

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

UNITED TRADING & SHIPPING, INC.	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	NO. 94-4742
v.	:	
	:	
COMMONWEALTH INSURANCE	:	
COMPANY and TRADERS, LTD.	:	
Defendants.	:	

GREEN, S.J.

September 10, 1999

MEMORANDUM and ORDER

Presently before the Court is Plaintiff, United Trading & Shipping Inc.’s Motion *In Limine* and For the Imposition of Costs and Attorneys Fees. Defendant presented opposition to this motion at the hearing on damages in the above-captioned matter, held May 13, 1999. For the reasons set forth below, the Plaintiff’s Motion *In Limine* and for the Imposition of Costs and Attorneys Fees will be granted.

FACTUAL AND PROCEDURAL HISTORY

United Trading and Shipping, Inc.(“United Trading”) filed suit against Commonwealth Insurance Company(“Commonwealth”) and Traders, Ltd., (Traders) to enforce the obligation of Commonwealth under a bond it issued as surety for an international sugar transaction between United Trading and Traders for the sale of 100,000 metric tons of sugar.

On December 23, 1996, Judge Rendell, then of this Court, granted United Trading’s motion for summary judgment against Commonwealth and denied Commonwealth’s cross motion for summary judgment. On December 27, 1996, the Clerk of Court entered judgment in favor of United Trading and against Commonwealth. However, the Order did not specify the amount of damages and final judgment was not entered. Commonwealth then moved for

reconsideration and to vacate judgment. On May 23, 1997, Judge Rendell denied both motions.

United Traders subsequently moved for final judgment and to fix damages after obtaining a writ of execution against Commonwealth. Commonwealth opposed both motions and also moved to strike the writ of execution. Because I determined that the amount of damages remained in dispute after Judge Rendell's entry of judgment against Commonwealth, I denied the motion for final judgment, granted Commonwealth's motion to strike the writ of execution, and denied the motion to fix damages. At the same time, I ordered a hearing to determine and fix damages.

Approximately two years after Judge Rendell's denial of Commonwealth's motion to reconsider, Commonwealth filed a new motion to reconsider the entry of summary judgment against it and also moved to reopen the record to allow further discovery. On April 22, 1999, I denied both motions and scheduled a hearing on the issue of damages.

In response to the Order requiring a hearing on damages, counsel for the Defendant contacted the Court by letter to inform it that Leonard Maltese, an expert witness obtained by Defendant to assess damages in this case, was under a doctor's care and would not be available to testify at the hearing on damages before the week of May 10, 1999. The hearing on damages was subsequently scheduled for May 13, 1999.

Defendant then scheduled a videotaped deposition of Mr. Maltese for May 11, 1999 in New York City. Counsel for the Plaintiff received notice of the scheduled videotaped deposition on May 6, 1999. After objecting to the taking of the deposition, counsel for the Plaintiff attended the deposition in New York City. During the deposition, Mr. Maltese admitted that he was able to travel to Philadelphia for the hearing on May 13, 1999, that he did not receive a subpoena to testify as a witness at that hearing, and that his place of business is at 130 Cedar Street in New York City, a location within 100 miles of the United States Courthouse in Philadelphia. (Dep. of Leonard Maltese at pp. 13-14). After the videotaped deposition, but before the hearing,

Plaintiff filed a Motion *In Limine* to preclude the Defendant's use of the deposition of Leonard Maltese. Defendant presented opposition to the motion during the hearing on damages. Because the Court reserved ruling on the Motion *In Limine* until after the hearing, the deposition testimony of Leonard Maltese was not presented during the hearing.

DISCUSSION

In its Motion *In Limine*, Plaintiff asserts that this Court must preclude Defendant from using the May 11, 1999 deposition of Leonard Maltese because the taking of such deposition violated the Court's Order of April 22, 1999 and, in the alternative, cannot be used under Fed.R.Civ.P. 32(a)(3). A review of the April 22, 1999 Order reveals that the Defendant's Motion to Reopen the record to allow further discovery was denied on the ground that Defendant had not established that new evidence necessitated reopening of the record. The evidence the Defendant characterized as new in its motion to reopen was actually available for discovery at the onset of the case. Therefore, the scheduling order issued by Judge Rendell (Docket Entry #9), was not modified and discovery remained closed as of April 30, 1996. Since discovery ended on April 30, 1996, Defendant was precluded from taking a discovery deposition in May 1999.

At the hearing on damages, Defendant argued that the deposition of Leonard Maltese was not a discovery deposition, but was a trial deposition, taken because the witness was unavailable to appear at the May 13, 1999 hearing on damages. Plaintiff contends, however, that even if the deposition was taken for use at trial, Fed. R. Civ. P. 32(a) precludes its use at the damages hearing.

According to Rule 32 (a)(3) of the Federal Rules of Civil Procedure¹, a deposition may be

¹ Rule 32(a)(3) reads in relevant part:

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

used at a hearing if at least one of five exceptions are applicable: (1) the witness is dead; (2) the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; (3) the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (4) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (5) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. Fed. R. Civ. P. 32(a)(3). None of these exceptions apply in the instant case.

Because discovery was closed at the time Defendant noticed the deposition of Mr. Maltese and the request to reopen discovery was denied by Order of this Court on April 22, 1999, and none of the exceptions under Rule 32 (a) apply to allow the admission of the videotaped deposition of Leonard Maltese in the instant case, Plaintiff's Motion *In Limine* will be granted.²

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- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
- (A) that the witness is dead; or
 - (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
 - (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
 - (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
 - (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

² In his deposition testimony, Leonard Maltese concludes that the sugar specified in the contract between United Trading and Traders cannot exist and therefore has no value. Defendant sought to present this testimony at the hearing to show that United Trading should not recover damages pursuant to the performance bond. Even if the videotaped deposition met the exceptions outlined in Fed.R.Civ. P. 32(a), however, the testimony of Leonard Maltese would not be admissible at the hearing on damages because the subject matter of the deposition focuses on

Furthermore, because the Plaintiff timely objected, but later appeared in New York City for the deposition of Mr. Maltese, at substantial financial expense, \$1,576.40 will be awarded to Plaintiff to cover expenses and attorneys' fees incurred in conjunction with the taking of the deposition.

An appropriate Order follows.

liability, an issue previously decided by Judge Rendell at summary judgment.

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ORDER

AND NOW, this 10th day of September 1999, upon consideration of the Plaintiff's Motion *In Limine* and Defendant's response thereto, **IT IS HEREBY ORDERED** that the Motion *In Limine* is **GRANTED**.

IT IS FURTHER ORDERED that Defendant, Commonwealth Insurance **SHALL** pay Plaintiff's reasonable costs, expenses and attorneys fees of \$1,576.40, incurred as a result of the scheduling and taking of the deposition of Leonard Maltese.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.