Singh v PGA Tour, Inc.
2017 NY Slip Op 31078(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 651659/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
---X
VIJAY SINGH,

Plaintiff,

-against-

PGA TOUR, INC.,

Defendant,
---X

Index No.: 651659/2013
Motion Date: 10/6/2016
Motion Sequence No.: 011, 012

BRANSTEN, J.

This matter comes before the Court on Plaintiff Vijay Singh and Defendant PGA Tour, Inc.'s respective motions seeking an Order striking witness testimony and opinions at the time of trial. (Motion Sequences 011 and 012). Both motions are opposed. All motions are addressed in turn below.

BACKGROUND[1]

Plaintiff, Vijay Singh, is a professional golfer and a lifetime member of the PGA Tour. (Plaintiff's 19-a Statement ("Pl 19-a.") ¶1). Defendant, PGA Tour ("The Tour") is the organizer of the main men's professional golf tours and events in North America. (Id. ¶5). In 2008, Defendant enacted an anti-doping program (the "Program"), which prohibits the use of certain substances by Defendant's members. (Id. ¶6). The terms of the Program are set forth in the Anti-Doping Program Manual (the "Manual"). (Ex "P" to

[1] Except where otherwise indicated, all facts detailed in this section are drawn from Plaintiff's 19-a statement in support of Motion for Summary Judgment.

Def. Aff. in Support). The list of prohibited substances contained in the manual is adopted from a list of prohibited substances maintained by the World Anti-Doping Agency ("WADA"). (Pl. 19-a, ¶11). As a condition of membership in Defendant's organization, golfers, including Plaintiff, consent to be bound by the terms of the Program, as set forth in the Manual. (Id. ¶19).

In 2012, on the advice of his caddie, Plaintiff began using a product called "deer antler spray" to address Plaintiff's knee and back problems. (Id. ¶21). Plaintiff used the spray during his off-season, over a period of approximately one month. (Id. ¶30). Plaintiff ingested the spray orally by spraying it into his mouth. (Id.).

On January 29, 2013, an article was posted on Sports Illustrated's website, www.SI.com, http://www.SI.com, discussing an athletic supplement company, that made the deer antler spray used by Plaintiff. (Id. ¶33). The article referenced Plaintiff's use of the deer antler spray, suggesting that by using the spray, Plaintiff had, in fact, used a banned substance. (Id.).

Immediately after the article's release, Plaintiff contacted Defendant to address the allegation that Plaintiff had used a banned substance. (Id. ¶38). A bottle of the deer antler spray was provided to Defendant by a representative of Plaintiff for testing. (Id.). Also, in the prior week, Plaintiff had submitted a urine sample which tested negative for any banned substance.

Defendant sent the bottle of spray to the UCLA Olympic Analytical Laboratory for testing. In a report dated February 14, 2013, that laboratory determined that the contents of the bottle tested "negative for anabolic androgenic steroids." (Id. ¶ 50.) However, the report did identify "IGF-1", or Insulin-like Growth Factor-1, as one of the substances contained in the bottle's contents. (Id.) IGF-1 is also listed as a prohibited substance in the Manual. (Pl.'s Ex. P at 20.)

Following the issuance of the laboratory's report, Defendant determined that Plaintiff had a committed an anti-doping violation by using the spray. Subsequent to Plaintiff's submission of a written explanation, Defendant informed Plaintiff he had committed an anti-doping violation, and, as a result, Plaintiff would be suspended from activities related to Defendant's organization for a period of 90 days. (Id ¶¶51-53). In addition, Plaintiff's earnings from competition in Defendant's tournaments would be held in escrow. (Id. ¶54).

On February 25, 2013, pursuant to the procedure set forth in the Manual, Plaintiff timely appealed Defendant's determination that Plaintiff had committed an anti-doping violation, and commenced an arbitration proceeding before the American Arbitration Association. (Id. ¶61). Defendant informed Plaintiff that he would be allowed to play in Defendant's tournaments during the pendency of his appeal, but that any prize money

would continue to be held in escrow and that Plaintiff risked forfeiture of those winnings if he did not prevail on his appeal.

