Ceglia v. Zuckerberg et al Doc. 633

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE FOSCHIO'S NOVEMBER 29, 2012 ORDER, DOC. NO. 615

STATEMENT OF JURISDICTION

A party may file objections to a magistrate judge's order concerning a non-dispositive pretrial matter within 14 days of receiving a copy of that order. F.R.C.P. 72(a); L.R. Civ. P. 72(a). Magistrate Judge Foschio entered his order, Doc. No. 615, on November 29, 2012, and Plaintiff Paul Ceglia was electronically served with a copy of that order on the same day.

STANDARD OF REVIEW

"The district judge . . . must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." 28 U.S.C. § 636(b)(1)(A); F.R.C.P. 72(a); L.R. Civ. P. 72(a). The magistrate judge's order is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Gualdani v. Adams, 385 F.3d 236, 240 (2d Cir. 2004)

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(quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395; citing Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 348 (2d Cir. 2003)). The magistrate judge's order is contrary to law "if the order fails to apply the relevant law." Lavigna v. State Farm Mutual Auto. Ins. Co., 736 F.Supp.2d 504, 510 (N.D.N.Y. 2010) (citing Olais-Castro v. United States, 416 F.2d 1155, 1158 n.8 (9th Cir. 1969)).

MAGISTRATE JUDGE FOSCHIO'S ORDER REQUIRING THE PAYMENT OF FEES RELATED TO CANCELLED DEPOSITIONS IS CONTRARY TO LAW

Magistrate Judge Foschio erred in granting Defendants expert fees, attorney preparation fees and other fees related to properly and timely cancelled depositions of the Defendants' expert witnesses. Doc. No. 615.

Defendants and Plaintiff reached an agreement regarding the reasonable costs and expenses related to expert depositions. Declaration of Dean Boland filed with opposition to Attorneys Fees at ¶2. Neither party was required to conduct any depositions of the opposing witnesses. Id. Defense Counsel Alex Southwell and Plaintiff's Counsel reached an agreement through a series of emails and phone conversations regarding which party would bear which deposition costs and expenses. Id. That agreement included, only, the following terms:

1. The party taking any deposition would pay the reasonable deposition fee for the witness' time in deposition and reasonable travel expenses of the witness attending that deposition. Id. at ¶4.

Neither Defense counsel nor Plaintiff's counsel obtained or sought any other

terms regarding costs or expenses of deposition.

Defendants noticed their depositions of Plaintiff's experts and demanded those depositions occur before Plaintiff would depose Defendants' experts. Id. at ¶9. Defendants noticed those depositions to occur at Defendants' offices in New York. Id. Plaintiff noticed depositions of Defendants' witnesses to occur in Cleveland, Ohio, the location of his office. Id. at ¶10. Before Plaintiff's noticed depositions of Defendants' experts could occur, Mr. Southwell requested a concession - namely, that all Defendants' witnesses be deposed at Mr. Southwell's offices in New York. Id. at ¶11. Plaintiff's counsel agreed to that concession with the qualification that respect be given to scheduling of those depositions to account for Plaintiff's counsel having to bear the cost and time away from home for all depositions. Id. at ¶12. Mr. Southwell agreed to be accommodating in this respect.

Most depositions of Defendants' experts noticed by Plaintiff were conducted. Some were postponed for reasons outside of Plaintiff's counsel's control, canceled flights during travel to New York. Others were timely cancelled in good faith.

CANCELLED FLIGHT

Three depositions were scheduled, two on one day and one other on the following day that were cancelled when Plaintiff's flight to New York was cancelled midway. Plaintiff's counsel traveled from Cleveland to New York on a flight that had a required stop in Philadelphia. Id. at ¶17. While in Philadelphia, at approximately 11:45 PM that evening, Plaintiff's counsel was informed that the flight to New York was canceled. Id. at ¶18. The next flight to New York was the

following day at 2:30 PM. Id. at ¶19. The train from Philadelphia had stopped running at that time and would not resume until 5:30 am the following morning. Id. at ¶20. That train ride was approximately a two hour trip to New York followed by a subway or cab ride from the train station to Mr. Southwell's offices. Id. In addition, the frequency of travel to New York, at Mr. Southwell's request earlier in the summer, had taken its toll on Plaintiff's counsel and he became ill while resting on seats at the gate in the Philadelphia airport waiting out the evening. Id. at ¶17. Mr. Southwell was informed of this unexpected issue as soon as possible and demanded that Plaintiff's counsel, after sleeping in the terminal for a few hours, get on a train to New York and conduct a full day of planned depositions anyhow. Id. at ¶21. Plaintiff's counsel declined his demand. Id. at ¶22.

