

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICAN SOCIETY FOR THE Docket No. 03-2006
PREVENTION OF CRUELTY
TO ANIMALS, ET AL,
Plaintiffs,
v. Washington, D.C.
October 15, 2010
1:00 p.m.
FELD ENTERTAINMENT, INC.,
Defendant.

AND

FELD ENTERTAINMENT, INC., Docket No. 07-1532
Plaintiffs,
v.
AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY
TO ANIMALS, ET AL,
Defendants.

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STATUS HEARING

*BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE*

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:00 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to
4 order. Civil Action 03-2006, American Society for the
5 Prevention of Cruelty to Animals, et al versus Feld
6 Entertainment, Inc. and 07-1532, Feld Entertainment, Inc.
7 versus American Society for the Prevention of Cruelty to
8 Animals, et al. Would counsel please identify yourselves for
9 the record.

10 MR. GLITZENSTEIN: Good afternoon, Your Honor. Eric
11 Glitzenstein on behalf of the Plaintiffs in the ASPCA versus
12 Feld case.

13 THE COURT: All right. Good afternoon.

14 MR. BRAGA: Good afternoon, Your Honor. Stephen
15 Braga on behalf of the nonlawyer defendants in the RICO case.

16 THE COURT: Counsel.

17 MS. STEEL: Good afternoon, Your Honor. I'm Laura
18 Steel. I'm here on behalf of the lawyer defendants in the
19 RICO case.

20 THE COURT: All right. Good afternoon.

21 MR. CRYSTAL: Howard Crystal on behalf of the
22 Plaintiffs in the ASPCA case.

23 THE COURT: All right. Counsel.

24 MS. WARIN: Your Honor, Kathleen Warin here on
25 behalf of the lawyer defendants in the RICO case.

1 THE COURT: Counsel.

2 MR. SIMPSON: Good afternoon, Your Honor. John
3 Simpson for the Defendant in 07 -- or 03-2006 as the Plaintiff
4 and 07-1532 as Defendant.

5 THE COURT: All right. Good afternoon.

6 MS. PARDO: Good afternoon, Your Honor. Michelle
7 Pardo for the Defendant, Feld Entertainment.

8 THE COURT: Ms. Pardo.

9 MR. SMITH: Good afternoon, Your Honor. Richard
10 Smith for the Plaintiff in the RICO matter.

11 THE COURT: All right. Sorry to hear you weren't
12 able to settle, but you know, we'll go forward. And I've had
13 a chance to reflect on your suggestions, your recommendations.
14 Here's -- and I'll hear from counsel briefly, but here's what
15 I think should happen with respect to the RICO case.

16 Well, first of all, the attorney's fee issue.
17 Notwithstanding counsel's assurances that I won't be reversed,
18 I think the better part of wisdom is to resolve the question
19 of cost and attorney's fees after -- you know, after the
20 Circuit has resolved and issued a mandate in its case.

21 The RICO case should go forward. There's been no
22 responsive pleading filed. I understand that. It's one
23 interest thing that made me chuckle. If I understand
24 Plaintiffs' position in the RICO matter, Plaintiffs have no
25 problem with giving the Defendants in that case 30 days within

1 which to file a motion to dismiss, but they want three months
2 to file a response. I think that both sides -- I mean, given
3 the gravity of the significance of the issues raised, I think
4 it's probably wise to give both sides the reasonable amount of
5 additional time that each side needs.

6 So, having said that, what I think is fair and
7 reasonable with respect to the two RICO cases, to give the
8 Defendants in that case, I think you've asked until December
9 to file a potentially dispositive motion, I believe. I think
10 it's December, first part of December. If I'm wrong, tell me,
11 and give -- and be just as courteous to the Plaintiffs to file
12 a response in 60 days.

13 I haven't really given a lot of thought to reply,
14 although reply briefs are extremely helpful, and if you need
15 60 days, then I should probably give you 60 days. Resolve
16 that -- and right, it's December 3rd, right. And actually
17 the Plaintiffs asked until March 4th. I don't have any
18 problems with that. And Defendants to file their reply by
19 April the 1st.

