UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DONALD ZARDA,

NOTICE OF MOTION

Plaintiff,

-against-

10-cv-04334-JFB

ALTITUDE EXPRESS, INC., dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

PLEASE TAKE NOTICE that at such time as the Court and counsel may be heard, plaintiff shall move to have the Court overrule defendant's objections to deposition designations of Raymond Maynard and Lauren Callanan.

The motion is fully briefed in the letters and other materials attached hereto.

Dated: New York, New York
July 15, 2014

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DONALD ZARDA,

DECLARATION

Plaintiff,

-against- 10-cv-04334-JFB

ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

GREGORY ANTOLLINO, an attorney admitted to this State and Federal District does hereby declare under penalty of perjury as follows:

1. Attached as Exhibit 1 is the letter that you directed Mr. Zabell to tender to me for me to respond to with regard to my deposition designations.

2. Attached as Exhibit 2 is my response, written to you.

3. Exhibit 3 is a Google map layout demonstrating the distance between Sparta, New Jersey and Central Islaip. My best research indicates that Lauren Callanan, a former office manager at Skydive Long Island, lives there at the present time and is beyond the

100 mile limit of a subpoena. (In addition, as I explain, she is an agent of a party opponent.)

4. Attached as Exhibit 4 are the portions of Raymond Maynard's deposition that defendants object to.

5. Attached as Exhibit 5 is a "cheat sheet" in which I have numbered the defense objections to Maynard's deposition testimony.

6. Attached as Exhibit 6 are the portions of Lauren Callanan's deposition that plaintiff has designated.

7. Attached as Exhibit 7 is an Exhibit in the case itself, one authenticated by Callanan and relied upon you in denying summary judgment on this discrimination claim.

Dated: New York, New York
July 15, 2014

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff

Counseling and Advising Clients Exclusively on Laws of the Workplace

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July 7, 2014

***VIA* ELECTRONIC MAIL**

Gregory Antollino, Esq.
275 Seventh Avenue,
Suite 705
New York, NY 10001

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in furtherance of Judge Bianco's June 10, 2014 Order which requires Defendants to send Plaintiff a letter detailing objections to Plaintiff's designation of deposition testimony to be used in his case in chief. [ECF Doc. 164]

Primarily, Defendants object to each designation based on the fact that Mr. Maynard will be available for Plaintiff to call as a witness during trial, and, as such, there is no logical reason why any portion of his transcript should be read into Plaintiff's case in chief. Defendants similarly object to such use of deposition testimony to the extent Ms. Callanan is available for trial.

"There is a strong preference for live testimony, long recognized by the courts, as it provides the trier of fact the opportunity to observe the demeanor of the witness. As Judge Learned Hand stated, '(t)he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.'" United States v. Intl. Bus. Machines Corp., 90 F.R.D. 377, 381 (S.D.N.Y. 1981) citing Napier v. Bossard, 102 F.2d 467, 469 (2d Cir. 1939); see Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946).

Fed. R. Civ. P. 32(a)(1) provides,

(a) Using Depositions. (1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).

F.R.C.P. 32(a)(1).

As such, the Court will allow deposition testimony if permissible under both the Federal Rules of Civil Procedure and the Federal Rules of Evidence ("FRE"). Defendants aver that the Court will exclude the use of deposition testimony from witnesses at trial.

FRE 611 provides "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Further, FRE 403 states "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Moreover, FRE 402 provides "[i]rrelevant evidence is not admissible."

In applying these rules, in addition to the other applicable FRE, the Court will determine that not only is the deposition testimony irrelevant, but it is a waste of time, not an effective means for determining the truth, intended to embarrass and harass the witness and, any "probative value" is substantially outweighed by the dangers of introducing such evidence.

"Despite its language, Rule 32 has not been applied mechanically. The Federal Rules have not abandoned 'the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.'" San Francisco Estates, S.A. v. Westfeldt Bros., Inc., CIV. A. 97-1102, 1997 WL 772811, *1 (E.D. La. Dec. 12, 1997) (citing *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2142*; see Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1493, 1501 (D. Colo. 1989) ("[T]he rule does not alter the judicial preference for direct and cross-examination of a witness at trial.")) "Instead, courts have tended to look at the circumstances of a case in order to determine the appropriateness of admitting deposition testimony." San Francisco Estates, CIV. A. 97-1102, 1997 WL 772811, at *1 (citing *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2147* ("[Courts] consider all the circumstances of why the party is away from the trial and determine in the light of these factors whether to allow use of the deposition."); see Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. at 1501 ("Under Rule 32 and the Rules of Evidence, the admission of deposition testimony in lieu of oral testimony at trial lies in the sound discretion of the trial court.")).

