

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH HERNIA :
REPAIR PATCH LITIGATION : MDL Docket No. 07-1842ML

This Document Relates to
THORPE v. DAVOL, INC., et al., C.A. No. 08-463ML
McELHATTON v. DAVOL, INC., et al., C.A. No. 08-541ML
BRUCE v. DAVOL, INC., et al., C.A. No. 08-257ML

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72) is Defendants' Motion for Protective Order filed on May 4, 2010. (Document No. 2751). Plaintiffs oppose the Motion. (Document No. 2799).

Background

This Motion relates to the bellwether trial process. Nearly three years ago, this multidistrict litigation ("MDL") was transferred to this Court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. The issue of bellwether trials was formally discussed as early as October 2007. (See Document No. 38 at p. 2). Common case or "master" discovery was addressed in a Case Management Order entered by the Court on December 6, 2007. (Document No. 66). Discovery proceeded, and the parties selected a group of cases for early neutral evaluation/mediation which proved to be an unsuccessful endeavor.

On February 24, 2009, the Court requested that each side provide a list of ten representative cases from which the Court would then select ten cases to schedule for trial. (Document No. 1725). After a change in defense counsel, the Court agreed to permit the parties to meet in an effort to agree on a list of representative cases for bellwether trials. (Document No. 1853). At a monthly status

conference held on June 2, 2009, the parties advised the Court of an agreement on five cases (Swallow,¹ Whitfield, Thorpe, Bruce and McElhatton) for bellwether trials and also reported that discovery was “moving along very well.” (Document No. 1872).

At the June 2, 2009 monthly status conference, the Court addressed discovery and asked Plaintiffs’ counsel if he was “talking about concluding discovery by the end of ‘09.” (Document No. 1907 at p. 33). He responded that he “said something very different,” i.e., “let’s finish our discovery this summer, through September and let’s start a trial date before the end of ‘09.” Id. On July 24, 2009, the Court entered an agreed Pretrial Case Management Order for bellwether cases which contained a detailed schedule and deadlines for various aspects of fact discovery, expert discovery and pretrial proceedings. (Document No. 1922). The parties initially agreed to try Whitfield in March 2010, Thorpe in April 2010, Bruce in July 2010 and McElhatton in September 2010. Id. The Schedule was amended on January 5, 2010 to extend the dates for completion of expert discovery and pretrial proceedings as to Whitfield and Thorpe. (Document No. 2420). The fact discovery deadlines were not amended, and fact discovery remained closed as of December 15, 2009 for those cases. (Document No. 1922). The deadlines as to Bruce and McElhatton were all subsequently extended by sixty days. (Document No. 2608). Whitfield was tried to verdict in April 2010. The trial in Thorpe is currently scheduled to commence with jury selection on July 28, 2010. Bruce and McElhatton have not been formally noticed for trial dates.

Discussion

Defendants seek a protective order precluding certain discovery which they characterize as “late and unnecessary.” (Document No. 2751 at p. 6). In particular, the discovery in dispute consists

¹ The Swallow case was resolved.

of a Rule 30(b)(6) deposition notice served on Defendants for testimony on corporate financial matters and a total of twelve subpoenas for deposition and document production served on six non-party doctors, who are all co-authors of the so-called Iannitti Study which was published in early 2008.

A party moving for a protective order under Fed. R. Civ. P. 26(c) must set forth “particular” facts to establish “good cause” for the order. Anderson v. Cryovac, Inc., 805 F.2d 1, 7-8 (1st Cir. 1986). “Prohibiting the taking of depositions is an extraordinary measure” requiring the moving party to meet a “heavy burden” of showing justifying circumstances. Prozina Shipping Co., Ltd. v. Thirty-Four Autos., 179 F.R.D. 41, 48 (D. Mass. 1998). Such requests are “rarely granted.” Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 92 (N.D. Tex. 1994); see also Jennings v. Family Mgmt., 201 F.R.D. 272, 275 (D.D.C. 2001).

Defendants contend that the requests are untimely since generic discovery (and case-specific discovery in Thorpe) has closed, and the discovery requests in issue “do not concern topics that have only arisen since the close of discovery.” (Document No. 2751 at p. 14). Plaintiffs counter that, although substantially completed, generic discovery has not been “explicitly or implicitly” closed by the Court. (Document No. 2799 at p. 5). Further, Plaintiffs contend that the requests in dispute are targeted discovery regarding long-overdue financial information relevant to their punitive damages claims and to rebut the statements made by Dr. Iannitti and Defendants’ other experts in their expert reports and at the Whitfield trial. Id. at pp. 15-16.

The purpose of the bellwether trial process is to try a group of representative cases in an effort to assess, i.e., predict, the strength and value of various types of cases a process which can lead to the resolution of other similar pending cases in a mass tort litigation such as this MDL.

Given this purpose, it is unfortunate that the parties have not completed or suspended generic discovery so that all involved can focus their attention on case-specific preparation for these important bellwether trials.

With that said, when you boil it all down, Defendants' Motion turns on the accuracy of their position that generic discovery has "closed." Defendants have not pointed to anything in the record explicitly establishing that generic discovery has closed by Court Order or by stipulation. They contend that "[t]he spirit of the Court's orders in connection with the bellwether trials has been that generic fact and expert discovery was to have been completed by these dates for all cases, leaving case-specific discovery to proceed in additional cases as appropriate." (Document No. 2751 at p. 7) (emphasis added). However, I am compelled to rely on more than "spirit" to conclude that generic discovery is closed in this MDL consisting of more than 1,500 cases when only one has been tried to verdict.