The court found it wholly appropriate that Plaintiff's counsel should have slept from 1:00 am to 5:00 am in the airport, take the 5:30 am train from Philadelphia to New York, and then be prepared to conduct critical depositions thereafter, all the while, Plaintiff's counsel was ill, which was undisputed. This assertion of an available remedy ignores Plaintiff's counsel's condition he would have been in at the start and throughout these depositions.

The depositions missed by that uncontrolled plane flight cancellation were either re-scheduled or timely canceled. Id. Defendants' have no reasonable argument that either those postponements or cancellations were done in bad faith.

TIMELY CANCELLATIONS

As noted above, the parties agreement was sparse and negotiated by

experienced lawyers. Id. at ¶3. Neither party obtained or sought any transfer of risk regarding cancellations of depositions they noticed. Defendants' case law centers on attorneys who cancel depositions, untimely, when they are the noticed party responsible to present themselves and their witness for a deposition. That scenario is an obvious opportunity for strategic and inappropriate cancellations merely to harass or exhaust resources of the opposing party. Universally, the depositions cancelled for which Defendants in this case complain, were those that the Plaintiff had noticed of Defendants' witnesses. Again, there was no requirement that either party take any depositions of the opposing witnesses. See above. There is no reasonable argument that Plaintiff was cancelling depositions of Defendants' experts in an attempt to exhaust the financial resources of the billionaire Defendants. Such an argument is ludicrous.

<u>DEFENDANTS DEMAND, BUT REFUSE TO MEET AND CONFER</u>

Defendants made no authentic attempt to meet and Confer. Moreover, they only began asserting their punitive expenses claim after their ambush attempt with Mr. Lesnevich was serendipitously thwarted by Plaintiff's timely cancellation of his deposition. Exhibit B. Plaintiff had no need to depose a witness whose entire expert analysis failed to determine the origin and integrity of the documents he analyzed. Mr. Argentieri's declarations regarding the altered copies that Mr. Lesnevich analyzed without inquiring as to their obviously not pristine nature, destroyed entirely the usefulness of Lesnevich's analysis and thereby his entire report. That left no reason to depose their uninformed expert. In addition, the

comparison of Lesnevich's report of March 26, 2012 and his previous declaration further exposed him as willing to say anything to fit the moment, ignorant of the record he had created contradicting himself at every important turn.

Plaintiff's counsel reached out to Defendants on two occasions since receiving Defendants' unreasonable demands in their motion in an attempt to reasonably resolve this dispute consistent with the parties agreement on deposition related expenses. Defendants showed no interest in holding reasonable discussions, other than check the box that they had attempted to meet and confer. First, Plaintiff requested the details of what charges they were alleging were the responsibility of Plaintiff. Their initial demand letter offered very little detail on the specifics of their demands. Second, Plaintiff offered to negotiate certain of the charges, while not waiving the right of refusal, so long as Defendants acknowledged that others were not Plaintiff's responsibility. Exhibit C to Plaintiff's response to Defendants' request for attorneys fees. Defendants ignored that correspondence and filed this motion with the court. It represents no real interest in meeting and conferring.

These falsities of forum, only serve Defendants as they go through the motions of motion practice. Their claims to meet and confer are formulaic with no intent to resolve problems informally but involve the court to manufacture a paper trail to bolster their obviously unsuccessful dismissal evidence and strategy.

ADDING PHANTOM TERMS TO THE PARTIES' AGREEMENT

Defendants were provided nearly $100,000 in costs and expenses, the bulk of which are for expenses and costs that were never agreed to or even discussed as

part of the parties agreement as noted above. Neither party saw fit to shift the risk of costs for witness preparation to the other party. Decl. of Dean Boland at ¶5-6. Neither sought to shift the risk of attorney preparation time spent with our respective witnesses to the other party. Id. Neither party sought to shift the risk of cancellation to the party cancelling a deposition they had notice of the other party's expert. Id. at ¶14. Neither party sought to impose "cancellation fees" on the other party in addition to the actual deposition fee that Defendants now seek from Plaintiff for depositions that never occurred. Id.

The court has adopted Defendants' obvious attempt to crush a financially weaker opponent.

THE WINDFALL EFFECT

Each of the cancellations at issue occurred with more than sufficient time for the respective witnesses to return, by air or land, to their offices and be ready to work on the day that their now cancelled deposition was to take place. The obvious import of this is that Defendants and their experts have now received a windfall for their experts and themselves. Those experts easily returned to their offices and on their now cancelled deposition day, were able to earn a full days income from their work while simultaneously seeking their full deposition fee for a deposition that never occurred. Meaning, had the deposition occurred, even a one question deposition that Plaintiff concluded, Defendants' unreasonable fee motion would have evaporated.

