



Ronald D. Coleman
Partner
rcoleman@goetzfitz.com

BY FACSIMILE

Honorable Deanne M. Wilson, J.S.C.
Superior Court of New Jersey, Law Division
Morris County Courthouse
Washington & Court Sts.
Morristown, NJ 07963-0910

Re: *University Communications Inc. v. Net Access Corp.*
Docket No. MRS-L-3626-08

Dear Judge Wilson:

We represent plaintiffs in the referenced matter. This letter is submitted in opposition to plaintiffs' short notice motion to amend, filed in frank contempt of the court-ordered deadline, and in support of a motion for sanctions in connection with the need to prepare this opposition. Per the instructions of Your Honor's chambers this submission is submitted by facsimile and a day late, considering the highly unusual circumstances here. Plaintiffs rely as well on my certification, transmitted herewith, in support of both their opposition and their request for sanctions. Under the circumstances we request the Court's leave to make the latter cross-motion informally, by this letter, to lessen the burden on both the undersigned counsel and the Court in managing in influx of additional last-minute paperwork.

Legal Argument

First and foremost, defendants' motion is not timely. The Court ordered that submission of this motion and service on plaintiffs take place on April 17, 2009, a date that was arrived at by agreement among the parties and counsel. It was, instead, filed and served without an additional grant of leave, much less an attempt at consent, on April 29th, which was actually the return date of this motion, in light of the original trial date of May 11th. These circumstances are set out more fully in my accompanying certification.

Although by virtue of the scheduled return date of the present motion, and the rescheduling of the trial for May 18th, the motion appears to conform with the timetable for motion practice set out by R. 1:6-3, the Court's consideration of this motion would work a massive injustice. This office received no notice of motion or other notice, compliant with R. 1:5-2 (much less R. 1:5-3), advising plaintiffs that a motion had been noticed for a return date of



May 15th, as it is currently scheduled. Nor would we have assumed that the Court would consider such a motion given the trial date, which was moved only today. Therefore, but for yesterday's call from chambers for suggesting that plaintiffs submit an opposition "to give to the trial judge on Monday," we would have had no opportunity to prepare any submission. As it stands plaintiffs have had about 36 hours to do what the Rules of Court provide a party under normal circumstances 16 days to research, write, revise and finalize. Frankly it is all this office can do to collate this submission today, the opportunity that the Rules demand be afforded a party opposing a motion to research and argue the legal grounds on which that opposition is based having been rudely denied by defendants' gamesmanship.

Secondly, defendants seek to stretch the limits of the "liberality" concept as to the amendment of pleadings. A pleading may **only** be amended on motion made on notice to the adverse party, with a copy of the proposed amendment accompanying the motion. Such an application must be definite, not vague. *See, e.g., 3 Walzer New Jersey Practice* § 11.1 at 317-18 (5th ed. 1998). These are not mere formalities. *See, Keller v. Pastuch*, 94 N.J. Super. 499 (App. Div. 1967). Furthermore, an applicant seeking an eve-of-trial amendment is charged with the burden of demonstrating why his application was not made in a timely fashion. Thus, it is not an abuse of discretion to deny amendments on the eve of trial nor should late amendments be permitted at the last minute as to do so would "afford a refuge to languid or dilatory litigants." *Branch v. Emery Transportation Co.*, 53 N.J. Super. 367, 375 (App. Div. 1958); *see Jackson v. Georgia-Pacific Corp.*, 296 N.J. Super. 1, 10-11 (App. Div. 1996), *certif. den.*, 149 N.J. 141 (1997).

In short, there are limits even to our courts' justly famous insistence at placing form over substance. Those limits are reached where, as here, a party such as Ellman that seeks a last-minute amendment – and we submit that defendant Net Access Corporation, having made no attempt whatsoever to excuse its lack of compliance with the motion scheduling order and being represented by counsel, has waived any possible consideration to be eligible to amend its complaint now – has clearly timed its application for the latest possible moment, even after promising the Court that it would comply with an order based on a stipulated, short-notice briefing schedule. (We reiterate our *nunc pro tunc* withdrawal of plaintiffs' consent, set out in my correspondence of April 21, 2009, based on defendants' refusal to satisfy the sole condition of our agreement to a short-order motion.)

In the case of this particular eve-of-trial application, not only has no attempt been made by defendants to explain why such an amendment, after years of neglect, would not "afford a refuge to languid or dilatory litigants" such as defendants and once again reward their cynical refusal to meet either the letter or the spirit of this Court's rules and orders. No properly compliant or timely motion was even made. This alone, under the circumstances here, is ample ground to deny this motion with prejudice.

Furthermore, in light of the essentially unparalleled equitable considerations found in the record of this case vis-à-vis defendants' compliance with court orders and procedural rules (the factual bases of which are extensively addressed in my certification) the Court should have no hesitation in denying the relief sought. It is also entirely appropriate in this event that the Court order that defendants be held responsible for plaintiffs' attorneys' fees expended over this 36-hour period for no justifiable purpose at all, relief which the facts indicate would be justly



granted regardless of the Court's decision on the merits of defendants' motion.

Conclusion

As Judge McKenzie said on the record in this very matter regarding exactly the type of procedural shenanigans employed on this motion (*see* Exhibit C to the accompanying certification), "Defendants have engaged in a continued pattern of annoyance, bad faith and abuse of the legal process. It is now time for that pattern to come to an end. . . ." Regrettably in the history of this tortured litigation this Court has rebuffed every opportunity to sanction defendants, one of which is represented by competent counsel, for thumbing their nose at the Court, the parties and the law. Now defendants seek not only to avoid sanction but to benefit from their contumacious approach to litigation. We ask the Court not to enable them in these efforts and, to the contrary, to regain control over process, procedure and fairness and enter an appropriate sanction.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Ronald D. Coleman".

Ronald D. Coleman

cc: Mr. Kenneth Ellman
Feng Li, Esq.

GOETZ FITZPATRICK LLP

Ronald D. Coleman
55 Harristown Road
Glen Rock, NJ 07452
(201) 612-4444
Attorneys for Plaintiffs
University Communications, Inc. and
Jason Silverglate

UNIVERSITY COMMUNICATIONS,
INC., d/b/a PEGASUS WEB
TECHNOLOGIES and JASON
SILVERGLATE,

Plaintiffs,

- vs. -

NET ACCESS CORPORATION,

Defendant and

KENNETH ELLMAN,

Defendant and Real
Party in Interest and
Indispensable Party.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NUMBER MRS-L-3626-08

**CERTIFICATION OF RONALD D.
COLEMAN IN OPPOSITION TO
MOTION BY DEFENDANTS AND
COUNTERCLAIMANTS TO AMEND
THEIR PLEADINGS AND IN
SUPPORT OF CROSS MOTION FOR
SANCTIONS**

Ronald D. Coleman, of full age, certifies and says:

Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

1. I am a member of the bar of this Court and a partner in the firm of Goetz Fitzpatrick, LLP, counsel for plaintiffs in this matter. I make this Certification in opposition to the “Joint Motion of Kenneth Elman and Feng Li, Esq. (“defendants”) to Amend Answer and Counterclaim-Short Notice” (the “Joint Motion”) and in support of plaintiffs’ cross motion for sanctions.

2. The Joint Motion of plaintiff relies entirely on the “Joint Certification of Kenneth Ellman and Feng Li,” etc., dated April 28, 2009 (the “Joint Certification”). No brief was submitted, notwithstanding 1:6-5.

3. The parties appeared for a status conference on Tuesday, April 14, 2009, at which time Ellman first broached the topic of amending his claims in this matter. After a considerable amount of colloquy, the Court rules that, pursuant to the Rules of Court, no amendment could be permitted other than pursuant to due consideration of a motion and an opportunity for plaintiffs to be heard.

4. Ellman represents himself pro se in this matter. Defendant Net Access Corporation, however, is represented by Feng Li, Esq.

5. Ellman stated on the record that he could prepare the motion more or less “immediately” and certainly no later than the next day, Wednesday, April 15th.

6. As a concession, plaintiffs agreed to a short-order motion schedule pursuant to which plaintiffs would submit any opposition on the explicit condition that Mr. Ellman’s motion be served at the above address no later than Friday, April 17th.

