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United States District Court, D. Connecticut.

Richard MESSIER, et al.
v.
Southbury Training School, et al.

No. 3:94–CV–1706 (EBB). | Jan. 30, 1998.

Opinion

RULING ON THE HOME AND SCHOOL ASSOCIATION'S MOTION FOR RECONSIDERATION

BURNS, Senior J.

***1** Plaintiffs, three advocacy organizations and seven individual residents or former residents of Southbury Training School ("STS"), brought this action for injunctive relief against defendants STS and Department of Mental Retardation ("DMR"), Department of Public Health & Addiction Services and Department of Social Services. Plaintiffs allege violations of the Due Process Clause of the Fourteenth Amendment, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Social Security Act. The Home and School Association of the Southbury Training School ("HSA"), a non-party subpoenaed by the plaintiffs for deposition and production of documents, moves the Court to vacate its December 22, 1997 order compelling the HSA to produce the requested documents. For the reasons set forth below, the HSA's Motion for Reconsideration (Doc. No. 291) is granted in part and denied in part. The plaintiffs' related Motion for Further Orders and/or Sanctions (Doc. No. 275) is denied.

I. Statement of Facts

The plaintiffs served a notice of deposition and subpoena duces tecum on the HSA on November 1, 1997 which directed the HSA to designate a custodian of records, pursuant to FED.R.CIV.P. 30(b)(6). This person was instructed to attend a deposition on November 21, 1997 and to produce certain documents at that time. Sarah E. Bondy, President of the HSA, timely objected to the document production requests on November 14, 1997. During her deposition on November 21, 1997, Ms. Bondy renewed her objections, refusing to produce the requested documents. She was not represented by counsel at that time.

On December 18, 1997, the plaintiffs moved the Court to compel production of the HSA documents. After considering the plaintiffs' stated reasons for requesting the documents as well as the HSA's objections to their production, the Court issued an order on December 22, 1997, ordering the HSA to produce the documents, subject to an *in camera* review of any documents that the HSA included in a privilege log. The Court directed all persons involved to observe all protective orders previously issued in the case. The HSA was ordered to produce the documents at a deposition to occur no later than January 9, 1998.

On December 23, 1997, the Court received a letter from Attorney Richard Scarola informing the Court that the HSA had retained him to represent it in this matter. The Court gave Mr. Scarola permission to file a Motion for Reconsideration by January 12, 1998. The motion was timely filed by the HSA. In the meantime, the plaintiffs filed a Motion for Other Orders and/or Sanctions to compel the HSA's compliance with the December 22, 1997 order. The plaintiffs complained that Ms. Bondy had refused to attend a deposition on January 9, 1998 or to produce the requested documents by that date.

II. Discussion

A. Motion for Other Orders and/or Sanctions

As to the plaintiffs' Motion for Other Orders and/or Sanctions, the Court will not sanction the HSA for a misunderstanding caused by inconsistent court instructions. The December 22, 1997 order directed the HSA to produce the requested documents by January 9, 1998. However, the Court told the HSA's counsel that he should file a Motion for Reconsideration by January 12, 1998. Under these circumstances, it would be patently unfair for the Court to sanction the HSA for failing to produce the documents before the Court ruled upon the Motion for Reconsideration. The plaintiffs' Motion for Other Orders and/or Sanctions is, therefore, denied.

B. Motion for Reconsideration

***2** The plaintiffs served a subpoena for a deposition and production of documents on the HSA pursuant to FED.R.CIV.P. 45. The Court granted the plaintiffs' Motion to Compel production over the objections of the HSA. In reconsidering that order, the Court must take into account the liberal discovery policy evinced by the Federal Rules of Civil Procedure. *Herbert v. Lando,* 441 U.S. 153, 177, 99 S.Ct. 1635, 1649, 60 L.Ed.2d 115 (1979); *Schlesinger Investment Partnership v. Fluor*

Corp., 671 F.2d 739, 742 (2d Cir.1982). This policy serves many important functions, including, *inter alia,* enabling parties to obtain the requisite factual information to prepare for trial. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 756 F.2d 230, 236 (2d Cir.1985). On the other hand, the Court recognizes that a search for information that is purely speculative can give rise to an abuse of the discovery process. Keeping this balance in mind, the Court will consider each of the plaintiffs' requests for production of documents seriatim.

> 1. All written documents in his/her possession concerning the provision of care, treatment and/or community placement to Southbury Training School residents.

The HSA objects that this request is over broad and unduly burdensome. Furthermore, the HSA argues, the information sought contains privileged information because the HSA opposes the relief the plaintiffs seek in this lawsuit against STS. Motion for Reconsideration at 8. The HSA agrees that the conditions at STS are central to the plaintiffs' claims; however, the HSA contends that the concerns of HSA members for their relatives and friends who are residents of STS are not evidence of the conditions at the school. Motion for Reconsideration at 9.