As such, the decision to allow the use of deposition testimony in Plaintiff's case-in-chief lies in the sound discretion of the Court. In doing so, the Court will be guided by the principle that "[d]eposition testimony is an imperfect substitute for personal testimony which should only be used when the witness is unavailable." Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. at 1501 (citing Napier v. Brossard, 102 F.2d 467 (2d Cir. 1939) (Friendly, J. "The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.")).

Plaintiff intends to offers over 125 portions of Mr. Maynard's deposition transcript and, seeing as Defendants object to each portion, we offer the following as a sample of Defendants' objections:

- 7:20-25 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers to be provided.
- 8:9-21 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers to be provided.
- 11:6-13 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation and the question posed is confusing, vague and ambiguous.
- 11:24-12:8 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading, confusing, vague and ambiguous.
- 15:11-25 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading, confusing, vague and ambiguous.
- 16:1-7 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading and confusing.
- 18:12-21 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 19:2-21 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 20:2-19 – Defendants object on the grounds that this testimony is wholly irrelevant, impermissible hearsay, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 20:24-25 – Defendants object on the grounds that this testimony is wholly irrelevant, and the question posed is leading, confusing, vague and ambiguous. Further, the designated portions do not allow for the answer to be provided.
- 22:2-10 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation and the question posed is compound, confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers or background information (albeit irrelevant) to be provided.
- 24:3-14 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous.

Defendants further object to each reference to documentation and/or offering of an exhibit not listed by Plaintiff on the Joint Pre-Trial Order.

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

With respect each specific designation from Ms. Callanan's deposition, Defendants object as follows:

- 11-15 – Defendants object on the grounds that this testimony is wholly irrelevant, protected, in part, by the attorney-client privilege and the questions posed are compound, leading, confusing, vague and ambiguous.
- 106:12-109:2 – Defendants object on the grounds that this testimony is wholly irrelevant impermissible hearsay, and the questions posed are leading, confusing, vague and ambiguous.
- Exhibit 1A –Defendants object on the grounds that this exhibit is irrelevant.

Defendants further object to each reference to documentation and/or offering of an exhibit not listed by Plaintiff on the Joint Pre-Trial Order.

If you have further questions, please do not hesitate to contact my office.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul D. Zabell

SDZ/hch

July 15, 2014

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)

Dear Judge Bianco:

I represent plaintiff in this case tentatively scheduled for trial in late 2014. In a conference in June, we agreed that Mr. Zabell would designate what objections he had to the testimony I had video-recorded of his client Maynard that I intended to present to the jury. Mr. Zabell presses few objections; mainly, his position is that, since defendant will be present at trial, I should cross examine him live, and he cites some very outdated authority from cases before the time that videotaped depositions were allowed. I'll speak to those cases presently, but my position is that I should be able to put on plaintiff's case as I reasonably see fit. In this case, there are two witnesses whose deposition testimony I would like to use by deposition. The first, a former office manager, Lauren Callanan, no longer works for the defendant and lives - as far as I can discern from an thorough internet search and witness tracker - in Sparta, New Jersey. Sparta is just over 100 miles from the Courthouse, see Exhibit 3, and thus outside of the reach of the subpoena power. FRCP 32(a)(3). What is more important, all I intend to do is read a handful of pages of her testimony, thus it would be grossly wasteful to require me to spend resources tracking her down to serve with a subpoena. She is beyond the subpoena power, and she is an agent of the defendant, id., FRCP 45(c)(1)(a); on both counts I'm allowed to use her deposition testimony. For all practical purposes why would I drag in a witness from more than a hundred miles away to ask her ten minutes of questioning? I don't know what the defense intends to do with Callanan, but my use for her is very limited. As far as the admissibility of her proposed testimony, I'll get to that presently.

Mr. Maynard will of course be present at trial, and Mr. Zabell, as I noted, spends the bulk of his letter arguing that, because Maynard will be present I should examine him in the witness stand. He cites authorities as old as 1939, before television, let alone videotaped depositions. Rule 32, which is applicable here, has been amended seven times since 1946, and the most recent case he cites is from 1997, since which time the rule has

been amended twice. See Notes to Rule 32.[1] Videotaped depositions were first allowed in 1993. See Committee Notes to 1993 Amendments.

Let me step back for a minute to explain why I want to do this. It was my client's strong desire to videotape Maynard insofar as we wanted to record his demeanor at his deposition. I recently did a trial before Judge Oetken and demeanor was discussed throughout the trial – my client's demeanor in the job he held, and the witness' demeanor in the courtroom. The funny thing is that had I recorded the two key witnesses and played their testimony for the jury, it would have hurt my case; both of them, as it happened, testified as if rehearsed and came off less than credible. I might be making that mistake here, but let me as the trial lawyer decide what is best for my case and what strategy I want to employ. Maynard gave excellent testimony for plaintiff, in my opinion, and I liked his demeanor. Why must I call him as a witness, and impeach him on every question he doesn't answer that does not comport with his deposition testimony? As it is, my deposition company can put in the snippets of testimony into one videotape, and given how little Mr. Zabell has objected to the designations I intend to present, Maynard's testimony will streamline the trial, and allow the jury to see the videotape without interruption (or perhaps only a break).