20 Apparently everyone agrees with respect to that,
21 that the -- that the reply should be no longer than a month
22 after, and the Court will -- Will I schedule a hearing on
23 that? I don't know whether I will or not. I want to see your
24 pleadings first and then I'll make a decision as to whether
25 the Court would benefit from argument on that, and let the

1 appeal wind its way through. The parties believe there's a
2 basis for expedited consideration of the appeal, they can seek
3 it. I'm not so sure there is, but that's between the parties
4 and the Circuit Court.

5 You've exhausted your efforts at trying to settle
6 the case, I assume; is that right? Or you still talking?

7 MR. SIMPSON: That's correct, Your Honor.

8 MR. BRAGA: Correct, Your Honor.

9 THE COURT: Which one? You still talking or you
10 exhausted?

11 MR. SIMPSON: We've exhausted.

12 THE COURT: Exhausted. All right. Yeah, I'll hear
13 from anyone. I mean, I don't think there's anything else to
14 be done here today. I'm sorry you weren't able to settle the
15 case. It's been ten years now, but there's a lot of money
16 involved, though, and I guess the demand to settle is
17 significant, I'm sure.

18 But whatever happened, happened between counsel and
19 the mediators, I have no idea what happened, so I'm going to
20 make an assumption everyone made a good faith effort. That's
21 fine. Those things happen. It wasn't settled, so let's move
22 on with litigation life. Anyone want to be heard about
23 anything?

24 MR. BRAGA: Your Honor, just -- Just one second,
25 John. I'm sorry.

1 On behalf of the nonlawyer defendants in the RICO
2 case, the schedule you've outlined is acceptable to us. It's
3 going to take a particular effort to try to get everybody to
4 file one consolidated motion to dismiss for Your Honor.
5 There's lots of Defendants. There may be some short
6 supplemental filings, but that time period will give us the
7 ability to do that. We may need some extra pages. We'll ask
8 for that later.

9 THE COURT: I had to consider that issue when I had
10 to craft an order in the multi-district litigation involving
11 polar bears. So we'll probably look at that and use some of
12 that language. I invite counsel to look at that. Some of the
13 attorneys in that case are here now.

14 But I want to be fair about that, but I don't need,
15 you know, two or three briefs saying the same thing either.
16 So I need you to take a look at it, but we'll take some
17 language from that as well.

18 MR. BRAGA: Okay. Very good. Otherwise the
19 schedule is great, Your Honor.

20 THE COURT: All right. That's fine. Thank you for
21 your assurances that I'll be affirmed, but you know, who
22 knows.

23 MR. SIMPSON: I could be wrong, Your Honor.

24 THE COURT: Absolutely.

25 MR. SIMPSON: I don't think so.

1 THE COURT: Absolutely. Sure. I think that's -- I
2 understand the Circuit's position. The Circuit would like to
3 get everything, but I think probably more judges probably
4 resolve issues of costs and attorney's fees after the
5 mandate's issued. That would be my guess.

6 MR. SIMPSON: Well, that's certainly within your
7 discretion, Your Honor, and I don't strongly disagree with
8 that. It's just my client was concerned because of the
9 20-million dollar fee claim that it made a little more sense
10 now that since the D.C. Circuit had actually held the appeal
11 in abeyance, we actually had an opportunity now --

12 THE COURT: To settle.

13 MR. SIMPSON: -- for you to go forward, they would
14 hold onto the appeal and we'd have the whole thing there at
15 once. That is possible to do.

16 And the other part of this, I mean, we've already
17 got a briefing schedule proposed in the D.C. Circuit, and even
18 if that holds and it's perfectly followed, the briefs won't
19 even be filed for seven months once that schedule goes in. So
20 we're looking at a year-and-a-half, two years before we even
21 have an opportunity to come back.

22 And as Judge Lamberth indicated in the *Brown versus*
23 *NFL* case that I filed in my notice of filing, you don't get
24 interest on attorney's fees. So that was our thinking, but
25 it's within your discretion under Rule 54.2 to do this, so we

1 don't -- we'll accept that.

