MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 325

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

DUKE'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO RE-OPEN THE DEPOSITION OF PLAINTIFF BRECK ARCHER AND COMPEL ANSWERS TO QUESTIONS PROPOUNDED BY COUNSEL

Defendant Duke University ("Duke"), through counsel, submits this reply in support of its Motion to Re-Open the Deposition of Plaintiff Breck Archer [DE 316 (the "Motion")].

INTRODUCTION

Mr. Archer's counsel deposed him after Duke finished questioning him. Mr. Archer's counsel elicited new testimony that revealed theories about Plaintiffs' fraud claim. Duke resumed its examination and asked directly related follow-up questions. Mr. Archer's counsel instructed him not to answer as to those theories. She maintained that instruction after Duke explained that any protection had been waived by counsel's inquiry into and Mr. Archer's testimony concerning the theories. This was improper and warrants the relief that Duke seeks in the Motion.

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Mr. Archer's Response to the Motion [DE 320 (the "Response")] fails to address most of Duke's arguments in support of the Motion. Instead, Mr. Archer argues that Duke failed to lay a proper foundation for re-opening the deposition. This argument is not supported by the law or the facts.

ARGUMENT

I. Mr. Archer Has Conceded Most of the Arguments Made in the Motion.

Mr. Archer failed to address the following arguments in Duke's Motion:

- The attorney-client privilege and work product doctrine do not protect facts from discovery [DE 317, at 6-7];
- Mr. Archer and his counsel waived any protections that might otherwise have prevented discovery on the issue of Defendant Drummond's alleged knowledge of the prior release of DukeCard information [DE 317, at 8-10];
- When an attorney improperly instructs a witness, the re-opening of the deposition is the proper relief [DE 317, at 10-11];
- Mr. Archer's counsel has failed to provide the affidavit they agreed to secure setting forth Mr. Archer's knowledge on relevant issues [DE 317, at 11-12];
- This Court can compel Mr. Archer to sign the affidavit that his counsel agreed to provide [DE 317, at 11]; and
- Duke may recover its costs in bringing the Motion [DE 317, at 12-13].

Mr. Archer conceded these points by failing to address them. *See*, *e.g.*, *Kinetic Concepts, Inc. v. ConvaTec, Inc.*, 1:08CV00918, 2010 WL 1667285, at *8 (M.D.N.C. Apr. 23, 2010) (unpublished case attached as Exhibit A); *Brand v. N.C. Dep't of Crime Control & Pub. Safety*, 352 F. Supp. 2d 606, 618 (M.D.N.C. 2004).

Mr. Archer *affirmatively acknowledges* that his counsel assured Duke about what his testimony would be, "prepared an affidavit to that effect for Mr. Archer to sign," and "arranged to have a declaration from Mr. Archer." [DE 320, at 5]. Yet, Mr. Archer has never actually provided that affidavit in the six months since his counsel promised it. That being the case, his repeated assertion that "[t]here is nothing to compel" is baffling. [DE 320, at 5].

These conceded points alone establish a basis for compelling Mr. Archer's provision of his affidavit (the alternative relief sought in the Motion) and for awarding Duke its costs. As shown below, moreover, there is good cause for re-opening Mr. Archer's deposition (the primary relief sought in the Motion), too.

II. Duke Laid the Foundation for Re-Opening Mr. Archer's Deposition.

Mr. Archer makes only one argument against re-opening his deposition: that Duke failed to lay a proper foundation for that relief. Mr. Archer cites no legal authority and quotes selectively from the transcript. His argument is meritless.

The unabridged colloquy confirms Duke's foundation for the Motion:

> Q. Other than what you know from the testimony of Mr. Gettlief [sic], do you know of any other facts that support your contention that as of June 2nd, 2006, Mr. Drummond knew that Sergeant Smith had turned over DukeCard information to Durham?
>
> MS. SMITH: Objection. To the extent that it would reveal legal theories of counsel, I'd instruct you not to answer.
>
> THE WITNESS: It's the--I mean, there's theories within counsel, but . . .

Q. Okay, and I'd like to know what they are.

MS. SMITH: Objection. You can't ask about theories of counsel.

MR. SEGARS: You've opened the door by asking the question, without qualification, on cross-examination, and it's my contention that that has waived any privilege --

MS. SMITH: And it's my contention that the privilege has not been waived.

MR. SEGARS: Very well. I -- I believe that what occurred just now was a waiver of the privilege, at least with respect to his basis of knowledge about Matt Drummond knowing of the DukeCard information being given to Durham as of June 2nd, 2006, because he was asked that unqualified question, a question to which we routinely receive attorney-client privilege instructions when we ask that question. And based on that contention, it's my position that he needs to answer that question, and as an additional reason for leaving this deposition held open, I would mark that. And subject to that, I have no further questions.

MS. SMITH: And I would assert that we are making privilege objections based on work product and attorney-client communications. If he has facts that are not legal theories or interpretation of facts, he can very well answer the question. And we do not think that any privilege was waived.

(Archer Dep. Tr. 335:11-336:25 [DE 317-1].)

Duke asked Mr. Archer for facts to support a contention in his complaint.[1] Mr. Archer's counsel instructed: "To the extent that it would reveal legal theories of counsel, I'd instruct you not to answer." Apparently under the mistaken belief that his knowledge of facts was protected, Mr. Archer affirmed that he knew—but was withholding—responsive information. Parroting his counsel's instruction, he affirmed: "there's theories within counsel." Duke again asked for the information: "Okay, and I'd like to know what they are." Mr. Archer's counsel again refused to allow Mr. Archer to provide that information: "You can't ask about theories of counsel." This is the foundation for re-opening the deposition.