The plaintiffs respond that the requested documents are expected to demonstrate, *inter alia,* that state officials knew of poor conditions at STS and that the DMR allowed the views of certain parents regarding community placement to dictate the school's community placement policy. Memorandum in Opposition at 7–8.

The Court finds that the production of documents containing information related to the care, or treatment of STS residents or community placement is reasonably calculated to lead to the discovery of admissible evidence. *See* FED.R.CIV.P. 26(b)(1). Because the plaintiffs' claims are based on allegedly poor conditions at STS and inappropriate denial of community placement, any information that the HSA has relating to the care of the STS residents or related to community placement is relevant to the plaintiffs' cause of action. The fact that the HSA disagrees with the goals of the plaintiffs is immaterial to whether or not documents in the HSA's possession are discoverable.

The Court orders the HSA to produce all documents responsive to this document production request. Any document that the HSA believes to be privileged may become part of the privilege log for *in camera* review, so that the Court can ascertain whether it is discoverable. However, the Court cautions the HSA that a document is not privileged merely because it contains information in opposition to the plaintiffs' goals.

> ***3** 2. All written documents in his/her possession concerning the condition of facilities and grounds at STS and modification or upgrading of those facilities and grounds.

The HSA objects that the requested documents are irrelevant and that it would be overly burdensome to produce these documents as they lie beyond the HSA's "core activities." Motion for Reconsideration at 8. The plaintiffs make the same response as they did for the first document production request. Memorandum in Opposition at 7–8.

The Court agrees with the plaintiffs that the requested information is relevant as it may shed light on conditions at STS as well as the state's knowledge of those conditions. The Court orders the HSA to produce these documents. The plaintiffs are directed to work with the HSA to devise the least burdensome method of production possible.

> 3. All written documents concerning the upgrading of facilities at STS to comply with ICF/MR standards.

The HSA objects to this request for the same reasons previously discussed for document production request # 2. Motion for Reconsideration at 9. The plaintiffs' response is also identical to its rejoinder to the HSA's objections to the first two document production requests previously discussed. *See* Memorandum in Opposition at 7–8.

The Court finds that information pertaining to the upgrading of facilities, for whatever purpose, is relevant to the conditions at STS, since the conditions at the school constitute an important part of the plaintiffs' claims. The Court orders the HSA to produce all documents responsive to this request.

> 4. All documents in the Home and School Association's files which have been written by its officers, board members and/or membership during the past five years to Connecticut legislators, the DMR Commissioner, the Director of STS and/or the Governor and/or his staff.

The HSA objects to this request, stating that this information is irrelevant, over broad, and may relate to private matters of STS residents and their families.

Motion for Reconsideration at 9–10. Moreover, the HSA claims that production of these documents would have a chilling effect on discussions between the family members of residents and the persons responsible for their care. *Id.* at 10. The plaintiffs argue that correspondence between parents/guardians of residents and key state officials will help determine why the DMR decided to repeat the family survey in 1996. Furthermore, the plaintiffs expect to discover why the DMR utilized only the survey results in its decision not to request funding for community placement in the 1998–99 budget. Memorandum in Opposition at 8–9.

The Court agrees with the plaintiffs that correspondence between family members of STS residents and certain state officials might lead to the discovery of admissible evidence regarding the DMR's community placement decisions. However, the request for documents is over broad as stated. First, it would require the HSA to produce all documents written to state officials by HSA members, officers, or board members, when the only relevant documents in this case are those pertaining to community placement.

***4** The request is also over broad in its inclusion of correspondence to state legislators. That correspondence is irrelevant to the plaintiffs' claims because it is the Commissioner of the DMR and, ultimately, the governor who are directly responsible for creating STS's community placement policy.

For these two reasons, the Court is narrowing the scope of the plaintiffs' document production request number 4. Therefore, the HSA is ordered to produce all documents in its files which have been written by officers, board members, and/or membership during the past five years to the DMR Commissioner, the Director of STS and/or the Governor and/or his staff, which relate in any way to community placement of STS residents.

> 5. All documents the officers, board members and/or general membership of the Home and School Association have received during the past five years from Connecticut legislators, the DMR Commissioner, the Director of STS and/or the Governor and/or his staff concerning Southbury Training School.

The HSA objects on the grounds that the requested information is irrelevant, over broad, and private. Motion for Reconsideration at 10. The plaintiffs respond that correspondence between state officials and members of the HSA may reveal why the DMR repeated the family survey in 1996 and based its decision not to request funds for community placement on those survey results. Memorandum in Opposition at 8–9.