7. Judge Wilson ordered that any motion to amend by filed and served by that date.

8. No motion was filed or served on that date.

9. On April 21, 2009, the undersigned telephoned Ellman and inquired about the status of the motion. He told me that the motion had recently been submitted, and that plaintiffs’ copy was “in the mail” and would probably be received “in the next day or so.”

10. In that April 21st conversation, I reminded Ellman of this Court’s order requiring that his motion be received at the undersigned’s office no later than Friday, April 17, 2009.

11. In response, Ellman stated that he would “go find out what’s going on.”

12. I received no explanation from Mr. Ellman, however.

13. The Joint Certification provides no explanation for the lack of notice to either plaintiffs or the Court of any requirement for a delay in filing the motion, nor any request that the motion schedule be readjusted prior to or on the date the motion was due, by order of this Court, to be filed and served.

14. The Joint Certification does not explain why Feng Li, Esq., counsel for defendant Net Access Corporation, which joins in this motion, was not able to see to the timely filing of this motion or even the provision of notice that defendants would file the motion, not pursuant to the Court's order, but whenever they felt like it.

15. Paragraph 13 of the Joint Certification does state under penalty of perjury that Ellman's motion was made out of time because Ellman was "medically ill."

16. During my conversation on April 21, 2009, which took place several days after the date for set for the motion to amend, Ellman did not mention any "medical illness."

17. Indeed, Ellman sounded very much like his usual, robust self during the call.

18. I wrote to the Court that date and requested by informal motion that the Court, under the circumstances, refuse to consider any late submission by defendants. A true copy of that letter is attached hereto as Exhibit A.

19. In the interim, I called Judge Wilson's chambers to inquire whether any papers had been received, and was informed by her law clerk that there had been none and that in the absence of the filing of a motion, there was no hearing scheduled.

20. On April 29, 2009, however, I received a fax copy of a letter from Ellman to Judge Wilson dated April 29, 2009, the return date for the motion (the "Return Date Letter"). A copy of that letter is attached hereto as Exhibit B.

21. The Return Date Letter state that Ellman was “medically ill with a chronic sickness,” was therefore unable to file his motion until that date – the return date – and that the motion had nonetheless “now” been filed and served.

22. Ellman did not respond to or rebut any of the issues, legal or factual, raised in my correspondence of April 21, 2009, nor did he oppose my motion requesting that the Court not consider any application made other than pursuant to the court-ordered deadline.

23. Ellman did state in the Return Date Letter, “If the Court wishes I can provide a medical certificate of illness [*sic*],” but no document which could fit such a description has been made part of the record of any way.

24. The Return Date Letter did not explain why Mr. Li, counsel for his co-defendant Net Access Corporation, neither informed the Court of his need for additional time after the court-ordered deadline to make a submission, much less requested one, or why Ellman’s illness would affect Mr. Li’s ability to file papers on behalf of his own client.

25. In fact, no communication or explanation was ever transmitted by defendant University Communications Corporation by its counsel, Mr. Li, in response to my letter or in connection with its failure to file its promised motion by the date ordered by his Court.

Document hosted at JDSUPRA™
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

26. As stated above, Ellman never informed the Court or plaintiffs that he was sick, nor did he tell me he was sick when we spoke on April 21, 2009. In fact he told me the motion had already been filed.

27. Ellman’s condition has, in the years I have been involved in this litigation, never prevented him from making a court appearance when one has been scheduled, nor from taking part in oral argument, taking and defending depositions, making ex parte and

emergency motions, running a successful business, and conducting litigation, including appeals, as attorney *pro se* in numerous courts at the same time.

28. It is possible however, notwithstanding the foregoing, that Ellman was sick and uncharacteristically unable to communicate the same to me during our conversation and that his illness affected his recollection of the status of the motion when he answered my inquiry.

29. There is no way to rule out the possibility that despite what appeared to be a brief episode of lucidness during our conversation, Mr. Ellman was so sick during the relevant time period that he was unable to convey information to that effect to the Court, either by letter, telephone advice or through the agency of a family member, including his son, Blake Ellman, who is intimately involved in this litigation.

30. It is also possible that Mr. Li also did not know about Ellman's medical condition and hence did not alert those concerned to the situation.

31. If, however, all these things, contrary to appearances, really did happen, and Ellman's and Li's statements in their Joint Certification, made under penalty of perjury, are all true, such an alignment of happenstance would not only be remarkable for having occurred once, but for having happened almost exactly the same way in another court in this State three years earlier.

32. The following statements of fact refer to information found in the public record, which happen to court opinions. These are not presented here as legal argumentation but solely to shed light on the credibility and good faith of the representations by Ellman on which this Court is being asked to rely to excuse his failure to file his motion to amend according to the terms of an order that defined a date for that submission to which he agreed on the record.

33. Our Appellate Division recounts facts stunningly similar to those suggested by the circumstances here, in its decision in *Ellman v. Hinkes*, 2007 WL 632968 (March 05, 2007), *certification denied*, 192 N.J. 295 (2007), in which Mr. Ellman was an appellant pro se from an order of this Court granting a summary judgment to defendants. The Appellant Division explains the circumstances as follows:

On July 5, 2005, defendants filed a motion for summary judgment [on various grounds].

Plaintiffs filed no opposition and on September 30, 2005, summary judgment was granted, dismissing the complaint. The judge gave no reasons, other than noting on the order that the motion was “unopposed,” and “this matter was dismissed for failure to prosecute on 7/22/05 and is now submitted on the merits.”

On October 3, 2005, plaintiffs filed a certification advising the court that because of the “incurable medical illness of Kenneth Ellman,” they encountered unavoidable delays preventing them from filing opposition to defendants’ summary judgment motion. Ellman suffers from multiple sclerosis. Defendants resisted the filing of any late opposition. On October 14, 2005, plaintiffs filed a motion for reconsideration or relief from the judgment, based upon Ellman’s illness. Plaintiffs submitted voluminous materials with their motion. Oral argument was heard on November 18, 2005. The judge denied the motion . . .

34. Although plaintiffs and their counsel are sympathetic to any victim of the illness described by the Appellate Division as multiple sclerosis, we nonetheless must bring to the Court’s attention the fact that, based on the foregoing, the most acute effects of this illness seem to track deadlines for the submission of motion papers in litigation. Perhaps in addition to his unfortunate condition, Ellman suffers from a sort of “motion sickness.”

35. Ellman’s illness also seems to affect persons close to the sufferer who are not otherwise known to be diagnosed with this malady but who are also unable to act as might be appropriate when a court-ordered deadline is going to be missed. This includes Mr. Li, the attorney for Net Access Corporation, who also failed to meet his deadline to

file a motion, as well as all other persons who could have communicated the medical situation to those interested in these proceedings.

36. The Court's consideration of the indulgence to which Ellman should be entitled under these facts should weight the fact that the failure of Ellman, for whom litigation is a sort of avocation, to meet procedural requirements in his *pro se* litigation career appears to have dogged him for decades. This is a matter of record in both this Court, as demonstrated below, and in others.

37. For example, in *Ellman v. Davis*, 42 F.3d 144 (2d Cir.), *cert. denied* 515 U.S. 1118 (1995), the United States Court of Appeals for the Second Circuit rejected, without reference to any medical condition, Ellman's insistence that deadlines requiring the filing of certain papers by certain dates did not apply to him, in a litigation where he proceeded – not unlike this one – both with an attorney at his side with a predilection for inaction and in his own right *pro se* where that met his perceived needs.

Following his incarceration, Ellman brought a state habeas action on September 24, 1992, in which he alleged that his incarceration for civil contempt violated his due process rights under the United States Constitution. . . . The state trial court dismissed the writ on September 28, 1992; no order to this effect was signed, however, until January 13, 1993. Although Ellman attempts to lay the blame for the lack of an appealable order on the trial court, the record indicates that Ellman's attorneys could have prepared the order and submitted it for the court's signature. . . .

Document hosted at JDSUPRA™
<http://www.jdsupra.com/post/documentviewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

In October of 1992, while waiting for someone to submit an appealable order for his habeas petition, Ellman, acting *pro se*, brought an article 78 proceeding before the state Appellate Division requesting a writ of prohibition. . . .