Mr. Archer's assertion that Duke "ended the deposition without giving Mr. Archer an opportunity to respond to his question" is false and at odds with another

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[1] The Court identified this very contention as critical to Mr. Archer's fraud claim: "Of course, it will ultimately be Plaintiffs' burden to prove all of the elements of this claim, including that Drummond was aware that the Duke Card reports had previously been provided *to the Durham police*, in order to establish the requisite intent to deceive." (Mem. Op. at 174, Mar. 31, 2011 [DE 186] (emphasis added).) After a year of discovery, Plaintiffs have no evidence to support this contention. Mr. Archer's Response characterizes the testimony of DukeCard office employee Roland Gettliffe as establishing that Mr. Drummond knew that DukeCard data had been given to unspecified "police" or "law enforcement." [DE 320, at 2]. There is a reason for Mr. Archer's vague, but careful wording. Mr. Gettliffe testified that he likely would have kept Mr. Drummond apprised of the fact that he provided reports *to the Duke police*. (Gettliffe Dep. Tr. 21:22-22:12, 42:25-43:16 (excerpts attached as Exhibit B)). There is no evidence, however, that Mr. Drummond knew the Duke police had given the reports *to the Durham police*. In fact, Mr. Drummond denied knowing this (and explained the distinction between these police departments) in the only testimony on this issue. (Drummond Dep. Tr. 59:24-60:22, 116:17-117:11, 132:19-133:16 (excerpts attached as Exhibit C)).

argument in the Response. [DE 320, at 4]. The Response opens: "Plaintiffs oppose [the Motion] because Mr. Archer has already answered the question at issue." [DE 320, at 1]. Mr. Archer cannot have "already answered" the question if Duke denied him an opportunity to respond. In any case, as the transcript shows, Duke gave Mr. Archer at least two opportunities to respond. Rather than ending the deposition, moreover, Duke *expressly held the deposition open* on the issue.

Similarly unavailing is Mr. Archer's claim that Duke had no remaining time within which to receive an answer to its question. [DE 320, at 4-5]. Mr. Archer could have answered the question easily during the time his counsel debated the point with speaking objections. *Cf.* Fed. R. Civ. P. 30(d)(1) (allowing for expansion of time limit in consideration of impediments or delays).

Mr. Archer bears the burden of establishing privilege. *See Kelly v. United States*, 281 F.R.D. 270, 276-77 (E.D.N.C. 2012). Having made no effort to carry that burden, Mr. Archer instead criticizes Duke's foundation. Courts have rejected this very tactic as a legally unsupported attempt to transfer the burden. *Cf. Saint Annes Dev. Co., LLC v. Trabich*, No. WDQ-07-1056, 2009 WL 324054, at *4 (D. Md. Feb. 9, 2009) (unpublished case attached as Exhibit D) (rejecting argument that inquiring counsel has an "'affirmative burden' . . . to make a record or suffer denial of a motion to compel").

Finally, Mr. Archer's argument should not be countenanced because it

squarely contradicts positions previously taken by his counsel. *See, e.g.*, *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (noting court's discretion to prevent "intentional self-contradiction . . . as a means of obtaining unfair advantage") (internal quotations omitted). During another deposition in this case, counsel extensively *objected* to Duke's follow-up questions after an instruction on privilege—the same type of questions Mr. Archer faults Duke for *not asking* here:

> Q. Mindful of your counsel's instruction, and consistent with that instruction, is there any reason as to why you decided to hire Mr. Bachman that you can share with me that wouldn't violate her instruction?
>
> MS. SMITH: Objection. I think that's confusing to him. It's confusing to me when I hear that. I think that asks the same question.
>
> BY MR. SEGARS:
>
> Q. Well, I guess--here's what I'm trying to find out. I'm trying to find out your reasons for hiring Glen Bachman--
>
> MS. SMITH: And we're instructing him not to answer.
>
> MR SEGARS: I understand.
>
> Q. And my question is, is there any information responsive to that question that is outside of the instruction that you've been given?
>
> MS. SMITH: Objection. I think it's confusing. I mean, these boys are not--
>
> MR. EKSTRAND: I think he's answering "no," so . . .
>
> MR. SEGARS: I'm just--

> MS. SMITH: I just mean--
>
> MR SEGARS: You're the one who's instructing him.
>
> MS. SMITH: --they don't understand privilege as well as we might, and so they have to follow our instruction. And I think every time you follow up with these questions it's confusing to them. And they not trying to withhold anything--
>
> MR SEGARS: Well--right.
>
> MS. SMITH: --but they're also trying to follow their counsel's instruction and the follow-up question. It's like--they're not lawyers. They can't determine what's reasoning that's separate from privilege; what's facts and separate from our work product. They just can't. And it happens at every single deposition. And we're not trying to have them withhold anything, but at the same time they should be able to follow their own counsel's instruction.

(McFadyen Dep. Tr. 126:25-128:16 (excerpts attached as Exhibit E)). Mr. Archer's current effort to argue the opposite position to his advantage is disengenuous. *Allen*, 667 F.2d at 1167.

Duke laid the proper foundation for its Motion. Accordingly, Duke is entitled to re-open Mr. Archer's deposition.

CONCLUSION

For the reasons set forth above and in its opening brief, Duke respectfully requests that the Court order the re-opening of Mr. Archer's deposition or, in the alternative, compel Mr. Archer to complete and return the affidavit he agreed to provide. In either case, Duke requests that its costs be taxed against Mr. Archer.

This the 19th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This the 19th day of December, 2012.

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