As in the case of document production request number 4, the Court agrees that the information sought by the plaintiffs is relevant, except with respect to the state legislators. However, the request is phrased in over broad language in that it asks for all such documents. Document production request number 5 is, therefore, revised in the following manner. The HSA is ordered to produce all documents in its files which HSA officers, board members, and/or membership have received during the past five years from the DMR Commissioner, the Director of STS and/or the Governor and/or his staff, which relate in any way to community placement of STS residents.

> 6. All documents relating to surveys that have been undertaken by the Department of Mental Retardation and/or the STS Foundation, Inc. to determine the views of parents, guardians and/or STS residents concerning community placement of STS residents.

The HSA protests that this request is over broad, irrelevant, and will necessitate the production of privileged and/or private information. Motion for Reconsideration at 11. The plaintiffs assert that information relating to the surveys conducted by the DMR and the Southbury Training School Foundation ("Foundation") may shed light on why the DMR chose to essentially replicate the 1993 Foundation survey in 1996. Memorandum in Opposition at 9.

The Court believes that the plaintiffs have proffered a sufficient rationale to establish that the production of these documents is calculated to lead to admissible evidence. Information which reveals anything about why the DMR decided not to ask for funding for community placement relates to the plaintiffs' claim that STS residents are being denied the opportunity for community placement. Despite the fact that this document production request focuses on a possible link between surveys conducted by the DMR and the Foundation, rather than the HSA, the plaintiffs may receive information from the HSA that it could not get from the Foundation. Indeed, the Foundation and the HSA have such a close relationship, sharing facilities, staff, and even key decision makers, *see* Memorandum in Opposition at 2, that it is altogether possible that information about the Foundation survey and its relationship to the DMR survey may be located in the HSA's files. The Court orders the HSA to produce all documents responsive to this request.

***5** 7. All documents relating to

> investigations the Home and School Association has undertaken to determine the adequacy of programs and services and/or safety of residents at Southbury Training School.

The HSA represents that they have no documents responsive to this request. Motion for Reconsideration at 11. Obviously the HSA cannot turn over non-existent documents. However, if the HSA should become aware of any responsive documents, the Court orders the HSA to produce them to the plaintiffs. Documents which contain information about the adequacy of services at STS or the safety of STS residents are relevant to the plaintiffs' claims that the conditions at STS violate certain laws or rights of residents.

> 8. All documents which reflect correspondence with families and/or friends of STS residents relating to improving conditions at STS and/or community placement of STS residents.

The HSA objects to this request, stating that the correspondence of its members has no bearing on the conditions at STS. Also, the HSA asserts that producing these documents would be extremely burdensome because they are not organized in a manner which makes them easy to collect. Motion for Reconsideration at 12. The plaintiffs contend that information relating to parental concerns about conditions at STS and community placement is relevant since DMR Commissioner O'Meara stated that he based his decision not to request funding for community placement on the results of surveys which were intended to reflect parental concerns about, *inter alia,* community placement. Memorandum in Opposition at 10. The plaintiffs expect to discover what advice the HSA gave to parents about completing the surveys. *Id.*

Given Commissioner O'Meara's deposition testimony that he decided not to request funds for community placement based on the survey results and the role that the HSA, an organization openly opposed to community placement, plays in advising parents, this document production request is calculated to lead to the discovery of admissible evidence. The Court orders the HSA to produce all documents responsive to this request. The stringent protective orders already issued by the Court in this case will protect the privacy of the persons involved. The Court also notes that it is only correspondence relating to improving conditions at STS or to community placement which must be produced. This narrow focus should allay some of the HSA's privacy concerns.

> 9. Complete copies of the minutes of meetings held by the Home and School Association during the past four years.

The HSA objects to this request on the grounds that the minutes are irrelevant to the issues in the case, contain privileged information, and their production is unduly burdensome. Motion for Reconsideration at 12. The plaintiffs respond that the minutes will enable them to uncover any connection between the 1993 Foundation survey and the 1996 DMR survey. Memorandum in Opposition at 10.

***6** The Court agrees that this request, as formulated, is over broad and most resembles a discovery "fishing expedition" disfavored by courts. *See e.g., United States v. Nixon,* 418 U.S. 683, 699–700, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1974); *Lyeth v. Chrysler Corp.,* 929 F.2d 891, 899 (2d Cir.1991). However, minutes containing information relating to the 1993 and 1996 surveys would be relevant to plaintiff's investigation as to why the DMR failed to request funding for community placement in the 1998–99 budget. Therefore, the HSA is ordered to produce minutes which mention either the 1993 or the 1996 survey or which discuss community placement.