[T]he district court . . . found that the “procedural obstacles” thrown in Ellman's way were not his fault, but were the fault of the state courts or the state Attorney General. A careful review of the record, however, discloses that these “procedural obstacles” were not obstacles but were reasonable procedural requirements. Nothing in the record suggests that Ellman was precluded from submitting an order either for the dismissal of his state habeas claim or for the October recommitment order. Ellman's counsel knew that an order was required to pursue the appeal. Yet, Ellman and his counsel failed to take advantage of the available procedures.

Ellman's own failure to utilize the state process cannot render that process "so clearly deficient as to render futile any effort to obtain relief[.]"

38. In addition to the foregoing case, Ellman has been found in criminal contempt by a Family Court in New York State, *Matter of Ellman*, 499 N.Y.S.2d 431 (App. Div. 1986).

39. Ellman's disregard for the Rules of Court and continuous exploitation of the judiciary's willingness to forgive his every misdeed are also a matter of extensive record in this action. They are best summarized in the words of the original judge in this case, Judge McKenzie, in remarks set forth in the attached transcript of a subsequent motion (Exhibit C) at 26 and 28, to wit:

Defendants have engaged in a continued pattern of annoyance, bad faith and abuse of the of the legal process. It is now time for that pattern to come to an end. . . .

Time and again defendants have demonstrated they have no respect for this Court, the other parties in the matter or the judicial process. They cannot now cry foul as the predicament they find themselves in is a product of their own doing.

40. Indeed the conduct surrounding the events that cause these words to be read by Judge Langlois, who replaced Judge McKenzie, into the record also led to an order by the former dismissing the answer and counterclaims with prejudice and inviting plaintiffs to move for default.

Document hosted at JDSUPRA™
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

41. On technical grounds still not understood by plaintiffs this order was subsequently vacated by Judge Langlois.

42. Judge McKenzie also found, at 24-25, that,

As an initial matter, defendants' requests for the appointment of a Discovery Master and offer to pay 1/3 of the costs of said Discovery Master is absurd. This request is no doubt a transparent attempt to further drive up costs and protract the effective resolution of the issues in this matter. . . .

The request to schedule the matter for trial at this point is equally ridiculous given that defendants have repeatedly ignored this Court's clear and unequivocal discovery orders such that plaintiffs do not have the information necessary to proceed.

The Court finds no merit to the claim that plaintiffs are responsible for the failure to resolve the numerous discovery issues in this matter. This is especially true in light of the:

1. Voluminous documentary evidence submitted by plaintiffs demonstrating an attempt to resolve said issues in good faith;
2. The complete lack of any similar evidence submitted by defendants demonstrating their own good faith;
3. Defendants' conscious efforts to ignore this Court's explicit orders; and
4. Defendants' unilateral decision to reschedule Court order depositions . . .

The above enumerated reasons are by no means exhaustive.

43. Unfortunately, in the procedural morass that followed, including a series of judges charged with the management of the conclusion of this litigation, none of the documentary discovery that was outstanding at the time Judge McKenzie made these findings—which was shortly before his retirement—was ever provided by defendants, and Judge Langlois subsequently ordered, without explanation, that no further discovery be had.

44. Notwithstanding Judge Langlois's vacatur of the order of dismissal against defendants, this Court's prior characterization regarding the conduct of plaintiffs and respect for deadlines, court orders and procedure, much less for the Court itself and least of for adversaries, as well as the determinations of other esteemed tribunals on the same issue, are hereby placed before the Court.

45. I respectfully submit that these are relevant and appropriate submissions, notwithstanding the admittedly *ad hominem* tone which is largely a result of the words of others as well as relevant facts. They are relevant, plaintiffs suggest, to place in the record of this motion as the Court as it weighs whether to permit, and whether in terms of

all equitable considerations whether to grant, plaintiffs' motion made out of time, in defiance of an explicit court order setting a motion schedule, and accompanied by a claim of medical excuse as to one party, Ellman himself (and no excuse as to Net Access Corporation) that the Court must weigh against and reconcile with the facts set forth herein.

46. Finally, there are misrepresentations in the Joint Certification regarding substantive matters as well.

47. Paragraph 3(b) of the Joint Certification states that "pursuant to the Order of the Honorable Catherine M. Langlois dated October 2, 2009 only the counterclaims and demands of Defendants for payment from the Plaintiffs remain," but does not enclose any such order. No such order was submitted with his papers, however, nor is the undersigned aware of any one. Certainly no determination of that nature was made on the merits at any time.

48. Paragraph 1 of the Joint Certification states that "Kenneth Ellman has been seeking to enforce the Agreements and collect the debt from the Plaintiffs." In fact, no attempt to collect this unspecified "debt" has ever been made by Ellman, who has never brought a collection action or filed any action sounding in breach of contract, account stated or any other cause of action for money in this or any other litigation.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false that I am subject to punishment.


RONALD D. COLEMAN

Dated: May 8, 2009

EXHIBIT A

Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>



GOETZ FITZPATRICK LLP
Attorneys at Law
www.goetzfitz.com
55 Harristown Road, Glen Rock, NJ 07452 | (T) 201-612-4444 | (F) 201-612-4455

Ronald D. Coleman
Partner
rcoleman@goetzfitz.com

BY FACSIMILE

Honorable Deanne M. Wilson, J.S.C.
Superior Court of New Jersey, Law Division
Morris County Courthouse
Washington & Court Sts.
Morristown, NJ 07963-0910

Re: *University Communications Inc. v. Net Access Corp.*
Docket No. MRS-L-3626-08

Dear Judge Wilson:

We represent plaintiffs in the referenced matter. Your Honor will recall that we appeared for a status conference on Tuesday, April 14, 2009, where Mr. Kenneth Ellman, the “defendant and real party in interest and indispensable party,” first broached the topic of amending his claims in this matter, which is currently scheduled to go to trial on May 11th. After a considerable amount of colloquy, Your Honor ordered that no amendment would be permitted other than pursuant to due consideration of a motion and an opportunity for plaintiffs to be heard. Mr. Ellman stated on the record that he could prepare the motion more or less immediately. As a concession, plaintiffs agreed to a short-order motion schedule pursuant to which plaintiffs would submit any opposition on the explicit condition that Mr. Ellman’s motion be served at the above address no later than Friday, April 17th.

Document posted at JDSUPRA™
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c71c85-3b03-4583-a3e8-7574e50d154f>

There has been no service of a motion to amend.

Today I telephoned Mr. Ellman, who the Court will recall is representing himself *pro se*, and inquired about the status of the motion. He told me that the motion had recently been submitted, and that plaintiffs’ copy was “in the mail” and would probably be received “in the next day or so.” I reminded him of Your Honor’s oral order requiring that motion be at the undersigned’s office no later than Friday, to which he responded that he would now “go find out what’s going on.”

Your Honor, this adventure is of a piece with every single procedural aspect that has preceded it in this litigation. This time, Mr. Ellman shows up at a status conference months after the last proceedings of any kind in this 2004 case with a new request to amend a pleading, no copy of the proposed amended pleading and no semblance of an explanation as to why the relief



sought could not have been applied for earlier. He then promises a motion when pressed by the Court, promises a specific time and place of service so that plaintiffs have a fair, if abbreviated, opportunity to oppose, and promptly does, instead, whatever he wants.

As the Court is well aware, a pleading may **only** be amended on motion made on notice to the adverse party, with a copy of the proposed amendment accompanying the motion. Such an application must be definite, not vague. *See, e.g., 3 Walzer New Jersey Practice* § 11.1 at 317-18 (5th ed. 1998). These are not mere formalities. *See, Keller v. Pastuch*, 94 N.J. Super. 499 (App. Div. 1967). Furthermore, an applicant seeking an eve-of-trial amendment is charged with the burden of demonstrating why his application was not made in a timely fashion. Thus, it is not an abuse of discretion to deny amendments on the eve of trial nor should late amendments be permitted at the last minute as to do so would "afford a refuge to languid or dilatory litigants." *Branch v. Emery Transportation Co.*, 53 N.J. Super. 367, 375 (App. Div. 1958); *see Jackson v. Georgia-Pacific Corp.*, 296 N.J. Super. 1, 10-11 (App. Div. 1996), *certif. den.*, 149 N.J. 141 (1997).

