

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
ARBITRATION PART

Case 1:10-cv-01957-JBW-VVP

DOROTHY GRIFFITH,

Plaintiff,

- Against -

DECISION and ORDER

MELALEUCA, INC.,

Defendant.

(Justice Ira J. Raab, Arbitrator)

In a compulsory arbitration case whereby the Plaintiff claims to have contracted salmonella after eating the Defendant's product, the arbitrator holds that he has the authority under Local Rule 83.10 to direct an expedited deposition of the Plaintiff's expert witness, limited to the issue of causal connection, although the text of the Rule neither prohibits, nor provides for pre-hearing depositions of non-party witnesses.

The within action was assigned to the undersigned by Order of Senior Judge Jack B. Weinstein on December 28, 2010. By agreement of the parties, the arbitration hearing is scheduled for March 11, 2011, at 10AM, at the United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201.

On January 14, 2011, the attorney for the Defendant moved by email submissions, for an Order granting the Defendant an oral deposition of the Plaintiff's treating physician or other expert. On January 15, 2011, the attorney for the Plaintiff, by email submission, opposed the Defendant's application.

The parties have failed to submit copies of their pleadings, although an email request for same was made on December 21, 2010. Thus, the arbitrator is not fully apprised of the all of the claims and defenses raised in said pleadings. Nevertheless, from the various emails exchanged between the attorneys for the parties and the arbitrator it is gleaned that the action is for personal injuries due to the Plaintiff's alleged contraction of salmonella from the Defendant's product, when the Plaintiff ate a candy bar prior to the receipt of a Notice of Recall.

In order to be prepared for trial, the Defendant seeks a pre-hearing oral deposition of the Plaintiff's treating physician or whomever the Plaintiff intends to present at trial to testify regarding the question, "Did the Plaintiff contract salmonella from the defendant's product?" The Defendant does not seek to depose any other person involved in the case. The Defendant agrees to pay for the witness's reasonable hourly rate during the deposition, which the Defendant estimates would be a low cost, due to the limited inquiry. The Defendant correctly states that nothing in the compulsory arbitration rules as

contained in Local Rule 83.10 prohibits discovery depositions, as provided for in Rule 30 of the Federal Rules of Civil Procedure, which permits oral depositions of “any person”.

The Plaintiff opposes the application, contending that the granting of such application would be contrary to the intended purpose of arbitration, that is, a forum meant to be a quicker and less expensive alternative to a trial before a judge or a magistrate. Further contending that such deposition is unnecessary, the Plaintiff offers that before the trial, the Plaintiff will supply the Defendant with a copy of the report and credentials of the expert, the sum and substance of the expert’s opinions and the facts upon which the expert relies. The Plaintiff correctly states that nothing in the compulsory arbitration rules contained in Local Rule 83.10 provides for expert depositions prior to arbitration.

Neither party has submitted any reported court decisions or administrative rulings concerning Local Rule 83.10, addressing the issues and contentions of the parties. Nor has the arbitrator found any such decisions or rulings in his own research.

In the classic movie, “Fiddler on the Roof”, there was a dispute between villagers Perchic and Mordcha, and each one presented his arguments on what the good book says. In deciding who was right, Tevya, the milkman, ruled:

TEVYA: “He is right (turning to Perchic) ...and he is right” (turning to Mordcha).

AVRAM: “He is right and he is right? They can’t both be right”.

TEVYA: “You know, you are also right”.
(Fiddler On The Roof Script – Script-O-Rama Movie Scripts, 1971)

In the within application, the argument of the Defendant is right. The compulsory arbitration rules contained in Local Rule 83.10 do not prohibit pre-hearing oral depositions of expert witnesses. The argument of the Plaintiff is right. The compulsory arbitration rules contained in Local Rule 83.10 do not provide for pre-hearing oral depositions. Accordingly, the arbitrator must determine the issue from sources other than the said arbitration rules. Thus, the arbitrator is also right.

COMPULSORY ARBITRATION UNDER LOCAL RULE 83.10

The objective of compulsory arbitration of civil cases mandated by Local Rule 83.10 of the United States District Court, Eastern District of New York, is to relieve court congestion and to provide litigants in cases concerning damages of up to \$150, 000, exclusive of interest and costs, with a forum to resolve their disputes in a more timely, efficient and less costly manner than trials before judges and magistrates. (Local Rule 83.10 (d) (1)) The damages in all civil cases are presumed to be not in excess of \$150,000 (Local Rule 83.10 (d) (3)), unless counsel for the Plaintiff or the Defendant

timely files a certification that the damages in the complaint or counter-claim, respectively, exceed \$150,000, exclusive of interest and costs (Local Rule 83.10 (d) (3) (A) and (B)). Counsel have 90 days from the date of the clerk's notice of arbitration to complete discovery (Local Rule 83.10 (e) (1)). A Single arbitrator hears the cases, unless a party requests a panel of three arbitrators, but cases concerning damages of \$5,000 or less, are heard only by a single arbitrator (Local Rule 83.10 (e) (4)).

“Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule” (Emphasis supplied) (Local Rule 83.10 (f) (4)). Interestingly, the Guidelines for Arbitrators regarding the compulsory arbitration process omit the words, “at an arbitration hearing”. There is no mention in the Local Rule 83.10 or in the Guidelines for Arbitrators of any specific rules of discovery, other than the aforementioned requirement that counsel for the parties have 90 days from the date of the clerk's notice of arbitration to complete discovery (Local Rule 83.10 (e) (1), Emphasis supplied). There is no indication of what specific type or types of “discovery” is referred to.

The Federal Rules of Evidence shall apply to such arbitration proceedings as guides to the admissibility of evidence (Local Rule 83.10 (f) (5)).

In summary, Local Rule 83.10 does refer to the Federal Rules of Evidence, and to the subpoena provisions of the Federal Rules of Civil Procedure, and to non-specified “discovery”. The word “discovery”, following the word “complete”, was not written in a vacuum. It must have substantial meaning. The arbitrator is of the opinion that the “discovery” mentioned in Local Rule 83.10 (e) (1) could only mean the discovery rules contained in the Federal Rules of Civil Procedure. The court is urged to amend Local Rule 83.10 (e) (1) so as to add, “as provided in the Federal Rules of Civil Procedure” after the words “complete discovery”.

FEDERAL ARBITRATION ACT (FAA)

A review of the court decisions regarding Section 7 of the Federal Arbitration Act (FAA) as to non-party depositions would be helpful in determining the Defendant's application to depose the Plaintiff's expert witness under the compulsory arbitration process.

Section 7 of the Federal Arbitration Act (9 U.S.C. Section 7) provides:

“The arbitrators selected either as prescribed in this title (9 U.S.C. Section 1 et seq.) or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case.if any person or persons so summoned to testify shall refuse or neglect said summons,.....the United States district court.....may compel the attendance of such

person or persons before said arbitrators”. (Emphasis supplied)

The words “attend before them” and “before said arbitrators” in FAA Section 7 are similar in nature to the words “at an arbitration hearing” in Local Rule 83.10 (f) (4). Do these word mean that an arbitrator under FAA Section 7 or under Local Rule 83.10 can compel a non-party witness to appear for a deposition only before the arbitrator or at an arbitration hearing, as opposed to compel the non-party witness to appear at a pre-hearing oral deposition in the absence of the arbitrator? This arbitrator could find no case on point as to the Local Rule 83.10 compulsory arbitration process. There are cases on point as to FAA Section 7.

The following are some of the cases, using a broad interpretation, that hold that an arbitrator under FAA Section 7 may compel a non-party witness to appear and give testimony at a pre-hearing oral deposition: Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla 1988); Amgen, Inc. v. Kidney Center of Delaware County, Ltd., 879 F. Supp. 878 (N.D. Ill 1995); Liberty Securities Corp. v. Fetchco, 114 F. Supp 2d 1319 (S.D. Fla 2000); In re Arbitration Between Scandinavian Reinsurance Co., Ltd and Continental Casualty Co., No. 04-C-7020 (S.D. Ill Dec. 10, 2004).

The following are some of the cases, using a narrow or strict interpretation, that hold that an arbitrator may not compel a non-party witness to appear and testify at a pre-hearing oral deposition: Integrity Insurance Co. v. American Continental Insurance Co., 885 F. Supp. 69 (S.D.N.Y. 1995); In the Matter of the Arbitration Between Hawaiian Electric Industries, Inc. and Hei Power Corp, 2004 WC 1542254 (S.D.N.Y. 2004); SchlumbergerSerma, Inc. v. Xcel Energy, Inc., 2004 WL 67647 (D. Minn Jan. 9, 2004); Odfjell ASA v. Celanese AG, 328 F. Supp.805 (S.D.N.Y 2004); Life Receivables Trust v. Snydercate 102 at Lloyd's of London, 549 F. 3d 210 (2nd Cir. 2008).

None of the above cases involve the pre-hearing oral deposition of a non-party expert witness whom a party intends to call to prove causal connection in a personal injury negligence or products liability suit.

