

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,

Plaintiffs,

vs.

RINGLING BROTHERS AND BARNUM
& BAILEY CIRCUS, et al.,

Defendants.

.
.
. Docket No. CA-03-2006
.
.
. Washington, D.C.
. Tuesday, January 11, 2005
. 10:40 a.m.
.

TRANSCRIPT OF A HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs: KATHERINE A. MEYER, Esquire
KIMBERLY OCKENE, Esquire
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Proceedings recorded by machine shorthand, transcript produced
by computer-aided transcription.

P R O C E E D I N G S

1
2 THE CLERK: Civic Action 03-2005, American Society
3 for the Prevention of Cruelty to Animals, et al. versus
4 Ringling Brothers and Barnum and Bailey Circus, et al.

5 would counsel please identify yourselves for the
6 record.

7 MS. MEYER: Katherine Meyer and Kim Ockene for the
8 plaintiffs.

9 MR. GULLAND: Good morning, Your Honor. I'm Gene
10 Gulland for the defendant, Ringling Brothers. And my colleague
11 Josh Wolson is with me.

12 THE COURT: Good morning, counsel.

13 Let me invite principal counsel to the podium.

14 This is a status hearing. You've been very quiet, so
15 I assume you've been working in resolving whatever issues you
16 had to resolve, I assume.

17 You haven't settled the case, though, have you?

18 MS. MEYER: No, Your Honor.

19 MR. GULLAND: We've not.

20 MS. MEYER: At this point, Your Honor, while we
21 continue to engage in some negotiations with respect to
22 plaintiffs' concerns about the defendants' responses to our
23 discovery, it's clear that we've reached an impasse on certain
24 issues. So plaintiffs are prepared to go forward with a motion
25 to compel. And our current plan is to file that within the

1 next two weeks. We were going to suggest two weeks from today,
2 which would be January 25.

3 THE COURT: All right. That's fine.

4 How much time do you need, counsel, to file a
5 response to a motion that you haven't seen?

6 MR. GULLAND: I think if we had two weeks, that would
7 be adequate.

8 THE COURT: That's fine.

9 And maybe another week for a reply?

10 MS. MEYER: That would be fine, Your Honor.

11 THE COURT: All right. Two weeks from the 25th of
12 January. That will take us to February 8. Why don't I give
13 you until the 18th.

14 Will two weeks be enough time?

15 MR. GULLAND: Now that you mention it, if we could
16 have three. The reason for that is the last two weeks of
17 January --

18 THE COURT: I don't have any problems with that.

19 The 25th for the filing of the motion. Three weeks
20 thereafter would be the 15th of February. Why don't I give you
21 until the 28th, the end of the month, to file a reply.

22 MS. MEYER: That's fine, Your Honor.

23 THE COURT: I'm not sure whether it will be a hearing
24 or not. Give me a chance to at least review the motion, the
25 response and reply. I normally have a lot of questions, but

1 sometimes I can resolve pleadings on the pleadings, so there
2 may not be a hearing in this case. So don't save your best
3 argument for a hearing.

4 So are you able to proceed with discovery
5 notwithstanding the filing of that motion or not?

6 MS. MEYER: We're certainly able to proceed with
7 discovery, Your Honor. The only problem is, in terms of giving
8 you a new pretrial schedule, we need the answers to some of the
9 discovery that's in dispute in order to agree to a discovery
10 cut-off. Because, obviously, some of the discovery that we
11 seek in this case may lead to additional deponents, et cetera.
12 In addition, we need certain records that we want to give to
13 our expert witnesses.

14 THE COURT: So are you suggesting that discovery has
15 to then be essentially stayed?

16 MS. MEYER: No. We're fine going forward. I'm just
17 saying, we haven't been able to give you a date for when
18 discovery should be cut off, that's all.

19 THE COURT: That's fine. I don't have any problems
20 with that.

21 MR. GULLAND: We have one potential problem. The
22 chief plaintiff, the only plaintiff who has standing in the
23 case, according to the D.C. Circuit, we want to depose. And
24 we're told we're not allowed to depose that witness until the
25 discovery issues are resolved. We don't see the relevance of

1 that.

2 As I understand it, the chief problem is they are
3 concerned that we may have information about this witness'
4 background that would be used for impeachment purposes in a
5 deposition and I want to get that in advance to eliminate the
6 potential of surprise and we don't think that's fair.