We ask that the Court close this door once and for all, for the fundamental equitable principles at the root of the above decisions apply as straightforwardly in this instance as in any that could be contemplated. Here plaintiffs not only agreed to respond to a motion to amend—made years after it could and should have been—in short order so that the equities and considerations could be properly weighed by the Court in some semblance of advance before the trial. The Court even required the undersigned to dictate his office address into the record despite the due entry into the docket of a substitution of attorney showing this firm's address of record. The date of service of the motion was also agreed to by consent and ordered by Your Honor, all on the record. And just as he has done regarding every single procedural requirement in the Rules of this Court, but especially relating to motions (not one of which has complied with the Rules), this simple, fair and explicit mandate was completely ignored by Mr. Ellman, who has for nearly half a decade mocked both the letter and spirit of all the rules of procedure.

Certainly any motion to amend as may be considered or granted despite Mr. Ellman's casual flouting of Your Honor's fair and simple order should not be construed as in any way being the product of, or with reference to, a waiver or consent by plaintiffs of any objection or right in general or in particular. Our previous concession as to the timing of the motion is of course no longer operative in light of Mr. Ellman's refusal to meet the sole condition of that concession—timely service of the motion.

Based on the foregoing, we move by this letter, begging Your Honor's leave for the informality considering all the circumstances, that the Court not consider any motion to amend as may be filed or served after the due date of April 17th.

Respectfully submitted,

Ronald D. Coleman

cc: Mr. Kenneth Ellman
Feng Li, Esq.

EXHIBIT B

Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

KENNETH ELLMAN
BOX 18
NEWTON, NEW JERSEY 07860
Phone: 9734549027
Fax: 9739482986

April 29, 2009

Honorable Deanne M. Wilson
Superior Court of New Jersey
Morristown, New Jersey
Phone: 9736564058
Fax: 9736564104

**Re: University Communications et. al. vs.
Net Access and Kenneth Ellman
Docket #3626-08**

Dear Judge Wilson,

The matter of University Communications vs Net Access and Kenneth Ellman is scheduled today for a hearing regarding a motion to amend the answer and counterclaim.

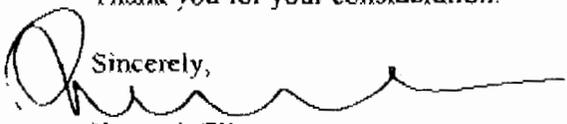
I have been medically ill with a chronic sickness. I am now sufficiently recovered to appear today April 29. I believe the time is 3pm. However due to my medical illness I was unable to file my Motion to Amend the Answer and Counterclaim until today. I have now filed and served that motion.

Since I have first filed this motion today, the Court may wish to reschedule this matter for a different date. I am available by cell phone at 9734549027. Otherwise I will appear today at 3pm and I will bring extra copies of the motion

I am sorry for this problem and apologize to the Court and parties. If the Court wishes I can provide a medical certificate of illness. I am trying some new medication schedule and it may resolve the problem for the near future. At this time I am fully able to proceed in this matter.

Thank you for your consideration.

Sincerely,


Kenneth Ellman

cc: Ronald Coleman, Fax: 2016124455

EXHIBIT C

Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

1 SUPERIOR COURT OF NEW JERSEY
2 CHANCERY DIVISION: MORRIS COUNTY
DOCKET NO. MRS-C-87-04

3 UNIVERSITY COMMUNICATIONS, :
ET AL, :
4 Plaintiffs, : STENOGRAPHIC TRANSCRIPT
: OF
5 -vs- : MOTION
: :
6 NET ACCESS CORP., ET AL, :
Defendants. :
7 ----- :

PLACE: MORRIS COUNTY COURTHOUSE
WASHINGTON AND COURT STREETS
MORRISTOWN, NEW JERSEY
DATE: OCTOBER 20, 2006

10 BEFORE:
11 HONORABLE CATHERINE M. LANGLOIS, J.S.C., P.J.

13 TRANSCRIPT ORDERED BY: KENNETH ELLMAN, PRO SE

15 APPEARANCES:

Document hosted at JDSUPRA[™]
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

16 RONALD D. COLEMAN, ESQ.
(Bragar Wexler & Eigel)
17 For the Plaintiffs

18 FENG LI, ESQ.
19 (Office of Net Access General Counsel)
For Net Access Corp.

21 KENNETH ELLMAN, PRO SE

22 EDWARD ZAJKOWSKI, C.S.R., R.M.R.
23 OFFICIAL COURT REPORTER
MORRIS COUNTY COURTHOUSE
24 WASHINGTON AND COURT STREETS
MORRISTOWN, NEW JERSEY
25 LICENSE NUMBER: 1016

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

MOTION

3

Motion

3

1 THE COURT: Filed on September 6, 2006 is a
2 motion to strike an answer, dismiss a counterclaim and
3 counsel fees brought by the plaintiffs, University
4 Communications, doing business as Pegasus Technology
5 and Jason Silverglade.

Document hosted at JD SUPRA™
http://www.jdsupra.com/legaldocs/submitview.asp?fileDoc=1c85-3b03-4583-a3e8-7574e50d154f

6 And appearing for the plaintiffs?
7 MR. COLEMAN: Ronald Coleman, Bragar, Wexler
8 and Eagel, Newark.

9 THE COURT: The defendants had filed a joint
10 motion on behalf of Mr. Ellman and Net Access to set
11 the case for trial, sanction plaintiff, and opposition.

12 And appearing for Net Access Corporation?
13 MR. LI: Feng Li, your Honor, representing
14 Net Access.

15 THE COURT: And, Mr. Ellman, you represent
16 yourself?

17 MR. ELLMAN: Yes, that's correct, your Honor.

18 THE COURT: Thank you.
19 Now, Judge MacKenzie had this case, and has
20 issued prior orders as it relates to discovery and set
21 forth various opinions and conclusions, as well. And
22 at issue here was the requirement of a deposition to be
23 conducted September 21st in the courthouse of
24 Mr. Ellman, Blake, and Alex Rubenstein. And on that
25 date the attorneys appeared. Situation arose during

Motion

4

1 the deposition. Mr. Coleman left. Mr. Ellman and Mr.
 2 Li came to this Court. Judge MacKenzie was on
 3 vacation. And there were proceedings conducted at that
 4 time regarding the use of a video, the issue regarding
 5 court reporter, and the fact that Mr. Coleman had left
 6 the deposition, and what this Court was going to do.
 7 And these are the motions that follow that proceeding.
 8 And that transcript, I've reviewed, as well, as the
 9 discussion that we all had. And so the plaintiffs have
 10 made the application to dismiss the answer,
 11 counterclaim and the attorneys fees with prejudice,
 12 relying primarily on the various other prior orders of
 13 Judge MacKenzie that this was the -- should be the
 14 third and the last opportunity for the case to proceed
 15 in view of the dispute over the discovery.

16 So what would you like to add Mr. Coleman?
 17 MR. COLEMAN: Your Honor, the only point I
 18 would actually make at this juncture is that we don't
 19 make these motions lightly. We make a lot of effort in
 20 making the motion. We gave legal grounds for the
 21 relief that we seek based on the Court Rules, based on
 22 decisions in this state. No brief was filed in
 23 response. That's that's called a concession. In terms
 24 of what what was filed --

25 THE COURT: Is it concession?

Motion

5

1 Now, in view --

2 MR. COLEMAN: Well, if a plaintiff makes a
 3 legal argument, and it's not rebutted, that is a
 4 concession, yes, your Honor.

5 THE COURT: Okay.

6 MR. COLEMAN: A cross motion for relief was
 7 made with no legal argument filed, no basis under the
 8 law or the Court Rules for granting it. I don't know
 9 how the Court could possibly grant it. I'm not aware
 10 that the papers that were filed were actually filed at
 11 all. They were not served on my office until I
 12 demanded a copy well more than a week --

13 THE COURT: Well, we have a filing date,
 14 September 21, 2006, cash, \$30. So they were filed.

15 MR. COLEMAN: Your Honor, there was no
 16 certificate of service filed. So my understanding had
 17 always been that certainly I was not served with it. I
 18 was not served with a certificate of service.