PRIVATE ARBITRATION FORUMS

A review of arbitration rules of private arbitration forums, not court annexed, reveals the following sample rules for depositions:

“At the discretion of the arbitrator(s), upon good cause shown, and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of such persons who may possess information determined by the arbitrator(s) to be necessary to (sic) determination of the matter.” American Arbitration Association (AAA), Rule L-4 (d)

“Expert Depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing (Rule 17 (a)), expert depositions may be conducted by agreement of the Parties or by order of the Arbitrator for good cause shown.” JAMS, Inc (JAMS), Rule 16.2 (e)

“NAM’s Arbitrations do not entail comprehensive discovery. Unlimited discovery would be contrary to NAM’s goal of efficient and economical resolutions. The parties shall have the right to take depositions and to request documents on an expedited and limited basis subject to the approval of the Hearing Officer.” National Arbitration and Mediation (NAM), Rule 11

In summary, private arbitration forums, not court annexed, provide for limited expedited and economical depositions at the sound discretion of the arbitrator, upon good cause shown.

DISCUSSION

Arbitration, of whatever form, compulsory or by agreement or contract, and of whatever forum, court annexed or private, is designed to achieve expedited, efficient and cost effective resolution of civil disputes, and to relieve the courts of the overburden of a multitude of cases in our modern litigious society. Discovery is generally discouraged, although permitted under certain limited circumstances.

Local Rule 83.10 of the United States District Court, Eastern District of New York, and similar rules of other United States District Courts, provide for compulsory arbitration of civil cases of a value of up to \$150,000. The rule does not specifically prohibit or provide for pre-hearing depositions, although reference is made therein for the completion of unspecified “discovery”.

Rule 30 of the Federal Rules of Civil Procedure provides a procedure for depositions of “any person”, meaning parties and non-party witnesses. It does not prohibit such depositions in compulsory arbitration cases.

Section 7 of the Federal Arbitration Act authorizes arbitrators to compel “any person” to appear as a witness before them and to produce material documents “in a proper case”, without any guidelines or standards as to what is a proper case. The use of the words “any person” includes parties and not-parties. It makes no differentiation as to a witness’s appearance before the arbitrators at a pre-hearing conference or deposition, or at the fact determination hearing, itself. Several cases decisions fall on both sides of the argument as to whether an arbitrator may compel non-party witnesses to appear at a pre-hearing deposition, where the arbitrator is not present.

The rules of private arbitration forums, not court annexed, allow arbitrators to compel or authorize limited pre-hearing depositions of parties and non-parties, upon good cause

shown.

The within case involves a Plaintiff who alleges that she contracted salmonella after ingesting the Defendant's product, a candy bar, before receiving a Notice of Recall. This type of claim requires the testimony of an expert in order for the Plaintiff to recover. The Plaintiff announced that she has such an expert, and has offered to deliver to the Defendant before trial the report and credentials of the expert, and the sum and substance of the expert's opinion and the facts upon which the expert relies.

The Defendant wishes to conduct a pre-hearing deposition of the expert on the limited issue of whether the Plaintiff contracted salmonella from the Defendant's product. This issue is the crux of the case. Without the connection of the injury to the product, the Plaintiff cannot recover. The Defendant seeks the deposition in order to prepare for the hearing. The Defendant does not seek to depose any other person. The Defendant offers to absorb the expenses of the deposition, including the reasonable compensation of the witness.

Such a pre-hearing deposition would shorten the hearing, but it could also lead to a settlement before the hearing, should the Defendant be of the opinion that the expert witness' testimony would make the required causal connection, or should the Plaintiff be of the opposite opinion.

The limitation of the scope of the pre-hearing deposition of the expert witness will make the arbitration process quicker, more efficient, and cost effective.

CONCLUSION

After analyzing the provisions of Local Rule 83.10, Rules 30 and 45 of the Federal Rules of Civil Procedure, Section 7 of the Federal Arbitration Act (and the cases interpreting it), and the rules of private arbitration forums, not court annexed, the arbitrator finds that there is good cause for the requested limited deposition. Accordingly, the application of the Defendant is granted.

Upon receipt of this Decision, the parties are directed to communicate with the expert witness to arrange for the expedited and limited deposition, whether by agreement of the parties and the expert, or by the timely service of a proper Notice of Deposition. The deposition shall take place not later than February 15, 2011. The arbitrator shall be notified of the date, time and place of the deposition, so that the arbitrator may be available for telephone rulings, should the need arise. The Defendant shall pay for the cost of the deposition, including the reasonable fee of the witness. Before the deposition, the Plaintiff shall supply the Defendant with copies of the report and credentials of the witness, including the sum and substance of the opinion of the expert and facts upon

which the expert relies. The Defendant shall supply the Plaintiff with a copy of the deposition transcript not later than 10 days before the March 11, 2011 hearing. Within 5 days after the conclusion of the deposition, the parties shall hold a pre-hearing telephone conference with the arbitrator.

Dated: January 25, 2011

(s)

JUSTICE IRA J. RAAB,
Arbitrator

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