DEFENDANTS INFINITELY FLEXIBLE DEFINITION OF "REASONABLE"

The parties' agreement only called for the payment of reasonable deposition fees and reasonable travel expenses. It did not contemplate the payment of any and all travel expenses and deposition fees regardless of the demanded fee. Gus Lesnevich's scheduled half-day deposition for a fee of $6,400 equates to $1,829 per hour. It is no wonder Defendants failed to find case law support for that being a reasonable fee. Lesnevich refused to provide an hourly rate so that Plaintiff could ask him the most basic of questions about his report. Defendants' expert Gerald McManemin demanded $5,000 ($1,429 per hour) to be deposed for one half day and was also unwilling to provide an hourly rate. Defendants' computer expert Eric Friedberg, demanded $975 per hour.

Plaintiff agreed to hold all depositions in New York City, rather than in Cleveland as a concession to Defendants' counsel and Defendants experts. Defendants' counsel did not have to travel for any of the depositions. The court ignored this professional courtesy especially when Plaintiff compromised and agreed to do all of the travel and have all of the burden associated therewith.

DOUBLE BILLINGS

The court not only ordered that Plaintiff pay for expert depositions that were timely postponed or cancelled, but he has been ordered now to pay for some depositions twice. This amounts to a windfall for Defendants' experts.

THE ILLOGIC OF DEFENDANTS' ARGUMENT

Essentially, Defendants' argument to the Magistrate Judge is that Plaintiff's failure to conduct depositions of Defendants' witnesses ought to be met with a

punishment that is 75% or more of the cost of actually conducting them. According to the Defendants' argument, had Plaintiff simply conducted all of the cancelled depositions and asked one question and then concluded them, Defendants' entire argument for punitive expenses and fees would evaporate. The court will notice that with one exception Defendants are not asking for witness or attorney preparation time expenses for depositions that were actually conducted. This acknowledges the parties' agreement did not include those expenses be borne by the deposing party even with the well known possibility of a cancellation of a deposition.

DEFENDANTS' PATTERN AND PRACTICE OF ONLY PAYING FOR ACTUAL DEPOSITION TIME

During Plaintiff's expert Neil Broom's deposition, it became apparent halfway through the full day deposition, that Defendants' repeatedly requested "fifteen minute breaks" (lasting forty-five minutes on average) were going to require Mr. Broom to stay at their offices for at least ten hours that day. Plaintiff's counsel noted that the rules only entitled deposition of Mr. Broom for seven hours without further permission of the court. F.R.Civ. P. 30(d)(1). Defendants' countered that the rule only contemplated the time **actually** in deposition. Decl. of Dean Boland at ¶25-26. Meaning, Defendants felt it was appropriate to keep Plaintiff's experts at their offices for as long as they saw fit provided he was only on the record being deposed for seven of those hours total. Id. Defendants continued with this practice with witness Larry Stewart. Id. at ¶27-29. Their refusal to pay Mr. Stewart for any

time other than that spent in deposition further underlines this point. Mr. Stewart billed Defendants for nine hours of time they required him to be present at their offices for his deposition. Id. Defendants refused to pay Mr. Stewart for one minute beyond the seven hours he was actually in deposition. Id. Therefore, they reinforce the practice started with witness Broom that only when a witness is being deposed are they entitled to be paid for deposition time. Id.

Despite this repeated practice by Defendants, the court ordered Plaintiff pay their experts despite them not being deposed at all. Even if this court were sympathetic to the notion that the expert had to sit at the Defendants' offices for a period of time on a given day of their deposition without being deposed, Defendants forcefully refused to pay Plaintiff's witnesses for any time spent at their offices outside of actual deposition time. It's duplicity defined. In Defendants' world, none of Plaintiff's experts deserve to be paid for merely being at Defendants' offices for a noticed deposition, they only get paid for time actually spent **in deposition**.

Mr. Southwell for Defendants and Plaintiff's counsel reached an agreement, negotiated between two experience lawyers, which assessed what costs and risks would be borne by each party. Declaration of Dean Boland.

CANCELLATIONS WERE ALL IN GOOD FAITH

As opposed to the grossly misrepresented case law referenced by Defendants, Plaintiff's few cancellations were in good faith.

Defendants argued that *Edmonds v. Seavey*, No. 08 Civ. 5646(HB) (JCF), 2009 WL 1285526, at * 3 (S.D.N.Y. May 5, 2009) supports their position that they

should be awarded their costs. *Edmonds* does not support their position at all. In *Edmonds*, the court awarded deposition costs and expenses not because of an untimely cancellation, but only because the court found that in the unique circumstances of that case, the cancellation could "only be construed as an attempt to gain leverage with respect to unrelated discovery issues." Id.

Defendants made no argument that that they were prejudiced by the cancellations in any way. The court found no prejudice based upon Defendants' filings.

Rule 30(g) (1) of the Federal Rules of Civil Procedure provides:

> **If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by that party and the party's attorney, including reasonable attorney's fees.**

Plaintiff did not fail to attend any of the depositions in question. Rather, Plaintiff's counsel gave timely notice to relieve Defendants' experts of the burden of deposition.

