

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ESTATE OF ZARDA,

Plaintiffs-Appellants,

15-3775

-against-

ALTITUDE EXPRESS

DECLARATION IN
OPPOSITION TO MOTION
TO STRIKE

Defendant-Appellee.

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GREGORY ANTOLLINO, an attorney admitted to practice in this court does hereby declare
under penalty of perjury that the following is true

1. I am plaintiffs-appellants' attorney and write in opposition to defendants' motion to strike essentially the the entire appendix because of certain "annotations." The first reason the motion should be denied is that the defense did not ask me if I opposed it under court rules. I would have told him I did if asked, but perhaps we could have worked out a compromise, I have learned however that Mr. Zabell rarely compromises, not even on procedural points. I note in my opening brief that he required me to lay a foundation for his clients' business record. Br. at 58. (I had to call his client to the stand before any other witness to authenticate the video that recorded the event that was the alleged basis for appellant's termination in this employment discrimination case.)
2. Defendants-appellees mentioned annotations" when the appendices were filed. I asked, what annotations in an email attached as "Exhibit A, only to get no response. At that point, the hard copies had not been filed and could more easily have been corrected.
3. When the appendices were filed, there were problems with the caption and the fact

- that some documents had less than 300 pages. I made a motion to deem these acceptable because of a page-counting error, which the defense did not oppose,
4. However, now he moves for the extreme relief of striking all appendices because of certain annotations. Over the course of the next few hours, I asked him to list which annotations he deemed unacceptable and he replied repeatedly, ” words to the the effect that “everywhere there is an annotation I want removed.” See emails attached as Exhibit B.
 5. He called and demanded same, and my questions resulted in no further clarifications, I asked him to list the pages where there were annotations he objected to, or what prejudiced him, and he only mentioned page 631, which identifies the document as an exhibit and says that Don Zarda was on the left. I see that as a frivolous point since he was so identified in the lower court, and the document was filed there
 6. As I see it, there are three potential “annotations” at issue. One, where the document is denoted as “Exhibit R,” or some such, which I see as completely fair game and a benefit to the reader. There might have been Exhibit tabs, but they do not scan well and Adobe Acrobat allows one to type in such information.
 7. The second type of annotation is the description of the Exhibit, such as “Exhibit X, Layout of SDLI Dropzone.” If that is what I called it in the original, where’s the prejudice or problem in identifying it s such in the appendix? It just makes it easier for the reader. The New York Appellate Divisions Departments require this. The 2d Circuit does not – merely in the table of contents. But, again, where’s the prejudice to this variance? It is merely a courtesy for the reader identifying the exhibit by name and description. I did this, by the way, for both parties.

8. The third “annotation” might be something else such as “Plaintiff on left,” the one thing the defendant pointed out to me on page 631. This is such a minor variance that it does not in anyway prejudice anyone unless incorrect. What I suggested to defense counsel - see exhibit B – is that he make a list of potentially prejudicial annotations, and we compromise. Defense counsel Zabell refused. That’s a problem because, first, the annotations help the reader; second the expense of reprinting the appendices does not justify the minor benefit?
9. Ultimately, I’ve tried to work out a compromise with Mr. Zabell, and he won’t even tell me the page number’s he’s unhappy about. The bottom line is that of the handful of annotations that are there, he’s suggesting that the Circuit judges, the best in Connecticut, Vermont and New York, and among the best in the country are going to decide legal issues on a few works in a 1200-page appendix. Since he won’t even tell me what he finds is so offensive, to go the the expense of redoing the appendix of a five-year litigation would not be proportionate to the benefit achieved
10. There are no filings the defense has identified as not being faithful to the record. If there are, I will modify them, but the defense refuses to identify a thing - sharp practice that serves no benefit. I must soon amend the cover of the appendix after my motion is decided on the page number. If the defendants want me to remove their names from the appendix, I will do so. Ultimately, defendants' motion elevates form over substance. There will perhaps be few perfect appendices in a case of this size and importance. Again, if defendant identifies the annotations that are so prejudicial as to violate the rules, I will remove them. What defense counsel is trying to do however – in an appeal over how (in part) his rule violations actually prejudiced the

Exhibit A

Monday, March 28, 2016 4:09 PM

Subject: Re: Appendix error**Date:** Tuesday, March 15, 2016 at 5:35 PM**From:** Gregory Antollino <gregory10010@verizon.net>**To:** "Saul D. Zabell" <szabell@laborlawsny.com>

I don't know what you are talking about. Certainly, for one, not every document in the lower court has to be included. That's for sure, but you can file a supplemental appendix if you think I have left something out. The rules provide for that. It's not like the AD.

As for annotations, I have no idea what you mean. You have a problem, for example, with "lunch taken"? You think that's an annotation? What are the "annotations" you are talking about? It's a maze, I fairly included everything relevant, and misrepresented nothing.

On 3/15/16, 5:31 PM, "Saul D. Zabell" <szabell@laborlawsny.com> wrote:

Gregory, we would consider your request if you remove all the annotations from the documents contained within the joint appendix. In addition, you are not permitted to strike certain pages that do not suit your case. If you would agree to submit a full and complete joint appendix then we would consent to your request.

Sent from a mobile location

Saul D. Zabell
Zabell & Associates, P.C
One Corporate Drive, Suite 103
Bohemia, NY 11716

(631) 589-7242

----- Original message -----

From: Gregory Antollino <gregory10010@verizon.net>

Date: 3/15/2016 4:39 PM (GMT-05:00)

To: "Saul D. Zabell" <szabell@laborlawsny.com>

Subject: Appendix error

Exhibit B

Monday, March 28, 2016 4:08 PM

Subject: Re: What annotations

Date: Monday, March 28, 2016 at 10:20 AM

From: Gregory Antollino <gregory10010@verizon.net>

To: "Saul D. Zabell" <szabell@laborlawsny.com>

You're saying "remove what I want removed." I don't accept that as clarity. Give me the page numbers. If you won't, that will be my response to you motion.

GA

On 3/28/16, 10:17 AM, "Saul D. Zabell" <szabell@laborlawsny.com> wrote:

Greg, I cannot be any clearer. In each and every instance in which you have put an annotation on an exhibit we want it removed. Please don't make a bigger deal out of this than it deserves. Just comply with the rules.

Saul D. Zabell Zabell & Associates, PC One Corporate Drive, Suite 103 Bohemia, NY

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