

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1999-009334

11/15/2004

HONORABLE MARK W. ARMSTRONG

CLERK OF THE COURT
C. Danos
Deputy

FILED: 11/16/2004

ALLAN WACHTER, et al.

DAVID C TIERNEY
JAMES W ARMSTRONG

v.

JOHN LEZDEY, et al.

DAVID PAUL BROOKS

DOUGLAS J ROVENS
660 SOUTH FIGUEROA STREET
SUITE 1910
LOS ANGELES CA 90017

UNDER ADVISEMENT RULINGS

These matters were taken under advisement after the hearing held November 1, 2004. The Court has considered the following motions and arguments of counsel:

- Defendant's Motions in Limine (6).
- Plaintiff's Cross-Motion for Judgment Pursuant to the Fugitive Disentitlement Doctrine.
- Defendant's Motion to Testify at Trial by Videoconference.

Defendant's Motions in Limine (6)

IT IS ORDERED denying Defendant's Motion in Limine No. 1 to Exclude Evidence of Preliminary Injunction, the Court finding that the probative value of such evidence is not substantially outweighed by its prejudicial effects, in light of evidence that Defendant has

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violated the injunction. The Court can adequately explain to the jury the difference in burdens of proof.

IT IS ORDERED granting Defendant's Motion in Limine No. 2 since Defendant was not a party to the permanent injunction.

IT IS ORDERED granting Defendant's Motion in Limine No. 3 for the same reason.

IT IS ORDERED denying Defendant's Motion in Limine No. 4, the Court finding that the probative value of such evidence is not substantially outweighed by its prejudicial effects.

IT IS ORDERED denying Defendant's Motion in Limine No. 5 for the reasons advanced by Plaintiffs.

IT IS ORDERED granting Defendant's Motion in Limine No. 6, except for statements of a party opponent or alleged co-conspirators, or conduct that gave rise to a criminal conviction or specific finding by this Court made after an evidentiary hearing.

Plaintiff's Cross-Motion for Judgment Pursuant to the Fugitive Disentitlement Doctrine

The Court agrees with Defendant that this doctrine has not been used in Arizona, and that it should be used sparingly and only in very limited circumstances. The Court agrees with Plaintiffs that this case presents such circumstances. The 40-folder file and pronouncements of Judges Katz and Burke speak for themselves. Briefly, Judge Burke found that Defendant testified falsely and obstructed justice in his November 22, 1999 deposition (Minute Entry dated 10/12/2000). Judge Burke further found Defendant in contempt twice – in the Minute Entry dated October 12, 2000, and in an order dated February 12, 2002. Judge Katz found Defendant in contempt a third time in a Minute Entry dated September 3, 2003, and ordered Defendant to self-surrender to the Maricopa County Sheriff's Office by October 28, 2003, an order that Defendant disobeyed. Finally, Judge Katz issued a bench warrant for Defendant's arrest on November 10, 2003, finding that Defendant had not purged his contempt or self-surrendered as ordered. Defendant currently is a fugitive from such arrest warrant.

In other words, this is an extreme case warranting application of the doctrine based on a fairly simple premise: To protect and preserve the integrity of the judicial system, Defendant should not be permitted to press claims in the Court while openly defying its authority. At this time, the Court is not willing to further apply the doctrine to Defendant's defense of Plaintiffs' claims.

IT IS THEREFORE ORDERED granting the motion with respect to Defendant's Counterclaim only and dismissing Defendant's Counterclaim with prejudice.

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Defendant's Motion to Testify at Trial by Videoconference

The Court would note initially that this motion was filed before Defendant's fall on August 7, 2004. The Court has considered the declaration of Dr. Mark Hepp, dated July 21, 2004. The Court has also considered the declaration of Dr. Achilles Papavasilliou, dated October 17, 2004, the Progress Note dated October 15, 2004, and X-ray report dated October 10, 2004 (These records were included with a pleading filed October 21, 2004, entitled Supplemental Brief and Declaration of Dr. Achilles Papavasilliou in Support of John Lezdey's Motion to Further Continue Trial or Testify at Trial by Videoconference. Plaintiffs had not received this pleading at the time of the last hearing and have not had an opportunity to respond to it.).

Prior to the fall, Defendant was able to travel back and forth between Cape Cod and Florida by train. After the fall, Defendant was diagnosed with an L4 fracture that is healing. According to the Progress Note of nearly a month ago, "[w]ill get MRI and xrays (sic). Continue brace for 6 weeks."

The Court is not persuaded that Defendant could not travel to Arizona by train or other land conveyance to testify at his trial that is set to begin November 30 and estimated to continue through most of December. He could come at any time during that time period and the Court would allow his testimony, including out-of-turn and over several days. In light of the history of this case, Defendants and the jury should be able to evaluate Defendant's testimony in person.

IT IS THEREFORE ORDERED denying Defendant's Motion to Testify by Videoconference.

IT IS FURTHER ORDERED denying Defendant's Motion to Continue Trial of this five-year-old case, unless all parties agree.

IT IS FURTHER ORDERED that any further motions to testify by videoconference or continue trial shall contain a declaration by John Lezdey as to his current residence and condition, and include reports of the most recent X-rays and MRI films taken after October 15, 2004. Additionally, Defendant's counsel shall simultaneously provide Plaintiffs' counsel with copies of the actual X-rays and MRI films for evaluation by their experts if desired.

LATER:

After this minute entry was prepared, counsel stipulated to continue the trial date, and the Court will so order upon receiving the formal written stipulation and order. This renders Defendant's Motion to Testify by Videoconference or Continue Trial moot for the time being, since both are based on Defendant's health, which may change. However, the Court has left the

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original language of the minute entry so the parties can see the Court's thought process on this issue for future reference.

/s/ Judge Mark W. Armstrong

The Honorable Mark W. Armstrong
JUDGE OF THE SUPERIOR COURT