Doing it the traditional way is no better. What magic is there to the old with the old "were you asked that question and did you give that answer?" Inevitably followed by "If it's written there," or "I don't remember," or "Let me see it," etc. And imagine how hard it is to impeach with a videotape. It can be done, but it takes more time. Further, as lawyers we know we know what impeachment is, but the jury does not, nor might they understand after instructions. Let them hear the witness' testimony unrehearsed, and the defendant can explain or counter-designate. A tape, uninterrupted by idiosyncrasies of impeachment is what I want to do to prove my case, and is much more streamlined, and the rules plainly allow it. The rule states that "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee[.]" FRCP 32(a)(3). It is my strategic decision – and an expensive one that comes with risks – to do it that way. Just because it's usually done in the traditional manner does not mean it can't be done differently when the rules allow it. I think it is the best way to prove my case.

To distinguish the cases cited by the defense, U.S. v. IBM, 90 F.R.D. 377 (S.D.N.Y. 1981) (citing cases from 1939 and 1946) was written before videotapes were allowed. See Committee Notes to Rule 32, 1993 Amendments. Further, the quotation from that case (citing the ancient cases) to wit: "the deposition . . . has always been second-best, not to be used when the original is at hand," id. at 381, is inapplicable. That

[1] The 1946 case is by Learned Hand. It's always nice to be able to cite one of the big three non-appointees (Learned Hand, Henry Friendly and Edward Weinfeld) because the hold the stature of an intellectual who didn't make it to the Supreme Court simply because of bad timing. Nevertheless, a citation to Hand does not hold much weight when discussing a technology that was not even invented at the time, let alone part of the Rule of Procedure.

case involved a stenographic deposition, which is admittedly second-best; a videotape is almost as good as the real thing, and can be better because you catch the witness' unrehearsed demeanor when he is asked questions for the first time, rather than when he has had a chance to spin a better answer. (Furthermore, the proponents of the depositions in that case were relying on the 100-mile rule – at a time when Google Maps didn't allow us easy access to distances -- id. at 383, and they were non-parties. Id. at 385.)

Mr. Zabell then argues, see p.2, without detail, that under F.R.E. 611, the videotaped deposition taken under oath would somehow (1) undermine the truth; (2) waste time, or (3) harass or embarrass a witness. As to 1, I don't see how the sworn testimony of the defendant would undermine the truth, nor does Mr. Zabell explain how. Second, I've explained above how this procedure will save rather than waste time; and (3) Mr. Zabell does not explain how Mr. Maynard's sworn testimony would harass or embarrass the defendant. Maynard was sworn, prompted on the purpose of a deposition, and Mr. Zabell's ipse dixit assertion does not prove that Maynard would be embarrassed by his own testimony; if he is, perhaps that because what he did, in plaintiff's opinion, was bigoted, illegal and unethical.

Specific Designations as to Maynard[2]

I've included herein the pages parts of 7-24 (Exhibit 4), that the defense objects to. I've taken the liberty of numbering the objections for ease (Exhibit 5) of reference and respond accordingly:

1. I will withdraw.
2. I will withdraw and ask to substitute 20-25, which merely indicates that the witness recognizes he is under oath.
3. This is highly relevant and attests to the witness' knowledge of the sport of skydiving, laying the foundation for his knowledge of what the lawsuit is all about. The objection is frivolous.
4. I will withdraw the reference to the newspaper, but this minor point adds to other points from this and other witnesses wherein the complainant admits she is claustrophobic and that someone who does not like to be touched should not skydive.
5. This refers to claustrophobia which the complainant Rosana admitted she was, and is therefore relevant to the contention that her complaint is lacking in credence.
6. See ¶ 5.
7. See ¶ 5.
8. This should be 2-18, so I withdraw lines 19 and 20, but it refers to a

[2] Defendants purport to object to all designations, despite only explaining their objections to a handful. The purpose of this exercise was to hash out the differences in advance of trial so that I could prepare a comprehensive videotape. The defendants' failure to object to the other designations is a waiver as to those designations.

situation wherein skydiving is a sport wherein one is naturally going to be touched, therefore a complaint that a passenger was touched – certainly without further investigation – would not be credible. This goes to the very question as to whether Maynard fired plaintiff because the complainant said she was uncomfortable – which we deny and will argue Maynard knew was nonsense - or because plaintiff told her he is gay, which we admit to. It is the heart of the case.

9. The point here is that skydiving is an inherently dangerous activity, and that passengers must be touched in order to keep them in the sky and land safely.

