

BLACK HORSE LANE ASSOC., L.P. V. DOW CHEMICAL CORP.

United States Third Circuit 2000.

228 F.3d 275.

Professor's Note: The purchaser of environmentally distressed property sued the seller for breach of contract, breach of implied covenant of good faith and fair dealing. It sought monetary and injunctive relief under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and New Jersey Spill Compensation and Control Act. Mr. Berger was the president of an entity plaintiff, and the deponent who appeared on its behalf.

This case opinion will provide useful insight into deposition practice—which will help you fine tune your trial witness examination skills. Several editorial enhancements have been made in this edited version of the case, without indicating the deviance from the original text.

Court's Opinion: GREENBERG, CIRCUIT JUDGE.

II. FACTS AND PROCEEDINGS

* * *

The parties commenced discovery on November 7, 1997. Appellants [plaintiffs] designated Berger as their Fed.R.Civ.P. 30(b)(6) witness to testify on behalf of USLR, USRR and Black Horse. On October 2, 1998, appellees' counsel began to depose Berger, but counsel was not able to obtain a date to reconvene the deposition. As a result of counsels' inability to agree on the date that Berger's deposition should resume, appellees' counsel sought an order from the magistrate judge overseeing discovery to set the date for the resumption of the deposition. After a teleconference with the parties on October 6, 1998, the magistrate judge signed an order dated October, 9, 1998, which provided the following:

IT IS on this 9th day of October, 1998, ORDERED, as follows:

Lawrence S. Berger, as Plaintiffs' Fed.R.Civ.P. 30(b)(6) designated witness and fact witness, shall appear for oral deposition commencing on Tuesday, October 13, 1998, at 10:00 a.m. and continuing from day to day thereafter until completed.

Notwithstanding the court's directive, when appellees' counsel appeared at Berger's lawoffice to continue his deposition on October 13, 1998, Berger failed to appear and his counsel, Paul Schafhauser, was “in trial” and not in the office. At that point, appellees' counsel again sought the court's intervention.

On October 15, 1998, the magistrate judge signed and entered an order which directed that Berger's deposition recommence on Monday, October 19, 1998, at 10:00 a.m. The order also provided that “[a]s a sanction for failure by Lawrence Berger to appear for depositions on Tuesday, October 13, Plaintiffs shall promptly pay the fees and costs of counsel fees for defendants (a) for appearing at Mr. Berger's non-deposition on October 13, and (b) for bringing this application and appearance today.” While Berger [finally] appeared for his deposition at the designated date and time, appellees claim that he provided evasive and non-responsive answers to many of counsel's questions relating to the negotiation and execution of the Agreement, and appellants' damages allegations.

* * *

III. DISCUSSION

A. District Court's Dismissal of the Amended Complaint

* * *

Moreover, it is relevant to our analysis that Berger's deposition testimony, as appellants' designated Rule 30(b)(6) witness, is far from illuminating on the necessary costs of response issue. Contrary to the spirit of Rule 30(b)(6), Berger's evasive answers provide us with little assistance * * *. We only need cite the following colloquy between Essex's counsel and Berger, which occurred at his deposition, to illustrate our point:

Q: * * * Mr. Berger, have you ever seen those bills before?

A. I have no idea.

Q. Well, then look through them.

A. I could look through them for the next five hours and I would have no idea. We've 90 properties. I get bills from people. There are bills going into 1997 and before. I have no idea whether I have ever seen these bills or any other bills you might put in front of me today.

Q. Mr. Berger, other than the charges represented in those bills, are there any other costs that have been expended by any plaintiff for any environmental consulting or removal or remediation with respect to the Black Horse Lane property?

A. I have no idea.

Q. Do you know a man named Mr. Irving Cohen?

A. Yes.

Q. How long have you known him?

A. I would say about ten years.

Q. And in what capacity do you know him?

A. Mr. Cohen was the president of Enviro Sciences. It's an environmental consulting firm.

Q. Has that firm ever been used by [appellant] Black Horse Lane Associates?

A. I have no idea.

Q. Looking through the exhibits, if you could, could you tell me whether those bills appear to indicate that such was the case?

