

GREGORY ANTOLLINO

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June 12, 2012

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 action, which is scheduled for oral argument tomorrow, June 13 at 2. I write because two additional items have come to light. First, yesterday I was in an initial discovery conference in which the highly experienced Magistrate Michael Dolinger made the following statement that is relevant to this case:

First of all, to the extent there may be disagreements between the parties about any matter having to do with pretrial, whether it's the propriety of a discovery request, the adequacy of the discovery response, or any other pretrial matter, before seeking a court ruling you are required in the first instance to attempt to work out the disagreement between yourselves. That obligation is not satisfied by wafting letters at each other. You actually have to talk to each other either on the phone or in person.

See attached transcript, Exhibit 1, Zaldumbide v. Hospital Insurance Co., pages 12-13 (I have only attached the relevant portion of the transcript, but will, upon request, provide the remainder.) Obviously Judge Dolinger's holding is relevant to the points I made in my brief at Point VI(C).

Secondly, although I would have preferred to have all fact discovery finished before I did this, I recently hired Kenji Yoshino, an endowed professor of, among other things, gender and sexuality studies at NYU Law School. Professor Yoshino, who happens to be a summa cum laude graduate of Harvard, a Rhodes Scholar, a trustee (overseer) of Harvard University, and a Law Review graduate of Yale, has written extensively on gender roles and sexuality. His best-known work is the well-regarded Covering, which addresses how forcing gay people to "cover" their sexuality is a form of, shall we say for lack of a better word, repression. As soon as I sent Professor Yoshino's report and cv to Mr. Zabell, he emailed me a subpoena for the following week, June 11.

See Exhibit 2. After receiving this, I asked Zabell for June 12, but it was not available, and therefore Professor Yoshino and I cleared our schedule and began preparing for the deposition. At the last minute, Mr. Zabell cancelled the deposition and said he would prefer at this point to deal with the matter via motion practice. I don't know precisely what this means – whether he intends to argue at summary judgment – which plaintiff intends to move for - that Professor Yoshino is not qualified to be an expert, or whether his opinions are inadmissible. Perhaps Mr. Zabell would like to bring upon a stand-alone motion on the matter before he has to spend the money to depose Professor Yoshino, something I would object to and would be a waste of court time when it can be decided at summary judgment. I have no fear that Professor Yoshino is qualified to be admitted as an expert, and that his opinions are admissible, but a sensible plan for dealing with his qualifications is to depose him first, then move. If nothing else, failing to allow Professor Yoshino to attest to his qualifications is a potential attack on his reputation, and could damage his sterling career.

Additionally, notwithstanding Zabell's change of strategy, Professor Yoshino deserves to be compensated for the time he spent preparing for the deposition before Zabell cancelled it. McNerney v. Archer Daniels Midland, 164 F.R.D. 584, 587 (W.D.N.Y. 1995); Am. Steel Prod. Corp. v. Pa. Cent. Corp., 110 F.R.D. 151, 152 (S.D.N.Y. 1986); Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F. Supp. 45, 53 (S.D.N.Y. 1982). The notice that the deposition would take place, where it would take place and when it would take place started on May 18. Mr. Zabell cancelled the deposition in response to a request I had for him to take a 20 minute break at 2 PM for the deposition. That notice I did not receive until June 4. See Exhibit 3.

I appreciate your consideration and look forward to addressing these and other issues tomorrow.

Sincerely,



Gregory Antollino

Cc: Saul Zabell by ecf

1 C6B8ZALC
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 JAIME ZALDUMBIDE,
3
4 Plaintiff,

5 v. 12 Cv. 1082 (BSJ)

6 HOSPITALS INSURANCE COMPANY, INC.,
6 et al.,
7
7 Defendants.

8 -----x

9
9 June 11, 2012
10 2:15 p.m.

11 Before:

12 HON. MICHAEL H. DOLINGER
12
13 Magistrate Judge

14 APPEARANCES

15 GREGORY S. ANTOLLINO
15 Attorney for Plaintiff

16 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP
17 Attorneys for Defendants

17 RICKI E. ROER
18 BINDU KRISHNASAMY

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17 THE COURT: October 31. Joint pretrial order or
18 dispositive motion within 30 days after that.

19 Let me touch on a couple of points about the logistics
20 of discovery on the pretrial matters, much of which I suspect
21 you're well aware of, but, nonetheless, I think bears
22 repeating.

23 **First of all, to the extent there may be disagreements**
24 **between the parties about any matter having to do with**
25 **pretrial, whether it's the propriety of a discovery request,**

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1 the adequacy of the discovery response, or any other pretrial
2 matter, before seeking a court ruling you are required in the
3 first instance to attempt to work out the disagreement between
4 yourselves. That obligation is not satisfied by wafting
5 letters at each other. You actually have to talk to each other
6 either on the phone or in person.

