

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-3775 Caption [use short title]

Motion for: order deeming appendix substanti- Zarda
ally in accordance with rules and overlooking
defects other than the caption changes.

Set forth below precise, complete statement of relief sought:

There were some problems with the appendix.
The case manager pointed them out and held
them in abeyance pending a motion. The ap-
pellee moved to strike the appendices on
different grounds. Judge Susan Carney denied
both motions without prejudice pending further information.

MOVING PARTY: Estate of Zarda OPPOSING PARTY: Altitude Express
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Gregory Antollino OPPOSING ATTORNEY: Saul Zabell
[name of attorney, with firm, address, phone number and e-mail]
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212-334-7397 gantollino@nyc.rr.com Bohemia, NY 11716 szabell@laborlawsny.com

Court-Judge/Agency appealed from: EDNY, Bianco, J.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney:  Date: April 8, 2016 Service by: CM/ECF Other [Attach proof of service]

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 &
SUPPORTING CROSS MOTION

Defendants-Appellees.

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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, with Stephen Bergstein, am plaintiff-appellant's (two executors, one estate to be referred to in the singular) attorney and write in support of appellant's cross-motion to deem the Appendix Substantially in accordance with the local and Federal Rules, with the exception of the caption and in opposition to Appellee's motion. I will correct the caption – and anything else deemed appropriate – as directed when this motion is decided.
2. After I filed the Appendix, Ms. Ellwood, the case manager, notified me of the issues with the Appendix in that not all volumes totaled 300 pages. She said she saw my intention, but that I would have to make a motion to have the Appendix accepted. The caption was incorrect, though, and would need to be redone for certain.
3. This is an important appeal of a cutting-edge issue in which precedent is in conflict with EEOC rulings, and, we contend, those of the Supreme Court. Similar appeals are pending in two other circuits. We are asking the Court to recognize that sex discrimination under Title VII encompasses sexual-orientation discrimination because

such discrimination relies on prohibited stereotyping and associational bias.

4. The case below had a “double federal diversity” insofar as plaintiff was a diverse citizen and we presented a federal question. The trial judge denied the Title VII claim, but allowed the case to be tried under a similar state law. Plaintiff lost, but the judge instructed the jury under a more restrictive standard than he would have under Title VII, and we allege other errors, including the allowance of 50 additional witnesses to be listed after discovery.
5. I start with plaintiff’s cross motion, because in actuality I filed that first: Again, with the exception of the caption, plaintiff asks that the defects in the Appendix as noted by Ms. Elwood be overlooked as insubstantial. She asked me to move for this relief before “bouncing” the appendices because the errors were relatively insubstantial in relation to the difficulty it would take to correct them. Defendant did not appose this relief.
6. I have briefed many appeals, perhaps even most as appellant, and nearly all “in house” without the use of an appellate press. However, this is the first time under the Court’s new rules that I, as appellant, have come in with a multi-volume appendix.
7. Because of a misunderstanding in reading Local Rule 32.1, I made an error in the six-volume appendix, which is as follows: I knew the material needed for the Joint Appendix was going to require six Volumes. The rules require that only necessary materials be included, and of course sometimes “necessary” is a grey area. However, I included all of the testimony and rulings, as well as all pre-trial documents materially necessary for the appeal and defense. There were some other things I could have put in, but leaned on the side of saving paper. They were colorably, if not

definitely, necessary.

8. I wanted to have the pre-trial documents in the first three columns and the trial in the last three volumes so that, in my head, I would know where to look for something, and so would a reader. There are 300 pages each in Volumes IV, V & VI. Volumes I, II and III are short of 300, however, anywhere from 4 to 80 pages. This was as a result of (1) my wanting to start a new volume at the beginning of a document rather than in the middle; and, more significantly, (2) problems I had with Donald Zarda's deposition testimony, and the parties' requests for designations of that deposition to be read at trial.
9. Mr. Zarda died after summary judgment and before trial. As such, there was some debate about which of his testimony would come in at trial. His deposition was 319 pages, and what each party did was to mark in color the portions they wanted to read, and submit them in toto in the 319-page deposition.
10. Judge Bianco did not rule on the testimonial questions until trial, and he ruled on them for substance, not form; he also did not refer to page numbers for the most part. The parties then each read Mr. Zarda's testimony at trial, referring to the deposition testimony by line and page number, and this was recorded in the trial transcript verbatim.
11. I decided originally to put in Mr. Zarda's deposition transcript with two pages on each side. Unfortunately, that printed awkwardly, with a reader having to turn the volume sideways to read.
12. Therefore, what I did was divide the testimony into four sheets per page, which is allowed by the rules, and which eliminated the awkwardness of turning the book.