19 THE COURT: I got a certificate of service of
 20 the motion, Court's copy received September 27th,
 21 Catherine Langlois' receipt date. I don't have it
 22 filed downstairs. Maybe there's a filed copy. But
 23 it's just the --

24 MR. COLEMAN: I don't know what it seeks
 25 because I wasn't served with the papers. I would have

Motion

6

1 known --

2 THE COURT: Is this all -- all this then is a
3 surprise to you, you've never seen it?

4 MR. COLEMAN: No, I saw it when I demanded it
5 a week later.

6 THE COURT: And which is why we're on October
7 the 20th instead of September.

8 MR. COLEMAN: That would explain it then.

9 Okay. So what was filed are these highly
10 improper affidavits or joint certifications.
11 Certification is a person says I am -- I am vouching,
12 for facts, and I am subject to the penalties of perjury
13 if I'm found to have lied. Two people cannot file a
14 certification. The Court Rules do not allow for such a
15 thing. Judge MacKenzie has -- this issue has been put
16 in front of Judge MacKenzie many times. He's never
17 ruled on it.

18 Fundamentally, on the merits, your Honor, the
19 papers speak very loudly. We think there is adequate
20 legal basis for the relief that we seek. We believe
21 that the defendants have demonstrated that they will do
22 whatever they want. Court orders regarding discovery
23 are not of any importance to them.

24 It was astonishing to be in a situation where
25 a party shows up with his own video recorder at a

Motion

7

1 deposition, without asking, without a court order,
2 without notice, refuses to turn it off, refuses to
3 answer questions, refuses to proceed with the
4 deposition unless the unauthorized recording takes
5 place. There are Court Rules in place that provide for
6 videotape depositions. They're not there as broad
7 suggestions. There is a lot of leniency that the Court
8 has exercised in this case because there is a pro se
9 party. But Mr. Li represents the corporation. The
10 witnesses in this deposition were witnesses of the
11 corporation. In fact, I'm not sure that Mr. Ellman has
12 any right to be heard on the motion as regards the
13 conduct of the deposition because he was permitted to
14 attend, but he was not the representative of the
15 witnesses. He's not the representative of the
16 corporation. His involvement in this case, frankly, as
17 basically an unlicensed attorney, has, in our view,
18 been highly improper. If the Court finds that despite
19 this, that despite the repeated refusal to make
20 discovery, that the case will, nonetheless, continue,
21 what we'd ask is that the Court allow us to -- I know
22 this is highly unusual, but this case is highly
23 unusual -- allow us to take the depositions in the
24 presence of the Court or a person deputised by the
25 Court who will make rulings at the time of the

Motion

8

1 deposition on the record at to whether questions must
2 or must not be answered, and also that our fees for
3 this motion and the previous discovery motion which
4 resulted in an order that ended up being disobeyed be
5 awarded.

6 THE COURT: Mr. Li.

7 MR. LI: Your Honor, it's a matter of fact
8 that plaintiff violated Judge MacKenzie's court order.
9 Judge MacKenzie order on that day for the deposition.
10 And we appeared here. And we ready for the deposition.
11 In the morning, 10:30, Blake a appeared for the
12 deposition. And Mr. Ellman sitting there, answered
13 questions properly. What he -- Mr. Coleman did, it's
14 not professional, your Honor. He instructs the court
15 reporter only type words from his mouth. And he refuse
16 that court reporter type anything from me, from
17 Mr. Ellman, your Honor.

18 THE COURT: But I think the ultimate
19 transcript did have it all in there.

20 MR. LI: No, your Honor. He instructs -- he
21 instructs -- Mr. Coleman instructs court reporter stop
22 typing when Mr. Ellman or I talk. And then he tell the
23 court reporter type now when he talks. Too
24 unprofessional, your Honor. I never saw attorney doing
25 deposition like this.

Motion

9

1 Also, your Honor, his client disrespectfully
2 apply music during the deposition, purposely interrupt
3 deposition, your Honor. The video shows he was bring a
4 laptop and playing music. It's like Japanese music,
5 something like. Nobody understand. Loudly. I could
6 not hear what Kenny Ellman said or Blake say or Coleman
7 say, your Honor. And they left the deposition.
8 That -- we have dispute about video recording, your
9 Honor. We said, okay, we have dispute; find a judge;
10 let judge resolve this issue. We tell Mr. Coleman we
11 need to talk judge, let judge rule whether we should
12 have a videotape in the courtroom. But Mr. Coleman
13 choose to left -- to leave, your Honor. He ordered
14 court reporter to leave. We said we need the judge and
15 let the judge resolve whether we should have this
16 videotape in this room. Mr. Coleman ordered court
17 reporter and told, until his client left on that
18 date -- I don't know what the time. Probably 11:30,
19 something like that. According to Judge MacKenzie
20 order, afternoon, I think 2:30 or 1:30 should be
21 Mr. Alex Rubenstein deposition. And we came here.
22 Mr. Coleman by the phone said Mr. Rubenstein is in the
23 courtroom and ready for his deposition.

24 We did everything we can do to comply with
25 Doctor MacKenzie -- I'm sorry -- Judge MacKenzie's

Motion

10

1 order, your Honor. We did not break any rules. We
 2 didn't break orders, your Honor. Anybody brings --
 3 breach -- I'm sorry. Why this Court, you order should
 4 be held contempt, this uniform rule, your Honor.
 5 Everyone knows that. They violated Judge MacKenzie
 6 order. They should get punish for contempt. We stay
 7 here, hold in, your Honor. We came here, your Honor.
 8 Your Honor, on the phone, called up Mr. Coleman, let
 9 him come back for the deposition. He choose not, your
 10 Honor. We stay a whole day over here. Mr. Ellman, me
 11 and Blake, Rubenstein and court reporter, your Honor.
 12 And until 6:00. We not leave this courtroom.

13 So that's, your Honor -- we ask that the
 14 Court denies that motion and hold them in contempt,
 15 your Honor, because purposely violates Judge MacKenzie
 16 order. And he's not coming back. He knows Judge
 17 ordered that thing. Waiting here.

18 So, your Honor, we just ask Court holds the
 19 plaintiff in contempt for this, the violation of Judge
 20 MacKenzie order, and just orders case to be -- to go to
 21 trial, your Honor. This -- it's been such a long time
 22 because plaintiff not cooperate with this defendant for
 23 all this deposition, discoveries, your Honor.

24 THE COURT: Thank you.

25 MR. LI: Thank you.

Motion

11

1 MR. ELLMAN: May I be heard, your Honor?

2 THE COURT: Shortly.

3 MR. ELLMAN: Your Honor, just very briefly.

4 Mr. Coleman mentioned relating to whether he was served
 5 with process or not. The Court accurately reflected
 6 that he's in possession of an affidavit of service.
 7 I'm also in possession --

8 THE COURT: I'm not worried about it,

9 Mr. Ellman. Move on.

10 MR. ELLMAN: I'll let that go, your Honor.

11 Your Honor, the problem really arose, and
 12 while it has all these complications attendant to it
 13 and emotions, it's a very simple situation. We did
 14 appear for the depositions. We wanted the depositions.
 15 We wanted them to go forward. The record reflects
 16 that. The transcripts by the court reporters who were
 17 present reflected that we wanted to go forward. We
 18 came to this Court and asked for assistance. We wanted
 19 it placed on the record because we were very fearful of
 20 just this type of situation arising.

