

[UAB Pamario Dvaras v. DKP Wood Railings & Stairs Inc.](#)

United States District Court for the District of New Jersey

August 18, 2016, Decided; August 18, 2016, Filed

Civil No.: 14-4495 (KSH) (CLW)

Reporter

2016 U.S. Dist. LEXIS 110999 *

UAB PAMARIO DVARAS and TEISUTIS MATULEVICIUS, Plaintiffs, v. DKP WOOD RAILINGS & STAIRS INC., DMITRI ONISHCHUK, VIATCHESLAV CHEPELEVITCH, and VIKTOR KLICHKO, Defendants.

Notice: NOT FOR PUBLICATION

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For DKP WOOD RAILINGS & STAIRS INC., DMITRI ONISHCHUK, Defendants: **GLENN R. REISER**, LEAD ATTORNEY, LOFARO & **REISER**, LLP, HACKENSACK, NJ.

Judges: Katharine S. Hayden, United States Magistrate Judge.

Opinion by: Katharine S. Hayden

Opinion

This matter comes before the Court by way of an appeal of two discovery orders pursuant to [Federal Rule of Civil Procedure 72\(a\)](#) and [Local Civil Rule 72.1\(c\)\(1\)](#) by plaintiffs UAB Pamario Dvaras and Teisutis Matulevicius. (D.E. 83.) Magistrate Judge Cathy Waldor denied plaintiffs' request to (1) exchange an expert witness and (2) conduct an inspection of defendant Dmitri Onishchuk's passport prior to his deposition on August 26, 2016. Plaintiffs ask this Court to reverse Judge Waldor's orders, arguing that they made reasonable requests to conduct material discovery that is necessary to the prosecution of their claims. Defendants argue that the appeal is untimely and that Judge Waldor's rulings were proper.

I. BACKGROUND

The Court writes for the parties and dispenses with a full factual summary of the case. For the purposes of this appeal, it is sufficient to say that plaintiffs allege defendants undertook fraudulent transactions involving [*2] vehicles that were damaged during transport abroad, culminating in an allegedly improper lawsuit against plaintiffs in Lithuania and the loss of plaintiffs' business there through bankruptcy. (D.E. 83-1 at 2.) The Court notes that the parties have been aggressively litigating on multiple fronts and cautions them that any matters raised in their submissions outside the scope of the appealed orders has not been considered.

The relevant discovery issues grow out of a claim that defendant Onishchuk traveled to Minsk, Belarus on March 21, 2011.¹ As part of their exchange of discovery, defendants produced a photocopy of some internal pages of Onishchuk's passport and an explanation of their origin and the stamps on each page. At an in-person status conference on June 14, 2016, plaintiffs sought an order directing defendants to produce a complete copy of Onishchuk's passport, seeming to question the authenticity of the documents produced. (June 14, 2016 Transcript at 77:17 to 78:1.) Defense counsel represented to Judge Waldor on the record that he had personally viewed the passport and that it belonged to his client, as did the internal travel pages that were produced in discovery. (*Id.* at [*3] 79:24 to 83:3.) Despite this, plaintiffs sought direct confirmation that the travel pages produced were from Onishchuk's passport. (*Id.* at 78:2 to 81:15.) On the request of plaintiffs' counsel, Judge Waldor ordered that Onishchuk bring his passport to his deposition so plaintiffs' counsel could view it in full. (*Id.* at 83:5 to 84:24.)

Two days later, plaintiffs sent a letter to Judge Waldor requesting an order permitting inspection of Onishchuk's passport prior to his deposition. (D.E. 60, 83-3.) Plaintiffs merely stated that it would be "greatly prejudicial" not to have viewed the passport in full in advance of the deposition, but did not expand on why this would be so in light of the already-exchanged photocopies of the passport's travel pages. (D.E. 60 at 2.) Judge Waldor denied the request, and the parties received a notification of that order on June 22, 2016. (D.E. 65; D.E. 95, Ex. 1.)

At the next status conference, plaintiffs sought to

retain the experts who would be able to explain to the Court what the law of the Republic of Belarus is with regards to entry and exit of United States citizens on U.S. passports in and out of the country, and specifically [*5] to explain that U.S. citizens are required to have not only Belarussian visa, but the visa has to be stamped upon entry and stamped upon exit, which would cut against Mr. Onishchuk's claim to have been in the country based upon what was set forth in his passport.

(D.E. 83-4 ("July 12, 2016 Transcript") at 4:21 to 5:5.) Judge Waldor denied the request, stating that she found an expert in this area to be irrelevant and ultimately inadmissible. (*Id.* at 3:13-17.) At the end of the proceeding, the following exchange occurred between defense counsel (Sferrazza) and plaintiffs' counsel (Nussbaum):

MR. SFERRAZZA: There's another issue here, to try to shortcut something. Our client, Dmitri, the individual, is a Belarussian native, citizen. So all this visa stuff from 10 minutes ago doesn't apply. He goes into Belarus as a citizen of Belarus. So, you know, we—I've been saying this—

THE COURT: Okay.