7 THE COURT: So are you referring to, what, the CEO of
8 the plaintiff?

9 MR. GULLAND: We're talking about Mr. Ryder, Tom
10 Ryder.

11 THE COURT: There's not been a motion filed for a
12 protective order. Why should his deposition be protected at
13 this point?

14 MS. MEYER: Your Honor, there hasn't even been a
15 notice of a deposition. We haven't received a notice of
16 deposition. We haven't received a single request to make him
17 available for a deposition.

18 The reason this came up, Your Honor, is one of our
19 discovery requests is we said give us everything you have on
20 Tom Ryder in your files.

21 THE COURT: Before he's deposed?

22 MS. MEYER: We didn't raise it before he was deposed.
23 They didn't give us a single document concerning Mr. Ryder in
24 their initial discovery responses. They gave us absolutely
25 nothing. So we said does that mean you don't have anything.

1 They didn't claim a privilege for anything.

2 So we've been trying to get to the bottom of, is it
3 that you don't have anything, you're claiming a privilege
4 because it's not in your privilege log, what's the story. And
5 we get cryptic responses. And our position is, even though we
6 haven't received a notice for his deposition, we need to know
7 what you have on him before we're going to make him available
8 for a deposition.

9 THE COURT: And they have not said that they don't
10 have anything on him?

11 MS. MEYER: Correct.

12 THE COURT: What was the response to the precise
13 request for production of documents?

14 MS. MEYER: Zero, nothing, we have no records
15 concerning Mr. Ryder.

16 THE COURT: I mean, question number five just blank?

17 MS. MEYER: That's right.

18 THE COURT: Nothing exists, didn't say that?

19 MS. MEYER: No, they don't say that, Your Honor.

20 THE COURT: Oversight? Did you go on to number six
21 and overlook five?

22 MR. GULLAND: We said that we'll give them all the
23 employment records and that sort of stuff that we have about
24 Mr. Ryder.

25 MS. MEYER: They haven't, Your Honor. They haven't

1 given us a single document.

2 THE COURT: wait a minute.

3 Are there documents that your client maintains
4 there's a privilege for regarding this particular witness?

5 MR. GULLAND: As I said, there's some documents that
6 we think refer to the background completely unrelated to his
7 employment with our client that could serve as impeachment with
8 Mr. Ryder. It's true, we haven't noticed him for a deposition
9 yet because we have been told specifically in writing and
10 orally by the plaintiffs that they're not going to produce him.
11 And I didn't notice a deposition until we thrashed this out.

12 THE COURT: why wouldn't they be entitled to
13 potential impeachment material pursuant to a request for
14 production of documents? If you have, whatever it is, if it's
15 not privileged, why wouldn't they be entitled to that upon
16 request?

17 MR. GULLAND: Some of it would be privileged in the
18 sense that it's documentation that counsel has gathered, not
19 part of our documents maintained in the ordinary course of
20 business, that would be work product.

21 MS. MEYER: Not listed in their privilege log, Your
22 Honor. Not a single document is listed in their privilege log
23 or has been provided to us. Their position so far, as far as I
24 can tell, Your Honor, is that the documents concerning Mr.
25 Ryder are not responsive to our document production request.

1 Now, I don't know why that would be, but they haven't given us
2 any.

3 THE COURT: Your document request, let me guess, is
4 any and all?

5 MS. MEYER: We said, yes, we would like all the
6 records you have on Mr. Ryder, yes, who worked there for two
7 and a half years and is the main plaintiff in our case, we'd
8 like to know what you have on him. And their answer was zip.
9 They didn't give us anything, they didn't claim a privilege for
10 anything. And we said do you want to stipulate that you don't
11 have anything. And the answer was, no, they don't regard
12 anything they have on him as responsive. This is the first
13 time I've heard from Mr. Gulland that, oh, yes, they do regard
14 certain records as responsive, but covered by a privilege.
15 It's not in their privilege log.

16 THE COURT: You two are doing exactly what you're
17 supposed to be doing without me present, discussing this issue.
18 So I'm going to tell you to finish your discussion. And if you
19 can't resolve it, then make that part and parcel of your
20 motion.

21 MS. MEYER: We will, Your Honor.

22 THE COURT: All right. What else can we talk about?

23 I saw an interesting documentary the other evening on
24 TV about heroic elephants and the significant role the
25 elephants are playing vis-a-vis the Tsunami disaster. It was a

1 farfetched thought. I do have a sense of humor, but I'm
2 completely serious about this. It was a farfetched thought at
3 that point. I said, gee, what could trained elephants lend to
4 this horrible situation, if anything?