A. * * * I can't tell you anything about these bills. All I'm doing is reading from the bills for you.

Q. Turn to the bills that talk about Black Horse Lane, Phase One, I believe.

A. There's a bill dated 10-16-97 that says 'Phase One, Black Horse Lane.'

Q. All right. To what does that bill refer?

A. I don't understand the question.

Q. What does Phase One, Black Horse Lane refer to?

A. I have no idea.

Q. Did you ever order a Phase One on Black Horse Lane?

A. I have no idea.

Q. Do you have an understanding what the phrase 'Phase One' means?

A. Yes, I do.

Q. What is that?

A. It's a preliminary environmental report which basically points out areas of potential

environmental concern.

* * *

Q. Do you have any idea why Black Horse Lane would have ordered a Phase One at or about the time period for which the bill is indicated?

A. Sitting here today, I have no idea why we did or didn't. I suspect if we did, in fact, order one a year ago, at that point I had a reason for it, but I don't know what that reason would be sitting here today. If, in fact, we did order a Phase One. I don't recall that either.

Our review of the remainder of Berger's deposition testimony regarding the nature of ESI's consulting work for appellants confirms that he failed to offer any useful information concerning the factual basis for appellants' CERCLA response cost claim relating to the fees paid for ESI's services.

B. District Court's Final Order of December 16, 1999

Appellants next contend that the district court erred in affirming the magistrate judge's letter opinion and order entered June 30, 1999, which granted appellees' motion for discovery sanctions against appellants pursuant to Rule 37(b) and (d). As we previously mentioned, the magistrate judge agreed with appellees' argument that Berger's conduct warranted a sanction in the form of precluding appellants from asserting a position and introducing evidence contrary to the position Berger asserted during his deposition. In addition, the magistrate judge concluded that Berger's lack of preparedness at his deposition justified the imposition of monetary sanctions pursuant to Rule 37(d) in the form of costs and attorney's fees associated with taking the deposition and bringing the sanctions motion before the court. * * *

Here, Berger was not completely prepared on any occasion for which he sat for a deposition. Further, his lack of preparation cannot be a mere oversight but is, instead, a clear demonstration of bad faith. This is obvious from Berger's repeated denial of any knowledge of his status as a 30(b)(6) witness despite being present at the deposition and being asked each and every time he appeared if he had knowledge of his status. Further, Berger * * * even denied knowledge of documents which he himself had signed, claiming that he had no recollection of such documents despite acknowledging that he normally did not sign anything that he did not read first. These infractions would not be so detrimental if Berger were no so consistent with his apparent incompetence and lack of cooperation. Had he taken the time to prepare in the slightest as Rule 30(b)(6) requires, he might have been fully prepared for at least one deposition. Additionally, Berger's actions are magnified by his status as a member of the Bar.

In affirming the magistrate judge's order, the district court provided its reasons on the record:

I read the record. It is appalling. It is appalling.

[Berger] did nothing except show his face only under the threat of court orders. When he showed up, he knew he was a 30(b)(6) witness and, notwithstanding the fact that he knew he was a 30(b)(6) witness, he refused to answer questions in an intelligent way. He refused to prepare, as you are required to prepare under 30(b)(6), to intelligently answer questions and just literally thumbed his nose at the defendants and, frankly, at the Court.

* * *

I'm satisfied, based upon my review of the record-and I defy anyone to look at the record here which was created by Mr. Berger--that the actions taken by [the magistrate judge] were well within his discretion and do not constitute either an abuse of discretion or are they contrary to law or shocking to the conscience of the Court. One, in order to come to that conclusion, one must live in the shoes of [the magistrate judge] in trying to conduct orderly discovery in this matter.

One must review meticulously the record of noncompliance by Mr. Berger in this matter. [The magistrate judge] did not issue this opinion lightly. [The magistrate judge] was fully cognizant of the totality of the facts surrounding this matter, which border upon almost conscious disregard of the Court and the court rules * * * .