10. Mr. Zabell makes a good point that the answer is not provided, so for completeness I will add line 2 of page 21 which provides the answer, "That's correct." The point is that in the 1990's, the defendant was sued for personal injuries and won the case on the basis of the release that every passenger signs before jumping. The decision does not use the word "death," but I assume it to be so because it is the only injury lawsuit in the state that was filed against the corporate defendant. The release also requires passengers to recognize and consent to be *touched* for the purpose of their safety. In the "personal injury" lawsuit, the defendant successfully invoked the release to defeat it; but, without an investigation, Maynard at least at one point contended that Rosana complained about being touched. Our argument is that Maynard never believed that and fired plaintiff for telling her he is gay. I expect the defense to make the "touching complaint" argument at trial, thus I must be entitled to compare how disparately Maynard enforces his release: someone who dies gets nothing, yet a homosexual who is accused of touching a passenger gets fired and the passenger gets her money back.

11. This is more of the same as ¶ 10 insofar as Maynard returned the complaint's money in plaintiff's case, but when someone died (or suffered other personal injuries), he didn't return theirs. He didn't have to in either situation, because the release provides for that protection. Yet, we will argue, he returned the money in plaintiff's situation because he told a client he is gay.

12. These exhibits, which are part of the pre-trial order (both in plaintiff's exhibit list, and as part of defendant's exhibit) show how a passenger is attached to a skydiver and makes matters more clear for the jury. How this would not be relevant is beyond me

13. Plaintiff does not know what defendant is referring to here, but this can be rectified if there are any exhibits referred to in the deposition that are not in the pre-trial order.

Specific Designations as to Callanan (designations attached as Exhibit 6 and 7)

--11-15 should have been written 11:22-15:23. This evidence pertains to her search for documents in the case and our ultimate request for a Zubulake inference at the end of the case for failure to preserve or search thoroughly for electronic evidence.

Callanan admits she did not do a comprehensive search, and we have the goods to prove it insofar as we were able to produce electronic documents that the defense had given to plaintiff when he was working there, but not when discovery took place. There might have been a reason for that, but none was ever provided and Callanan's testimony shows that, and demonstrates she did not search for all of the electronic vehicles at the defendants' locations.

--106:12-109:2: These portions demonstrate (1) That the gay plaintiff did not flirt with women at the dropzone, a contention the defendants, and their complaining witnesses have made and will make; (2) that Ray Maynard approved the letter to unemployment in the attempt to deny plaintiff's benefits. In that letter, which you mentioned **as a basis to deny on summary judgment**, the defendants, if they had wanted to, could have had at least a shot at denying plaintiff his benefits on the basis of misconduct had they mentioned that plaintiff had wrongfully touched a woman. Instead, they mentioned that plaintiff had shared "personal information" with clients and had his own business. Shifting explanations provide evidence of pretext. Schmitz v. St. Regis Paper Co., 811 F.2d 131, 132-33 (2d Cir. 1987).

--Exhibit 1A: is attached as Exhibit 7, is the letter itself, authenticated as a business record by Callanan.

