FEDERAL PRACTICE UPDATE

Four Decisions From the Eastern District

By James M. Wicks

This month we review four decisions rendered by the Judges of the Eastern District of New York, Alfonse D'Amato Courthouse.

- Hon. A. Kathleen Tomlinson's decision granting a motion to serve a subpoena for a witness deposition.
- Hon. Joseph F. Bianco's decision denying a motion to certify two court orders for interlocutory appeal.
- Hon. A. Kathleen Tomlinson's decision granting a motion to take depositions in excess of the presumptive limit of ten provided for in Rule 30(a)(2)(A) of the Federal Rules of Civil Procedure.
- And a decision by the Hon. Arlene R. Lindsay declining to order disclosure of a settlement agreement.

In *Ehrlich v. Incorporated Village of Sea Cliff*, No. CV 04-4025(LDW)(AKT) (E.D.N.Y. June 1, 2007), the District Court considered defendants' motion for an order to compel disclosure of witness identifications and service of a Rule 45 subpoena. The case arose from an alleged incident on March 18, 2003, when plaintiff Ehrlich claimed one of the defendants, a Village Trustee, yelled religious epithets at him from across the street. Defendants argue that plaintiffs' counsel improperly delayed disclosing the identities of witnesses, including one crucial individual, to the event until February 9, 2007.

Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure mandates that a party must provide the name, and if known, the address and telephone number of each individual likely to possess discoverable information that the disclosing party may use to support its claims and defenses. It was undisputed that plaintiffs did not include the names of witnesses in their Rule 26(a) disclosures. Furthermore, plaintiffs did not supplement their Rule 26(a) disclosures to include the names of those witnesses, nor did they respond in a timely fashion to the repeated requests of defendants' counsel to obtain the names prior to the approaching final deadline for discovery.

Plaintiffs' conduct was found not only inexplicable, but difficult to excuse. The court stated that providing the information on the eve of the final deadline without substantial justification was unpersuasive and unacceptable. The issue, then, was the remedy defendants were entitled to for the failure to timely disclose. Rule 37(c)(1) of the Federal Rules of Civil Procedure states that a party failing to disclose information required by Rule 26(a) without substantial justification is not permitted to use as evidence at trial, at a hearing, or on a motion, any witness or information not so disclosed, unless such failure is harmless. The purpose of the rule is to prevent "sandbagging" an opposing party with new evidence.

It is an open question in the Second Circuit whether bad faith or willfulness is required before testimony may be excluded under Rule 37(c)(1). *See Fleming v. Verizon New York, Inc.*, No. 03-CV-5639, 2006 WL 2709766 (S.D.N.Y. Sept. 22, 2006). Nevertheless, the Court granted defendants' motion to serve a subpoena to take the deposition of the crucial witness, if they still so desired, because, while plaintiffs' counsel did not act in bad faith, they were still careless, failing to comply with the rules of discovery. Furthermore, the Court precluded plaintiffs from introducing any other witnesses to the alleged incident at trial. Introduction at trial of the crucial witness, however, was conditioned upon the completion of the defendants' deposition by the time of the trial.

In *Morris v. Flaig*, No. 02-CV-5988(JFB)(VVP) (E.D.N.Y. June 6, 2007), the District Court denied a motion to certify two previous court orders for interlocutory appeal because plaintiffs did not meet the requisite criteria. The case arose from a dispute between a landlord and tenant regarding state claims and violations of the federal Residential Lead-Based Paint Hazard Reduction Act ("RLPHRA").

28 U.S.C. § 1292(b) states that a district court may certify an immediate appeal of an interlocutory order if the court finds that the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and would advance the ultimate termination of litigation. Congress passed § 1292(b) to ensure that the courts of appeal would be able to rule on ephemeral questions of law, and promptly resolve knotty legal problems. As a result, interlocutory appeal is a rare exception.

First, the Court found that plaintiff's motion was untimely. While § 1292(b) does not specify a time in which a party must move for the order to be certified, courts have held that any delay in seeking amendment and certification must be reasonable. *See Green v. City of New York*, No. 05-CV-0429(DLI)(ETB), 2006 WL (E.D.N.Y. Oct. 23, 2006). In the instant case, plaintiffs moved for certification on an order issued nearly two years ago, and had even proceeded to trial without certifying the question.

Second, the Court determined that granting certification would require the Court of Appeals to consider mixed questions of law and fact. Interlocutory appeal must refer to pure law that can be decided quickly and cleanly without having to study the record.

Third, the Court held that plaintiff did not present a controlling question of law. A question of law is controlling if reversal of the district court's order would terminate the action. *See S.E.C. v. Credit Bancorp, Ltd.*, 103 F.Supp.2d 223 (S.D.N.Y. 2000). Plaintiff presented four alleged questions of law: whether a landlord must know of the duties imposed upon him by the RLPHRA to incur liability under the statute; whether the plaintiffs are entitled to rent abatement under New York Real Property Law; the constitutionality of the punitive damages award; and plaintiffs' claim of negligent infliction of emotional distress. In none of these instances would reversal terminate the action.

