UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVI KOSCHITZKI, On Behalf Of Himself and all Others Similarly Situated, Plaintiff, v. APPLE INC. and AT&T MOBILITY LLC, Defendants.	Civil Action No. 08 Civ. 4451 (JBW) (VVP)

DEFENDANT APPLE INC.'S MOTION FOR PROTECTIVE ORDER TO QUASH THE DEPOSITION OF APPLE EMPLOYEE TJ TERRY

Pursuant to Federal Rule of Civil Procedure 26(c), defendant Apple Inc. ("Apple") hereby moves the Court for a protective order to quash plaintiff's notice of deposition of Apple's employee, TJ Terry.

I. INTRODUCTION

Plaintiff has noticed the deposition of TJ Terry, an Apple employee, in connection with AT&T Mobility LLC ("AT&T")'s motion to compel arbitration.[1] Plaintiff may not do so without a court order, and cannot make the showing required for such an order. Plaintiff must show that the benefit of taking the deposition outweighs the resulting burden and expense placed on Apple and Mr. Terry. But there is *no* benefit from Mr. Terry's deposition. Plaintiff argues that the Court can determine as a matter of law that AT&T's arbitration provision is unenforceable. AT&T, on the other hand, argues that the Court can determine as a matter of law that the arbitration provision *is* enforceable. If either plaintiff or AT&T is correct, there is no

[1] Plaintiff's deposition notice is improper and unenforceable; no deposition may be noticed without leave of Court prior to the Rule 26 conference. No Rule 26 conference has been held.

factual dispute and nothing to depose Mr. Terry about. Indeed, the Court has postponed any evidentiary hearing on AT&T's motion until after oral argument on the legal issues. In any event, there are no factual disputes about the contents of Mr. Terry's declarations, which merely lay foundation for and authenticate the record of plaintiff's signature at Apple's retail store.

Conversely, the burden and expense imposed on Apple and Mr. Terry by requiring travel from California to New York for the deposition is clear, and is disproportionate to any possible benefit. Finally, federal law presumes that, absent "peculiar circumstances," the deposition of a party employee will be taken in the district where he works and/or resides. There are no such circumstances here. Thus, even if Mr. Terry could properly be deposed, that deposition must take place in California.

II. PROCEDURAL BACKGROUND

The present action is in its very earliest stage. The parties are currently in the process of briefing initial pleading motions; Apple and AT&T have both moved to dismiss the amended complaint, and AT&T has also moved to compel arbitration. Apple is not a party to AT&T's arbitration motion. The proposed depositions and present motion for protective order relate solely to AT&T's arbitration motion.

The Court has issued an order scheduling oral argument on AT&T's arbitration motion for March 13. That order states that the Court may schedule a subsequent evidentiary hearing on AT&T's motion to compel arbitration only *if*, after oral argument, the Court concludes that such a hearing is necessary. No initial case management conference is scheduled, and the parties have not yet been required to conduct the Rule 26 conference. Nonetheless, last week, plaintiff unilaterally issued four notices of depositions to take place at the New York offices of plaintiff's counsel. One of the depositions plaintiff purported to notice is that of TJ Terry, an Apple employee based in Cupertino, California.

AT&T submitted Mr. Terry's declaration in support of its arbitration motion because plaintiff Avi Koschitzki ("plaintiff" or "Koschitzki") purchased his iPhone 3G at an Apple retail store, and agreed to AT&T's Terms of Service at the time of that transaction. In his initial

declaration (attached as Exhibit A hereto), Mr. Terry confirmed, based on Apple's business records, that plaintiff had accepted AT&T's Terms of Service by signing on an electronic handheld device. Plaintiff's opposition questioned whether Apple in fact had Koschitzki's signature in its files. Mr. Terry's supplemental declaration, attached as Exhibit B hereto, will be filed with AT&T's reply, and authenticates and attaches the document with Koschitzki's signature.

Mr. Terry is Senior Manager of Apple's Retail Store operations. He was not present at the store for Mr. Koschitzki's purchase, but in the course of his employment, is familiar with the business records of Apple's retail stores. Last week, plaintiff noticed Mr. Terry's deposition for early March 2009. A copy of the deposition notice is attached hereto as Exhibit C.

III. UNDER THE FEDERAL RULES, THE BURDEN RESULTING FROM A DEPOSITION OF MR. TERRY OUTWEIGHS ITS NONEXISTENT BENEFIT.

Federal Rule of Civil Procedure 30 requires a prior court order for any deposition that will be taken prior to the parties' Rule 26 discovery conference. Fed. R. Civ. P. 30(a)(2)(A)(iii). Such an order may not issue unless the likely benefit of the deposition outweighs the burden and expense attendant thereto. Fed. R. Civ. P. 26(b)(2)(C)(iii); Fed. R. Civ. Proc. 30(a)(2). That standard is not met here.