On April 30, 2013, approximately one week before the first scheduled arbitration hearing, Defendant ceased its disciplinary action against Plaintiff, and the arbitration was discontinued. (Id. ¶135). Several days earlier, WADA issued a letter announcing deer antler spray is not considered prohibited. (Id. ¶¶129-134).

On May 8, 2013, Plaintiff commenced this action against Defendant, alleging, among other things, that Defendant recklessly administered its anti-doping program, exposing Plaintiff to ridicule and humiliation; that Defendant placed Plaintiff's prize money in escrow without legal authority; and that Defendant inconsistently disciplined golfers who had admitted using deer antler spray, and in some cases, imposed no discipline at all. Plaintiff asserts causes of action for negligence, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress, and conversion. (Pl's Ex. "A").

Defendant's Motion to Strike Newly Disclosed Opinions and Data in the Second Report of Plaintiff's Expert, Don Donovan

Defendant moves to strike the newly disclosed opinions and data of Mr. Don Donovan, one of plaintiff's experts, pursuant to Commercial Division Rule 13(c). Defendant argues the disclosure was untimely and was only served in response to Defendant's rebuttal expert report. Contained within the second disclosure is data that

was allegedly never before offered and opinions outside the scope of his initial report. Plaintiff argues the untimely disclosure did not result in any prejudice as Defendant was in possession of both reports prior to Mr. Donovan's deposition and did, indeed, inquire about both reports at his deposition. Plaintiff also avers the second report "merely elaborated on the information and opinions already contained" in the first report. (Plaintiff Memo in Opp at 4).

Plaintiff's Motion to Strike the Affidavit of Defendant's Expert Richard Young and to exclude him from testifying at trial

Plaintiff moves to strike the affidavit and trial testimony of Mr. Richard Young, one of Defendant's witnesses on three grounds: 1) Mr. Young is actually being offered as an expert and was never noticed as such in violation of Commercial Division Rule 13(c); 2) Plaintiff was prohibited from asking Mr. Young questions at his deposition under the guise of privilege, topics which Defendant now discusses in his affidavit; and 3) Mr. Young's affidavit speaks to the "ultimate issue" of the case. Defendant denies Mr. Young is being offered as an expert witness, maintains all topics addressed in Mr. Young's affidavit were discussed at his deposition and, finally, that Mr. Young does not speak to the "ultimate issue" of the case.

For the following reasons, Defendant's motion to strike the newly disclosed portions of Plaintiff's expert, Don Donovan, is granted. Plaintiff's motion to strike the Affidavit of Richard Young and to exclude him from testifying at trial is denied.

ANALYSIS

I. Commercial Division Rule 13(c)

Commercial Division Rule 13(c) requires that an expert report include a complete statement of all of the expert witness' opinions and the data the expert considered in forming those opinions. N.Y. Sup. Ct. Commercial Div. R. 13(c) (A)-(B). This rule was promulgated in an effort to "harmonize the disclosure rules of our state and federal courts." The Chief Judge's Task Force on Commercial Litigation in the 21st Century, Report and Recommendations to the Chief Judge of the State of New York, June 2012 at 16. Further, this Court has recognized that "[t]he Commercial Division also looks for guidance on [expert disclosure] issue[s] to the Federal Rules of Civil Procedure." *Maniscalco v. Couri*, Index No. 115646-08 (New York Sup, 2010) (Bransten, J).