2 With respect to the RICO matter, Your Honor, we
3 think that it's important today that you -- that you indicate
4 that we go forward in discovery as well.

5 We've asked that you set a -- that the parties
6 conduct a Rule 26(f) conference on November 15th. We think
7 that this case is going to be complicated. The discovery
8 could be contentious. We think there are a lot of issues to
9 be addressed. We think you should consider appointing a
10 magistrate judge to supervise that.

11 But I say that, Your Honor, because this case was
12 filed, as you know, in August of 2007, and it was stayed by
13 Your Honor in -- on November 2007. So it was stayed for
14 two -- more than two years before you ruled in the ESA case in
15 December of 2009. And since that time, although there has
16 been a stay period for mediation, the other side has had eight
17 months to think about what they're going to say in response to
18 this complaint, and --

19 THE COURT: They've had longer than that. I mean, I
20 stayed it for a couple of years, so they've been thinking
21 about it for a long time, I'm sure.

22 MR. SIMPSON: But my point is, if they want to file
23 a motion to dismiss, that's their right as long as what
24 they're doing is consistent with Rule 11. But what they
25 shouldn't be allowed to do is lodge in this case and get an

1 embargo on discovery. Because what's going to happen is
2 they're going to file the motion, whatever papers are going to
3 be filed are going to stack up on your desk, and Your Honor --
4 one thing I learned in that trial is you have a nightmare of a
5 schedule. So, inevitably what's going to happen is it's going
6 to sit there and the case will languish.

7 THE COURT: Maybe I'll send it to a new judge. I
8 haven't thought about that.

9 MR. SIMPSON: That can happen, too, but then he's
10 going to have cases as well. But what ought not to happen,
11 they shouldn't be allowed to profit from the congestion of
12 this court by embargoing discovery. I think the just thing to
13 do is to move ahead and do the discovery and get this thing
14 started. Make the parties do the plan, get the parties going
15 on discovery on production requests and taking depositions,
16 because we're going to have a lot of issues we need to deal
17 with.

18 And I would just make an observation here. When we
19 came into the ESA case in 2006, the Defendant filed a motion
20 for summary judgment in August of that year and we asked for a
21 stay of discovery on the ground that we've got a dispositive
22 motion and it would waste resources to do discovery in the
23 interim, and Your Honor denied that motion. And we went
24 forward and did the discovery, and it was during the period of
25 time that year that ensued when all we -- when we got involved

1 in all these disputes about the elephant documents and so
2 forth and so on. And at the end of that period you granted
3 that motion in part and excluded half the elephants from the
4 case. We went ahead and did all the discovery on them anyway.

5 So I think that's what has to happen in the reality
6 of modern proceedings in modern federal court. We have to go
7 forward on both tracks because otherwise they get the benefit
8 of a delay that they're not entitled to get, and we need to
9 move forward. This is a serious case. I'm not talking about
10 a slip and fall at the Safeway. We're talking about what we
11 think is a criminal conspiracy that resulted in a perpetration
12 on a fraud on the Court. Those are serious allegations.

13 My client was injured, at a minimum, by a tune of
14 \$20 million as a result, and we want to get this case ready
15 for trial and to proceed. We think the just thing is to
16 proceed with discovery.

17 THE COURT: All right. Counsel.

18 MR. BRAGA: Yes, Your Honor. If I might just
19 address that discovery point raised by Mr. Simpson. I mean,
20 certainly the ordinary practice in this case is that the
21 motion to dismiss is ruled on before discovery is undertaken.

22 I do agree with Mr. Simpson about two things, that
23 discovery is likely to be complicated and it's likely to be
24 contentious. Those are exactly the kinds of cases where when
25 you look at the Supreme Court's decisions in *Twombly versus*

1 *Bell Atlantic and Ashcroft versus Iqbal*, that the Court should
2 take a good hard look at whether the pleadings justify going
3 down that discovery road before you open up that can of worms.