21 At no time have the defendants ever thwarted
 22 the depositions that day as ordered by Judge MacKenzie
 23 and, in fact, we went ahead, asked Mr. -- Mr. Coleman
 24 abandoned the deposition. We had to have our own
 25 stenographer come in because Mr. Coleman directed the

Motion

12

1 stenographer, your Honor, to leave. As a result we had
 2 to call Rosenberg up to come down and bring a
 3 stenographer so Blake and Alex Rubenstein could be
 4 deposed. And that is, in fact, what happened. And
 5 those depositions have been filed with this Court.
 6 So --

7 THE COURT: Sit down, please.

8 MR. ELLMAN: So the problem we have is
 9 twofold. (1) I want this case to go to trial. As the
 10 record reflects, I am owed in excess of \$100,000. I
 11 have a security agreement that is awaiting execution in
 12 this case. The damage and penalty to me over a period
 13 of time in suffering with this type of financial loss
 14 is unwarranted. I want an expeditious trial on the
 15 merits. I certainly want the discovery to be
 16 completed. I certainly appeared, as did Mr. Rubenstein
 17 and Mr. Blake Ellman. And the conduct at the
 18 deposition of playing of music, of interruption of th
 19 deposition, and most extraordinary, of ordering the
 20 court stenographer to leave. I have never heard of
 21 such a thing here in this courthouse for that to occur.
 22 And then, on top of that, as the record clearly
 23 reflects, I asked that any disputes about this
 24 deposition go before a judge that day so we could
 25 continue with them. And that's why I wanted them held

Motion

13

1 in the courthouse, your Honor, so that these disputes
 2 could be expeditiously resolved, and the deposition be
 3 completed.

4 Again, the Court is aware and the record
 5 shows that Mr. Coleman would not come before the Court
 6 to resolve this. And clearly my position, as the
 7 deposition transcript shows, was that whatever the
 8 Court orders, whether we make a recording, don't make a
 9 recording, whether a question is answered or a question
 10 is not answered, we obey the order and we go forward.
 11 That's why we're holding it in the courthouse.

12 So what do we want?

13 We want our damages for having to have had
 14 Rosenberg come down to the courthouse, with no notice
 15 at all, and complete the deposition. We want this case
 16 now, as Mr. -- Judge MacKenzie had said, discovery is
 17 over, to go ahead and be scheduled for trial on the
 18 merits. And whatever sanctions the Court deems
 19 appropriate for a party in the courthouse, in a
 20 deposition room, turning on and playing loud music so
 21 that as the record reflects, the stenographer
 22 Mr. Coleman hired said I can't hear anything -- she
 23 turned to me. Now, can I site these various provisions
 24 in the transcripts. They've been filed with the Court.
 25 At this point Kenneth Ellman's deposition has been

Motion

14

1 completed. Jason Silverglade appeared twice. His
 2 deposition has been completed. Alex Rubenstein and
 3 Blake Ellman's depositions have been filed with this
 4 Court. Mr. Coleman abandoned them over our objection.
 5 I can't think of any other remedy another than to say
 6 bring this case to trial. Otherwise I, as somebody who
 7 is owed what to me is a significant amount of money,
 8 I'm just being punished further and further and
 9 further. And the depositions of Mr. Jason Silverglade,
 10 your Honor, will show -- and that's really not
 11 appropriate to go into in detail in this hearing -- but
 12 would show that the plaintiff's case has no merit,
 13 whatsoever.

14 So we have our papers in front of you. We
 15 did file an amended notice of motion, your Honor.

16 And last closing sentence. He says he would
 17 like this held before a judge. It is the defendants,
 18 your Honor, who made a motion to Judge MacKenzie, a
 19 thick motion, asking for a master to be appointed to
 20 avoid this problem, your Honor. The record shows that.
 21 We then, because Mr. Coleman didn't want to pay for it,
 22 offered to pay for the master, just so we could
 23 conclude these depositions, on the condition that
 24 whoever wins has to have that fee added in. If we win
 25 we expect Mr. Coleman to reimburse us.

Motion

15

1 Who objected to the master?

2 Mr. Coleman.

3 On the record. The transcript -- it was --

4 THE COURT: You're going backwards.

5 Mr. Ellman. Please don't go any further backwards.

6 MR. ELLMAN: I'm sorry? What did you say?

7 THE COURT: I don't need to go backwards.

8 MR. ELLMAN: Okay. So, your Honor, that's

9 all I can tell you. I do think, fortunately, the
 10 record is rather clear in this because we have
 11 transcripts available for the Court to refer to.

12 And --

13 THE COURT: Thank you.

14 MR. ELLMAN: Thank you, your Honor.

15 THE COURT: Anything else you'd like to add,

16 Mr. Coleman?

17 MR. COLEMAN: Just so briefly, your Honor.

18 There's no contempt motion here. There's

19 no --

20 THE COURT: It is. I think their application
 21 is to sanctions.

22 MR. COLEMAN: Well, there's no legal -- they
 23 haven't given any legal basis for it. They haven't
 24 cited any rule or any provision, nor is there any
 25 factual basis for it.

Motion

16

1 In case there's any chance that this has
 2 eluded the Court, these depositions were ordered at my
 3 request. So the fact that he continued with deposing
 4 his own witnesses, one of whom is his own son, no
 5 one -- he didn't have to do that. The idea that they
 6 wanted these depositions to proceed, they twice did not
 7 show up for earlier court ordered depositions. The
 8 depositions were for the benefit of my client, not for
 9 his benefit. He can ask his son questions any time he
 10 wants.

11 That's, frankly, that's all I have to add.

12 THE COURT: So, therefore, the fact that you
 13 chose not to stay and not to go ahead is your choice to
 14 do. You made that clear when we had our telephone
 15 conference. So I don't understand then why you think
 16 you have an order to strike the answer and dismiss the
 17 counterclaim when you chose, on your own, not to
 18 continue the depositions.

19 MR. COLEMAN: Your Honor, it was impossible
 20 for me to continue the depositions.

21 THE COURT: Oh. So you're saying it's
 22 because of the situation. You wanted to go ahead.

23 MR. COLEMAN: I absolutely wanted to go
 24 ahead.

25 THE COURT: Thank you.

Motion

17

1 I'm going to begin with just reviewing the
 2 first aspects of the deposition then. I'm only
 3 referring to the transcript. It starts off with "Have
 4 you stated" -- says "questioning already in progress".
 5 So I don't know what that means. But Mr. Coleman says

6 "QUESTION: You've stated that your address
 7 is what?

8 "ANSWER: Parsippany.

9 "QUESTION: And you work for whom?

10 "ANSWER: Net Access.

11 "QUESTION: What is your role?

12 "ANSWER: I'm the President of the company.

13 "QUESTION: Is there a Vice-President?

14 "ANSWER: Yes, there is.

15 "QUESTION: Who is that?

16 "ANSWER: Alex Rubenstein.

17 "QUESTION: Are there any other officers in
 18 Net Access?

19 "ANSWER: The officers in Net Access
 20 Corporation are confidential.

21 "QUESTION: Do you have an attorney who
 22 directed you not to answer that question?

23 "ANSWER: The officers of Net Access are
 24 confidential.

25 "QUESTION: Based upon what are you asserting

Motion

18

1 you don't have to answer that?
 2 "ANSWER: Because I believe the information
 3 is confidential.
 4 "QUESTION: You believe the information is
 5 confidential. Okay. So you recognize that if a judge
 6 reviewed this and determined you do have to answer it
 7 you have to come back?
 8 "ANSWER: Yes.
 9 "QUESTION: Is Ken Ellman an officer of Net
 10 Access?
 11 "ANSWER: Any officers of the corporation are
 12 confidential.
 13 "QUESTION: But didn't Mr. Ellman actually
 14 say -- testify he was an officer in his deposition?
 15 "ANSWER: I don't know this gentleman."
 16 Mr. Li then objects. "I think that's not a
 17 question for him -- Mr. Ellman to answer. He wasn't
 18 present when Kenny Ellman -- what was his deposition."
 19 And Mr. Coleman says, "You were not present at the
 20 Ellman deposition? The witness says, "I don't think
 21 so, no". So Mr. Coleman reads the testimony from that
 22 deposition in which Mr. Ellman is asked "Are you a
 23 shareholder?".
 24 "ANSWER: Yes.
 25 "QUESTION: How much stock do you hold?

