

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING . CIVIL ACTION NO. 07-40098-FDS
. .
V. . BOSTON, MASSACHUSETTS
. JULY 26, 2007
GAILON ARTHUR JOY, et al .
Defendants .

.

TRANSCRIPT OF TELEPHONIC CONFERENCE
BEFORE THE HONORABLE TIMOTHY S. HILLMAN
UNITED STATES MAGISTRATE JUDGE

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CASE CALLED INTO SESSION

THE CLERK: The Honorable Timothy S. Hillman presiding. Today's date is July 26, 2007 in the case of Three Angels Broadcasting v. Gailon Arthur Joy, et al., Civil Action No. 07-40098-FDS. Counsel please identify yourself for the record.

THE COURT: For the plaintiff, please.

MS. HAYES: Yes, Your Honor. Jerrie Hayes with Siegel, Brill, Greupner, Duffy & Foster Minneapolis, Minnesota admitted pro hac vice for plaintiffs 3ABN and Danny Shelton.

THE COURT: Afternoon.

MS. HAYES: Good afternoon, Your Honor.

MS. RICHARDS: Your Honor, also Attorney Lizette Richards with the firm Fierst, Pucci & Kane also appearing on behalf of the plaintiff.

THE COURT: All right. Thank you, and good afternoon to you.

MR. HEAL: Good afternoon, Your Honor. This is Laird Heal for defendant Robert Pickle.

THE COURT: Good afternoon to you, Mr. Heal. And Mr. - is it Mr. or Ms. Joy?

MR. JOY: It's Mr. Joy.

THE COURT: Mr. Joy, you are appearing without a lawyer, sir?

1 MR. JOY: Yes, sir. Yes, Your Honor.

2 THE COURT: All right, so you are pro se in this
3 matter?

4 MR. JOY: Yes.

5 THE COURT: Okay. I received this from Judge Saylor
6 earlier in the week. Let me start with one of the
7 representatives of the plaintiffs. Can somebody focus me in on
8 what exactly is going on and then I will hear from each of the
9 defendants.

10 MS. HAYES: Certainly, Your Honor. I'd be happy to
11 fill you in. The--

12 THE COURT: Who is this please?

13 MS. HAYES: This is Jerrie Hayes, I apologize.

14 THE COURT: Go ahead.

15 MS. HAYES: The basic dispute arose in relation to
16 our 26(f) conference and early discussion under Rule 16 and 26
17 about the form of the electronic discovery and electronic
18 production. One of the issues that we had dispute with that
19 forced the parties to submit somewhat competing 26(f) reports
20 was the issue of the form of which electronic data and
21 information would be produced for a party requesting it.
22 Essentially it boils down to plaintiffs want to be able to
23 directly access with their computer forensic expert the hard
24 drives and computer systems at issue that contain relevant
25 data. It is defendants' position, and I don't want to put

1 words in their mouth, but my understanding of defendants'
2 position is that they would prefer that they be allowed to make
3 or have their computer expert make a copy of the data and
4 provide that to us on a CD-ROM or other variable mixed media
5 source. So that's basically the disputed issue as I understand
6 it.

7 THE COURT: Great. That helps me. Mr. Heal, what do
8 you want to say?

9 MR. HEAL: Your Honor, I do again repeat myself with
10 respect to this--

11 THE COURT: You can't repeat yourself because this is
12 the first time I'm listening to you.

13 MR. HEAL: I'm sorry, I'm not repeating myself to you
14 but I'm repeating myself - we've already made our backup copies
15 for any electronic records keeping and there's, you know, it's
16 not, there's no need to access any computers or any hard discs
17 with any documents they be stored on. It would also violate
18 the confidentiality of numerous third parties whose financial
19 records in the case with the, you know, the co-hosting
20 websites, you know, you have any number of third parties that
21 have no relation to Mr. Pickle whatsoever and they're just
22 located on the same computer. It's, you know, absolutely
23 unnecessary because there's no suggestion that we are not
24 producing everything.

25 However, if this Court does order that kind of access

1 I would like at the very least to have the complete source
2 code for all programs that are going to be run on any of our
3 computers and a description of what utilities are going to be
4 used so that we can verify there's going to be no destruction
5 or, you know, inadvertent or otherwise to any, you know, host
6 computer.

