
Avagliano v. Sumitomo: District Court
Proceedings

Sumitomo Shoji America, Inc. v. Avagliano, 457
US 176 - Supreme Court 1982

8-15-1978

Affidavit by Hicks in Support of Defendant's Motion re: Date for Filing on Motion to Dismiss

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
LISA M. AVIGLIANO, et al.,

Plaintiffs, :

-against- :

SUMITOMO SHOJI AMERICA, INC.,

Defendant. :

AFFIDAVIT
IN SUPPORT OF MOTION

77 Civ. 5641 (CHT)

-----x
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the law firm of Wender, Murase & White, counsel herein for the defendant, Sumitomo Shoji America, Inc. ("Sumitomo"). I make this affidavit in support of a motion by Sumitomo, made pursuant to Rule 6(b) of the Federal Rules of Civil Procedure and this Court's Order dated July 28, 1978, for an order setting a date certain for the filing of all papers in respect of Sumitomo's motion for an order dismissing the complaint herein.

2. The facts giving rise to this motion may be summarized as follows:

(a) Sumitomo has moved pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' claims (purportedly brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981), on the ground that pursuant to the 1953 Treaty of Friendship, Commerce and Navigation (the "Treaty") between the United States and Japan, Sumitomo's activities as alleged in the complaint were lawful and privileged. At the same time that Sumitomo made such motion, counsel for plaintiffs moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing certain counterclaims made herein by Sumitomo. The Equal Employment Opportunity Commission ("EEOC") sought leave to intervene on the latter motion as an amicus curiae.

(b) As a consequence of the EEOC's apparent interest in this case, counsel for Sumitomo inquired on numerous occasions whether that agency intended to file an amicus curiae brief in connection with the principal motion made by Sumitomo to dismiss the complaint. In substance, we have been advised by the EEOC that it is considering doing this, but that it cannot give a firm answer either way until it receives an opinion which it has requested from the United States Department of State relating to Sumitomo's defenses based on the Treaty.

(c) Because the date for Sumitomo to file a reply memorandum in support of its motion was coming due and the EEOC still had not

stated whether it would file its own brief -- which would have necessitated Sumitomo thereafter filing still another reply brief -- counsel for Sumitomo attempted to work out with plaintiffs' counsel, by consent, an extension of time in which to file its reply papers herein, conditioned upon the EEOC either filing, or giving notice that it did not intend to file, an amicus curiae brief. Counsel for the plaintiffs refused to consent to any such arrangement.

(d) Consequently, on July 27, 1978, Sumitomo applied ex parte to this Court for enlargement of time in which it could serve its reply memorandum. This Court ordered that Sumitomo's time to file such memorandum was extended to and including seven business days following the EEOC's serving of an amicus curiae brief or giving of notice that it did not intend to serve such a brief; and further ordered that in the event the EEOC had neither served a brief nor taken a position by August 14, 1978, counsel for either party could move forthwith for appropriate relief.

(e) As of this date, counsel for Sumitomo has not received notification from the EEOC that it will, or will not, serve an amicus curiae brief. Therefore, pursuant to the Court's order, Sumitomo brings on this application for an order setting a date certain as to when all papers herein must be served.

3. Subsequent to its application to this Court for the July 27, 1978 Order, counsel for Sumitomo received a copy of a letter dated July 28, 1978 from Lee R. Marks, Deputy Legal Advisor to the United States Department of State, addressed to Abner W. Sibal, Esq., General Counsel of the Equal Employment Opportunity Commission, advising that in response to the EEOC's request, the Department of State is considering the relationship between the Treaty and Title VII, and will provide the EEOC with an authoritative statement of the Department of State's position as quickly as possible. A true copy of Mr. Marks' July 28, 1978 letter is annexed hereto as Exhibit A.

4. Clearly, it should aid the parties, this Court, and the EEOC, to have the views of the Department of State on the meaning of the Treaty. Sumitomo believes that in fairness to it, and in the interest of judicial economy and to save the parties the expense of preparing repetitious memoranda of law on the Treaty question, no further papers should be filed by Sumitomo until after the State Department renders the opinion referred to in Exhibit A hereto.

5. Since the EEOC says it wishes to consider such State Department opinion before it will decide whether to file papers on the Treaty question, and since there is clear indication that the State Department's opinion will be forthcoming in the near future, it does not appear that plaintiffs herein, or the EEOC,

will be prejudiced by any delay which would result. On the contrary, enlargement of Sumitomo's time to file response papers will establish a more orderly procedure of briefing for this Court, plaintiffs, the EEOC, and Sumitomo.