The original Pretrial Case Management Order for the bellwether cases (Document No. 1922) provides, in part, that "the parties are to take fact discovery in all of the cases selected for bellwether treatment according to the schedule" contained in the Order. Neither the bellwether Case Management Order (Document No. 1922) nor Practice and Procedure Order No. 21 (Document No. 1885) which identified the bellwether cases indicates that the process would also provide for the closure or even suspension of generic discovery.

Defendants, in their Reply Brief, also rely on certain statements made by Plaintiffs' counsel at the January 7, 2010 Chambers conference which they contend contradict Plaintiffs' current position that generic discovery has not closed. In particular, Plaintiffs' counsel indicated that "[w]e have completed our fact witness discovery period" and that he had received certain databases

“literally on the last day of discovery.” (Document No. 2427, Tr. of Jan. 7, 2010 Chambers Conference at p. 2). While these comments suggest the passage of a discovery closure deadline, they do not explicitly indicate that any stipulation or order exists cutting off all generic discovery. At the January 7, 2010 conference, Plaintiffs’ counsel was presumably referring to the December 15, 2009 deadline for “completion of all fact witness depositions and close of fact discovery” a deadline which is contained in the bellwether Case Management Order under the Section entitled “Schedule for John Whitfield and Christopher Thorpe.” (Document No. 1922 at p. 2)

Finally, Defendants claim that their position as to the closure of generic discovery is supported by comments made during a subsequent Chambers conference preceding the Whitfield trial. On February 9, 2010, Defendants’ counsel proposed a “truce on the generic discovery kind of thing once whatever’s outstanding gets done so we can focus on the [Whitfield] trial.” (Document No. 2504, Tr. of Feb. 9, 2010 Chambers Conference at p. 10).² He also expressed concern about “getting new requests now when we’re a few weeks from trial.” Id. at p. 11. At the time, Whitfield was scheduled for trial commencing in a few weeks, with jury selection scheduled for March 25, 2010. In response, Judge Lisi “suggested” that the parties “work out a truce” because of her concern about the parties being able to meet the schedule for trial in Whitfield. Id. Plaintiffs’ counsel agreed “to a truce on generic discovery” and noted that his side had already represented to Defendants’ counsel that “with respect to Ducheyne or anybody who was Thorpe-specific, we have absolutely no objection to putting it off to get Whitfield done.” Id. at p. 13. However, he also went on to discuss a concern about “outstanding discovery.” Id.

² Defendants’ counsel’s request for a generic discovery “truce” indicates that he did not believe at that time that the bellwether trial process had resulted in the closure of generic discovery because if he had, he presumably would not have proposed a truce but rather argued that such generic discovery was out of time.

These informal discussions never resulted in either a formal stipulation or a Court order closing generic discovery. Defendants are essentially asking that I interpret these comments about discovery status and a discovery truce made in the context of discussing final preparations for the Whitfield trial as an agreement to completely close all generic discovery. I am unable to do so. Further, the term “truce” is defined by Webster’s as “a temporary suspension or cessation of hostilities by agreement of the opposing sides.” (emphasis added). Thus, the use of that term is not indicative of an agreement to permanently close generic discovery but rather a temporary respite to allow the parties to focus on what was then the fast-approaching Whitfield trial.

Plaintiffs served the discovery requests in dispute in late April on the heels of the Whitfield verdict and with Thorpe scheduled for trial in early June. The trial in Thorpe has since been continued to August and Bruce and McElhatton have not been scheduled. Thus, Defendants’ claims as to interference with imminent pretrial preparations carry less weight at this point. In addition, Defendants’ reliance on the Court’s prior Order denying Plaintiffs’ Motions to Compel on the eve of the Whitfield trial is misplaced. See Document No. 2674. Those Motions involved case-specific discovery requests that were simply served too late in the context of the Whitfield litigation. The Order does not consider or find that generic discovery had closed as presently argued by Defendants.

As to the discovery requests, Defendants legitimately take issue with the relatively short time frame provided for response. The Rule 30(b)(6) notice was served on April 21, 2010 and called for production of documents by April 26, 2010 (i.e., within three business days) and deposition on May 6, 2010. (Document No. 2751-13). Similarly, the twelve non-party subpoenas in dispute were served on or after April 22, 2010 and called for production of documents between May 5 and 7, 2010 and depositions at various locations around the country between May 10 and 14, 2010. (Document

Nos. 2751-18 to 2751-23). Given the nature of these requests, they failed to allow a reasonable period of time to comply under the circumstances. However, because of the rescheduling of the Thorpe trial and the passage of time for briefing and decision on their Motion for Protective Order, Defendants have effectively obtained relief on the timing issue.

Defendants also question Plaintiffs' motive for serving the disputed discovery requests and argue that the discovery sought is simply not necessary. Plaintiffs counter that the discovery sought is necessary, remains outstanding and will eventually need to be obtained in one of the more than 1,500 cases pending in this MDL (or in the related state court litigation). Defendants have not shown that the discovery sought is not relevant to the claims or defenses brought in these cases or that any of the grounds for limiting discovery under Fed. R. Civ. P. 26(b)(2)(C) are present. Given the nature of the discovery sought and the context of this MDL, Defendants have not made a sufficiently compelling showing of discovery abuse to warrant an order prohibiting the discovery in issue.

Conclusion

For the foregoing reasons, Defendants' Motion for Protective Order (Document No. 2751) is DENIED.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
June 10, 2010