Fourth, plaintiffs failed to present a single case that contradicted the Court's holdings as to each of the four legal questions presented. A substantial ground for a difference of opinion can be established when, there is conflicting authority on the issue, or the issue is particularly difficult and of first impression for the Second Circuit. *See In re Lloyd's Am. Trust Funds Litig.* No. 96-CV-1262, 1997 WL 458739 (S.D.N.Y. Aug. 12, 1997). Plaintiffs failed to demonstrate that any difference of opinion existed.

Lastly, plaintiffs failed to indicate how certification of the Court's orders for interlocutory appeal would advance the ultimate termination of the litigation. An immediate appeal advances the ultimate termination of the litigation if the appeal promises to advance the time for trial or to shorten the time required for trial. In the instant case, plaintiffs conceded that a new trial would be required over the rate abatement issue, frustrating this objective. Moreover, plaintiffs could not evade a new trial on punitive damages or a remittitur by moving for interlocutory review.

In *RxUSA Wholesale, Inc. v. McKesson Corporation*, No. CV 06-4343(DRH)(AKT) (E.D.N.Y. June 25, 2007), the District Court granted plaintiff's motion to take depositions in excess of the presumptive limit of ten provided for in Rule 30(a)(2)(A) of the Federal Rules of Civil Procedure. Plaintiff sought to conduct twenty-one depositions, but defendant opposed the motion asserting that it was willing to agree to fifteen depositions, but twenty-one was cumulative and prohibited under Rule 26(b)(2)(C)(I).

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A party may request leave to conduct more than ten depositions, but the request is granted only if the Court deems it consistent with the principle of Rule 26(b)(2). Defendant's opposition rested primarily on Rule 26(b)(2)(C)(i), stating that the frequency or extent of discovery methods used can be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. Plaintiff argued that the specific circumstances of the case warranted more depositions, given that the controversy was in excess of $50 million, the defendant was the world's largest distributor of pharmaceutical products, and the information sought was necessary to establish the elements of plaintiff's claim.

The Court addressed the additional deposition sought via the three categories of witnesses plaintiff identified as necessary for its breach of contract claim. Regarding the first category, the Court held that there was significant overlap in the substance of the testimony outlined for two proposed witnesses. Therefore, plaintiff's counsel had to choose which of the two they preferred to depose. Moreover, the court found that there was no delineation of the "personal knowledge" two witnesses holding CEO positions possessed of the disputed facts. Therefore, plaintiff was instructed to depose the other witnesses in the category first, and if, after all other depositions were completed, plaintiff demonstrated that the two CEOs possessed information unavailable from another source, plaintiff could then seek leave to take the additional depositions.

In the second category, the Court permitted plaintiff to take the depositions of three specific people, albeit not be name,

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but clearly by position. The Court found that in light of the likely knowledge these individuals possessed, the depositions were consistent with the principles of Rule 26(b)(2).

In the third category, the Court found that all but one witness could be deposed. As in the first category, after deposing the other witnesses in this grouping, plaintiff could seek leave to take the deposition of the last witness upon a showing of unique knowledge or need.

Overall, the Court permitted plaintiff to depose seventeen of the twenty-one witnesses that were identified in the three delineated categories.

In the last case we review, *General Electric Co. v. Dr Systems, Inc.*, No. CV 06-5581(LDW)(ARL) (E.D.N.Y. June 20, 2007), the District Court considered whether a settlement agreement was discoverable. Plaintiff argued that the Court erred by imposing a higher burden on him to establish that the settlement documents at issue were discoverable. Plaintiff asserted that the recent case law does not require a "particularized showing" that settlement evidence is likely to be admissible at trial before such documents are produced in discovery, and, as a result, the Court was led to "legal error" by the defendant's citation to *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158 (E.D.N.Y. 1982), requiring a "particularized showing."

District courts within this Circuit disagree as to the applicable standard concerning the discoverability of settlement documents. This Court followed, however, the most recent view that the relevancy standard of Rule 26 of the Federal Rules of Civil Procedure applies to the disclosure of settlement documents.

Nevertheless, the Court found that disclosure would not be warranted at this time even under a more liberal Rule 26 standard. Plaintiff asserted that the settlement documents were relevant to the issue of appropriate royalty payments and witness state-of-mind. As to royalties, the Court found that settlement agreements reached to resolve litigation or threatened litigation are generally not relevant to this issue. As to state of mind, the Court found that the plaintiff's argument, without more, was simply unavailing. As a result, the Court declined to order disclosure of the settlement agreement.

Note: The author is a member of Farrell Fritz, P.C., and a member of the firm's Commercial Litigation Practice group. The author expresses his gratitude to Jennifer C. White, a Summer Associate at Farrell Fritz, for her assistance in the preparation of this article.