C. HSA's Motion for Interlocutory Appeal

In the event that the Court declines to vacate its December 22, 1997 order compelling production of the subpoenaed documents, the HSA moves the Court to certify its decision to the Second Circuit Court of Appeals for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay the Order pending appeal. Motion for Reconsideration at 3. The plaintiffs respond that the HSA does not meet the requirements under the statute for interlocutory appeal. Memorandum in Opposition at 11.

The Court may certify an order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) if each criterion of a three-pronged test is met. Certification is justified if the district court determines that an order "(1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order would materially advance the ultimate termination of the litigation...." *Telectronics Proprietary, Ltd. v. Medtronic, Inc.,* 690 F.Supp. 170, 172 (S.D.N.Y.1987).

Only "exceptional circumstances" warrant departure from the general rule that appellate review should occur only after a final judgement is entered by the trial court. *Klinghoffer v. Achille Lauro Lines, et al.,* 921 F.2d 21, 25 (2d Cir.1991)(quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 2461, 57 L.Ed.2d 351 (1978)). Indeed, the Second Circuit has admonished the

district courts to use § 1292(b) sparingly. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.,* 964 F.2d 85, 89 (2d Cir.1992).

Because the present case fails to meet each of the three requirements delineated in § 1292(b), the Court declines to certify its order for interlocutory appeal. First, there is no controlling question of law involved. It is doubtful that an incorrect refusal to vacate the order compelling the HSA to produce the subpoenaed documents would constitute grounds for reversal of a final judgment. *See Telectronics Proprietary, Ltd.,* 690 F.Supp. at 172 (explaining that a question of law is controlling if its incorrect disposition would necessitate reversal of a final judgment for further proceedings).

Moreover, there is no substantial ground for difference of opinion as to the Court's methodology in determining whether the requested documents are discoverable. The plaintiffs served the HSA with the subpoena for deposition with notice for production of documents in accordance with FED.R.CIV.P. 45(b). An objection was timely filed by the HSA as is their prerogative under Rule 45(c)(2)(B). This same rule gives the Court permission to compel production of the documents over the objections of the non-party. The Court must quash the subpoena if it requires the production of privileged information or places an undue burden on the non-party. FED.R.CIV.P. 45(c)(3)(A)(iii), (iv).

***7** The Court has determined that the production of the requested documents does not impose an undue burden on the HSA and has invited the HSA to create a privilege log so that any documents the HSA believes in good faith to be privileged may be reviewed *in camera* before they are produced. The HSA may disagree with the Court's decision; however, there is no controversy within the Second Circuit regarding the correct technique to employ in deciding whether a non-party must produce subpoenaed documents. *Cf. German v. Federal Home Loan Mortgage Corp.,* 896 F.Supp. 1385, 1399 (S.D.N.Y.1995)(holding that there was no "substantial ground for difference of opinion" as to the proper methodology courts should apply in determining whether a statute confers a cause of action under § 1983).

Finally, an interlocutory appeal on this issue would not advance the termination of the litigation. Even if the appellate court reversed the Court's order requiring production of the documents, it is unlikely that the plaintiffs would withdraw from the litigation since the underlying issues would not have been resolved. Therefore, certification in this case will not "avoid protracted and expensive litigation." *Id.* at 1398.

In summary, the Court finds that its order compelling production of the subpoenaed documents is not a good candidate for certification for interlocutory appeal pursuant to § 1292(b). None of the criteria for certification established by the statute are implicated by the Court's order. Therefore, the HSA's request for certification for interlocutory appeal is denied.

III. Conclusion

For the reasons discussed above, the HSA's Motion for Reconsideration and to Vacate Order (Doc. No. 291) is granted to the extent that the Court's order of December 22, 1997 compelling production of the subpoenaed documents is modified as follows:

1. As to the plaintiffs' document production request number 4, the HSA shall produce all documents in its files which have been written by its officers, board members and/or membership during the past five years to the DMR Commissioner, the Director of STS and/or the Governor and/or his staff, which relate in any way to community placement of STS residents.

Similarly for document production request number 5, the HSA shall produce all documents in its files which its officers, board members and/or membership have received during the past five years from the DMR Commissioner, the Director of STS and/or the Governor and/or his staff, which relate in any way to community placement of STS residents.

2. As to the plaintiffs' document production request number 9, the HSA shall produce minutes from its meetings which mention either the 1993 or the 1996 survey or which discuss community placement.

3. The HSA shall produce the documents noticed in the plaintiffs' subpoena dated October 15, 1997, as modified by this ruling, at a deposition to be held no later than February 20, 1998.

***8** The December 22, 1997 order remains in effect in all other respects.

SO ORDERED.