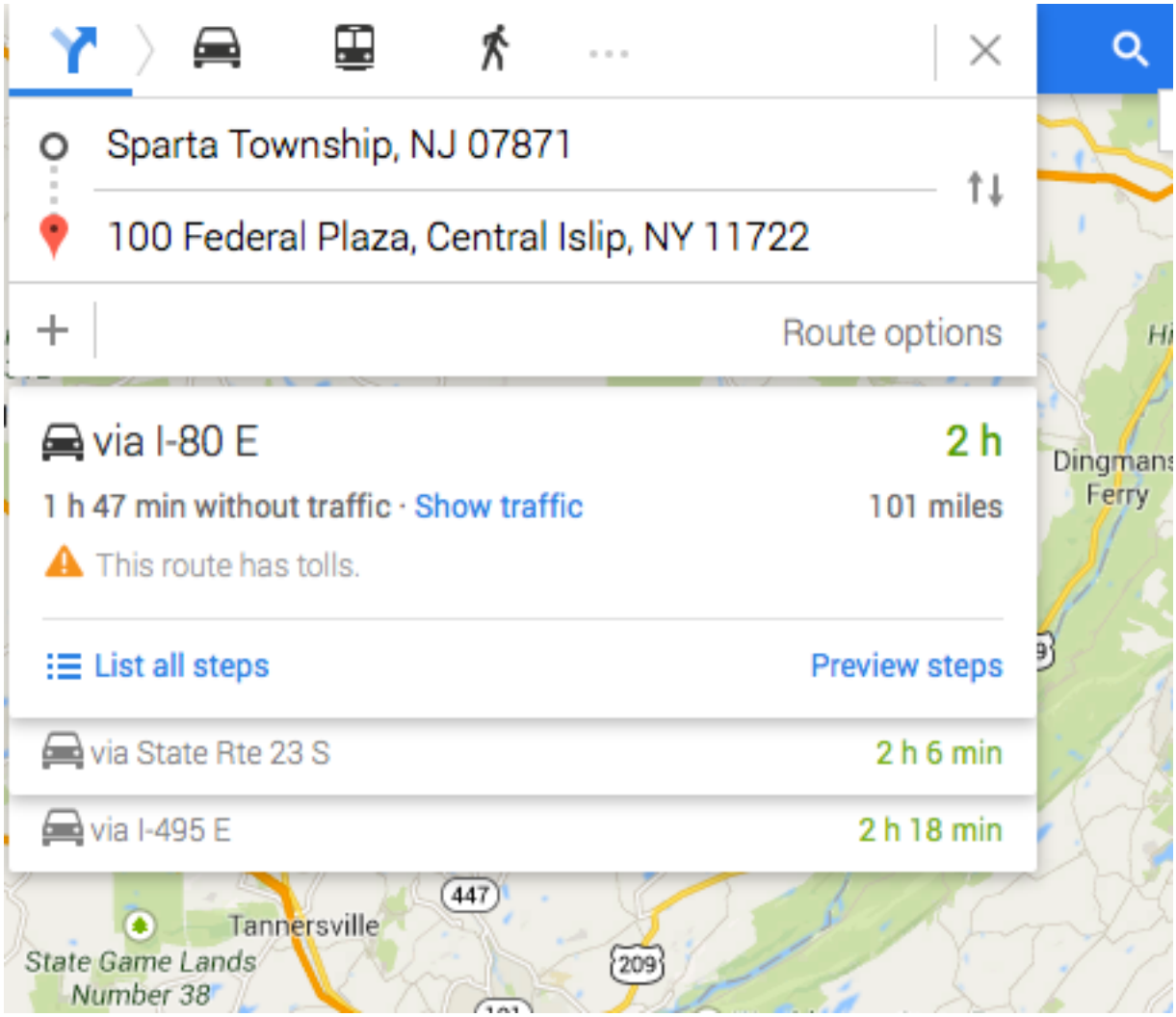
For these reasons, the defendants' objections should be overruled.

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell by ecf


Sparta Township, NJ 07871
100 Federal Plaza, Central Islip, NY 11722
Route options
via I-80 E
2 h
1 h 47 min without traffic · Show traffic
101 miles
This route has tolls.
List all steps
Preview steps
via State Rte 23 S
2 h 6 min
via I-495 E
2 h 18 min
Dingmans Ferry
447
Tannersville
State Game Lands Number 38
209

RAYMOND MAYNARD, called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. ANTOLLINO:

Q. Good morning, Mr. Maynard.

A. Good morning.

Q. I'm Greg Antollino. We haven't had a chance to meet before.

MR. ZABELL: Prior to beginning questioning, I'm reserving my client's rights to review this transcript at the conclusion of the deposition.

MR. ANTOLLINO: Certainly.

Q. Have you ever had a deposition taken before?

MR. ZABELL: Objection to the form. You may answer.

A. I was in one deposition many years ago.

Q. What kind of case?

MR. ZABELL: Objection to the form. You may answer.

A. It was an air show at the airport

that I worked closely with the organizer.

Q. And what happened?

A. There was a gentleman suing the organizer because he wanted to be part of it and I was at a lot of meetings so they wanted to hear what I had to say.

Q. You were not a subject of the lawsuit?

A. No.

Q. Just a witness?

A. Just a witness.

Q. Other than that, never any depositions?

A. No.

Q. How about testimony in court?

MR. ZABELL: Objection to the form. You may answer.

A. No.

Q. Do you understand that you're under oath?

A. Yes.

Q. All right. And that means you're sworn to tell the truth?

A. Yes.

long have you been been skydiving?

MR. ZABELL: Wait, wait. Are you withdrawing the two previous questions and now asking that question?

Q. The second question, the question I'm asking, is how long have you been skydiving?

A. Over 40 years.

Q. How many jumps have you taken?

MR. ZABELL: Objection to the form. You may answer.

A. Just under 4,000.

Q. Do you have any certifications?

MR. ZABELL: Objection to the form. You may answer.

A. Yes.

Q. What are they?

A. A tandem instructor. I'm a coach.

Q. Anything else?

A. I'm a FAA rigger.

Q. Anything else?

A. I think that's it.

Q. Skydiving is not for everyone, would you agree with that statement?

MAYNARD

MR. ZABELL: Objection to the form of the question.

You may answer.

A. Yes.

Q. And, in fact, you once told a newspaper that; right?

A. Yes.

Q. That's some Hamptons.com newspaper, you had an interview with them in 2008 or thereabouts; is that correct?

MR. ZABELL: Objection to the form of the multiple questions.

You may pick a question and provide an answer to it.

Q. You can answer.

A. Well --

Q. Why don't I withdraw the question and just mark an exhibit, all right?

MR. ZABELL: Are you asking him if that's okay?