Appellants make two arguments in support of their request to vacate the monetary sanctions order. * * * They * * * claim that pursuant to Rule 37(d), "a party making a motion based upon an alleged violation of Rule 37(d) must certify that the *movant has in good faith conferred or attempted to confer* with the party failing to answer or respond in an effort to obtain such answer or response without court action," but that there was no such "good faith" effort by appellees to resolve the dispute without court action.

Finally, they rely on the fact that Rule 37(d) states that sanctions may be imposed when a party, *inter alia*, "fails * * * to appear before the officer who is to take the deposition, after being served with a proper notice." Here, they argue that we should apply the "fails to appear" language literally, and that sanctions were inappropriate in this case because Berger appeared for his deposition after the magistrate judge's October 15, 1998 order and "testified under oath for more than *seventeen hours*." * * * Their second argument is based on their interpretation of Berger's behavior during his deposition. They claim that even if we agree with the magistrate judge's finding that Rule 37(d) could support the imposition of sanctions when a Rule 30(b)(6) witness provides inadequate and evasive answers, the record demonstrates that Berger's deposition did not present a situation warranting sanctions. They claim that "[a] fair examination of the transcript of Mr. Berger's 570-page deposition confirms that Mr. Berger testified fully and in good faith in response to Defendants' questioning." In any event, they maintain that "any 'violation' of Rule 30(b)(6) which might be said to have existed was minimal, and indeed, paled in comparison with the extraordinarily broad discovery obtained by Defendants in this matter."

We are not persuaded by either contention.

* * *

The deposition of a corporation, however, poses a different problem, as reflected by Rule 30(b)(6). Rule 30(b)(6) streamlines the discovery process. It places the burden of identifying responsive witnesses for a corporation on the corporation. Obviously, this presents a potential for abuse which is not extant where the party noticing the deposition specifies the deponent [by the individual's name]. When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.

* * * The district court did not abuse its discretion in awarding fees and costs under Rule 37(d).

* * *

We reject appellants' final contention that Berger's responses during his deposition did not support the district court's finding that he failed to cooperate with appellees' attorneys, and that his conduct was tantamount to a failure to appear that warranted sanctions under Rule 37(d). To the contrary, our review of Berger's deposition testimony in its entirety confirms the observations of both the magistrate judge and the district court on this point. Indeed, throughout his lengthy deposition, Berger failed to offer meaningful testimony about most, if not all, of the items specified in the notice of deposition. While we need not recite every instance in which Berger's testimony was incomplete and unhelpful on the specified topics, we believe that two examples of his uncooperative attitude and his flagrant disregard for his obligation as a Rule 30(b)(6) witness amply illustrate our point.

* * *

Obviously, as appellants' Rule 30(b)(6) witness, Berger should have been prepared to discuss these and other topics designated in the notice of deposition. Instead, he divulged as little information as possible in every area that appellees identified. Moreover, Berger's uncooperative attitude is demonstrated further by statements in which he claimed that he was unaware that he was appellants' designated Rule 30(b)(6) representative, did not know what the phrase "Rule 30(b)(6) representative" meant, and was not familiar with Rule 30(b)(6) or what it required him to do. He also admitted at one point that he did not recall whether he reviewed the notice of deposition prior to the date of the deposition, and later stated clearly that he had not bothered to read it at all. Simply put, we find his professed ignorance on these points particularly unconvincing given that he obtained undergraduate and law degrees from prestigious universities and has been licensed to practice law since "either [19]65 or [19]66."

In any event, we believe that the magistrate judge's finding that Berger engaged in discovery abuses plainly is justified on this record. The magistrate judge had ample evidence of Berger's failure to cooperate, which in turn *rendered his deposition a virtual non-event*. Accordingly, we will affirm the monetary sanctions ordered pursuant to Rule 37(d).

IV. CONCLUSION

For the foregoing reasons, the district court's orders * * * will be affirmed.