

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-053292

08/09/2013

HONORABLE THOMAS L. LECLAIRE

CLERK OF THE COURT
K. Hartley
Deputy

PHILLIP GRIMM

CORY A TALBOT

v.

ROGER HAYWARD, et al.

LAWRENCE C WRIGHT

STEPHEN F BANTA

MINUTE ENTRY

Counter-claimants oppose the admission of Counter-defendant Karlberg's statement that Dr. Fuller stated that the Counter-claim was filed against Karlberg to give Counter-claimants leverage in settlement negotiations with Plaintiff Grimm. Counter-claimants claim that the disclosure by Karlberg is untimely and violates Rule 26.1, Ariz.R.Civ.Proc. After reviewing the facts and applicable authority, the Court determines that the disclosure was untimely, but its admission is harmless and not prejudicial.

PROCEDURAL HISTORY

On June 29, 2009, Plaintiff Phillip Grimm ("Grimm") filed a complaint with the Court against Defendants Richard Hayward ("Hayward"); Richard Fuller, PhD ("Fuller"); Timothy Pfafman, PhD ("Pfafman"); Jonathan Nichols ("Nichols"); Konstantin Gromov, PhD ("Gromov"); Fernando Saldain ("Saldain"); and GeoTrax Protection, LLC., ("GeoTrax").

Subsequently, on March 29, 2011, Counter-defendants Glenn Karlberg ("G. Karlberg") and Cindy Karlberg ("C. Karlberg") submitted an answer to the Counter-claim.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-053292

08/09/2013

Counter-claimants allege that upon exchanging drafts of Joint Pretrial Statements on July 02, 2013, Counter-defendant G. Karlberg disclosed for the first time the intention to present a material issue of fact or law. Counter-claimants allege that during the exchange Counter-defendant Karlberg stated that, "After Grimm filed this lawsuit, Fuller initiated a phone conversation with Karlberg and informed Karlberg that (a) the Engineers were going to file a counterclaim against Grimm; (b) Karlberg was going to be named as a defendant on the counterclaim; and (c) **the reason the Engineers planned to include Karlberg as a defendant on the counterclaim was because they hoped Karlberg would be able to convince Grimm to dismiss his lawsuit against the Engineers.**" Joint Pretrial Statement, pp. 9-10. (Emphasis added.)

Counter-claimants object to that issue in the Joint Pretrial Statement on grounds of untimely disclosure. *Id.*, p. 10, fn. 5. (July 2, 2013)

DISCUSSION

Rule 26.1, Ariz.R. Civ.Proc. does not prohibit or preclude the Court from admitting discovery after the discovery period has been concluded. Subsection(a) requires each party to disclose in writing to every other party; (4) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess. Subsection(5) requires the names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

Furthermore, Rule 37(c) allows the Court to admit discovery first disclosed during trial. Under Subsection(1), A party who fails to timely disclose information required by Rule 26.1 shall not, unless such failure is *harmless*, be permitted to use as evidence at trial, . . . , except by leave of the court for good cause shown. (Emphasis added.)

The disclosure by Counter-defendant is untimely, but such disclosure is harmless and not prejudicial to Counterclaimants.

First, Counter-claimants object to Counter-defendant G. Karlberg's disclosure on the grounds that such disclosure is untimely. But, Rule 37(c) does not prohibit or preclude such untimely disclosure in all cases. In addition, the Counter-claimants would have to establish that such disclosure would cause harm by the admission of such disclosure. That harm has not been established.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-053292

08/09/2013

Counter-claimants claim that the disclosure by Counter-defendant G. Karlberg was first discovered during the Joint Pretrial Statement which occurred on July 2, 2013. Trial commenced July 30, 2013. Ample time existed between discovery and trial for Counter-claimants to prepare to address the statement. The statement was purported telephonically and between two parties.

No extraordinary preparation would be needed to address or rebut the statement. As such, the life disclosure is harmless and not prejudicial.

IT IS ORDERED that Counter-defendant Karlberg's statement is ADMITTED.

THOMAS L. LeCLAIRE
JUDGE OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.