1-22-1986

Plaintiff's Memo in Support of Motion to Compel Defendant's To Turn Over Documents Re: Subsidiaries

Lewis M. Steel '63

11/22/86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LISA M. AVAGLIANO, et al.,

Plaintiffs,

-against- 77 Civ. 5641 (CHT)

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

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PALMA INCHERCHERA,

Plaintiff,

-against- 82 Civ. 4930 (CHT)

SUMITOMO CORP. OF AMERICA,

Defendant.

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MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DEFENDANT TO TURN OVER DOCUMENTS OF ITS SUBSIDIARY CORPORATIONS IN ACCORDANCE WITH DISCOVERY REQUESTS

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PRELIMINARY STATEMENT

This memorandum is submitted in support of plaintiffs' motion to compel defendant to turn over documents of its subsidiary corporations in accordance with discovery requests.

Virtually every discovery request which has been made to date, either through the use of interrogatories or requests to produce, has asked for information and documents with regard to the methods of operation and staffing of Sumitomo Corp. of America (hereinafter SCOA). Counsel for SCOA has informed class counsel that certain departments and/or divisions of SCOA, since the commencement of the Avagliano case, have been spun off into separate corporate entities. These corporate entities are discussed in the supporting affidavit of Lewis M. Steel. It is the position of SCOA that they have no obligation to turn over any documents, nor do they have any discovery obligation with regard to these subsidiary corporations after the date that they formally became separate corporations. For example, plaintiffs have not been given these entities' personnel files.

Counsel for both parties have met to discuss the issues raised by this situation and have been unable to resolve this issue. Therefore, this motion has been filed to compel SCOA to engage in discovery in behalf of its spin-off subsidiaries.

ARGUMENT

I.

DOCUMENTS OF SCOA'S SUBSIDIARIES ARE WITHIN THE SCOPE OF RULE 26(b), FED.R.CIV.P. BECAUSE THEY CONTAIN INFORMATION NEEDED TO DETERMINE WHETHER THESE SUBSIDIARIES SHOULD BE BROUGHT WITHIN THE FRAMEWORK OF THIS LAWSUIT FOR PURPOSES OF LIABILITY AND RELIEF AND, IF SO, BY WHAT PROCEDURE THEY SHOULD BECOME PARTIES TO THE SUIT

Under Fed.R.Civ.P. 15(d), this Court may permit plaintiffs to serve a supplemental pleading on SCOA, "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Depending upon the relationship of the newly formed subsidiaries to SCOA, these entities may be added to this lawsuit under Rule 15(d). Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 227 (1964); American Civil Liberties Union of Mississippi, Inc. v. Finch, 638 F.2d 1336 (5th Cir. 1981); United States v. National Screen Service Corp., 20 F.R.D. 226 (S.D.N.Y. 1957); Henss v. Schneider, 132 F.Supp. 64 (S.D.N.Y. 1955); United States v. Forrestal Land, Timber & Railways, 89 F.Supp. 316 (S.D.N.Y. 1945). The test for determining the appropriateness of such a supplemental pleading is "whether the entire controversy . . . could be settled in one action and the extent to which the additional claim involves the same or similar issues, subject matter, or facts." Wright & Miller, Federal Practice & Procedure, Civil §1506, at 550. See, e.g., Conmar Products Corp. v. Lamar Slide Fastener Co., 50 F.Supp. 1019 (S.D.N.Y. 1942).

Thus, a supplemental pleading to this action charging SCOA's subsidiaries with discriminatory employment practices similar to

those alleged by plaintiffs to have been committed by SCOA would be proper if these subsidiaries have maintained the operations and kept many of the employees of former SCOA departments and/or divisions. Under such circumstances, the claims against the subsidiaries would then clearly involve similar issues, subject matter and facts as the claim against SCOA.[1]

Only upon examination of documents kept in the regular course of business by these subsidiaries can a determination be made whether a sufficient "continuity of operations" with SCOA exists for purposes of adding the subsidiaries as defendants by way of a supplemental pleading.

Rule 25(c) also may be relevant to this situation. This Rule states:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

In the context of Title VII litigation, the courts have ruled that a corporation that takes the place of another corporation through a change in the form of ownership (e.g., a "successor" corporation) can be brought into the original action against the predecessor and held jointly and independently liable. See, e.g.,

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[1] Title VII plaintiffs have been allowed to bring before federal courts incidents occurring subsequent to the original charges filed with the Equal Employment Opportunity Commission on which a suit was originally based. Thus, Title VII procedural requirements have not been enforced where the discrimination alleged in the supplemental pleading is related or grows out of allegations contained in the original EEOC charge. See Sanchez v. Standard Brands, 431 F.2d 455, 466 (5th Cir. 1970); Davidson v. Quash, 11 FEP 570 (S.D.N.Y 1975).

Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974); Equal Employment Opportunity Commission v. Sage Realty Corp., 521 F.Supp. 263 (S.D.N.Y. 1981). A number of factors are generally considered by the courts in determining whether a successor corporation should be held liable. The principal factors are (1) the continuity in operations and work force, (2) notice to the successor employer of its predecessor's potential legal obligation, and (3) the ability of the predecessor to provide adequate relief directly. Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984); MacMillan, supra, 503 F.2d at 1094.

Obviously, SCOA's spin-off subsidiaries had notice as they became separate entities after this lawsuit. Clearly, these corporations understood the potential legal obligations involved. In order to determine the extent of continuity in operations and work force between SCOA and its spin-off entities, and whether SCOA can provide adequate relief directly, documents kept by the subsidiaries in the regular course of business need to be examined. For example, the personnel files of these successor entities and their tables of organization would contain information which would reveal whether the successors maintain the same types of jobs which were maintained by SCOA. After discovery, plaintiffs could then determine whether it is appropriate to file a supplemental pleading under Rule 15(d) or to add the spin-off subsidiaries to the case under Rule 25(c).

II.

DOCUMENTS OF SCOA'S SPIN-OFF SUBSIDIARIES ARE WITHIN SCOA'S CONTROL FOR PURPOSES OF FED.R.CIV.P. 34(a)

Under federal discovery standards, production by a corporate litigant can be compelled even if the requested documents are in the possession of a separate corporate entity, if the two businesses are closely related or have intertwined business activities. See, e.g., Societe Internationale v. Rogers, 357 U.S. 197 (1958) [Swiss holding company compelled to produce records of Swiss banking firm based upon the substantial identity of the two firms]; Cooper Industries, Inc., v. British Aerospace,Inc., 102 FRD 918 (S.D.N.Y. 1984) [documents in possession of parent corporation must be produced]; Advance Labor Service, Inc. v. Hartford Accident & Indemnity Co., 60 F.R.D. 632 (N.D. Ill. 1973) [production required of documents held by corporation with same shareholders and directors and intertwined business activities with litigant corporation]. It is absolutely clear, therefore, that corporations in litigation may be required to produce documents held by their subsidiaries. See Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction, §2210, at 622. See also George Hantscho Co., Inc. v. Miehle-Goss-Dexter, Inc., 33 F.R.D. 332 (S.D.N.Y. 1963); Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631 (D. Md. 1978); Standard Ins. Co. of N.Y. v. Pittsburgh Elec. Insulation, Inc., 29 F.R.D. 185 (W.D. Pa. 1961).

Hubbard v. Rubbermaid, Inc., supra, is illustrative. In that case, the court ruled that the documents sought in discovery by plaintiff in a Title VII sex discrimination action against her former employer were not shielded from production on the theory that they

were records of wholly owned subsidiaries not parties to the action. The court stated:

> Defendant . . . submits that these documents need not be produced, arguing that the two subsidiary corporations are not parties to this suit, that the corporate entity should not be cast aside and that neither of the subsidiaries are subject to the jurisdiction of this court. . . . The defendant's arguments . . . merit little discussion. The fact that we are dealing with separate corporate entities here is irrelevant. No attempt is being made to "pierce the corporate veil." . . . [T]he non-party status of the wholly owned subsidiaries does not shield their documents from production . . . [t]he crucial factor is that the documents must be in the custody, or under the control of, a party to the case. . . . Here the documents in question are under the control of [defendant]. They are, therefore, subject to production.
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> 78 FRD at 636-7.

In this case, plaintiffs' counsel is informed that the spin-off subsidiaries in question, Ipanema, Sumitrans and Sumitomo Tire Co., were all formed out of constitutent departments of SCOA. It is counsel's understanding that they are wholly owned subsidiaries of SCOA. Furthermore, it is the understanding of class counsel that these spin-off corporations were originally staffed by employees who were "transferred" from SCOA. See Steel Affidavit, ¶6, and Exhibit 3.

Moreover, Ipanema Shoe Corp. is still located at the same address it occupied at the time of the corporate transfer, appeared in the SCOA internal telephone directory long after the transfer, and remained on SCOA's organizational charts long after the transfer (see Steel Affidavit, ¶5, and Exhibits 1 and 2).

Class counsel has little information concerning Sumitomo Tire Co. (Steel Affidavit, ¶7). It is clear, however, that the San Francisco office tire division forms the basis of the new entity. Class counsel has included Sumitomo Tire Co. within the framework of this motion as counsel does not want to fragment this motion. Moreover, class counsel has less information with regard to this San Francisco subsidiary as it has not yet received employee files and other discovery relating to out of town personnel.

CONCLUSION

For all of the above reasons, class counsel requests that this Court enter an order requiring defendant to engage in discovery with regard to the above mentioned spin-off subsidiaries, and any other subsidiary which was spun off after the Avagliano case was filed, and thereby answer all outstanding interrogatory questions and requests to produce by supplying information and documents relating to these entities.

Dated: New York, New York
Janaury 22, 1986

Respectfully submitted,

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by _____
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