MR. ANTOLLINO: I don't want to engage in any colloquy, Counsel.

I'd like to mark this -- I've premarked it as R-1. I don't know if we

that feeling inside of them and they want to experience that.

Q. What about people who are claustrophobic, are they good candidates for tandem skydiving?

A. I'm not an expert on claustrophobia. I don't know if that would be a problem or not. It's going to be an individual feeling and choice.

Q. Well, what is your understanding of what a claustrophobic is?

A. When I think being claustrophobic, I would think of being in a closet, a confined area.

Q. Claustrophobic, would it be fair to say, is someone who's afraid of being in a confined area; correct?

MR. ZABELL: Objection to the form. You may answer if you can.

A. I'm not sure.

Q. Are passengers in a tandem skydive situation placed in a confined area?

A. The cab of the aircraft is a fairly small area.

MAYNARD

Q. And it's often filled with many people; correct?

A. Correct.

Q. And they're also very closely strapped to another person; correct?

A. That's correct.

Q. What about someone who doesn't want to be touched, is that a good candidate for someone -- withdrawn.

What about someone who wants to be touched? Is someone who wants to be touched a good -- who doesn't want to be touched a good candidate for skydiving?

MR. ZABELL: I'm going to object to the three questions you just asked.

MR. ANTOLLINO: I'll be draw the question and ask it again.

MR. ZABELL: Are you going to withdraw the last question?

MR. ANTOLLINO: I'll withdraw what I said and ask it again.

MR. ZABELL: Okay.

Q. Is someone who does not want to be touched a good candidate for skydiving?

statement like that, that's a statement to which no response is required.

Q. Why is someone who does not want to be touched not a candidate for skydiving, for tandem skydiving?

MR. ZABELL: Objection to the form. If you can, you may.

A. You're asking me to answer a question of someone else's feeling. I can't give you that answer.

Q. Well, I'm asking you as a tandem instructor if someone came to you and said, I don't like to be touched, do you think I should go up in a tandem skydive, what would be your answer?

A. I would tell that in order to do a tandem skydive, you will be touched and hooked up in a harness. And that's all explained to them. There will be close contact with another person.

Q. Therefore, what would be your recommendation to that person?

A. I would tell him those are the facts and you have to make a choice.

MAYNARD

Q. What if that person went up in a skydive and then afterwards made a complaint to you and said, I was touched, I went up in the skydive and I was touched, is that a legitimate complaint?

MR. ZABELL: Objection to the form of the question.

You may answer.

A. I would ask them to give me more detail.

Q. Okay. Well, the person was adjusting straps around my body and I felt uncomfortable, what would -- would that be a legitimate complaint?

MR. ZABELL: Objection to the form.

You may answer.

A. No.

Q. Okay. At how many points does the and instructor have to be attached to the passenger?

MR. ZABELL: Objection to the form.

You may answer.

A. At how many points?

Q. Yeah.

A. There's four points of attachment.

Q. Are there any other points of attachment other than the four points?

A. No.

Q. Where are the four points of attachment?

A. There's two -- there's one on each shoulder and one on each hip.

Q. This article in Drop Zone -- I'm sorry, not Drop Zone, Hamptons.com indicates there's about one injury per year at Skydive Long Island. Is that a true statement?

A. For a while we average about one a year.

Q. And are those injuries of passengers, of skydivers or both?

MR. ZABELL: Objection to the form.

A. Both.

Q. When you say one injury per year, it's one injury and it's either a passenger or a skydiver?

A. Yes.

Q. Okay. And there was one death in 1989; correct?

A. That's correct.

Q. All right. It says here that this death was an apparent suicide; is that correct?

A. Yes.

Q. Why was it believed to be an apparent suicide?

A. Because the student himself released himself from the parachute 200 feet off the ground.

Q. And was there any indication that he was suicidal?

A. No.

Q. So it's possible that he just made a mistake?

A. It's possible.

Q. But it was his fault?

A. Absolutely.

MR. ZABELL: Objection to the form.

Q. Did the family complain?

MR. ZABELL: Objection to the form.

Q. About his death?

MR. ZABELL: Objection to the form.

A. Did they complain?

Q. Yeah.

A. Well, they started a lawsuit.

Q. They did? And what happened?

A. It was dismissed.

Q. Okay. Did you give them their money back?

A. No.

Q. Why not?

MR. ZABELL: Objection to the form.

A. Because I didn't.

Q. Well, did they ask for it back?

A. No.

Q. And you thought that their complaint was illegitimate?

MR. ZABELL: Objection to the form.

Did you say "illegitimate"?

Q. You felt that their claim was illegitimate; correct?

MR. ZABELL: Objection to the form.

A. Yes.

Q. And this particular lawsuit was dismissed without you being deposed?

A. I believe.

MR. ZABELL: Objection to the form.

A. I don't really remember, to tell

MAYNARD

Identification.)

