Docket #0422 Date Filed: 9/8/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WELDED CONSTRUCTION, L.P., *et al.*,	Case No. 18-12378 (LSS)
Debtors.	(Jointly Administered)
WELDED CONSTRUCTION, L.P., Plaintiff, vs. THE WILLIAMS COMPANIES, INC., WILLIAMS PARTNERS OPERATING LLC, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Defendants.	Adv. Pro. No. 19-50194 (LSS)

DEFENDANT'S AUTHORITY & ARGUMENT IN DEFENSE OF PLAINTIFF'S REQUEST FOR REVIEW AND PRODUCTION OF INADMISSIBLE TRIAL PREPARATION DOCUMENT

1. On Monday, August 28, 2023, Defendant's corporate representative and fact witness, Mr. David Sztroin, took the stand on direct examination. Following approximately an hour of direct testimony, the Court recessed overnight. Mr. Sztroin was instructed by the Court at that time not to discuss his testimony with anyone. Approximately sixteen hours later, Mr. Sztroin re-took the stand and his direct examination continued for several more hours.

2. Waiting until the close of Mr. Sztroin's direct testimony, Plaintiff's counsel commenced cross examination by accusing Mr. Sztroin of violating the court's instruction by "looking at a

document from his attorneys on the subject matter of his testimony" during the overnight recess that occurred during his direct examination, and sought the production of the document in question.

3. The Court provided the opportunity for Defendant's counsel to supply authority and argument in opposition to Plaintiff's request. Accordingly, Defendant maintains that Plaintiff is not entitled to inspect, obtain, seek testimony regarding, or move for the evidence of the document in question, In support thereof, Defendant provides the following:

DEFENDANT AND ITS WITNESS DID NOT VIOLATE THE COURT'S INSTRUCTION, FEDERAL RULES OF EVIDENCE, OR ANY STATE OR LOCAL RULES & PLAINTIFF'S CLAIM FOR ACCESS TO THE DOCUMENT AT ISSUE SHOULD BE OVERRULED

4. Defendant understands that Federal Rule of Evidence 615 forms the basis of the Court's verbal instruction to Mr. Sztroin at the commencement of recess on Monday, August 28, 2023. *See United States v. McLaughlin*, 955 F. Supp. 132, 134 (D.D.C. 1997). "It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such non-discussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections."

5. Rule 615 provides that the court shall "order witnesses excluded so that they cannot hear other witnesses' testimony" upon request or of its own volition. Instructions to counsel and the witnesses shall "make it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom." *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978). Notably, the rule of sequestration does not apply to corporate representatives, which, as Plaintiff's counsel pointed out on the record on August 29, 2023 during Mr. Sztroin's cross examination, Mr. Sztroin is

Defendant's corporate representative and has been present in the courtroom at all times since the inception of trial.

6. Even still, the purpose of Rule 615, the rule of sequestration, is to serve the truth-seeking function of the trial. *See United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978) ("The aim of imposing "the rule on witnesses," as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. Sequestering a witness over a recess called before testimony is completed serves a third purpose as well preventing improper attempts to influence the testimony in light of the testimony already given.") (internal citations omitted).

7. Here, the instruction to Mr. Sztroin from the bench was to refrain from speaking to anyone about his testimony on Monday August 28, 2023. Mr. Sztroin did not speak to anyone about the testimony he gave on direct examination. Thus, Mr. Sztroin did not breach the Court's verbal instruction and/or Rule 615. Instead, Mr. Sztroin maintained possession of a document prepared by or with counsel in preparation for trial, which was provided to him well before taking the stand to commence his direct examination. Mr. Sztroin reviewed this privileged document after a 16 hour recess prior to re-taking the stand on Tuesday, August 29, 2023 to complete several more hours of his direct examination. *See Chesbrough v. Life Care Centers of Am., Inc*., No. WOCV201201339A, 2014 WL 861200, at *6 (Mass. Super. Feb. 14, 2014) ("It is this Court's experience, at the bar and on the bench, that attorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid-morning or mid-afternoon, the lunch recess, and the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during

trial).”). Rule 615 is not implicated because Mr. Sztroin did not breach the court’s verbal instruction, and there was no improper attempt to influence his testimony in light of the testimony already given.

8. U.S. Dist. Del. Loc. R. 43.1 further supports Defendant’s position in this regard. Rule 43.1 states that “counsel offering [a] witness on direct examination shall not consult or confer with the witness regarding the substance of the witness’ testimony already given or anticipated to be given . . .” or “[s]uggest to the witness the manner in which any questions should be answered.” However, this rule only applies “[o]nce direct examination of a witness is concluded and until cross examination of that witness is concluded.” As the Court knows, the issue raised by Plaintiff’s counsel corresponds to a document reviewed well before the conclusion of Mr. Sztroin’s direct examination. Thus, there has been no breach of U.S. Dist. Del. Loc. R. 43.1.

9. Notwithstanding the above authority dispensing with the notion that Defendant’s witness acted impermissibly, Plaintiff is not entitled to access to the privileged document Mr. Sztroin maintained in his possession as a result of trial preparation with counsel. Such production finds no support in Rule 612 of the Federal Rules of Evidence. Rule 612 provides that “an adverse party is entitled to have the writing used to refresh a witness’s recollection produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony.”