Specifically, Rule 26(a)(2)(B) of the Federal Rules provides that an expert's written report "must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them" and "(ii) the data or other information considered by the witness in forming them." Section 37(c)(1) of the Federal Rules provides that, "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) ..., 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." *Voom Hd Holdings LLC v. Echostar Satellite L.L.C*, 2010 WL

8400073 (Trial Order; Lowe, J.) (NY Sup 2010); *See also Williams v County of Orange*, 2005 WL 6001507, *3 (SDNY 2005) ("Rule 37[c][1] is 'self-executing,' and the exclusion of undisclosed information is automatic unless the non-disclosing party sustains its burden of showing that the failure to disclose was either substantially justified or harmless"). "A failure to comply with Rule 26(a)(2) is considered to be harmless when the party entitled to the expert disclosure has not been prejudiced." *Id.* The determination of preclusion is a matter within the court's discretion.

II. Defendant's Motion to Strike

On May 8, 2015 Plaintiff served a 6-page expert report from Mr. Don Donovan which contained opinions as to two topics: 1) whether certain fans of golf had ever heard of Plaintiff and whether they had ever heard of other professional golfers; and 2) whether Plaintiff had fewer or more endorsements than other professional golfers, including ones less well known than Plaintiff. Defendants argue these opinions were supported by two pieces of data: the answers to a single survey question asking whether the participants had heard of certain golfers, and the expert – Mr. Donovan's – estimation of endorsements that Plaintiff and other golfers had. (See September 27, 2016 Transcript, 9:10-24; see also Def. Memo in Sup at 1-2; see also Exhibit "A" to Pl's Aff. in Opp). Defendant argues, in contravention of Commercial Division Rule 13(c), Mr. Donovan failed to include any data regarding the participants' opinion of Plaintiff, whether they

were aware of Plaintiff's use of deer antler spray or whether he had been suspended. The report was also void of information about whether the participant's views of Plaintiff changed as a result of his suspension and any opinions about whether Plaintiff lost any sponsorships as a result of the suspension. (Id. at 10:3-14).

Defendant highlighted these deficiencies in its June 12, 2015 rebuttal report to Plaintiff. Specifically, Defendant noted, through its expert Mr. Jonathan Orszag, Plaintiff lacked evidence or opinion linking anything the Defendant did to any damage Plaintiff may have suffered. (Id. at 10:15-19; see also Exhibit "B" to Pl's Aff. in Opp).

On June 26, 2015 Plaintiff served a reply report (see Exhibit "C" to Plaintiff's Aff in Opp). Defendant contends the Reply impermissibly included new opinions which were not included in the First Report. Plaintiff responds by arguing the Reply was a "response" to the critiques raised by Defendant and "merely elaborated on the information and opinions already contained in (Donovan's) Expert Report and the same quantitative data that formed the basis of his initial Expert Report." (Pl's Memo in Opp. at 4). A review of the First and Second report submitted by Mr. Donovan requires this Court to disagree with Plaintiff. Plaintiff's Reply Report is replete with new information, data and conclusions that were not provided in Plaintiff's First Report, despite R. 13(c)'s requirement to include "a complete statement of all of the expert witness' opinions and the data the expert considered in forming those opinions". New York *Commercial*

Division Rule 13(c). Specifically, Section 3 of Plaintiff's Reply Report includes data concerning Plaintiff's "favorability among consumers". Such opinions and data were not included in Plaintiff's first report. The Reply Report also indicates "consumer views" on Plaintiff and discusses Plaintiff's purported various attributes (i.e. "Hard Worker"; "Good Role Model"; and "Ambassador for Golf"). (Exhibit "C" to Pl's Aff. in Opp at 5). Most significantly, perhaps, Plaintiff's Reply Report included data concerning the "current impression of Vijay Singh" after his suspension among those who knew and did not know about Defendant's reversal. (Id at 7).

All of this new data, presented for the first time in Plaintiff's Reply, led Plaintiff to the conclusion (expressed for the first time) that "the consumer data…presents clear evidence that the PGA TOUR suspension reduced the favorable criteria that marketing executives would use in their decision making process in evaluating Vijay Singh's viability as a spokesperson/endorser/advocate." Also, Plaintiff asserts "regardless of the fact that the PGA Tour reversed its suspension…the damage to his reputation was done and it was the suspension that was the causal factor". Id.