6. Sumitomo has endeavored to bring this motion to a prompt resolution by the Court, without need of Court intervention in connection with these scheduling problems. As noted above, Sumitomo heretofore requested plaintiffs' counsel to consent to a reasonable adjustment of the date for filing all papers herein, which plaintiffs' counsel refused to do. We have also suggested to the EEOC that State Department action herein could be expedited by a joint presentation by the parties and the EEOC of the issues to the State Department. However, the EEOC has rejected this offer, stating that it prefers to present its views of the issues ex parte to the State Department. Consequently, if reasonably prompt and practicable dates for the filing papers herein are to be set, it appears necessary for the Court to set them.

7. Therefore, Sumitomo respectfully prays that this Court order as follows:

(a) Upon receipt by the EEOC of the aforesaid State Department opinion on this matter, the EEOC will promptly notify the Court and all counsel, and transmit to each of them a copy of said opinion.

(b) Seven business days after the EEOC gives the notification referred to in part (a) hereof, it will file an amicus curiae brief herein; or be foreclosed from filing such a

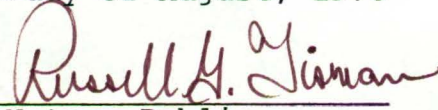
brief or other papers on Sumitomo's motion or otherwise appearing in connection therewith.

(c) Seven business days after the EEOC is required to file its brief or other papers or be foreclosed therefrom, Sumitomo will file its reply papers, or be foreclosed therefrom.


J. PORTIS HICKS

Sworn to before me this

15th day of August, 1978


Notary Public

RUSSELL G. TISMAN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 41-4066519
Qualified in Queens County
Commission Expires March 30, 1980



DEPARTMENT OF STATE

Washington, D.C. 20520

July 28, 1978

Mr. Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D. C. 20506

Dear Mr. Sibal:

By letter dated March 15, 1978, an attorney in this office provided you with a tentative response to your request for guidance on the meaning of Article VIII of the 1953 Friendship, Commerce and Navigation Treaty between the United States and Japan.

By letter dated June 9, 1978, you asked for further clarification of our views. In addition, we have been asked by defendants in Avigiliano, et al. v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (SDNY) and Spiess, et al. v. C. Itoh & Co. Inc., Civ. 75-H-267 (SD TEX) to reconsider the views expressed in the March 15 letter.

In light of these developments, and because the relationship between Article VIII of the Treaty and Title VII of the Civil Rights Act of 1964 raises serious issues, we are extensively reviewing this matter. In light of this review, the March 15 letter should no longer be regarded as representing the view of the office of the Legal Adviser, and we are so advising the parties to the pending cases mentioned above.

We will respond as quickly as possible to your June 9 letter, and will at that time provide you with an authoritative statement of our position.

If you have any questions concerning this matter, please call George Lehner of my staff at 632-0349.

Sincerely yours,

Lee R. Marks
Deputy Legal Adviser

STATE OF NEW YORK, COUNTY OF

SS.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is
the foregoing in the within action; deponent has read
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true. and knows the contents thereof; the same is true to

☐ Corporate Verification the of in the within action; deponent has read the
a corporation, and knows the contents thereof; and the same
foregoing is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit of Service By Mail On 19 deponent served the within
upon
attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at
deponent served the within upon

the
herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on

19

M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No.77 Civ.5641(CHT) Year 19
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

NOTICE OF MOTION
AND AFFIDAVIT

WENDER, MURASE & WHITE

Attorneys for Defendant.

Office and Post Office Address, Telephone

400 PARK AVENUE

NEW YORK, N. Y. 10022

(212) 832-3333

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

RECEIVED AUG 7 1978

BURTON Z. ALTER
CAROL SEABROOK BOULANGER
PETER A. DANKIN
WILLIAM L. DICKEY*
SAMUEL M. FEDER*
PETER FIGDOR
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ARTHUR R. KITAMURA
(ADMITTED IN ONTARIO ONLY)

August 4, 1978

Hon. Charles H. Tenney
United States District Court Judge
United States District Court for the
Southern District of New York
Foley Square
New York, New York 10007

Re: Avigliano, et al. vs. Sumitomo Shoji
America, Inc. 77 Civ. 5641 (CHT)

Dear Judge Tenney:

We received today a copy of an August 2, 1978 letter addressed to the Court by Eisner, Levy, Steel & Bellman, P.C., attorneys for plaintiffs in the action referred to above.

Plaintiffs' counsel fails to note in its letter to the Court that many of the adjournments on consent referred to therein were at plaintiffs' request. In fact, our application was made ex parte because we understand that the Court prefers to avoid participating in conferences between attorneys who are unable to agree on adjournments or similar matters. The fact that plaintiffs' counsel demanded that our firm only apply for an

Hon. Charles H. Tenney
United States District Court Judge
August 4, 1978
Page 2.

adjournment on notice to its firm is therefore irrelevant,
and we dispute counsel for plaintiffs' accusation that
there was impropriety in this regard.