5 I mean, how many elephants does Ringling Brothers
6 own?

7 MR. GULLAND: I think the answer to that is in the
8 40s.

9 THE COURT: That's all, really? Down from what?
10 Hundreds, I assume, at one point.

11 MR. GULLAND: I don't think Ringling ever had that.
12 many, but they have about on the order of 40 elephants.

13 THE COURT: Again, I do have a sense of humor, but
14 I'm really dead serious about this. Could those elephants be
15 of any assistance over there?

16 MR. GULLAND: I don't know the answer to that.

17 THE COURT: I don't know how you would get them there
18 anyway. I mean, that's one thought that occurred to me, how
19 would you get them there. But they're trained elephants.
20 Elephants can go places bulldozers can't go.

21 MR. GULLAND: They can go between the trees in ways
22 that vehicles cannot.

23 THE COURT: I don't know if either of you saw it or
24 not, but it was very interesting.

25 MR. GULLAND: I dare say that the plaintiffs would

1 say that the ways in which those elephants are used would
2 violate the Endangered Species Act, even in Sri Lanka.

3 THE COURT: I shared this thought with a former law
4 clerk and that's the exact same response, well, Judge, do you
5 know what, that sounds like a great idea, but getting them
6 there is problematic. I don't know. Probably so, I guess. I
7 don't know.

8 Maybe you can send them back over there to help out.
9 And then if they ever reentered this country again, they would
10 reenter this country pursuant to federal regulations in place.
11 I don't know. Maybe it's farfetched, but it certainly was not
12 humorous. I was amazed at the story.

13 MS. MEYER: It is amazing. Also, the fact that they
14 felt the vibrations of the Tsunami before the humans.

15 THE COURT: Absolutely.

16 There's probably no way to get them over there. Your
17 client wouldn't want to part with those elephants anyway.

18 MR. GULLAND: I don't know the answer to the
19 possibility of that. It's an interesting suggestion.

20 THE COURT: It is interesting. I'm just sharing a
21 thought with you, but I'm dead serious about it.

22 All right. What else can we talk about?

23 MS. MEYER: I think that's it, Your Honor.

24 THE COURT: We can't talk about anything else? Well,
25 it's good to see everyone.

1 I should schedule another status hearing. I'm going
2 to take a hard look at your motion. And maybe what I should do
3 is try to resolve it before -- well, certainly look at it as
4 soon as it becomes ripe. Maybe schedule a status hearing for
5 the latter part of March. And I'll either let you know that
6 there will be a hearing on that motion at that time or I will
7 have resolved it and we'll move on to something else.

8 MS. MEYER: Could we do it sooner than that, sort of
9 mid March, Your Honor?

10 THE COURT: You're cutting into my time, which
11 lawyers always do. I'm giving you this big briefing schedule
12 that goes through the end of February and now you don't want to
13 give me 24 hours to read the motions.

14 MR. GULLAND: From my point of view, it's something
15 of a compromise, the week of the 21st of March.

16 MS. MEYER: When is Easter?

17 THE COURT: Good Friday is the 25th. Easter is the
18 27th.

19 MS. MEYER: If we do it before then, Your Honor,
20 that's fine.

21 THE COURT: May I suggest the 24th of March?

22 MS. MEYER: That's fine.

23 MR. GULLAND: That's fine with us, Your Honor.

24 THE COURT: All right. The 24th at 11:00.

25 And I'll let you know if I'm going to convert that

1 status hearing to a hearing on the pending motion.

2 Actually, just a minute. Do you know what? That's a
3 frantic period of time because we're still under the auspices
4 of the Biden Bill, the six month motions reporting period. And
5 the last couple of weeks prior to the expiration reporting
6 period are very, very hectic.

7 So I think what I want to do is to move it to the
8 first full week in April, April 8, at 11:30.

9 MR. GULLAND: That's fine with us.

10 THE COURT: That will be a status hearing or either a
11 hearing on the pending motion. That will give me more than
12 enough time to focus on your motion. I can't tell you how
13 hectic matters are during the last two weeks of a reporting
14 period.

15 All right. Thank you.

16 If there is any interest on my thought, let me know.
17 There probably isn't. I mean, I don't know how you would get
18 the elephants over there. I have no idea. But they're true
19 heroes over there in Sri Lanka.

20 MR. GULLAND: It's remarkable.

21 THE COURT: It is remarkable. Have a nice day.

22 (The hearing concluded at 10:55 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Elaine A. Merchant

ELAINE A. MERCHANT, RPR, CRR

official Court Reporter