, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. The Eleventh Circuit has held that where evidence could cause the jury to make "an irrational decision based on an improper basis…" then it may be excluded under Rule 403.

As stated in the Pretrial Order, the only issues to be tried in this case are the amount of compensatory damages, if any, to Plaintiff and whether punitive damages should be awarded. Neither Plaintiff's husband nor her daughter can competently testify as to either of these issues.

Compensatory damages in a Georgia right of publicity case are measured by the unjust enrichment of the defendant. *See Pierson v. News Group Publ'ns, Inc.*, 549 F. Supp. 635, 642 (S.D. Ga. 1982). Importantly, reputational damages are not permitted in a Georgia right of publicity case. *See, e.g., Cabaniss v. Hipsley*, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966). The Witnesses' hurt feelings – if that is what they will describe in their testimony -- are thus clearly irrelevant.

Further, it is beyond dispute that they have no knowledge of LFP's finances and can offer no testimony relevant to this issue.

The question of punitive damages is dependent upon whether "the acts of the defendant have been of a character to import premeditation or knowledge and consciousness of the appropriation and its continuation." *Cabaniss*, 114 Ga. App. at 386-87. The Witnesses have no knowledge regarding the state of mind of LFP employees at the time they decided to publish the Benoit images. Accordingly, the Witnesses can offer no insight that would have the tendency to make any fact that is of consequence to the determination of punitive damages more or less probable.

Moreover, even if the Court finds that the Witnesses' testimony might have some relevance to this dispute, it should be excluded on the ground that such relevance is substantially outweighed by the danger of unfair prejudice under Rule 403. That is because allowing the Witnesses to testify runs a significant risk that they will attempt, through the introduction of irrelevant testimony, to inflame the passions of the jury against LFP and otherwise attempt to improperly influence the jury through irrelevant reference to the shock, shame and emotional harm purportedly suffered by Plaintiff (or themselves). This type of testimony is simply not relevant to the issues in this case, and on its face would be highly prejudicial.

In sum, to allow Witnesses to testify concerning the subjective emotional harm to Plaintiff or the reputational damage to Nancy Benoit allegedly suffered by reason of LFP's publication of the Benoit images, would enable Plaintiff to elicit the sympathy of the jury concerning damages of a type that are not cognizable or recoverable on a Georgia right of publicity claim. *See Pierson*, 549 F. Supp. at 642; *Cabaniss*, 114 Ga. App. at 381, *supra*. Under these circumstances, it appears that Plaintiff seeks to use the Witnesses' testimony merely "for the sake of its prejudicial effect" and whatever relevance it could even arguably have is clearly and substantially outweighed by the danger of unfair prejudice. We respectfully submit the testimony should thus be excluded under Rule 403.

III. Conclusion

For all of the foregoing reasons, LFP respectfully requests that this Court exclude the trial testimony of the Witnesses.

Respectfully submitted this 20th day of May 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing BRIEF IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF PLAINTIFF'S WITNESSES AT TRIAL via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 20th day of May 2011.

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