Very truly yours,

WENDER, MURASE & WHITE

by

J. Porthus Hicks

cc: Lewis M. Steel, Esq.

RECEIVED AUG 2 1978

BURTON Z. ALTER
CAROL SEABROOK BOULANGER
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August 1, 1978

Lewis M. Steel, Esq.
Eisner, Levy, Steel & Bellman, P.C.
351 Broadway
New York, New York 10013

Re: Avigliano, et al. vs. Sumitomo
Shoji America, Inc.

Dear Lew,

I have received in the mail an envelope from your office, apparently containing your reply memorandum of law on plaintiffs' motion to dismiss Sumitomo's counter-claims. I am holding this unopened; please let me know if you would like me to return it to you pending disposition of the matters covered in the Order of the court dated July 27, 1978.

Sincerely,

Portis

J. Portis Hicks

JPH:gg

EISNER, LEVY, STEEL & BELLMAN, P.C.

Attorneys at Law

351 Broadway, New York, New York 10013
(212) 966-9620

Eugene G. Eisner Lewis M. Steel
Richard A. Levy Richard F. Bellman
 Arthur N. Read

Mary M. Kaufman
Counsel

August 2, 1978

Hon. Charles H. Tenney
U.S. District Judge
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Avigliano, et al. v. Sumitomo Shoji America, Inc.
77 Civ. 5641 (CHT)

Dear Judge Tenney:

I am in receipt of the ex parte order you signed in the above matter extending the defendants' time by which to file its reply memorandum of law in support of its motion for an order dismissing the complaint.

On July 27, 1978, the defendants' attorney, J. Portis Hicks, Esq., called me to ask that the filing date of his brief be put off for the reason set forth in his affidavit seeking an ex parte order. I declined, for many reasons, which I believed to be substantial, including the fact that the filing date had already been adjourned by consent many times.

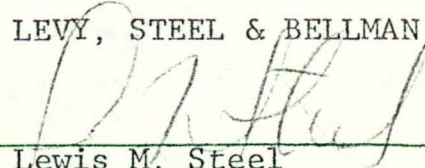
I further informed Mr. Hicks that if he intended to apply to Your Honor for an adjournment, I wished to be notified so that I could appear in opposition. I told Mr. Hicks that my office was close to the Courthouse and that I would make myself available to suit the Court's convenience. Instead of complying with this request, Mr. Hicks chose to appear before Your Honor ex parte.

I believe that Mr. Hicks acted improperly in this regard. I respectfully request that in the future counsel for plaintiffs be notified of any other requests made to this Court by the defendants.

Respectfully yours,

EISNER, LEVY, STEEL & BELLMAN, P.C.

By


Lewis M. Steel

LMS/pc
cc: Portis Hicks

Memo

from the desk of

Lewis Steel

To: P/1/78

Date: File

Re conversation w. to
George Lehner, US State Dept
202-632-0349

State Dept originally issued letter to
EEOC that F. Corps covered by VII.
Now has withdrawn that letter pending
a review.

Review will be completed shortly.
He hopes that within a few weeks memo
will be ready for transmittal to EEOC.
But can't be definite. Will try to best.
Hicks ~~came~~ went down to State

Last week to make a presentation.
Lehner has my brief. Offered to have
me make a presentation. I said I
would stand on my brief. He said he
believed that was correct, so Hicks had not

Memo from the desk of
Lewis Steel

To:

Date:

opened anything outside his
his brief.

Impt: Hicks' Argument
Re Expense. He goes to State
to try to influence it, etc.

~~Not~~

Lehner said he would
notify me, if there was any
change of plans, or if I had
overlooked documents in my brief.
Right now, he does not think
so.

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July 28, 1978

Lewis M. Steel, Esq.
Eisner, Levy, Steel & Bellman, P.C.
351 Broadway
New York, New York

Re: Avigliano, et al. vs. Sumitomo
Shoji America, Inc.

Dear Lew,

I regret that I found it necessary to obtain an ex parte Order regarding service of Sumitomo's reply memorandum of law. As you know, I have always extended every courtesy to you in respect of your requests for extensions of time, and I was disappointed that you could not do the same for me yesterday, particularly under the circumstances.

The ex parte Order does not refer to service of your reply memorandum of law on plaintiffs' motion to dismiss Sumitomo's counterclaims. Naturally, if you feel that it would not be appropriate for you to serve that memorandum until the question of filing of an amicus memorandum by the EEOC is resolved, I would be pleased to extend that courtesy to you.

Sincerely,

Portis

J. Portis Hicks

JPH:gg