4 Your Honor certainly has experience with RICO cases
5 like antitrust cases. They're a potential nightmare of
6 discovery. There are many, and I say in all good faith to the
7 Court, there are many substantial grounds for dismissing this
8 RICO complaint, and at the very least what I suggest is that,
9 Your Honor, if you don't want to follow the ordinary practice
10 of postponing discovery until after the motion is ruled on, at
11 the very least wait to make that decision till you see our
12 motion to dismiss filed on December 3rd and you will then
13 see that there is very good grounds for this case never going
14 forward into discovery and not starting in precipitously as
15 Mr. Simpson would like. Thank you, Your Honor.

16 THE COURT: Counsel, anything else?

17 MR. SIMPSON: Well, I just want to point out, I've
18 been a member of this bar since 1979, and every case I've been
19 involved in but two has been a Defendant's case. I've never
20 gotten a stay of discovery on the basis of a dispositive
21 motion. I've never had that experience.

22 Maybe I've drawn the wrong judges but I've never had
23 that experience. As far as I know, there is no such custom.
24 The custom is you go forward on all fronts.

25 THE COURT: Motions to dismiss?

1 MR. SIMPSON: Motions to dismiss --

2 THE COURT: Am I the only one that --

3 MR. SIMPSON: -- motions for summary judgment.

4 THE COURT: We are the only one that doesn't allow
5 it for --

6 MR. SIMPSON: I must have been unlucky, but I've
7 never had --

8 THE COURT: I'm the only one? I can't believe that.

9 MR. SIMPSON: I've never had that experience.

10 THE COURT: I need to have a brown bag lunch with my
11 colleagues if I'm the only one.

12 (LAUGHTER.)

13 THE COURT: Seriously. Is that right?

14 MR. SIMPSON: That's right, Your Honor. And so --
15 when he said that in that filing, I thought, well, what court
16 has he been practicing in because it's different than my
17 experience. But I think, you know, in all seriousness, Your
18 Honor --

19 THE COURT: These are complicated issues. You know
20 look, sure my calendar is demanding but everyone else's
21 calendar is just as demanding as well, and this motion to
22 dismiss, which I haven't seen, it's not going to get lost.

23 I mean, I'm not going to sit here and promise I'll
24 give you a decision by a certain date. I'm not going to do that,
25 but I'm not going to let this get lost in the office either.

1 So, you know, counsel's suggestion is a good one.
2 It may well be after December 3rd I take a look at it, and you
3 know, this strikes me as somewhat unusual. Maybe discovery
4 should go forward, I don't know. I think for the time being
5 I'm not going to allow discovery to go forward, but that's
6 something I can revisit on my own at any point in time. I can
7 take a look at the motion and say, you know, I don't think I'm
8 going to be persuaded to dismiss this and this right now or
9 then. There is not a compelling reason to stay discovery. I
10 think I at least owe it to myself to take a look at the motion
11 and then make some preliminary decisions and observations
12 about merit.

13 But even if I deny -- continue to deny discovery or
14 stay discovery after December, you know, no one's going to do
15 anything to intentionally drag this out. I'm not going to
16 extend the time for filing. These are firm dates that the
17 parties have suggested and I'll give you a prompt decision,
18 but I'm not going to promise a decision by a certain day. I'm
19 not going to do that, but I will give you a prompt decision.

20 So I'll deny the request to go forward with
21 discovery without prejudice. It's something I can review at,
22 you know, at any point between now and the resolution of the
23 motion to dismiss, and I'll do that.

24 MR. SIMPSON: Very well, Your Honor.

25 THE COURT: All right. Anything else?

1 MR. BRAGA: Nothing, Your Honor.

2 THE COURT: All right. Good to see everyone and
3 have a nice weekend.

4 MR. BRAGA: Thank you, Your Honor.

5 THE COURT: All right.

6 THE DEPUTY CLERK: This honorable court now stands
7 in recess.

8 (PROCEEDINGS END AT 1:15 P.M.)

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12 **CERTIFICATE OF REPORTER**

13 I, Catalina Kerr, certify that the foregoing is a
14 correct transcript from the record of proceedings in the
15 above-entitled matter.

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Catalina Kerr

Date

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