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United States District Court, N.D. California.

Kristina RIDGEWAY, Individually and on Behalf of all Persons Similarly Situated, Plaintiffs,

v.

FLAGSTAR CORPORATION and Denny's, Inc., Defendants.
UNITED STATES of America, Plaintiff,

v.

FLAGSTAR CORPORATION and Denny's, Inc., Defendants.

Nos. C 93-20202 JW, C 93-20208 JW. | Nov. 3, 1994.

Opinion

ORDER VACATING DEPOSITIONS OF GERALD SALAAM AND PAUL JACKSON AND REQUIRING PRODUCTION OF CLAIMANT LIST TO CLASS COUNSEL

WARE, District Judge.

*1 The hearing on Class Counsel's Motion for an Order Compelling Gerald Salaam's and Paul Jackson's Responses to Deposition Questions and for Attorneys Fees and Costs was held on September 30, 1994 at 9:00 a.m. After considering the papers and arguments of counsel, the Court hereby vacates the depositions scheduled by Class Counsel and finds as follows.

I. BACKGROUND

This is a class action suit brought under federal and state civil rights statutes challenging racially discriminatory customer policies and practices at Denny's Restaurants in California. On May 24, 1994, the parties filed, and the Court preliminarily approved, an Amended Consent Decree settling all monetary and injunctive issues. The Amended Consent Decree was given final approval by the Court on July 29, 1994. The Amended Consent Decree includes provisions for the establishment of a claims procedure under which members of the class who file valid and timely claims are entitled to a pro rata share of a settlement fund of approximately \$27 million.

Under the Amended Consent Decree, the claims procedure is to be administered by an experienced claims administrator jointly selected by the parties. The parties selected the Rust Consulting Group, Inc. of Minneapolis, Minnesota as Claims Administrator. A toll-free 800 telephone number was established to provide potential claimants with access to the Claims Administrator to request claim forms and to seek assistance in completing and filing claims. Additionally, under the Amended Consent Decree, the law firm of Saperstein, Mayeda & Goldstein is designated as Class Counsel.

Following preliminary approval of the Amended Consent Decree and announcement of the settlement in May 1994, the parties received reports that a number of individuals and organizations in California were charging fees to individuals for services related to the preparation and/or filing of claims in this case. The parties investigated these activities and submitted two reports on their investigation to the Court.

On June 16, 1994, the Court approved a Stipulation and Order that (1) amended the claim form in this action to include express language advising that "giving false information or assisting others in providing false information on this claim form is a crime" and that anyone "provid[ing] false information on this claim form or assist[ing] others in providing false information ... could be subject to investigation ... and ... criminal prosecution;" and (2) directing that a Special Notice be mailed, along with the claim form, to all potential claimants. The Special Notice expressly cautions claimants that the Claims Administrator and Class Counsel are available to provide, free of charge, assistance in filing claims.

Ridgeway v. Flagstar Corp., Not Reported in F.Supp. (1994)

Gerald Salaam and Paul Jackson are persons affiliated with Accident Claims Experts (ACE) or Accident Claims Services in Oakland, California. ACE came to the attention of the parties in connection with their investigation of activities related to the filing of claims against Denny's. Class Counsel learned that ACE was advertising on a local cable television station that it would provide assistance to individuals wishing to file claims against Denny's in connection with the settlement of this case. Class Counsel further learned that individuals responding to ACE's ad were interviewed by either Gerald Salaam or Paul Jackson. Salaam or Jackson obtained information from potential claimants about their Denny's claim and had the claimants sign retainer agreements with one of two attorneys, Martin McDonagh¹ and Jerry Varnado.² The retainer agreement provided for the claimant to pay to McDonagh or Varnado 33⅓% to 40% of the amount that he or she recovered.

*2 As part of their ongoing investigation, Class Counsel issued a subpoena for Mr. Salaam and Mr. Jackson to appear for depositions scheduled on August 24, 1994 at 9:30 a.m. and August 24, 1994 at 1:30 p.m. respectively.

Salaam was personally served with the subpoena on August 12, 1994. On August 18, 1994, attorney G. William Hunter telephoned the offices of Class counsel on Salaam's behalf. Hunter stated that it was his position that service of the subpoena on Salaam was defective. Class Counsel responded that there was a declaration from the process server describing how Salaam had been personally served with the subpoena. Hunter responded, "well, she's lying." Class Counsel confirmed this conversation in a letter to Hunter.

Class Counsel then sent Hunter a second letter to which was attached the declaration of the process server. It was Class Counsel's position that Salaam had been properly served and, therefore, Hunter was informed that a court reporter would be present and Class Counsel ready to conduct Salaam's deposition on the date and at the time indicated on the subpoena. Mr. Salaam appeared for his deposition at the scheduled time.

