

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

REGSCAN, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
DEAN MARK BREWER, et al.	:	NO. 04-6043

Baylson, J.

September 5, 2006

MEMORANDUM

Plaintiff has moved for Reconsideration of the Summary Judgment decision issued in this case on February 17, 2006. The Motion for Reconsideration (Doc. No. 63) was filed on February 22, 2006, and Defendants' response was submitted on March 8, 2006. The Court withheld ruling on the motion pending the United States Supreme Court's decision in Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006).

I. Plaintiff's Motion for Reconsideration

Essentially, Plaintiff sets forth two bases for reconsideration. First, it argues that the Memorandum and Order issued by this Court on August 23, 2005 permitted Plaintiff to develop supporting facts for its RICO claims through discovery. See Regscan, Inc. v. Brewer, 2005 WL 2039180, at *4 n.1 (E.D. Pa. Aug. 23, 2005). Plaintiff contends that it has not had the opportunity to conduct discovery on this issue and that the Court, in its February 17, 2006 summary judgment decision, should not have determined that the capacity of the parties was identical for preclusion purposes. Specifically, Plaintiff maintains that Dean Brewer, Kevin Spence, Bruce Regan, and Gary Tabbert (the "Individual Defendants") acted on behalf of Citation, Inc. *before* they were ever employed by the company. Thus, according to Plaintiff, the

Court's conclusion as to capacity was not well-founded. Plaintiff contends that the discovery provided for in the August Memorandum and Order would allow it to further develop its argument as to capacity and potentially change the outcome of the Court's recent ruling.

Plaintiff's second line of argument focuses on the Lycoming County court's denial of Regscan's attempt to amend the complaint to include RICO claims. Plaintiff asserts that this denial was merely a procedural action and was not a final decision on the merits as required under Pennsylvania preclusion doctrine.

II. Defendants' Response

In their response, Defendants essentially adopt three lines of argument. First, they contend that aside from a few perfunctory complaints about a lack of discovery, Plaintiff opposed summary judgment in this case on substantive grounds. Defendants argue that the Motion for Reconsideration should fail because Plaintiff did not seek to invoke F.R. Civ. P. 56(f) in its opposition and did not submit affidavits supporting any claim of lack of information. Defendants maintain that Plaintiff's decision to oppose summary judgment on substantive grounds prevents it from seeking relief on grounds of lack of discovery. Defendants cite two cases in support of their position. See Bradley v. United States, 299 F.3d 197, 206–07 (3d Cir. 2002); Sitkoff v. BMW of N. Am., Inc., 1995 WL 696894, at *1 (E.D. Pa. Nov. 20, 1995). Defendants also cite case law holding that failure to invoke Rule 56(f) at the opposition stage results in waiver. Radich v. Goode, 886 F.2d 1391, 1393 (3d Cir. 1989).

Second, Defendants argue that the footnote from this Court's August Order concerned the issue of capacity in the context of the RICO claims, and the language was essentially a warning to Plaintiff that the capacity issue could be a significant barrier moving forward. Defendants

contend that the issue is distinguishable, because the summary judgment decision of February 17, 2006 dealt with capacity in the context of res judicata and concerns the identity of the quality or capacity of the parties suing or being sued. Moreover, Defendants note that Plaintiff, in its Motion for Reconsideration, admits that Defendant Brewer “acted on behalf of” Citation and that Defendant Spence was “involved” with the company. See Pl’s Mot. for Recons. at 2, 4. Even if discovery did bear out the fact that these individuals acted on behalf of, or were involved with, Citation prior to their official employment with the company, these facts would not necessarily alter the Court’s determination as to the identity of capacity for preclusion purposes. Defendants argue that the facts on which Plaintiff seeks additional discovery appear to support Defendants’ position on the issue of privity in the context of res judicata.

Finally, Defendants maintain that Plaintiff is already in possession of a significant amount of information in this case. In fact, Defendants assert that Plaintiff has deposed all of the Individual Defendants in the state court case and those depositions totaled more than twenty hours and resulted in over 800 pages of transcript.

III. Discussion

The Court will turn first to the characterization of the state court decision as procedural or merits-based. Though the denial of Plaintiff’s Motion to Amend was merely a one-sentence order, the parties have acknowledged that there was argument on the record before the state court judge. In addition to the order denying the addition of RICO claims, the Lycoming County court also issued a lengthy opinion imposing sanctions on Plaintiff’s counsel for signing, filing, and advocating the Motion to Amend. See Order on Mot. to Amend (Ct. of Comm. Pleas for Lycoming Cty. Aug. 31, 2004) (located at Ex. I to Defs’ Mot. for Summ. J.). The state court

determined that Plaintiff's motion "contain[ed] accusations so scurrilous as to rise to the level of harassment of both the principals of Defendant Citation as well as counsel." Id. at 3. The court continued, noting that "the claims in the Motion to Amend are not warranted by existing law." Id. The court also concluded that it did not, under the circumstances, find "any nonfrivolous argument for the extension or modification of existing law," nor did Plaintiff's counsel provide the court with any "basis on which to find that he had evidentiary support for the factual allegations made in the Motion to Amend . . ." Id. at 3-4. This Court therefore concludes from all the relevant facts, but particularly based on the quotations from the order imposing sanctions, that the motion to include RICO counts was denied on the merits and was not "procedural" as Plaintiff contends.

As to discovery, the Court has held numerous discovery conferences in this case, and granted one of Plaintiff's requests for additional discovery. See June 28, 2006 Order (extending discovery deadline to July 13, 2006 for purposes of scheduling depositions). Plaintiff has had adequate discovery on all issues presented. The deposition of each of the Individual Defendants in the state court case should have been sufficient to inquire into any capacity and/or timing issues. Defendants' argument concerning Rule 56(f) is also convincing. Plaintiff certainly could have attempted to raise the discovery issue through affidavit but instead chose to respond to the substance of the summary judgment motion. Finally, Defendants' distinctions concerning the notion of capacity in the RICO and res judicata contexts is well-taken. The footnote from the August Order was meant to address the potential difficulties Plaintiff might encounter in pursuing the RICO claims, and the language does not require reconsideration of the Court's recent summary judgment decision.

The Court also concludes that Anza does not directly address the issues in this case, nor does it show that the Court's Order on the RICO claims was erroneous.

An appropriate Order follows.

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ORDER

AND NOW, this 5th day of September, 2006, for the reasons stated in the foregoing Memorandum, Plaintiff's Motion for Reconsideration (Doc. No. 63) is DENIED.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.