Motion

19

1 "ANSWER: It depends on the confidential
 2 agreement among the shareholders, but I'm a
 3 shareholder."
 4 And there Mr. Coleman refers back to the
 5 present witness. Document hosted at JDSUPRA[™]
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>
 6 "QUESTION: Do you think it's confidential
 7 information whether or not Mr. Ellman is a shareholder?
 8 "ANSWER: I believe so."
 9 "Mr. Li: Objection. I think it's
 10 confidential."
 11 And that's when it all breaks down. Mr. Li
 12 continues to object, and then Mr. Coleman said, "There
 13 isn't going to be any videotaping. You're not
 14 authorized to be here. I will do this." And that's
 15 when everyone starts in.
 16 So the beginning of this deposition shows me
 17 that within the very first question the witness is
 18 refusing to answer questions, and more accurately, Mr.
 19 Li is making objections to questions which were clearly
 20 to do nothing other than to be obstreperous and to not
 21 let a very simple question be asked. And that's how
 22 the deposition started. And I put that deposition and
 23 the responsibility for that deposition to fall apart
 24 directly in the hands of Mr. Li and Mr. Ellman.
 25 Not to let that witness answer a very simple

Motion

20

1 question, Are you a shareholder, is Mr. Ellman a
2 shareholder, objection because it's confidential,
3 that's nonsense.

4 Then there's the videographer. Without
5 request of the Court the video person shows up, sets up
6 and keeps going. There's been no application to the
7 Court for a video. And that issue, very simply, could
8 have been addressed by turning it off and not doing it.
9 That wasn't done. And I put that on the side of the
10 defendants again.

11 Nothing but the intention to disrupt and
12 prevent a deposition from the very first question to
13 the very request to turn off the video. These
14 defendants, again, did what Judge MacKenzie was sick
15 and tired, in his judicial manner, of having done in
16 this litigation. And I refer to the prior motions and
17 opinions of Judge MacKenzie that he was fully
18 familiar -- and this goes back to July. Written
19 opinions by Judge MacKenzie. He's fully familiar with
20 the long and tortured history of this matter, and
21 incorporates previous orders and opinions. He reviews
22 the discovery, procedural history, indicating that the
23 plaintiffs had noticed the depositions of Blake Ellman,
24 Alex Rubenstein in October 7th. For Kenneth Ellman
25 October 10th of 2005. "On October 6th the defendants

Motion

21

1 communicated they would not appear for the October 7,
2 2005 depositions. Defendants provided no justification
3 or excuse for their refusal to appear; did not request
4 a conference; or make any other arrangements which
5 would allow these depositions to proceed. Moreover,
6 defendants never noticed any of their proposed 18
7 depositions." And I'm reading from Judge MacKenzie's
8 decision.

9 "The parties were again before the Court on
10 December 22, 2005. At such time the Court ordered both
11 parties to produce any outstanding documents, laid out
12 specific dates for depositions to be held, ordered that
13 all depositions be completed by February 28, 2006. In
14 one of a series of unusual and/or unnecessary requests
15 defendants insisted that Kenneth Ellman be deposed at
16 the Morris County Courthouse."

17 "Kenneth Ellman was deposed on January 5,
18 2006. During the Kenneth Ellman deposition plaintiffs
19 made additional document requests. Defendants have not
20 responded to those requests.

21 Silverglade was deposed January 11, 2006. As
22 defendants scheduled to depose Silverglade at 11:00
23 a.m. that deposition has yet to be completed."

24 Quote in a footnote: "Not surprising given
25 the history of the parties relationship and the complex

Motion

22

1 issues involved in this case."

2 "January 13, 2006 defendants informed
3 plaintiffs and this Court that they were unilaterally
4 rescheduling the court ordered deposition of Blake
5 Ellman due to Martin Luther King Day, and cancelling
6 the court ordered deposition of Alex Rubenstein because
7 he would be out of the country."

8 "With respect to the Blake Ellman deposition
9 it is undisputed that at the time this Court set the
10 deposition date, defendants were made aware that same
11 was to occur on Martin Luther King Day and did not
12 object. It's also interesting to note the Court Order,
13 which was drafted by defendants, provided that any
14 deposition which fell on a holiday would be conducted
15 on the following day. No justification as to why
16 Mr. Rubenstein left the country was ever provided."

17 Telephone conferences the Judge again refers
18 to. The rest of the Court's opinion refers to Court
19 Rules regarding the failure to attend a deposition or
20 comply with a demand or respond to a request, failures
21 to comply with the Court Order. The Judge set forth
22 plaintiffs' argument that this was a repeated pattern
23 of discovery abuses over the last two years,
24 summarizing it by plaintiffs argue that defendants
25 ignore discovery deadlines; plaintiffs request relief

Motion

23

1 for guidance from the Court; defendants file a cross
2 motion claiming more time is necessary to complete
3 discovery; extension is granted; and (5) defendants
4 revert to Number 1.

5 There is another footnote by Judge MacKenzie
6 that says, "Most likely by sheer oversight plaintiffs
7 fail to note defendants' claim, without fail, upon
8 every submission made by either plaintiffs' former
9 counsel or present counsel that the submission is
10 untimely. Other repeated patterns include (1) claims
11 to never have received proper notice from counsel or
12 this Court, (2) sending up to five faxed copies of the
13 same largely incoherent document and (3) contacting
14 each member of chamber's staff to obtain the same
15 answer to the exact same questions provided by another
16 member of chamber's staff just two minutes before."

17 "Defendants respond" -- and again I'm reading
18 from the July opinion -- "that the plaintiffs' motion
19 should be denied because they failed to produce
20 Mr. Silverglade to complete his deposition". And the
21 defendants claim that the failure to complete the
22 deposition cannot be attributed to any action on their
23 part. Defendants requested a discovery master be
24 appointed to "take this abuse off of the defendants and
25 the Court". Judge MacKenzie says, "It is unclear how

Motion

24

1 the costs of the Master would be financed. Defendants
 2 initially seem to graciously offer 'to pay 2/3 of
 3 Master costs.'" and "in the next sentence, however
 4 defendants contradict this statement by stingily
 5 offering only 'to pay one-third each of all Court
 6 approved charges that the Master may make.'

7 Finally, defendants opine that plaintiffs'
 8 claim is 'bogus' and a fraud upon both the Court and
 9 defendants."

10 And Judge MacKenzie has another footnote
 11 where he actually defines the word bogus. "For
 12 example, 'Dude, defendants' justification for failure
 13 to produce Rubenstein is like totally bogus.'" I think
 14 he was doing his definitional terms.

15 Judge MacKenzie's finding in July that "The
 16 discovery rules were designed to eliminate, as far as
 17 possible, concealment and surprise in the trial of
 18 lawsuits to the end that judgments therein be rested
 19 upon the real merits of the causes and not on the skill
 20 and maneuvering of counsel." Quoting Wymbs versus
 21 Township of Wayne. "Where there has been a breach or
 22 abuse of the discovery rules trial courts have 'wide
 23 discretion to decide the appropriate sanction.'"

24 "As an initial matter", Judge MacKenzie
 25 writes, "defendants' requests for the appointment of a

Motion

25

1 Discovery Master and offer to pay 1/3 of the costs of
 2 said Discovery Master is absurd. This request is no
 3 doubt a transparent attempt to further drive up costs
 4 and protract the effective resolution of the issues in
 5 this matter. A Discovery Master is also unnecessary as
 6 all outstanding discovery issues have already been
 7 resolved. With respect to any issues which still need
 8 to be resolved as a result of defendants' actions,
 9 those issues are addressed" in full. "The request to
 10 schedule the matter for trial at this point is equally
 11 ridiculous given that defendants have repeatedly
 12 ignored this Court's clear and unequivocal discovery
 13 orders such that plaintiffs do not have the information
 14 necessary to proceed.

15 The Court finds no merit to the claim that
 16 plaintiffs are responsible for the failure to resolve
 17 the numerous discovery issues in this matter. This is
 18 especially true in light of the:

- 19 1. voluminous documentary evidence submitted
- 20 by plaintiffs demonstrating an attempt to resolve said
- 21 issues in good faith;
- 22 2. the complete lack of any similar evidence
- 23 submitted by defendants demonstrating their own good
- 24 faith;
- 25 3. Defendants' conscious choice to ignore

Motion

26

1 this Court's explicit orders; and
 2 4. Defendants' unilateral decision to
 3 reschedule Court ordered depositions of Blake Ellman
 4 and Alex Rubenstein.

5 In short" --

6 And again a footnote by Judge MacKenzie.

7 "The above enumerated reasons are by no means
 8 exhaustive."

9 "Defendants have engaged in a continued
 10 pattern of annoyance, bad faith and abuse of the legal
 11 process. It is now time for that pattern to come to an
 12 end."

