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

Barbara HANDSCHU, et. al, Plaintiffs,
v.
SPECIAL SERVICES DIVISION, et. al,
Defendants.

No. 71 CIV. 2203 (CSH). | May 16, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

***1** On April 14, 1989 the Court conducted a hearing with respect to one of the motions for contempt brought by the plaintiff class. That motion the Court characterized at the hearing as having to do "with perceived violations in respect of the manner in which documents are being maintained by the defendants in their files and disclosed to members of the plaintiff class." Hearing Tr. 1. I expressed, in the clearest words of which I was capable, the Court's concern with the fact that "there is a logjam building up in respect of the processing of requests for documents under the stipulation ..." Tr. at 2. Defendants in their answering papers had submitted fact affidavits and expert opinion affidavits which, in essence, acknowledged defects in the document retrieval system in place at the time this Court's guidelines and procedures went into effect under the stipulation of settlement; and described remedial steps which, in defendants' perception (evidently not shared by class counsel and intervenors) had remedied those defects to the maximum degree possible. At the beginning of the hearing the Court posed this question (mixing metaphors liberally) to all counsel:

Given the affidavits of experts qualified to express opinions in this area of expertise, in what respects are the plaintiffs still dissatisfied? Why can we not turn the traffic light to green, destroy the logjam, let the waters begin to flow again, thereby relieving what I am sure is a real anxiety and frustration on the part of class members. Why can we not do that?

Tr. 5.

The Court's concern, shared by counsel, arose from the fact that responses by defendants to inquiries by class members had been held in abeyance pending resolution of this particular motion by class counsel for an order of contempt.

The ensuing colloquy, which for present purposes I need not recount in detail, resulted in two directions by the Court. I decided to appoint pursuant to Rule 706(a) of the Federal Rules of Evidence an expert in records management. This will be an independent expert, appointed by the Court and answerable to the Court, although his or her findings will of course be made available to all counsel of record and subject the comments or questions of counsel. I generally described the expert's responsibilities at Tr. 31:

I have attempted to give anew some indications of what his boundaries of responsibility will be. It will be to evaluate the presently existing system or systems. It will be to examine the documents in the file within that context and it will be, within certain boundaries, not yet entirely clear in my mind, to observe the system as it works. It will work *because I make the direction that the disclosure of documents resume.*

(Emphasis added).

I emphasize the last phrase because it reflects the second ruling the Court made at the April 14, 1989 hearing in terms which I had thought were clear to all concerned. That second ruling reflected what I characterized as "my immediate concern ... to get the system working again." Tr. 30.

***2** As to the appointment of an expert I asked counsel to agree upon an independent expert if they could, or to submit suggestions to the Court if they could not. Those responses from counsel are not yet at hand. But I also directed at the April 14, 1989 hearing that defendants' disclosures should resume even before the Court appointed an expert under Rule 706. The resumption of disclosure was made contingent only upon the drafting of language to accompany disclosure which would indicate to inquiring class members that, to a degree, there was ongoing litigation with respect to the adequacy of defendants' document retrieval systems, and that conceivable further disclosures might be required by the Court in the future. As to such language, the Court said to counsel for all parties at the April 14, 1989 hearing:

And also I would like you to take your hand at drafting language which, if I adhere here to my point of principle, would accompany the delayed disclosures which I now wish to make. It needn't be long. It's the sort of thing the surgeon general put on cigarette packages. I want to get the message across without going into too much detail. I think in fairness to class members there should be some sort of notice and I adhere to that feeling which I came

into this hearing feeling inclined towards because I do not think that there is a distinction, a valid, practical distinction, between individual appeals and generic notices.

So, I would like you to exchange drafts on that kind of language as quickly as you can and then give them to me and I will determine that language very quickly.

Tr. 33–34

That the resumed disclosure of documents should precede the appointment of an expert was made clear by the following exchanges:

"MR. TURBOW: Your Honor, if I may, I somehow think that the parties will be able to agree on that surgeon general's warning. I don't think that will present a problem.

In the event, your honor, if we do not agree, I trust that the defendants have the liberty to start producing the documents with such notice or do you want us to report to your Honor?

THE COURT: You have that leave as long as the language is agreed even if the expert is not in place.

MR. TURBOW: I want to alert the court so there is no mistake in the record, searches have been conducted already under the new system with respect to approximately 400 requests. We're ready to send out the information with respect to those 400 requests. There's still about 200 outstanding. But the expert obviously will not have the opportunity to review our efforts with respect to those 400 requests. They can review it with respect to the 200 and if he's unsatisfied, of course, or dissatisfied, of course we'll do it again. We do have those 400 requests, 200—144 of which we have some documents with respect to.

THE COURT: My view is, and the plaintiffs class counsel may take a different view, that should go ahead. Look at what happens. Suppose the expert comes in and says, good God, not only is this a dreadful mess but the steps taken to remedy it are inadequate. On the other hand, if we take these additional steps we're going to get a lot better results. I'm speaking hypothetically. If he says something like that, then those 400 would have to be redone, which is one reason for the little notice.

***3** I would prefer, I think, counsel may have a different view, to start getting these things in the mail.

MR. CHEVIGNY: I don't disagree. I would like to clarify one thing. Do you want those to go out after the language has been prepared to accompany them or do you want them to go out before?

THE COURT: I want them to be accompanied by the language.

MR. CHEVIGNY: That will be after we finish with our little drafting job.

THE COURT: Correct. I think that's better.

Tr. 34–36

The optimism of counsel with respect to the speed with which the disclosure language could be drafted has not come to pass. Counsel are therefore directed to send to the Court within seven (7) days of the date of this Order the agreed language. If agreement has not and cannot be reached, then the parties are directed within the same time frame to forward to the Court their respective drafts and the reasons why they object to the rival drafts. The Court will then determine the language to be used, so that disclosure may resume.

As to selection of the Rule 706 expert, in joint letter dated May 12, 1988 counsel for the class and for defendants each submit two names and ask me to make the selection among the four names submitted. I infer that neither party agrees to either of the other's nominees, but I have no idea why that is so. It is better if I approach a prospect with the unanimous approval of the parties. Counsel are directed to agree on a name or names if possible. If they cannot, counsel are directed to submit further letters explaining why they cannot agree, and setting forth in detail reasons why their nominees should be preferred over the other party's. These submissions are to be filed and served within fourteen (14) days.

It is SO ORDERED.