The conclusions and data expressed by Mr. Donovan in the Reply Report concerning the participant's current impression of Plaintiff, inquiry of the participants as to whether they knew of the suspension, and consumer's view of various attributes associated with Plaintiff all should have been included in the First Report. Plaintiff's

explanation that these were merely "responses" to the critiques raised by Defendant's expert is unavailing. A Reply Report is not an opportunity for a party to "correct" the deficiencies and omissions made in an initial expert report – including addition of new data and opinions, particularly when that data was available to the expert at the time the initial report was issued. *Sloan Valve Co. v. Zurn Industries, Inc.*, 2013 WL 3147349 * 3 (N.D. Ill. June 19, 2013) (Court struck a "new opinion regarding damages" included in the plaintiff's expert reply report because the expert "had access to all of the data at issue…before [he] completed his Initial Report.")

Mr. Donovan reviewed the Rebuttal Report and used this Reply Report as an opportunity to say what he neglected to say in his opening Report which is a direct violation of Commercial Division Rule 13(c) and FRCP 26. Perhaps, adding to the egregiousness of the belated disclosure, Plaintiff does not proffer any explanation for the discovery violation. Rather, Plaintiff argues, nevertheless, Defendant did not suffer any prejudice from the untimely disclosure because Defendant was in possession of both reports prior to Mr. Donovan's deposition. That misses the mark.

The expert discovery rules are promulgated so no party will be "sandbagged" or surprised by another expert's opinion. Here, Defendant was entitled to be fully apprised of Plaintiff's expert opinion prior to its expert reviewing and preparing a rebuttal report. *In re High-Tech Employee Antitrust Litigation*, 2014 WL 1351040 (N.D. Cal. Apr 4,

2014 * 11-12) (Court concluded the plaintiffs' expert's opinion in his reply report regarding his regressions analysis was "untimely disclosed because he could have and should have included this theory in his opening merits report to allow Defendants the opportunity to respond." Accordingly, the Court struck down that opinion, explaining "Plaintiffs will not be permitted to 'sandbag' Defendants with new analysis that should have been included at the very lease in the opening merits report."). By Mr. Donovan's own admission his First Report made no reference to Plaintiff's reputation or favorability, or the supposed impact of any alleged misconduct by the Defendant (Exhibit "C" to Defendant's Aff. at 83:24-86:21). A party does not have free reign to produce a rebuttal report containing additional analysis on the basis that it is premised on the same subject matter of the initial reports. A rebuttal report is not the time to account for noted deficiencies. *Bowman v. Int'l Bus. Mach. Corp.,* 2013 WL 1857192 * 7 (S.D. Ind. May 2, 2013).

In sum, this Court finds the new analysis, information, opinion and data contained within Plaintiff's Reply Expert Report violates Commercial Division Rule 13(c) and FRCP 26 and is precluded as discussed herein. As such, Defendant's motion to Strike the newly disclosed opinions and data in the Second Report of Plaintiff's Expert, Mr. Don Donovan, is GRANTED.

III. Plaintiff's Motion to Strike Richard Young's Affidavit and Exclude from Testifying at Trial

Plaintiff seeks to preclude Defendant from using the affidavit and trial testimony of fact witness Richard Young. Mr. Young is the primary drafter of both the Defendant's Anti-Doping Program (the "Program") and the World Anti-Doping Agency Code (the "Code"). (Pl's Memo in Opp. at 1). From 2001 to 2003 he worked on behalf of WADA to develop the Code and later drafted the 2009 and 2015 amendments to the Code. (Id at 3). In 2007 Mr. Young was the primary drafter of the Program which ultimately took effect in 2008. (Id).