MR. SFERRAZZA: All along. So, you know—

THE COURT: Right.

¹ Plaintiffs do not state why Onishchuk's presence in Belarus is relevant in their appeal. The Court gathers from the transcript of the proceedings before Judge Waldor that his whereabouts go to the issue of fraudulent documents and sales, which, according to plaintiffs' counsel,

all purport—or from what the defendants are explaining, they all purport that Mr. Onishchuk. The principal of DKP Wood, was in three different, simultaneously, almost, in three different towns in Belarus in Minsk and Pinsk and five other places on the same day, and he had sold all cars to individuals and with specific regard to these three individuals, pretty much simultaneously. And it just didn't really—it's physically impossible to be in these large—in these countries separated by large distances all at the same time, all in the same day. If I remember correctly, some of those [*4] agreements actually purport that he sold 20 cars all on the same day at the same time.

So we are alleging, based upon that that those are original—quote/unquote original agreements and bills of sale are fake and that none of the individuals identified on those agreements actually purchased the vehicles.

(D.E. 83-2 ("June 14, 2016 Transcript") at 32:21 to 33:15.)

MR. SFERRAZZA: —he's got dual citizenship. I don't understand all this. And that's not—

MR. NUSSBAUM: —this is actually the first time that I'm hearing about this—

MR. SFERRAZZA: Oh, my goodness.

THE COURT: No, it's in my notes. It's in my notes Mr. [*6] Nussbaum.

(*Id.* at 14:24 to 15:17.) Following this exchange, Judge Waldor directed that both passports be brought to Onishchuk's deposition. (*Id.* at 16:19-23.) Despite Judge Waldor's indication that her notes reflect otherwise, plaintiffs maintain to this Court that the above exchange was the first time Onishchuk's Belarussian passport was disclosed.

On July 26, 2016, plaintiffs filed a letter on the docket noting their objections to Judge Waldor's June 17, 2016 order denying the request for plaintiffs' counsel to view Onishchuk's passport(s) in person prior to his deposition (D.E. 65) and her July 12, 2016 oral order denying plaintiffs' request for an expert on Belarussian requirements for entry and exit of U.S. citizens (July 12, 2016 Transcript at 3:13-17). This Court required plaintiffs to file a formal application pursuant to *Local Civil Rule 72.1(c)(1)* to appeal Judge Waldor's orders (D.E. 79), which they did on July 31, 2016 (D.E. 83). Defendants submitted opposition on August 15, 2016, and plaintiffs filed their reply on August 17, 2016, all in compliance with the Court-ordered briefing schedule. (D.E. 89, 95, 101.)

II. LEGAL STANDARD

Magistrate judges may hear and determine any non-dispositive pretrial matter [*7] pending before the court pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#). A party may appeal a magistrate judge's non-dispositive order within 14 days of being served with a copy of the order. [Fed. R. Civ. P. 72](#); *L. Civ. R. 72.1(c)*. The district court will only reverse a magistrate order on a pretrial matter if it is "clearly erroneous or contrary to law." [28 U.S.C. § 636\(b\)\(1\)\(A\)](#); [Fed. R. Civ. P. 72\(a\)](#); *L. Civ. R. 72.1(c)(1)(A)*. An order is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Huertas v. City of Camden](#), 2009 U.S. Dist. LEXIS 87950, 2009 WL 3151312, at *1 (D.N.J. Sept. 24, 2009) (Hillman, J.) (quoting [South Seas Catamaran, Inc. v. Motor Vessel Leeway](#), 120 F.R.D. 17, 21 (D.N.J. 1988)). A decision is contrary to law when "the magistrate judge has 'misinterpreted or misapplied applicable law.'" [Merck Sharp & Dohme Corp. v. Sandoz, Inc.](#), 2014 U.S. Dist. LEXIS 52548, 2014 WL 1494592, at *7 (D.N.J. Apr. 16, 2014) (Sheridan, J.) (quoting [Doe v. Hartford Life & Accident Ins. Co.](#), 237 F.R.D. 545, 548 (D.N.J. 2006) (Linares, J.)).

Mere disagreement with the magistrate judge's findings is insufficient for reversal, and a district judge may not consider evidence not before the magistrate judge. See [Haines v. Liggett Grp. Inc.](#), 975 F.2d 81, 91 (3d Cir. 1992); [Andrews v. Goodyear Tire & Rubber Co.](#), 191 F.R.D. 59, 68 (D.N.J. 2000). The appellant bears the burden of demonstrating that the magistrate judge's decision meets the standard for reversal. [Exxon Corp. v. Halcon Shipping Co.](#), 156 F.R.D. 589, 591 (D.N.J. 1994).