Q. Take a look at R-3 and I'm going to ask you if you recognize any of these documents.

A. Yes.

Q. What is this?

A. It's showing you the attachment points of the tandem passenger harness attaching to a tandem master.

Q. Does it fairly and accurate represent how a tandem master is strapped to a passenger?

A. Yes.

MR. ZABELL: Counselor, before your question, I notice that these pages -- is there an order to these pages because they appear to be numbered but it looks like the second -- the third page is the page that's identified as R-3.

MR. ANTOLLINO: I think they're out of order.

MR. ZABELL: And what is the order that you'd like them in?

MR. ANTOLLINO: The order they're

Plaintiff intends to offers over 125 portions of Mr. Maynard's deposition transcript and, seeing as Defendants object to each portion, we offer the following as a sample of Defendants' objections:

- 7:20-25 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers to be provided.
- 8:9-21 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers to be provided.
- 11:6-13 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation and the question posed is confusing, vague and ambiguous.
- 11:24-12:8 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading, confusing, vague and ambiguous.
- 15:11-25 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading, confusing, vague and ambiguous.
- 16:1-7 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is leading and confusing.
- 18:12-21 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 19:2-21 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 20:2-19 – Defendants object on the grounds that this testimony is wholly irrelevant, impermissible hearsay, calls for speculation, assumes facts not in evidence, and the question posed is leading, confusing, vague and ambiguous.
- 20:24-25 – Defendants object on the grounds that this testimony is wholly irrelevant, and the question posed is leading, confusing, vague and ambiguous. Further, the designated portions do not allow for the answer to be provided.
- 22:2-10 – Defendants object on the grounds that this testimony is wholly irrelevant, calls for speculation and the question posed is compound, confusing, vague and ambiguous. Further, the designated portions do not allow for the questions and answers or background information (albeit irrelevant) to be provided.
- 24:3-14 – Defendants object on the grounds that this testimony is wholly irrelevant and the question posed is confusing, vague and ambiguous.

Defendants further object to each reference to documentation and/or offering of an exhibit not listed by Plaintiff on the Joint Pre-Trial Order.

A Because I received a message to call the office.

Q Who did you receive the message from?

A I don't recall. Actually, I do believe I received a message from Ray to call the office.

Q What did Ray say in the massage, simply to call the office or something else?

A To call the office regarding the deposition.

Q Was anything else said?

A No.

Q When you called the office, did you speak to Mr. Zabell?

A I did.

* Q What did you say to him?

MR. ZABELL: Objection. The same direction I gave you before regarding communications between yourself and myself.

A I cannot answer the question.

MR. ANTOLLINO: Mark it for a ruling since she said she retained you this morning.

Q Did you do any search for documents in connection with this lawsuit?

MR. ZABELL: Objection to the form. You may answer.

A I previously did gather information, yes.

Q When was that?

A That was over the winter last year.

Q How did you gather information?

A I searched e-mails and documents.

Q How did you search e-mails?

A I believe by doing a general search.

Q How did you do a general search?

A I went into the e-mails and I searched Don or Zarda.

Q And.

A To see if any correspondences populated.

Q What did you come up with?

A I don't recall specific documents off the top of my head.

Q You said you searched documents, how did you search documents?

A I searched documents in terms of a legal waiver that was written.

Q Anything else?

A Also other legal waivers.

Q When was that?

A Last winter.

Q What other documents did you search for?

A I can't remember specific documents?

Q On what computer did you search for the e-mails?

A One of the computers at Altitude Express.

Q Did you search any of the other computers at Altitude Express?

she also admitted **A We have multiple computers. I'm not aware of which computer I used to perform any search.**

Q Do you have a server?

MR. ZABELL: Objection to the form. You may answer?

A We currently have a server. We did not previously have a server.

Q In order to do a search for e-mails, a comprehensive search for e-mails, you would have to go to each individual computer before you had the server. Is that a fair statement?

MR. ZABELL: Objection to the form of the question. You may answer.

A I cannot confirm whether I went to each individual station to perform any type of comprehensive search. Therefore, I can't say whether I performed a comprehensive search or not.

Q So, you don't remember the particular

computer you looked on, correct?

A Correct. It may have been multiple computers.

Q Wait a minute. Before you said it was one computer. Now, you're saying it was multiple computers perhaps.

MR. ZABELL: Objection to the form. To the extent you can, you may answer.

A Iím saying, I do not recall which computer I used. I did not say it was a single computer that I used to perform the search. I may have used multiple computers to perform the search. I use multiple computers on a daily basis.

Q How many computers are there in total?

MR. ANTOLLINO: Objection to the form of the multiple question. You may pick one and answer.

A Last year there were four computers in my office or in the manifest office, the office which I work in.

Q The computer or computers that you searched were in the manifest office alone, correct?

A Correct.