- However, it also eliminated about 161 pages from the first three volumes. I distributed these empty pages among these three volumes, with the biggest emptiness in Volume I.
13. The ability of an e-reader to obtain the exact page number cited in a brief volume is still workable insofar as each volume begins at 1, 301, 601, 901, 1201, and 1501. The only thing missing is that I did not fill each volume to 300 pages.
 14. I respectfully ask the Court to overlook this defect. I could add material that is colorably necessary to the appeal and fill up those volumes with fewer than 300 pages. What I would probably do is take the pages the parties designated for Zarda's deposition and print them out and redo the shorter page Volumes without changing the appendix references in the brief.
 15. However, I believe that this would be to elevate form over substance, and increase the carbon footprint; the deposition is already in Volume I for the purposes of summary judgment. For the purposes of admission at trial, it is discussed by topic area where in dispute, sometimes referenced by page number. Where there were no disputes, or after the court ruled on some testimony, the designations were read aloud to the jury and the speakers noted the page and line numbers.
 16. So the deposition is now in the appendix, Volume 1, in toto. The portions admitted at trial were read at trial and discussed, where in dispute, by topic area. I can, but do not believe it is necessary, to add more pages to the shorter appendixes. I now understand Local Rule 32.1(b)(2) and (3) to mean not only that Appendix Volumes must not exceed 300 pages, but that they must complete the entire 300 pages before starting a new volume; that was not clear to me when I read the rule, but it is now. But for the

- reasons described in paragraph 8, however, I would have been able to achieve this. I ask that the decision I made to correct the awkwardness for the reader be forgiven, overlooked and the appendices deemed filed without any do-over. I understand Captions are more important and I can easily modify those when this motion is decided.
17. I also note that when I discovered this, there were only a couple of days to fix the problem, and I still needed time to work on the brief. I had originally chosen March 30 as my filing date, but I miscalculated, and it was ordered to be filed by March 11. Dana Ellwood, the case manager, told me I could move for additional time, but of course that relief was not guaranteed, and I was able to rearrange my other cases to correct my mistake in scheduling my due date. So there was some pressure on me when this error arose, and I did the best I could.
 18. For all of these reasons, I ask that the Court accept the appendices as filed that do not reach three hundred pages. I do not believe anyone is prejudiced by this and I believe that the goal in complying with the rule would not be worth the paper resources and attorney time expended to fix it, though I certainly am on notice for the future if I am in this position again.
 19. As for defendant's motion, he is exalting form over substance as well. Originally, weeks ago, he called to tell me to demand that I remove annotations. I asked him "What annotations?" He replied that I "had been weighed and measured and found to be come up wanting" and the annotations be removed. He provided no detail.
 20. He moved to strike the appendices. I opposed his motion on the grounds that he didn't identify the annotations. I wondered if perhaps I had truly done something prejudicial

- to him. He note that not all documents had a court stamp on them, but did not identify a single document that is not an accurate reproduction of what was filed below.
21. The Court, Carney, J., wondered as well what annotations were at issue, and denied the motion without prejudice, pending a recitation of the annotations, as well as my earlier unopposed motion.
 22. Defendant moved again, identifying 20 annotations. As it turns out, the annotations are milquetoast references to things like “Exhibit K,” verbatim descriptions of the exhibits, and minor things to help the reader, like “remainder on page 3.” None of these are prejudicial in the least, and affect merely 20 pages out of a daunting 1000-page appendix.
 23. There were a couple of annotations that, in retrospect, describe things, such as “Maynard’s ex-wife” and “facebook posts.” Shame on me, I should not have done that, and please forgive my non-compliance with the rules, but there was nothing I did intentionally to mislead the Court or prejudice the defense. Indeed, the defendants do not point out how these few annotations in any way prejudice their position on appeal. Again, appellees do not identify a single document that misrepresents what was filed.
 24. The idea that the judges and staff of this Court will somehow be swayed by a few extra words that for the most part simply name the document is an embarrassing argument to make and a waste of time to defend. I originally tried to work out a compromise with defense counsel, whose adding 50 witnesses after discovery - which we contend was truly prejudicial - is an issue for appeal. In comparison to these annotations, we’re debating about nothing and nothing.