III. DISCUSSION

a. Timeliness

[Federal Rule of Civil Procedure 72](#) and *Local Civil Rule 72.1(c)* permit a party to appeal a non-dispositive magistrate order within 14 days. In this case, the parties received notice of the order denying plaintiffs' request for an advanced viewing of Onishchuk's [*8] passport on June 22, 2016. Under the Rules, that order should have been appealed by July 6, 2016. Even back-dating plaintiffs' appeal to the date of their informal letter to this Court on

July 26, 2016, they are still sorely out of time to appeal this ruling. See [Huertas, 2009 U.S. Dist. LEXIS 87950, 2009 WL 3151312, at *2](#) (bringing appeal well beyond deadline is alone sufficient for dismissal). Plaintiffs' appeal of Judge Waldor's July 12 oral order is arguably out of time as well because their July 26, 2016 letter to this Court did not comply with the Local Rules governing this district, with which plaintiffs' counsel should be familiar. (See D.E. 79.) Notwithstanding the Court will address the merits of plaintiffs' appeal of both orders.

b. Merits of appeal

Judge Waldor's rulings address non-dispositive matters and are therefore reviewed under the "clearly erroneous or contrary to law" standard. [Fed. R. Civ. P. 72\(a\)](#); [Kounelis v. Sherrer, 529 F. Supp.2d 503, 517-18 \(D.N.J. 2008\)](#) (Debevoise, J.) (pretrial discovery matters are non-dispositive). It is worth noting that [Federal Rule of Civil Procedure 26\(b\)\(1\)](#) entitles a litigant to discovery that is relevant to a claim or defense and proportional to the needs of the case; the Rule also provides that the scope of this discovery may be limited by court order. See also [E.E. O. C. v. Univ. of Penn., 850 F.2d 969, 979 \(3d Cir. 1988\)](#) (relevancy "is the touchstone of any discovery [*9] request"). [Rule 26](#) permits the judge overseeing pretrial discovery "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." [Crawford-El v. Britton, 523 U.S. 574, 598, 118 S. Ct. 1584, 140 L. Ed. 2d 759 \(1998\)](#).

As to Judge Waldor's first order (D.E. 65) denying the request to view Onishchuk's passport some days prior to his deposition, given plaintiffs' access to photocopies of the internal pages of the American passport and defense counsel's representations on the record that the pages were indeed from his client's passport, the determination that plaintiffs' request was unnecessary and disproportionate to the needs of the case was not clearly erroneous or contrary to law. To accommodate plaintiffs' counsel's desire to confirm the validity of the pages produced in discovery, Judge Waldor directed that the passport to be brought to the deposition for an attorney's eyes only review. The record in no way suggests that plaintiffs will be prejudiced thereby. The Court is left with the definite and firm conviction that no mistake has been committed here. See [Huertas, 2009 U.S. Dist. LEXIS 87950, 2009 WL 3151312, at *1](#).

The Court is also in agreement with Judge Waldor's oral order denying plaintiffs' request to exchange experts on the issue of American travel and admission to Belarus. As can be seen from the [*10] numerous proceedings on the docket, Judge Waldor has been shepherding this case through discovery over the past two years. (See, e.g., conferences held on February 19, 2015; December 3, 2015; February 2, 2016; February 19, 2016; March 1, 2016; March 21, 2016; June 14, 2016; July 12, 2016; and August 9, 2016.) The record confirms that Judge Waldor appropriately deemed this discovery irrelevant at this juncture. Even if Onishchuk's presence in Belarus is relevant to plaintiffs' claims, an expert on the conditions of passport entry for American passport-holders in Belarus is not relevant because Onishchuk was a citizen of Belarus travelling with a Belarussian passport.² (July 12, 2016 Transcript at 14:24 to 15:17.) On the present record, Judge Waldor's ruling was an appropriate limitation of discovery under [Rule 26\(b\)\(1\)](#) and well within her discretion.

IV. CONCLUSION

For the reasons stated above, plaintiffs' appeal [*11] is denied as to both of Judge Waldor's orders. An appropriate order will follow.

/s/ Katharine S. Hayden

Katharine S. Hayden, U.S.D.J.

² Even if the Court disregards Judge Waldor's prior notes reflecting Onishchuk's Belarussian citizenship and assumes plaintiffs' counsel learned of this passport on July 12, 2016, this does not make the requested expert any more relevant. If anything, it mitigates against filing this appeal.

Dated: August 18, 2016

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