

June 6, 2011

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)(ARL)

Dear Judge Bianco:

I represent plaintiff in this action and ask that this letter be deemed a letter brief in support of plaintiff's motion to disqualify Saul Zabell from representing non-party witnesses and for discovery sanctions against Mr. Zabell and two non party witnesses who refused to appear at a duly subpoenaed deposition notice that was timely and properly served. The facts behind this motion are included in the accompanying declaration by me, filed simultaneously herein.

1. Disqualification

A. Improper Solicitation

Mr. Zabell has made clear statements not only that he represents witnesses, but also that he solicited them. He told me in a letter that the non-party employees were represented by counsel and they therefore I could not contact them. Antollino Declaration, Exhibit F. he later admitted in a letter to you (Exhibit G) that he solicited the witnesses, but only "indirectly." Indirect solicitation is as improper as solicitation, especially when it is engaged in for the purposes of denying a party access to witnesses. For the reasons set forth in Rivera v Lutheran Med. Ctr., 73 A.D.3d 891 (N.Y. App. Div. 2d Dep't 2010), affirming Rivera v. Lutheran Med. Ctr., 22 Misc. 3d 178 (Kings Sup. 2008), this was held to be completely improper. One federal court has cited Rivera with approval. See Matusick v. Erie County Water Auth., 2010 U.S. Dist. LEXIS 15161 (W.D.N.Y. Feb. 22, 2010) (distinguishing Rivera but warning defense counsel not to interfere with plaintiff's access to employee witnesses for the reasons set forth in Rivera). In combination with my pending motion to have the names and addresses turned over, I ask that Zabell be disqualified from representing the witnesses because this was solicitation pure and simple, and it has obstructed discovery. It has been eight months and not one deposition has taken place, nor have I been able to speak to a single non-party. No non-party witness is in need of representation; rather, defendants merely want to

have a monopoly on the disclosure of facts. Their desire, however, runs afoul of this court's expectation that this matter can be completed expeditiously, as well as plaintiff's right to have information available to him unfettered by defendant's coaching and otherwise intimidating witnesses, a charge that has been made in this case before.

B. Conflict of Interest

One of plaintiff's claims involves the non-payment of minimum wages. While his claim of employment discrimination may not effect non-party employees, if plaintiff were to obtain a finding that defendants must tender unpaid wages, that could be used as *res judicata* against the defendants in another proceeding brought by similarly non-party witness employees who, like plaintiff, were paid wages on a "contingency" basis (i.e., they were paid only when customers showed up, but were required to stay on site during open hours whether customers showed up or not). Insofar as these non-party witnesses would, at least in part, benefit by plaintiff's case, Zabell has a conflict of interest in representing them. They have no need to be represented, and could be harmed by plaintiff's loss of a cause of action that could enrich them. Zabell's representing these witnesses is therefore a conflict of interest.

2. Sanctions for Non-Compliance with a Subpoena.

"[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt," In re Martin-Trigona, 732 F.2d 170, 173 (2d Cir. 1984), and thus can sanction an individual or entity that fails to comply with the court's discovery orders when certain conditions are met. Pursuant to Federal Rule of Civil Procedure 45(e), an "issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena." See Beare v. Millington, 2010 U.S. Dist. LEXIS 2501, 2010 WL 234771, at *3 (E.D.N.Y. Jan. 13, 2010) (stating that unless the subpoena is improperly issued or the non-party has an adequate excuse, failure to comply with a subpoena made under Rule 45 may be deemed contempt of court) (citing Fed. R. Civ. P. 45(e)).

In this case, I served a valid subpoena on Drellana and Kengle through Saul Zabell, who represented that he acted as agent for the non-parties. While the witnesses (again through Zabell) indicated preferred not to appear in Brooklyn or on any day other than Wednesday, I did not consent to such limitations, though I was willing to accommodate both the location and the date of the week *if the depositions took place while plaintiff was in New York*. Despite numerous attempts to negotiate an alternative, Zabell refused to produce the witnesses, or to advise them to comply with the validly executed subpoena. He also did not move to quash the subpoena. A deposition was held, but the witnesses did not appear. This contemptuous on the part of both the witnesses and Mr. Zabell.

While in the normal case, I hate to have to make such a motion, especially for a non-party witness, this is not a normal case. In this case, Zabell refused to tender

the witnesses' addresses for no reason whatsoever. Zabell was required to tender the information as part of discovery and the witnesses had no privilege or basis to withhold their addresses. As a result, I could not contact the witnesses to learn first hand when they could come in, and have my client work around their schedule. Rather, I was forced to choose a date on my own and direct my client to fly in on the date noticed for the subpoena. After learning of the witnesses' preferences as to location and timing of the deposition, I was willing to negotiate, so long as the depositions took place while my client was in New York. I even offered to have my client extend his stay, only to have my suggestion ignored.

At no time was the subpoena withdrawn. When the witnesses did not appear, they were in contempt. They should therefore be adjudged in contempt, and Mr. Zabell sanctioned for enabling their contempt, and otherwise not complying with his obligations under initial disclosure in the first place: He was required to tender the witnesses' addresses.

For these reasons, as well as the reasons set forth in the accompanying declaration, I ask that this motion be granted in all respects.

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell by ecf