Salaam appeared alone, but stated that he consulted with and was represented by G. William Hunter.³ Upon questioning by Class Counsel, Salaam repeatedly refused to answer questions on the basis of his "fifth amendment rights." Class Counsel claim that Salaam's invocation of the Fifth Amendment was improper and intended to frustrate the deposition.⁴

Mr. Jackson was personally served with the subpoena on August 12, 1994. On August 23, 1994, attorney Leon Rountree, Jr. advised Class Counsel that Jackson would not be appearing for his deposition because he was not personally served the deposition subpoena. On August 23, 1994, Mr. Rountree was provided a copy of the declaration of the process server which attested to personal service of Jackson's deposition subpoena.

Jackson appeared for his deposition, without counsel. He failed to produce any documents responsive to Attachment A of his deposition subpoena. Upon questioning by Class Counsel, Jackson repeatedly refused to answer questions asserting his "constitutional right" to do so.⁵ Class Counsel claim that Jackson's invocation of the fifth amendment was also improper and done with the intent to frustrate the deposition.

Class Counsel made a final attempt to resolve this matter without Court action. They sent Salaam and Jackson letters requesting that they reconsider their positions and agree to produce the requested documents and answer questions upon oral examination. Class Counsel also advised Salaam and Jackson of their intent to file the instant motion if a resolution could not be reached by noon, Wednesday, August 31, 1994. The letters were hand-delivered via Federal Express courier to Salaam and Jackson at ACE on August 29, 1994. The Federal Express package was returned on August 30, 1994 and was unopened and marked "return per Mr. Jackson."

II. LEGAL STANDARDS

*3 Federal Rule of Civil Procedure 37(a)(2)(B) provides that "[i]f a deponent fails to answer a question propounded ... the discovering party may move for an order compelling an answer.... The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action."

Federal Rule of Civil Procedure 37(a)(4)(A) provides that

[i]f the motion is granted ... the court shall, after affording an opportunity to be heard, require the ...

deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees.

Local Rule 230-4(a) provides that if "counsel for the party against whom the motion will be made willfully refuses or fails to confer, the judge (in the absence of a prior order dispensing for good cause with such a conference) may order the payment of reasonable expenses, including attorney's fees, pursuant to Rule 37(a)(4)."

III. ANALYSIS

Class Counsel seeks to compel the deposition testimony of Mr. Salaam and Mr. Jackson. They claim that Salaam and Jackson's invocations of their Fifth Amendment rights at deposition were merely tactics intended to frustrate the depositions. However, at the hearing on September 30, 1994, Salaam and Jackson agreed with Class Counsel to the following:

IV. ORDER

1. Gerald Salaam and Paul Jackson each agree to produce a list of any and all Denny's claimants that have contacted them and/or have signed contingency fee agreements with them. Such list shall contain the names, addresses and telephone numbers of each claimant. The list shall be produced to Class Counsel at the offices of Saperstein, Mayeda & Goldstein, 1300 Clay Street, 11th Floor, Oakland, CA 94612 within three (3) business days of the date of this Order.

2. Gerald Salaam and Paul Jackson shall each provide a written certification to Class Counsel, at the offices of Saperstein, Mayeda & Goldstein. Such certification shall contain a statement made under the penalty of perjury that neither person represents any class members.

3. The depositions of both Paul Jackson and Gerald Salaam are hereby VACATED without prejudice. Class Counsel reserves the right to renotice such depositions if necessary.

IT IS SO ORDERED.

Footnotes

¹ Martin McDonagh was subpoenaed for deposition on three separate occasions and failed to appear. McDonagh's subpoena was issued from the Central District of California because McDonagh maintains an office in Los Angeles and could not be located for service in Oakland. Class Counsel are in the process of filing a motion for an order for McDonagh to show cause and to transfer contempt proceedings against him to this Court because of the relationship between McDonagh, Varnado, Salaam and Jackson.

² Varnado was subpoenaed for deposition and failed to appear. On August 12, 1994, Class Counsel filed a motion for an order to show cause why Varnado should not be held in contempt. The Court issued an Order to Show Cause set for hearing on September 30, 1994 at 9:00 a.m.

³ Mr. Hunter claims that he no longer represents Mr. Salaam and that Mr. Salaam sought his services only to determine the validity of the service of the deposition subpoena.

⁴ Salaam refused to answer nearly every question posed. He refused to answer any questions about ACE including the nature of its business; the name of employees; the affiliation of attorneys such as Martin McDonagh and Jerry Varnado; the nature of ACE's representation of and communication with potential *Ridgeway* class members; whether Salaam or anyone affiliated with ACE assisted in the filing of claim forms in *Ridgeway*; whether potential class members were ever represented by ACE with respect to filing claims in *Ridgeway*; what steps, if any, were taken by Salaam, ACE or anyone affiliated with ACE to insure that potential class members who retained and/or contacted Salaam, ACE and its affiliates as a result of ACE's advertisements are not under the impression that they have filed claims simply by contacting ACE; and whether potential class members seeking the service of Salaam, ACE and its affiliates were apprised of the services provided by the Claims Administrator and Class Counsel free of charge.

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⁵ For example, Jackson refused to answer any questions about ACE, his employment with ACE and ACE's representation of potential Denny's class members. Mr. Jackson further represented that it was his intent to assert his "constitutional rights" and refuse to answer all questions posed.