Wells Fargo Bank NA v. LaSalle Bank National Association Doc. 428

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

WELLS FARGO BANK, N.A.,

Plaintiff, : Case No. 3:07-cv-449

-vs- Magistrate Judge Michael R. Merz

:

LaSALLE BANK NATIONAL ASSOCIATION,

Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO QUASH TRIAL SUBPOENAS

This case is before the Court on Defendant's Motion to Quash Plaintiff's Trial Subpoenas and for Attorney Fees (Doc. No. 392), seeking to quash Plaintiff's trial subpoena duces tecum seeking timekeeping and billing records of Kegler, Brown, Hill & Ritter and Plaintiff's trial subpoenas ad testificandum issued to LaSalle counsel, Loriann Fuhrer and Stephanie Union. No such subpoenas have been served on attorneys from the Cadwalader firm because they are outside the range of this Court's subpoena power, but Plaintiff's counsel have indicated their intention to serve similar subpoenas on any Cadwalader attorneys who appear for the trial on November 1, 2010 (Final Pretrial Order, Doc. No. 424, PageID 28016; Memorandum in Opposition, Doc. No. 395, PageID 25204). Plaintiff opposes the Motion (Doc. No. 395) and Defendant has filed a Reply in support (Doc. No. 399). The Motion was argued orally on October 15, 2010; that argument has been transcribed and filed (Doc. No. 421).

In *Nationwide Mutual Ins. Co. v. The Home Ins. Co.*, 278 F. 3d 621 (6th Cir. 2002), the Court of Appeals adopted the test for permitting a deposition of opposing counsel developed in *Shelton*

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v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986): "Discovery from an opposing counsel is 'limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information . . .;(2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.'" *Id.*. at 625. Defendant argues Plaintiff has not met this standard.

Plaintiff relies on *Black v. Lojac Enters.*, 1997 U.S. App. LEXIS 17205 (6th Cir. 1997), where the court stated "Undoubtedly, where the issue of the reasonableness of the time expended is fully joined, the amount of time spent by the opposing party is a relevant benchmark as to the amount of time reasonably required," citing *Mitroff v. Xomox Corp.*, 631 F. Supp. 25, 28 (S.D. Ohio 1985)(Rubin, Ch. J.). However, as Plaintiff acknowledges, the language is dictum in that the issue in *Black* was whether the plaintiff's attorney could recover his own fees for his motion to compel billing statements from his opponent.

In *Mitroff*, Judge Rubin opined that

> Pertinent to any consideration of a reasonable amount of time expended in the prosecution of a law suit is the amount of time expended by the defendant in defending that law suit. This Court has previously deemed that where a plaintiff's attorney claimed hours exceeding those of defense counsel, such defense counsel's hours could be used in a consideration of "reasonable " hours. *Brinkman v. Gilligan*, 557 F. Supp. 610 (S.D. Ohio 1982), aff'd 697 F.2d 163 (6th Cir. 1983).

Id... at 28[1], *reversed and remanded on a different issue* at 797 F. 2d 271 (6th Cir. 1986).

Black is an unpublished opinion of the Sixth Circuit which lacks precedential weight; both *Black* and *Mitroff* were handed down before the Sixth Circuit adopted the *Shelton* standard in *Nationwide*. Subsequent authority relied on by Plaintiff includes principally *Serricchio v. Wachovia Secs., LLC*, 258 F.R.D. 43 (D. Conn. 2009). In refusing to quash a discovery subpoena for an

[1]*Brinkman* was the Dayton school desegregation case.

opposing party's attorney's billing records in that case, the court noted that reservations about comparability of billing rates and hours worked were best resolved in weighing the evidence produced, rather than allowing it to be discovered in the first place.

At the outset of her opinion in *Serricchio*, Judge Arterton quotes a leading Supreme Court case on attorney fees, *Hensley v. Eckerhart*, 461 U.S. 424 (1983): "A request for attorney's fees should not result in a second major litigation." *Id.*. at 437. Most of the authority she cites involves **discovery** of opposing counsel's billing records, not their blanket subpoena for trial without any knowledge of volume or contents.

It is important to keep in mind that the subpoenas in question are **trial** subpoenas for material whose content, form, and volume are unknown to Plaintiff's counsel. To put it another way, these are not subpoenas to obtain trial authentication of material which Plaintiff's counsel has already reviewed. Instead, it would not be surprising if, having obtained the documents in question, Plaintiff's counsel then proceeded to cross-examine Defendant's counsel about the reasonableness of their own work on this case, with a view to proving that Plaintiff's counsel's fees are reasonable.

The Court agrees with the authority cited by Plaintiff that Defendant's counsel's hours and rates are or may be relevant evidence as that term is defined in Fed. R. Evid. 401: "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... ." (emphasis added). Nevertheless, Fed. R. Evid. 403 provides: "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." While no unfair prejudice is likely and there is no jury to be confused, all of the other considerations in Fed. R. Evid. 403 weigh against permitting the introduction of this evidence, particularly since Plaintiff does not now know what is in the subpoenaed materials.

The Motion to Quash is granted. In reaching this decision, the Court has not relied on Defendant's argument that enforcing the subpoenas would be equivalent to reopening discovery.

October 28, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge