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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. 8, 1994.

Attorneys and Law Firms

Leo Bazile, Harrison, Taylor & Bazile, Oakland, CA.

Thomas L. Pfister, Latham & Watkins, Los Angeles, CA.

Brian F. Heffernan, U.S. Dept. of Justice, Housing and Civil Enforcement Div., Washington, DC.

Mary Beth Utti, Asst. U.S. Atty., San Francisco, CA.

Antonio Lawson, Saperstein, Mayeda & Goldstein, Oakland, CA.

Amanda K. Wilson, Public Interest Law Firm, San Jose, CA.

Opinion

ORDER VACATING DEPOSITION OF JERRY VARNADO AND REQUIRING PRODUCTION OF CLAIMANT LIST TO CLASS COUNSEL

WARE, District Judge.

*1 The hearing on the Order to Show Cause re: Contempt issued to Jerry Varnado was held on September 30, 1994 at 9:00 a.m. After considering the papers and arguments of counsel, the Court hereby vacates the deposition of Jerry Varnado and orders 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

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

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.

Jerry Varnado is an attorney with offices in Oakland, California. Mr. Varnado came to the attention of Class Counsel in connection with their investigation of activities related to the filing of claims against Denny’s. Class Counsel learned that a company called Accident Case Experts (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 initially interviewed by either Gerald Salaam or Paul Jackson.¹ 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 McDonagh² and Jerry Varnado. 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 On July 12, 1994, Class Counsel issued a subpoena for Varnado to appear for deposition on July 26, 1994 at 1:00 p.m. The subpoena further directed that he produce for inspection and copying documents identified in Attachment A to the subpoena. Varnado was personally served with the subpoena on July 12, 1994.

On July 13, 1994, Varnado telephoned the offices of Class Counsel and spoke with Antonio Lawson. Varnado stated that he had received the subpoena but did not know whether he would appear. Lawson advised Varnado that his deposition was being taken in order to provide a report to the Court on the status of claims administration. Lawson further advised Varnado that his deposition remained as scheduled on July 26, 1994.

On July 26, 1994, Varnado did not appear for his deposition nor did he produce any of the documents identified in Attachment A to the subpoena. Class counsel confirmed in writing in a letter to Varnado his failure to appear for his deposition without justification.

On July 27, 1994 Class Counsel drafted a Motion for Order to Show Cause re: Contempt requiring Jerry Varnado to appear and show cause why he should not be held in civil contempt and subject to sanctions. A copy of the draft of the OSC motion was served on Varnado on July 27, 1994. Prior to filing the OSC motion with the Court, Class Counsel sought to provide Varnado another opportunity to appear for his deposition. A second subpoena was issued on July 27, 1994, noticing Varnado’s deposition for Monday, August 8, 1994 at 9:30 a.m. Varnado’s secretary, Yvette Johnson, accepted service of this subpoena.

On July 28, 1994, attorney Leo Bazile called Class Counsel claiming to represent Jerry Varnado. Bazile informed Lawson that Varnado was in receipt of the subpoena but did not recognize the authority under which it was issued and might not appear for deposing. In a letter dated August 1, 1994, Lawson advised Bazile of the nature of Class Counsel’s investigation and need to depose Varnado. The letter also advised that Varnado’s deposition remains scheduled for August 8, 1994. A copy of the August 8, 1994 deposition subpoena was personally served on Varnado on August 1, 1994.

On August 8, 1994, Varnado did not appear at the scheduled time for his deposition nor did he produce any of the documents identified in the attachment to the subpoena. Late in the afternoon on August 8, 1994, Class Counsel received a letter from Bazile, advising that Varnado would not attend his deposition because he is a “practicing and busy attorney” and had a conflict.³

Class Counsel provided Varnado with a third opportunity to appear for his deposition requesting in a letter that Varnado contact Class Counsel by 5:00 p.m. on Thursday, August 11, 1994 to schedule a mutually convenient date for his deposition. Neither Varnado nor Bazile responded to Class Counsel’s letter.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 45(e) provides that “[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.”

III. ANALYSIS

*3 Class Counsel requests that the Court hold Jerry Varnado in contempt for his actions related to the taking of his deposition, and further requests that the Court order Varnado to pay Class Counsel’s expenses and legal fees in connection with this motion and the aborted depositions. However, at the hearing on September 30, 1994, Varnado agreed with Class Counsel to the following:

IV. ORDER

1. Jerry Varnado agrees to produce a list of any and all Denny’s claimants that have contacted him and/or have signed contingency fee agreements with him. 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. Jerry Varnado shall 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 he does not represent any class members.

3. The depositions of Jerry Varnado is hereby VACATED without prejudice. Class Counsel reserves the right to re-notice such depositions if necessary.

IT IS SO ORDERED.

Footnotes

¹ Jackson and Salaam are also being investigated by Class Counsel. Both Jackson and Salaam appeared at their depositions in this matter, but failed to answer any questions, claiming to invoke their fifth amendment privilege against self-incrimination. Class Counsel has filed Motions to Compel their deposition testimony which are scheduled for hearing on September 30, 1994.

² 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.

³ The letter from Bazile was dated on August 4, 1994 and postmarked August 4, 1994.