7 THE COURT: What is the - is the information stored
8 on a separate server? Where is it presently?

9 MR. HEAL: In the, in, I'm sorry, but in some sense
10 of the, you've got a co-hosting website where, you know, I'm
11 assuming that the defendants will have uploaded their web pages
12 to their area of the computer and then that will be run, you
13 know, from some kind of shared access, but I don't know the
14 exact system that's being used. Their email is what they use
15 or Mr. Pickle uses for his, you know, his electronic business,
16 and in order to produce the documents he's gone through all of
17 his email and separated out everything that has to do with his
18 business and produced everything else.

19 THE COURT: Mr. Joy, what do you want to say?

20 MR. JOY: We already--

21 THE COURT: Can you speak up a little bit, Mr. Joy,
22 I'm just having--

23 MR. JOY: I'm sorry, is this better?

24 THE COURT: Yes.

25 MR. JOY: Okay. We had discussed this during the

1 26(f) and I had made it pretty patently clear that we had
2 asked how we were, how we were going to preserve data, et
3 cetera. I made it clear that all data that was coming in
4 whether it was by email or fax we had isolated to a Microsoft
5 program, Microsoft Outlook to be exact, and we were frankly,
6 and our IT guy has no problem making available those emails in
7 an identical format to a CD, DVD or whatever so that they would
8 have no problem with regards to their issue. They seem to be
9 having, they seem to be arguing before Judge Saylor that they
10 were having a problem with their expert on the question of
11 essentially administrative control of the data that he used to
12 become an expert on. And obviously there is numerous
13 evidentiary trails where obviously the documents and/or the
14 blood samples or whatever it may be are drawn by third parties
15 made available and certified and protected and made available
16 to experts for their analysis, and I can't see why that would
17 be a problem in this particular case. And as yet we don't even
18 have a debate over whether or not the information is being
19 appropriately provided.

20 THE COURT: Who just spoke to me on behalf of the
21 plaintiff, Ms. Richards or Ms. Hayes?

22 MS. HAYES: Jerrie Hayes, Your Honor.

23 THE COURT: Ms. Hayes, what is the reason that you
24 want the mirror image of the hard drive as opposed to the CDs
25 or whatever it is they're going to give you?

1 MS. HAYES: Yes, Your Honor. Well, as to electronic
2 discovery I will completely admit to the Court that I am not an
3 expert, but I have talked to our computer forensic analyst,
4 we're using Computer Forensic Services here out of Minneapolis,
5 and the bulk of the computer analysts that we have dealt with
6 have explained to me the process of information gathering as a
7 four step issue. There is a collection and capture phase.
8 There is an inventory phase, a re-readying phase and then data
9 management. Now, the collection and capture phase is the
10 simplest. That's where the analyst is going to make basically
11 a mirror image of the hard drive. Then what happens is he
12 takes that, what is then in that form still raw data and
13 conducts an inventory of that data without in a manner changing
14 or transferring or destroying that data.

15 The next step is a re-readying process where using
16 whatever software systems are necessary for the data that
17 exists, whether it's transferring the information that is a
18 form of an email or a database or a spreadsheet or an Excel
19 program or a Word document, you take the raw data and transfer
20 it using a software system into a form that is readable by a
21 person, putting it into a narrative or text format. The next
22 step of course is data management which relates to how either
23 party decides to organize the information that then appears on
24 the disc. At three of those steps it is possible to lose very
25 important historic information about the documents from the

1 trail.

2 Now, what we anticipate there's going to be discovery
3 related to here are three issues, the electronic emails, the
4 electronic documents and chat or web log material. And what
5 happens is when you conduct the capture and collection phase,
6 skip over the inventory phase and produce the information in a
7 read ready format on a CD-ROM or a disc as Mr. Heal and My Joy
8 suggest, is that you can lose very important metadata which
9 gives history about the document, the email or the website
10 conversation that may or may not have occurred in conjunction
11 with that material. That's why it's important that we don't
12 receive the information in a read ready form but that we
13 receive it in a native format and that the expert has an
14 opportunity to collect and capture that information without any
15 translation done.

16 Now, it is possible that we could have the two
17 parties or the two sides of the case, if you will, have their
18 computer experts speak to one another about the quickest,
19 easiest means of doing that. I don't have any issue with that,
20 and we are certainly not anticipating that the defendants are
21 going to have to shut down their computers or mail us their
22 hard drives or anything of the sort. But then what will happen
23 is those two experts could get together and talk about the
24 easiest way of doing that, of providing the information in raw
25 data form that has not been translated. But we feel very

1 strongly that there is going to be very important historic
2 information, information relating to persons who may have
3 received emails, documents, who were parties to conversations
4 held on websites in chat rooms that would not appear in
5 material that is produced in read ready form for either of the
6 parties. And that's why for us it's so important that we have
7 access to that.

8 Now, we are very cognizant of the recent amendments
9 to the rules from December of 2006 which provide for a cost
10 ship when a party wants direct access. We are perfectly
11 willing to assume that burden. But we believe because of the
12 nature of the information and the fact that so much of the
13 defamation that is at issue in this case has occurred by
14 persons using pseudonyms, anonymous postings and information
15 that Mr. Joy refuses to provide to us based on a press
16 privilege of some sort that it's going to be necessary that we
17 can track down this information and trace the other individuals
18 who have been involved in some of these defamatory statements.
19 That's why it's so important to us, Your Honor.

20 And again, we're not attempting to burden the
21 defense. We're perfectly willing to have our expert work with
22 their expert. We're perfectly willing to do the cost
23 assumption that's necessary for this. It's just a matter of
24 the new federal emphasis on electronic discovery being open
25 source material that can then be used and translated by the

1 party that receives it.

2 THE COURT: Mr. Heal, what is the, what confidential
3 information is on the drives?

4 MR. HEAL: Well, there are at least four separate E
5 businesses that are run by Mr. Pickle which he doesn't own. He
6 simply does website management for at least four. There are,
7 you know, the customer information which come in through his
8 Pickle Publishing for, you know, all the orders will have
9 credit card information, et cetera. And as far as the hidden
10 historical kind of information, you know, I haven't heard
11 anything there that we couldn't just be asked for, you know, in
12 an interrogatory to provide and, you know, and find if it's
13 there.

14 This plaintiff has a history of employing private
15 investigators to get the goods on anyone he knows and employing
16 it. You know, this sounds like the same kind of fishing
17 expedition, Your Honor.

18 THE COURT: Well, I mean metadata is going to be, it
19 sounds like it's going to be an important part of the discovery
20 process and who knows. All right, let me make - and before I
21 do that, Mr. Joy do you want to chime in at all on that?

22 MR. JOY: Yes. First of all, any metadata that would
23 be available on the, coming in from emails obviously would be
24 available through third party sources. And anything that was
25 not available through third party sources would not be

1 available obviously on the Outlook that I have. Everything
2 that I have downloads and goes into an Outlook. That is a
3 simply MS document or an MS program and as a consequence is
4 very easy for that document to be mirror imaged or all the
5 information in there relative to 3ABN to be mirror imaged and
6 made available to them.

7 Now, if it's documents that are downloaded obviously
8 meta doesn't apply, clearly doesn't apply. It would be a
9 download from somewhere. We would have had it. In our view
10 they'd have to go back and source it themselves. So any
11 downloads that we have clearly would not apply in this
12 particular case to this metasourcing that they're constantly
13 concerned about and, you know, frankly, I think it would be
14 more appropriate for them to first take a look at the data that
15 we're providing them and then if they have particular
16 individuals that they're interested in tracking, I think we'd
17 be happy to provide that in the discovery process as long as it
18 does not, as long as it's within the capability of us to
19 provide that.

20 But this idea that they need to come in and take hard
21 drives and mirror image them, et cetera, is ludicrous. It does
22 not apply. My expert says what they're looking for is, they're
23 not going to get in my system. They're going to have to get
24 that from web servers and good luck. That's a totally third,
25 that's a totally third party in this case.

1 THE COURT: All right. Here's what I want you all
2 to do. Now we have set aside the afternoon of August 9th
3 starting at two o'clock and I'm going to hold that date and
4 time, however between now and then I'm going to ask you to put
5 your respective experts together to see if you can come to some
6 common ground and if you can and if you have agreement about
7 the form of discovery, then you do not need to appear. If
8 there is disagreement, then I will need to see you all and
9 hopefully with some experts on August 9th at two p.m.