Beginning in January 2013 Mr. Young served as counsel for Defendant during its investigation of Plaintiff's admitted use of deer antler spray and the arbitration in which Plaintiff appealed Defendant's initial decision to suspend him for violation of the Program. (Id at 1). Given this involvement, Plaintiff deposed him as a fact witness during discovery. (Id). Plaintiff now seeks preclusion of Mr. Young on three grounds: 1) Defendant previously prevented Young from speaking about the very issues he discusses in his Affidavit at this January 7, 2015 deposition under the guise of privilege; 2) Mr. Young's statements in the Affidavit constitute "untimely expert opinions"; and 3) Mr. Young offers opinions on the "ultimate issue" of the case. Id at 2-3. Each argument will be addressed in turn.

A. Privilege Asserted at Deposition

Plaintiff argues Defendant impermissibly prevented Mr. Young from answering various questions during his deposition under the guise of privilege, however, later submit an Affidavit in support of Defendant's motion for summary judgment including some of these "privileged" topics. Defendant acknowledges privilege was invoked during Mr. Young's deposition, however, the topics were limited to legal advice Mr. Young provided to Defendant and his mental impressions regarding the investigation of Plaintiff's use of deer antler spray and the subsequent arbitration. Id at 5.

While Plaintiff argues he was prevented from exploring various topics at Mr. Young's deposition he has failed to cite to any specific question for which privilege was asserted which is the subject of Mr. Young's Affidavit. To the contrary, however, Defendant argues – and this Court agrees – virtually all of topics contained in Mr. Young's Affidavit were discussed at his deposition. Paragraphs 1-6 of the Affidavit discuss Mr. Young's background in anti-doping and were addressed during his deposition at 58:15-59:16; Paragraphs 7-8 of the Affidavit discuss Mr. Young's drafting of the WADA Code and were addressed during his deposition at 70:13-14; Paragraphs 9-12 of the Affidavit discuss Mr. Young's drafting of Defendant's Program and were addressed during his deposition at 100:19-101:19; Paragraph 13 of the Affidavit discusses the inapplicability of the Program to the Champions Tour was addressed during his

deposition at 111:4-14; Paragraphs 15-19, 26 of the Affidavit discuss Mr. Young's understanding of admissions of use under the Program and were addressed during his deposition at 172:13-19; Paragraphs 22-25 of the Affidavit discuss Mr. Young's understanding of the irrelevancy of whether a prohibited substance has a performance-enhancing effect and were addressed during his deposition at 175:23-176:2; Paragraph 27 of the Affidavit discusses Mr. Young's understanding of the irrelevancy of the biological activity and species of IGF-1 and was addressed during his deposition at 185:19-21; Paragraphs 29-31 of the Affidavit discuss the testing of the spray conducted in connection with the arbitration in which Plaintiff appealed Defendant's sanction and were addressed during his deposition at 148:7-20; and Paragraphs 35-40 of the Affidavit discuss Mr. Young's communication with WADA and were addressed during his deposition at 219:10-23. (See Def. Memo in Opp at 10-13; Exhibit "A" and "B" to Pl's Aff. in Opp).

It appears Plaintiff was provided ample opportunity to inquire about those topics contained within Mr. Young's Affidavit notwithstanding Defense counsel's objections to those questions which potentially impeded attorney-client privilege. Further, in reviewing the questions asked and objections given, the questions do improperly attempt to pierce the attorney-client privilege by asking about conversations had between Mr. Young (as counsel) and Defendant (Exhibit "B" to Pl's Aff. in Opp at 88:2-13; 98:8-

99:14; 260:22-261:5) and by asking about responsibility of advising Defendant (Id at 196:2-8; 197:9-21). Additionally, Plaintiff contends it was not permitted to inquire about communications Mr. Young had with WADA but the record is clear – counsel for Defendant did not object to the disclosure of such discussions, counsel for WADA did. In fact, counsel for Defendant clearly remarked the objections were not being made on its behalf and were being made by WADA. (Id at 204:21-205:9).

As such, this Court does not find Defendant's use of Mr. Young's Affidavit and trial testimony should be precluded based on Plaintiff's "sword and shield" argument.