13 With that the Court orders document requests
 14 to be provided on August 2, 2006, indicating "these
 15 legitimate requests were made over a year ago. The
 16 Court has already ordered the same be produced yet
 17 plaintiffs have repeatedly ignored this directive." If
 18 the defendants fail to comply Mr. Coleman will notify
 19 the Court, a judgment of default will be entered,
 20 counterclaim dismissed with prejudice.

21 The deposition of Blake Ellman at 9:00 a.m.,
 22 Monday, August 7th. The deposition of Alex Rubenstein,
 23 9:00, Wednesday, August 9th. The continuation
 24 necessary will take place the following day at the same
 25 locations.

Motion

27

1 "Should defendants be more than one hour late
 2 for either deposition Mr. Coleman will notify the
 3 Court, a judgment of default will be entered and
 4 defendants' counterclaim dismissed with prejudice.

5 No excuse for defendants' failure to produce
 6 Blake Ellman or Alex Rubenstein for these scheduled
 7 depositions will be considered or tolerated. In other
 8 words, failure to comply will lead to default being
 9 entered and the defendants' counterclaim dismissed with
 10 prejudice."

11 Obviously those dates were later changed to
 12 August 21st.

13 "The Court is of the opinion the defendants
 14 are now in possession of all documentation necessary to
 15 appropriately defend this matter. Moreover, having
 16 failed to take any legitimate steps to notice and take
 17 the 18 depositions requested, despite numerous
 18 extensions, defendants will only be permitted to
 19 complete their deposition of Silverglade and to notice
 20 and take one other deposition." And they will go
 21 forward "if and only if the depositions of Blake
 22 Ellman, Alex Rubenstein are attended and completed".
 23 Other conditions were imposed that I won't place on the
 24 record here, except the only acceptable places for the
 25 depositions to occur will be at Net Access or the New

Motion

28

1 Jersey office of Bragar, Wexler & Eigel. "However,
2 should defendants again needlessly insist on using
3 Morris County Courthouse facilities defendants will be
4 solely responsible for all costs."

5 "The Court's decision is based on the fact
6 that defendants have been relying on the same meritless
7 arguments for over a year and a half. Time and again
8 defendants have demonstrated they have no respect for
9 this Court, the other parties in the matter or the
10 judicial process. They cannot now cry foul as the
11 predicament they find themselves in is a product of
12 their own doing."

13 This Court honors and respects that opinion
14 of Judge MacKenzie. He says it is a fact that these
15 defendants have relied upon the same meritless
16 arguments for over a year and a half. Time and again
17 demonstrating they have no respect for this Court, the
18 other parties in this matter or the judicial process.
19 They cannot now cry foul as the predicament they find
20 themselves in is a product of their own doing.

21 The predicament the defendants found
22 themselves in on August 21, 2006 is of their own doing.
23 The very first questions asked in that deposition were
24 perfectly appropriate and absolutely no basis to
25 object. They brought a videographer there who had no

Motion

29

1 business being there, was not permitted by any court
2 order, and should have, upon the request of
3 Mr. Coleman, left and concluded it. After that the
4 rest of that deposition -- the rest of what occurred
5 there is out of control. And I don't, in any way,
6 condone the fact that Mr. Coleman got up and left
7 rather than having a court take a look at how this
8 might have otherwise had been resolved. So in that
9 sense Mr. Coleman is not going to get any fees for this
10 application. However, I do strike the answer, dismiss
11 the counterclaim, with prejudice, and allowing the
12 plaintiff here to move for default.

13 Enough is enough.

14 MR. COLEMAN: Thank you, your Honor.

15 MR. ELLMAN: Your Honor, I've never seen
16 that.

17 THE COURT: I am granting the motion to
18 strike the answer, dismiss the counterclaim, with
19 prejudice. I will deny an application for fees. I am
20 denying motions to set the case for trial and/or
21 sanction plaintiffs. And I'll enter that order for
22 purposes of any appeal.

23 MR. COLEMAN: Thank you, your Honor.

24 MR. ELLMAN: Your Honor, I've never seen this
25 decision of Judge MacKenzie. I don't think anybody

1 here has.
 2 THE COURT: I was reading from --
 3 MR. ELLMAN: And this is the first we've ever
 4 heard of it.
 5 THE COURT: Is that right?
 6 MR. ELLMAN: I never heard that, your Honor.
 7 THE COURT: I have it in his file.
 8 Perhaps it's --
 9 MR. COLEMAN: Your Honor, I don't see what
 10 difference it makes.
 11 MR. LI: What difference it makes?
 12 THE COURT: Well, it made a --
 13 MR. COLEMAN: I mean the findings and the
 14 conclusions are what they are.
 15 THE COURT: Did he ever put these on the
 16 record?
 17 MR. COLEMAN: He may have placed them on the
 18 record and then, in other words, maybe he did it
 19 orally.
 20 THE COURT: You don't know?
 21 MR. COLEMAN: All we got was the order.
 22 THE COURT: You just got the order.
 23 MR. LI: First time we hear that, your Honor.
 24 MR. ELLMAN: The only thing I would say to
 25 the Court is it appears from the Court reading that

1 that the Judge had gone ahead and said certain things
 2 that he wanted done, dates and depositions. I've never
 3 seen this opinion before.
 4 MR. COLEMAN: We didn't make any objections
 5 based on those. Document hosted at JDSUPRA™
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>
 6 MR. ELLMAN: I would ask to be given a copy
 7 of it, and I would ask if there's --
 8 THE COURT: I read it into the record.
 9 I will confirm and see whether or not perhaps
 10 Judge MacKenzie did put it on the record and perhaps
 11 it's out there.
 12 I'm relying upon it, counsel.
 13 MR. ELLMAN: I understand that.
 14 THE COURT: Thank you.
 15 MR. ELLMAN: But if it's never been provided
 16 to anybody how could we act upon it?
 17 THE COURT: I agree. So I'm going to find
 18 out for you whether it was placed on the record.
 19 MR. ELLMAN: Okay.
 20 I have ordered a transcript of every
 21 proceeding every time we appeared before Judge
 22 MacKenzie.
 23 THE COURT: Thank you.
 24 MR. ELLMAN: I don't know if the stenographer
 25 files that, but I do have my copies.

Motion

32

1 THE COURT: I'll follow up with it.
2 MR. COLEMAN: Just to clarify, your Honor.
3 The only objection I think that the defendant
4 is going to have here is there were trigger dates that
5 were placed there. We didn't make use of the trigger
6 dates. All the findings of fact and conclusions of law
7 are what they are. And I don't see any reason --
8 THE COURT: Okay.
9 MR. COLEMAN: But nonetheless, the Court will
10 deal with it in due course.
11 THE COURT: I will. Because I want to make
12 sure -- again, I'm picking this up because Judge
13 MacKenzie has retired.
14 MR. COLEMAN: Right.
15 THE COURT: And when I go through the files
16 there's a lot of information there. I will confirm
17 whether or not perhaps it was on the record.
18 MR. COLEMAN: Thank you, Judge.
19 THE COURT: If it wasn't then maybe it is a
20 surprise to everybody. But it seems to be something
21 significant here.
22 MR. LI: It is surprising.
23 THE COURT: Counsel, thank you. I won't sign
24 an order. I'll wait and see whether it was on the
25 record.

Motion

33

1 Okay.
2 MR. LI: Thank you, your Honor.
3 MR. ELLMAN: Thank you, your Honor.
4 (Proceedings Concluded)

Document hosted at JDSUPRA™

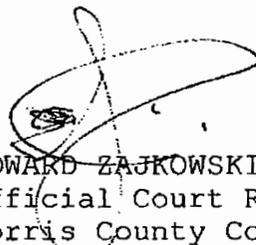
<http://www.jdsupra.com/post/documentViewer.aspx?fid=86c31c85-3b03-4583-a3e8-7574e50d154f>

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, EDWARD ZAJKOWSKI, C.S.R., License Number 1016, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript to the best of my knowledge and ability.


EDWARD ZAJKOWSKI, C.S.R.
Official Court Reporter
Morris County Courthouse
Morristown, New Jersey

Date:

10/21/06