Q You didn't search anything on Ray's computer,

correct?

A Not that I recall, no.

Q Have you ever used Ray's personal computer?

A I have previously, yes. It's not his personal multiple computer. It's a business computer.

Q What do you mean by that? Is it one of the four in the manifest room or a different one altogether?

A A different computer.

Q Do you have any document retention policy at Sky Dive Long Island?

A Document retention in what respect?

Q For how long do you keep documents?

MR. ZABELL: Objection to the form. You may answer.

A It depends on the document.

Q What is the longest you would keep a document?

MR. ZABELL: Objection to the form. You may answer.

A There is no time line that we have set aside for a particular document. It depends on the document.

Q Well, I guess -- you say it's depending on the document. Is it just a document by document basis or

A I don't feel there would be a need to share that.

Q Did you ever see Don flirt with any women at the drop zone?

A Not that I recall, no.

Q Do you believe that Don has any interest in women, whatsoever?

MR. ZABELL: Objection to the form. You may answer.

A I don't know.

Q Were there any complaints about Don from other employees at SDLI?

A I cannot recall specifically. I know I have heard people say in passing that Don liked to talk a lot, if you want to classify that as a complaint.

Q Anything else that you recall?

A There is nothing else that I can specifically remember.

Q Did Ray ever make that complaint, that Don liked to talk a lot?

A I don't recall.

Q After Don was fired he applied for unemployment insurance, is that right?

A That is correct.

Q When did you find out about that application?

A When Ray received the letter in the mail?

Q Did you open that letter?

A No, I do not believe so.

Q Did Ray tell you about the letter?

A Correct, I do believe so. I can't say for sure.

Q Did he show you the letter?

A I believe he did, yes.

Q What did he say to you in response to that application for unemployment insurance?

A I believe, we're going back some time, that he had asked me if I knew or had heard that Don may have been working elsewhere or possibly owned another business, while he was collecting unemployment or attempting to collect unemployment.

Q Did he say anything else?

A He asked me to basically write back in response.

Q What did he tell to write back in response?

A He asked me to basically look into whether Don was working, as well as just drafting the letter. Which I did. I basically showed it to him.

Q Did he review it?

A He did.

Q Did he say this is accurate?

A He said, yes.

Q Is this the letter, Exhibit 1-A, that you drafted in opposition to Don's unemployment insurance?

A Correct.

Q Did Ray ask you to make any changes in the letter?

A Not that I recall.

Q That is your signature there, correct?

A Yes, that is my signature.

Q Whether or not he asked you to make any changes, he definitely didn't ask you to make any changes in this one, correct?

(Continued on the next page to include the jurat and signature line.)

A I do not believe so.

MR. ANTOLLINO: I have nothing further.

Thank you very much.

(Whereupon, the examination of this witness was concluded at 3:40 p.m.)

* * *

I have read the foregoing record of my testimony taken at the time and place noted in the heading hereof and I do hereby acknowledge it to be a true and correct transcript of the same.

_____

LAUREN CALLANAN

Subscribed and sworn to before me this _____ day of_____ , 2012

_____

NOTARY PUBLIC

ALTITUDE EXPRESS Inc.

dba SKYDIVE LONG ISLAND

CALVERTON, NY
631.208.3900
WWW.SKYDIVELONGISLAND.COM

RE: SS#

October 1, 2010

To whom it may concern,

I am writing to you in regards of a former employee, Mr. Donald J. Zarda (SS# of 489-86-2464). Our company received a request for employment and wage data for an unemployment claim that Mr. Zarda had filed and we would like to provide some further information that you may not already have in your files.

To begin, Mr. Zarda was rehired with our company Altitude Express Inc, dba Skydive Long Island back in May of 2009. During his first bout of reemployment, Mr. Zarda fractured his right ankle and began colleting disability as of July 3rd, 2009 in the sum of $24,600. To the best of my knowledge, the last hearing on the matter took place in Hauppauge, NY this past July 2010.

Furthermore, it is speculated that during this time through present day, Mr. Zarda has also owned/ co-owned and maintained his own business, Advanced Skin Fitness located at 2928 Oak Lawn Ave. in Dallas, Texas 75219 (http://www.advancedskinfitness.com).

Mr. Zarda resumed working for Altitude Express Inc. on May 15th, 2010 through June 21st, 2010 and was terminated for believed misconduct as we received complaints from customers stating Mr. Zarda shared inappropriate information with them regarding his personal life. This was not the first time that we had received complaints from paying customers regarding Mr. Zarda and unfortunately had to make the decision to let him go.

I hope this information had been of help, however if you have any further questions please do not hesitate to contact us at 631.208.3900.

Sincerely,

Lauren Callanan
Office Manager
Skydive Long Island
Calverton, NY

525 JAN WAY · CALVERTON, NY 11933

EXHIBIT
tabbies
CALANAN 1-A
12-21-11