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United States District Court, S.D. New York.

Paul JOLLY, Plaintiff,
v.
Thomas A. COUGHLIN, Robert Grefinger, John P. Keane, C. Greiner, S. Kapoor, Defendants.

No. 92 CIV. 9026 (JGK). | Aug. 21, 1995.

Opinion

MEMORANDUM AND ORDER

KOELTL, District Judge.

***1** The defendants object on appeal, pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72, to an order from Magistrate Judge Leonard Bernikow directing the defendants to provide to plaintiff, a note written by the defendants' counsel to the defendant Robert Grefinger during his deposition. For the reasons explained below, the defendants' objection is overruled and Magistrate Judge Bernikow's order is affirmed.

The plaintiff deposed defendant Robert Grefinger on January 5, 1995. At the beginning of the deposition, the plaintiff's counsel informed defendant that he could speak with his counsel before answering any question asked of him. During the deposition, when asked, "What is your definition of an administrative keeplock?", the defendant's counsel objected to the question and the defendant requested a private consultation with his attorney. (Tr. 90–91). After the deposition resumed, when asked the same question, the defendants' counsel wrote the defendant witness a note. The defendants' counsel then stated that she and her client were having "a written consultation". After reviewing the note the defendant answered the question. When the plaintiff requested a copy of the note and was refused, the plaintiff sought an order from Magistrate Judge Bernikow requiring production of the note. After a hearing and briefing, Magistrate Judge Bernikow entered an order requiring production of the note pursuant to F.R.Ev. 612. Rule 612 of the Federal Rules of Evidence provides "... if a witness uses a writing to refresh memory for the purposes of testifying, either—(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

Magistrate Judge Bernikow determined, after examining the note *in camera,* that the note may have had an impact on the defendant's testimony and may have refreshed his memory. (Order at 2). Because the defendant actually referred to the note *during* his testimony, the Magistrate Judge determined that under F.D.Ev. 612(1) the note should be produced.

Magistrate Judge Bernikow noted that even if this situation were governed by Fed.R.Ev. 612(2), where the Court in its discretion must consider whether the disclosure was in the interests of justice, the disclosure was appropriate. The note provides a valuable source of information for cross-examination. *See Bank Hapoalim v. N. American Home Assurance Co.,* 1994 WL 119575 at *7 (S.D.N.Y. April 6, 1994).

An order from a Magistrate Judge may not be set aside unless it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *Bank Hapoalim,* 1994 WL 119575 at *2. The defendants argue that because the note was a confidential communication between a client and his attorney, the Magistrate Judge's order to produce the note was clearly erroneous and contrary to law.

***2** The Magistrate Judge correctly applied F.R.Ev. 612(1) and, in the alternative F.R.Ev. 612(2). The document was plainly used to prompt the witness's testimony and was properly producible. This Court's review of the document *in camera* and the deposition testimony shows that the note was used during testimony to prompt the witness's actual testimony. The Magistrate Judge's order was neither clearly erroneous nor contrary to law. The fact that the document used to refresh a witness's recollection while testifying would otherwise be privileged, does not shield it from being produced under F.R.Ev. 612(1). *See, e.g., S & A Painting Co., Inc. v. O.W.B. Corp.,* 103 F.R.D. 407 (W.D.Pa.1984). And it should also be produced under the discretionary standard of Rule 612(2) because it relates to an important issue in the litigation, would be a valuable source of material for cross examination, was actually relied upon by the witness for purposes of responding to a question at the deposition, and is note an impermissible fishing expedition. See *Bank Hapoalim,* 1994 WL 119575 at *6; *Berkey Photo, Inc. v. Eastman Kodak Co.,* 74 F.R.D. 613, 615 (S.D.N.Y.1977). Even under Rule 612(2), the fact that the document was otherwise privileged would not prevent its production under the circumstances of this case. *See id.*

Therefore, the objections to the Magistrate's order are overruled and the document is ordered to be produced. This Court has recently granted the plaintiff's request to

relieve his former counsel and this case has been placed on the pro bono list for new counsel to be appointed. The Court has also recently issued a preliminary injunction. The document should be produced to new counsel or to the plaintiff at such time as the plaintiff continues the case *pro se* if no new pro bono counsel is forthcoming.

SO ORDERED.