7 If there is any matter which you cannot resolve in
8 this fashion for which any party wants a court ruling, in that
9 event I suggest you come reasonably promptly to the Court. I
10 am available on short notice for conferences, and I can do
11 telephone conferences if that's more convenient for the
12 parties. Generally speaking, I have found where these sorts of
13 disputes get presented to the Court for a ruling, that can be
14 done in a fairly informal fashion through either letter or
15 conference or some combination of the two. The main exception
16 would be if there is a claim of privilege, in which case the
17 party invoking the privilege has the burden of proving the
18 facts on which the privilege claim is based and must do so by
19 producing competent evidence. So for that we generally require
20 affidavits or some equivalent evidentiary proffer.

21 With respect to settlement discussions, I assume in
22 the first instance you will be dealing with the mediator. Down
23 the road, if that is not successful and there is a desire on
24 the part of the parties for a further court supervised
25 discussion, let me know and we can always arrange something

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1 along those lines.

2 Finally, I will remind you that you have the right, if
3 you wish, on a joint consent basis to proceed for all purposes
4 before a magistrate judge. I don't get involved in the
5 discussion as to whether that's a good idea, a bad idea, or a
6 so-so idea. But we will give you the consent forms to do with
7 as you see fit.

8 Are there any other matters that we should address at
9 this time?

10 MR. ANTOLLINO: I don't think so, Judge.

11 MS. ROER: Thank you, your Honor. No.

12 THE COURT: Thank you.

13 (Adjourned)

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Saul D. Zabell
SZabell@laborlawsny.com

May 18, 2012

VIA ELECTRONIC MAIL

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

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

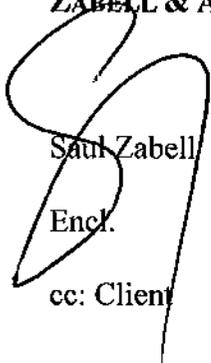
Dear Mr. Antollino:

Pursuant to Fed. R. Civ. P. 45 enclosed please find a subpoena *ad testificandum* which we intend to serve upon Kenji Yoshino on Wednesday May 23, 2012.

Kindly contact me should you have further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.


Saul Zabell

Encl.

cc: Client

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

DONALD ZARDA

Plaintiff

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD

Defendant

Civil Action No. CV 10-4334 (JFB)(ARL)

(If the action is pending in another district, state where:)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Kenji Yoshino
New York University School of Law, 40 Washington Square South, New York, NY 10012

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Zabell & Associates P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716

Date and Time:
06/11/2012 10:00 am

The deposition will be recorded by this method: Stenographer

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Any and all documents used and/or referred to in production of the Expert Report of Kenji Yoshino (including fees for services rendered and invoices) generated in connection with the above-referenced matter.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 05/18/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Defendants

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, et al., who issues or requests this subpoena, are:
Saul D. Zabell, Zabell & Associates P.C., 1 Corporate Drive, Suite 103, Bohemia, New York 11716
SZabell@Nylaborlaws.com
(631)-589-7242

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. CV 10-4334 (JFB)(ARL)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* Kenji Yoshino
was received by me on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Tuesday, June 12, 2012 11:42 AM

Subject: Re: Zarda v. Altitude Express, Inc., et al.
Date: Tuesday, June 5, 2012 8:29 AM
From: SZabell@laborlawsny.com <SZabell@laborlawsny.com>
To: Gregory Antollino <gregory10010@verizon.net>

I've decided to hold off on the deposition until we get some clarification from the court. I am considering a motion on the issue. Will you consent to striking your "experts" report?

Sent from a remote location.

Please Note Our New Address

Saul D. Zabell
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716

On Jun 4, 2012, at 7:06 PM, "Gregory Antollino" <gregory10010@verizon.net> wrote:

Re: Zarda v. Altitude Express, Inc., et al. Mr. Zabell, the date of the deposition is fine, though I chose the 11th because I have a small conference during that day before Magistrate Pitman at 2. M. Pitman's initial conferences are informal, speedy affairs, and I wonder whether I can obtain your consent to conduct the conference during the deposition. I will represent your position to the court, making sure that you limit your consent to twenty minutes (and, in this standard case, it won't take that long). Please let me know right away so that I might make other proposals in case you are unwilling to consent. Do not feel the need to scan a letter in response, as it will delay my knowledge of your response.

Thanks,

Greg Antollino

On 5/24/12 10:30 AM, "mwalsh@laborlawsny.net" <mwalsh@laborlawsny.net> wrote:

Please see attached from Saul Zabell.

Mark Walsh, Paralegal Please direct questions regarding this Email to

Saul D. Zabell **Zabell & Associates, PC**

1 Corporate Drive

<blocked::blocked::blocked::blocked::blocked::http://maps.google.com/maps?f=q&hl=en&geocode=&q=945+E+Jericho+Turnpike,+Huntington,+New+York+11746&sll=37.0625,-95.677068&sspn=42.310334,82.265625&ie=UTF8&z=16&iwloc=adr&om=1> Bohemia, NY 11716 **Office: 631-589-7242**

E-mail: SZabell@laborlawsny.com

<<mailto:SZabell@laborlawsny.com>>

Fax: 631-563-7475 Please direct all questions

regarding this Email to Saul D. Zabell **Website:**

LaborLawsNY.com <<http://LaborLawsNY.com>>

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