10. Rule 612 does not apply in this instance because there is no evidence to suggest that Mr. Sztroin relied upon the document at issue to refresh his memory, which is an essential component of the rule. *See, e.g., Guarantee Abstract & Title Co., Inc. v. U.S.*, 696 F.2d 793, 796 (10th Cir. 1983); *U.S. v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995); *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985); *T & S Enters., L.L.C. v. Sumitomo Corp. of Am.*, No. 11CV1318-GPC MDD, 2012 WL

4845544, at *1 (S.D. Cal. Oct. 10, 2012); *United States v. Bourseau*, No. 03CV00907, 2005 WL 8173191, at *5 (S.D. Cal. Aug. 9, 2005) (denying discovery because the defense "failed to ask [the witness] during her deposition whether she had refreshed her memory by using any of the documents at issue," preventing the court from determining whether her testimony was "directly affected by the privileged documents."). This principle applies equally to trials and depositions. *See T & S Enters*., 2012 WL 4845544, at *1 (citing Fed. R. Civ. P. 30(c) & Fed. R. Evid. 612); *Hiskett v. Wal-Mart Stores, Inc*., 180 F.R.D. 403, 406 (D. Kan. 1998); *In re Asbestos Litig*., 492 A.2d 256, 257–58 (Del. Super. Ct. 1985) (concluding that Fed. R. Evid. 612 applies to both trial and deposition testimony).

11. Even if it were the case that Mr. Sztroin relied upon the document to refresh his recollection, Mr. Sztroin did not use the privileged document at issue to refresh his memory while testifying. The scope of Rule 612 is confined to circumstances when a witness uses a writing to refresh memory (1) while testifying; or (2) before testifying, if the court decides that justice requires the party to have those options. As the Court noted on the record, "He was reviewing a document before his testimony." *See also Hiskett v. Wal-Mart Stores, Inc*., 180 F.R.D. 403, 407-08 (D. Kan. 1998) ("The court finds that plaintiff reviewed the document in question "before testifying." Within the meaning of Fed.R.Evid. 612(1), "while testifying" requires more than the fact that the review occurred after commencement but before completion of a deposition. Plaintiff had left the witness stand. Transcription had ceased until her testimony resumed. She proffered no testimony during the break. In short, she was not then testifying."). While there is an aspect of discretion involved, generally an opposing party does not have any right to access Rule 612 documents when the writing is used prior to taking the stand. *See Wright & Miller*, 28 Fed, Prac. & Proc. Evid. § 6185 (2d ed.). As the advisory committee reported, "The Committee considered

that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." H.R. Rep. No. 93-650. That is exactly the situation implicated here. Plaintiff's request on cross-examination for the production of the document Mr. Sztroin was reviewing is a fishing expedition for papers a witness may have used in preparing for trial. The Rule does not extend to the privileged document used in preparation for trial that Mr. Sztroin was reviewing. As the Court in *In re Comair Air Disaster Litigation* stated,

> [N]ot every time a witness looks at any document in preparation for trial that such document should be disclosed to other side. Rather, a determination must be made regarding extent to which documents were consulted and relied upon, and extent to which opinions and conclusions reflected therein, as opposed to factual recitations, ought to be redacted in interest of preserving policies underlying attorney-client or work-product privilege. 100 F.R.D. 350, 353 (E.D. Ky. 1983)

12. Thus, because Mr. Sztroin used the document before testifying, the document is only subject to the rule "if the court decides that justice requires the party to have those options" pursuant to FRE Rule 612. In this case, justice does not require that the document be made available to Plaintiff's counsel. In fact, justice requires the opposite result. First, the document in question is subject to attorney-client privilege and/or the attorney work product doctrine. As Mr. Sztroin stated, the document contained a list of questions from the review that he "had with legal." The advisory committee expressly stated that it "intends that nothing in the Rule [612] be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." H.R. Rep. No. 93-650. *See also Vuz v. DCSS III, Inc*., No. 20-CV-0246-GPC-AGS, 2022 WL 542883, at *1 (S.D. Cal. Feb. 23, 2022) ("Nothing in Rule 612 evinces an 'evident' Congressional intent to infringe upon attorney-client or work-product protections. So the Court must presume that Rule 612 left those common-law principles unscathed.").

13. Further, there was no manifest attempt by Mr. Sztroin or Defendant's counsel to circumvent the Court's direction to refrain from discussing testimony with anyone. No discussions were had. Lastly, there is no prejudice to Plaintiff. *See In re Joint Eastern & Southern Dist. Asbestos Litig*., 119 F.R.D. 4, 5 (E.D.N.Y. 1988) (finding the inclusion of the interest of justice provision incorporates a balancing analysis into determining whether disclosure of the writing is required). Mr. Sztroin's review of the document in question occurred over a 16 hour recess that arose during his direct examination. Mr. Sztroin's review of the document in question occurred several hours, and multiple recesses, earlier in the day before he took the stand for hours of direct examination. Had Plaintiff's counsel been concerned, Plaintiff's counsel should have raised the issue promptly. Even still, Plaintiff's counsel has not been deprived of any unfettered opportunity to effectively examine Mr. Sztroin in this matter.

For these reasons, Plaintiff's counsels' request for access to the trial preparation document should be overruled.

Dated: August 30, 2023

SAUL EWING LLP

By: */s/ Lucian B. Murley*

Lucian B. Murley (DE Bar No. 4892)
1201 N. Market Street, Suite 2300
Wilmington, DE 19899
Telephone: (302) 421-6898
luke.murley@saul.com

WATT TIEDER HOFFAR & FITZGERALD, LLP
Shelly L. Ewald, Esq. (Admitted *Pro Hac Vice*)
Jonathan Burwood, Esq. (Admitted *Pro Hac Vice*)
Jennifer L. Kneeland, Esq. (Admitted *Pro Hac Vice*)
1765 Greensboro Station Place, Suite 1000
McLean, Virginia 22101
Telephone: (703) 749-1000
sewald@watttieder.com
jburwood@watttieder.com
jkneeland@watttieder.com

Counsel for Defendants The Williams Companies, Inc., Williams Partners Operating LLC, and Transcontinental Gas Pipe Line Company, LLC