There is no "benefit" to be gained by plaintiff from deposing Mr. Terry. The Court has ruled that it will hear oral argument on the motion to compel arbitration *before* deciding if there are disputed issues of fact that must be resolved in order to decide the motion, thus requiring an evidentiary hearing. Indeed, plaintiff argues that the Court can determine that the arbitration clause is unenforceable as a matter of law, without respect to whether Koschitzki effectively consented to its terms when he purchased his iPhone 3G at the Apple store. Conversely, AT&T argues on various grounds that the Court can determine as a matter of law that its arbitration clause *is* enforceable. Should the Court accept either plaintiff's or AT&T's argument when it holds oral argument on the arbitration motion, then Mr. Terry's declaration – and any deposition testimony he might give – has no relevance whatsoever.

Moreover, even if there is an issue as to whether Koschitzki "consented" to AT&T's terms when he purchased his iPhone 3G, deposition testimony from Mr. Terry could add nothing on that issue to the contents of his declarations. Mr. Terry's declarations do only two things: (1) lay foundation for and authenticate Koschitzki's signature; and (2) set forth Apple's retail store policies and procedures with respect to assent to terms. Plaintiff's opposition to AT&T's motion, however, does not dispute that Koschitzki in fact signed, but instead argues that Koschitzki's actual signature must be submitted. Mr. Terry's Supplemental Declaration (Exhibit B hereto) resolves that issue by attaching the signature. The only possible subject matter for a deposition of Mr. Terry would be cross examination as to foundation and authenticity, but plaintiff does not dispute these issues.

Moreover, Koschitzki does not deny that he signed the document. This is not sufficient, however, to create a dispute of fact. Koschitzki's lack of memory of his Apple store transaction falls far short of the "unequivocal denial," with substantiating "evidence," required by the Second Circuit to create a factual dispute. *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945); *see also, e.g.*, *Gilmore v. Shearson/Am. Express Inc.*, 668 F. Supp. 314, 320 (S.D.N.Y. 1987) (compelling arbitration even though plaintiff "has no recollection of even having seen the [arbitration] agreement, much less having signed it"); *Zola v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1985 WL 94, at *3 (S.D.N.Y. May 28, 1985) ("Zola's asserted failure of recollection is insufficient to raise a substantial issue under the rule declared in *Almacenes* and subsequent cases"). Absent such a dispute of fact, there is simply nothing to question Mr. Terry about.

With respect to the discussion in Mr. Terry' s initial declaration regarding Apple's retail store policies and procedures, plaintiff's opposition argues that those policies and procedures are irrelevant. (Plaintiff's Memorandum of Law in Opposition to AT&T Mobility LLC's Motion to Compel Arbitration, at 5.) Plaintiff cannot properly seek to depose Mr. Terry as to matters plaintiff contends are not relevant.

In short, there is no "benefit" to be gained from a deposition of Mr. Terry; there is no relevant testimony to be adduced from him. Conversely, the burden of the proposed deposition is real and substantial. Plaintiff seeks to impose on Mr. Terry and his employer, Apple, the expense, burden and business disruption of a trip to New York to give purposeless deposition testimony. A deposition would also require Mr. Terry to spend time that would otherwise be devoted to business preparing for his deposition, and Apple to incur the legal fees required for its lawyers to prepare Mr. Terry and defend his deposition.

For all these reasons, the plaintiff's deposition notice should be quashed, and plaintiff should not be permitted to depose Mr. Terry.

IV. MR. TERRY MAY NOT BE DEPOSED IN NEW YORK

As set forth above, Mr. Terry is an Apple employee who works in Cupertino, California. Accordingly, he cannot be deposed in New York:

> There is a general presumption that a "defendant's deposition will be held in the district of his residence". . . . Thus, a plaintiff may only overcome the presumption by showing "peculiar" circumstances favoring deposition at a different location.

Six West Retail Acquisition v. Sony Theatre Management Corp., 203 F.R.D. 98, 108 (S.D.N.Y. 2001) (internal citations omitted). "Courts have reasoned that since the plaintiff is free to choose the forum to litigate, and 'defendants are not before the court by choice, it is the plaintiff who should bear any reasonable burdens of inconvenience that the action presents.'" *Ward v. Leclaire*, 9:07-CV-0026 (LEK)(RFT), 2008 U.S. Dist. LEXIS 31880, at *15 (N.D.N.Y. April 17, 2008) (citation omitted). "[P]laintiff has the affirmative burden of presenting [the] 'peculiar circumstances' which [would] justify a court order directing the defendant's deposition be taken in a different location," but there are no such "peculiar circumstances" here. *Id.* Nor could such circumstances justify the burden and cost plaintiff seeks to impose on Mr. Terry and on Apple as described above.

V. CONCLUSION

For the reasons stated above, the Court should deny plaintiff's request to depose Mr. Terry.

Dated: New York, NY
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