Defendants were not, as often happens in sanctionable deposition cancellations, left sitting in the deposition room wondering when opposing counsel and the witness were going to appear. They were given ample notice for cancellation and at no point were Defendants left languishing warranting an award under Rule 30 (g). Defendants' did not argue, nor did the court find reliant on any of their arguments, the essential elements under Rule 30(g).

THREE OF THE CANCELLATIONS WERE DUE TO WEATHER AND ILLNESS

Plaintiff was forced to postpone, but not cancel, the depositions of Dr. Lyter, Mr. Tytell and Dr. McManemin because Plaintiff's counsel's flights were cancelled and because he subsequently became ill as a result of the travel strain. These circumstances beyond Plaintiff's control caused the cancellation of three of the depositions. As soon as those plane flights were cancelled and no other way to reasonably attend the day and a half of deposition existed, Plaintiff's counsel immediately contacted Defendants' counsel by email.

> **It appears that both of the attorneys representing plaintiff in this lawsuit became ill during the week of January 14, and that they notified defendant's counsel by the afternoon or evening of January 15 that they could not appear for the deposition the next day. (Affidavit of Malik Cutlar, Esq., sworn to Apr. 3, 1997, at ¶¶ 14–24; Affidavit of Andrew J. Entwhistle, Esq., sworn to Mar. 17, 1997, at ¶¶ 8–9 and Ex. F). That notice was undoubtedly sufficient to permit defendant's attorney to cancel the reporter's appearance, and thus avoid incurring any expense. Moreover, the proffered excuse was surely sufficient to justify postponing the deposition, particularly in the absence of any demonstrated prejudice. Attorneys in this court routinely extend, and are expected to extend, common courtesies to their adversaries; whatever the frustrations of litigation—and they should not be underestimated—counsel must not lose sight of the fact that they are professionals acting in accordance with certain accepted standards, and not gladiators fighting for their lives.** *Tomlinson v. St. Paul Reinsurance Management Corp.* 1998 WL 65996.

Two of the depositions (Dr. Lyter and Dr. Tytell) that were affected by Plaintiff's counsel's cancelled flight and subsequent illness were rescheduled and taken by telephone. While those depositions were being re-scheduled, Plaintiff's counsel questioned the reasonableness of Mr. McMenamin's fee for his scheduled

half-day deposition. The deposition of Dr. McManemin was never rescheduled because despite numerous attempts by the Plaintiff to discuss the matter with Defendants, Defendants refused to provide an hourly rate for the witness. Exhibit A. Dr. McManemin sought a five thousand dollar fee for a half day deposition, i.e. 3.5 hours. Once timely cancelled, Mr. McManemin now seeks a windfall additional "cancellation fee" of five thousand dollars more. Finally, he was likely sitting in his office on the day of his cancelled deposition earning even more income. This inappropriate gouging should be rejected by the court.

REMAINING CANCELLATIONS HAD SUFFICIENT NOTICE

Other than the short notice given for the flight cancelled due to thunderstorms and the subsequent illness, Plaintiff provided timely notice of any other deposition cancellations. See Declaration of Dean Boland.

"Thus it appears that plaintiff was provided oral notice of cancellation at least two days prior to the deposition. I do not find that this constitutes insufficient notice of cancellation warranting the award of attorneys' fees and costs." *Donini Intern., S.P.A. v. Satec* (U.S.A.) LLC 2006 WL 695546 at *8.

The eventual cancellation of Defendants' expert Mr. Friedberg (Stroz Friedberg) and Novak's depositions were reasonable. Stroz Friedberg's offices are in New York and Defendants' counsel, Mr. Southwell, specifically sought to have those experts' depositions in New York, as opposed to Cleveland where they were noticed, to minimize Defendants' travel expenses and related logistics. At no time was Plaintiff's counsel informed that some of the Stroz witnesses did not live in

New York during those conversations that resulted in Plaintiff's counsel compromising to fly to New York for those depositions. Now, as is obvious, that compromise for Defendants' counsel's benefit has been returned to Plaintiff as Defendants' naked attempt to financially harm Plaintiff as a litigation tactic. Even had Mr. Novak had to fly to New York, he surely, as a computer expert for Stroz, could have continued to work from the secure environment of the main office of Stroz,in New York City. He therefore could not have lost a days work as he was at the main office of his employer.

PROPOSED PAYMENTS

The court erred in not adopting Plaintiff's proposed payments for the timely cancelled or re-scheduled depositions.

CONCLUSION

Based on the foregoing arguments, Plaintiff respectfully requests that the Court overrule Magistrate Judge Foschio's Order because it is contrary to law and clearly erroneous.

Respectfully submitted,

/s/ Paul A. Argentieri

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