10 Any questions?

11 MS. HAYES: No, Your Honor.

12 MR. HEAL: Your - go ahead.

13 THE COURT: I'm--

14 MS. HAYES: No, no questions, Your Honor.

15 THE COURT: All right. Mr. Heal?

16 MR. HEAL: Your Honor, with all due respect I have
17 over 25 years as a software engineer and I feel that I qualify
18 as an expert on this matter.

19 THE COURT: Well it's, then you are going to -
20 weren't you the one that said you had the expert that was going
21 to talk to their expert?

22 MR. JOY: No, I have an expert.

23 THE COURT: That was Mr. Joy?

24 MR. JOY: Yes.

25 THE COURT: I'm sorry. All right, Mr. Heal, you can

1 - I can't force you to hire an expert. If you want to
2 represent your client's interest at the conference with the
3 other two experts be my guest.

4 Mr. Joy, what about you?

5 MR. JOY: Well, my expert is local. He'll have no
6 problem appearing.

7 THE COURT: No, no. I want you all; I want your
8 expert, the plaintiffs' expert and Mr. Heal to discuss the form
9 of discovery to see if you can come to some sort of resolution
10 along the lines that you have all discussed.

11 MR. JOY: Yeah.

12 THE COURT: If you can't--

13 MR. JOY: Here's the problem, Your Honor, and this is
14 a problem we have--

15 THE COURT: Actually you know what the problem is,
16 you can't interrupt me so let me finish, okay and then you can
17 tell me what, how wrong I am. So what I want you all to do,
18 and I'm ordering you all to send your experts, put them in the
19 room together, put them on a conference call, do whatever it
20 takes but I need some certification that they have at least
21 spoken. And then failing that then I will see you here August
22 9th at two p.m., and it would help if you had experts available
23 for me because you're going to have to educate me.

24 All right, now, Mr. Joy, what was it that you wanted
25 to say?

1 MR. JOY: We have, as you know we have another order
2 that says that we must just provide or do our automatic
3 discovery. We're really ready for that at this particular
4 point, but unfortunately the media is at, the media user of
5 that is obviously in dispute strangely enough. So I think at
6 this point what we need to know is, I need to know do we still
7 need to produce that by the third?

8 THE COURT: It would certainly help so that you could
9 say - it's by the ninth or is the third your deadline for your
10 discovery?

11 MR. JOY: Exactly.

12 THE COURT: Yeah. Well, it would help if you had I
13 suspect because then that'll be one more thing that we won't
14 have to argue about and we may still have to have the argument
15 about the media. I suspect that we will from what you are all
16 saying but at least if you produce something it gives everybody
17 a start and people can either point to it in support of or in
18 opposition to a respective position.

19 MR. JOY: And is the other side bound to produce
20 theirs by the same date, Your Honor?

21 THE COURT: Is that the date that Judge Saylor gave
22 you?

23 MS. HAYES: Yes, Your Honor. The August 3rd date is
24 the date that at least we intend to respond by, yes.

25 THE COURT: Okay. So it sounds like you're all in

1 agreement on that.

2 Now, let me ask one final question. Have you all had
3 any mediation or third party dispute resolution?

4 MS. HAYES: No, Your Honor, not as related to the
5 immediate action. There was apparently some effort as dispute
6 resolution prior to filing of the suit between 3ABN and Mr.
7 Joy. That was unsuccessful. This litigation was filed and
8 since then there's been no effort at mediation, arbitration or
9 any other ADR.

10 THE COURT: All right, well, I will follow up on that
11 with you on August 9th because failing that, I mean it maybe
12 water over the dam but maybe not.

13 MS. HAYES: Okay.

14 THE COURT: All right, unless I hear differently
15 August 9, 2007 at two p.m. Does that work for the plaintiffs?

16 MS. HAYES: Yes, Your Honor, absolutely.

17 THE COURT: And Mr. Heal does that work for Mr.
18 Pickle?

19 MR. HEAL: Yes, Your Honor.

20 THE COURT: And, Mr. Joy, how about yourself?

21 MR. JOY: That's fine, Your Honor.

22 THE COURT: Great. Now, obviously if you can work
23 this out we'll save you all a trip and failing that I'll see
24 you then.

25 MS. HAYES: All right. Well thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. HEAL: Thank you, Your Honor.

3 THE COURT: Bye-bye.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

January 5, 2010

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