B. Use of Young as an Expert Witness

Next, Plaintiff argues Mr. Young is not actually being produced as a fact witness and, really, is an expert witness. (Pl's Memo in Reply at 10). Defendant avers Mr. Young is being offered as the author of the Programs and Codes at issue and to offer his understanding of these agreements as a fact witness based on personal knowledge. (Def. Memo in Opp. at 13). Courts have held drafters' of contracts deposition and/or trial testimony is permissible when testifying as to his or her understanding of the agreement. *See, Turner v. Delta Air Lines, Inc.*, 2008 WL 222559 * 1 (E.D.N.Y. Jam 25, 2008) ("Experts are those whose information was acquired in preparation for trial, and do not include actors . . . with respect to transactions or occurrences that are part of the subject matter of the lawsuit; the latter should be treated as ordinary witnesses."); *See also*,

Iconoclast Advisers LLC v. Petro-Suisse Ltd., 27 Misc. 3d 1230(A), 2010 N.Y. Slip Op. 50972(U), at *6 (Sup. Ct. N.Y. Cnty. May 14, 2010) (granting summary judgment to defendant in breach of contract action based on, inter alia, drafters' deposition testimony regarding the "apparent purpose for which the provision [of the contract] was drafted"); cf. *Ainetchi v. 500 W. End LLC*, 51 A.D.3d 513, 516 (1st Dep't 2008) (concluding that the trial court's "exclusion of the drafter's testimony was an improvident exercise of discretion and was not harmless" as "[t]he testimony regarding the scrivener's error was clearly relevant and based on personal knowledge").

Reviewing Mr. Young's Affidavit confirms all of the statements contained therein are limited to his personal knowledge from having drafted both the Program and the Code and, therefore, his understandings of their meanings and application. Mr. Young is not offering expert testimony nor will it be considered as such by this Court. The Court will, therefore, permit the consideration of Mr. Young's Affidavit and will allow him to offer fact testimony concerning his understandings based on his personal knowledge and dealings with the Code and Program.

C. Use of Young's Affidavit to "speak to the ultimate issue"

Finally, Plaintiff argues Mr. Young improperly offers opinions on the ultimate issue of the case. (Pl. Memo in Supp. at 15-17). Citing to four paragraphs of Mr. Young's Affidavit, Plaintiff asserts Mr. Young is depriving the jury the ability to answer

the "ultimate question" in this case – whether Plaintiff committed an anti-doping violation by ingesting deer antler spray. (Id at 16-17). To the contrary, however, this Court finds the "ultimate issue" in this case is not whether Plaintiff violated the anti-doping provision, but, rather, did the Defendant act arbitrarily, irrationally or in bad faith in declaring Defendant had violated the Program in the aftermath of the Sports Illustrated published article.

A review of Mr. Young's Affidavit confirms he does not specifically opine as to whether Defendant acted arbitrarily. While Mr. Young does review Plaintiff's claims, he responds based on his understanding of the requirements under the Program which he assisted in writing, not based on an expert opinion of the "ultimate issue". While Defendant is free to rely on Young's testimony, like any other fact witnesses' testimony, as to what the requirements are under the Program in order to establish the reasonableness of its actions, Defendant cannot, and is not, relying on Mr. Young's opinion "that Defendant acted in good faith".

As such, this Court does not find any of Plaintiff's arguments to be persuasive and his request to preclude the use of Mr. Young's Affidavit and trial testimony is Denied.

CONCLUSION

ACCORDINGLY, it is hereby

ORDERED, that Plaintiff's motion for Preclusion of Mr. Young's Affidavit and trial testimony is DENIED; and it is further

ORDERED, that Defendant PGA Tour, Inc.'s motion to Preclude the New Material contained within Plaintiff's expert Don Donovan's Reply Report is GRANTED as stated herein.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 15, 2017

ENTER:

Hon. Eileen Bransten, J.S.C.