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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HOWARD K. STERN,

Plaintiff,

v.

07 CV 8536(DC)

RITA COSBY, et al.,

Defendants.
-----X

New York, N. Y.
October 18, 2007
11:00 a.m.

Before:

HON. DENNY CHIN

District Judge

APPEARANCES

POWELL GOLDSTEIN LLP

Attorneys for Plaintiff

BY: L. LIN WOOD

-and-

GILBERTI STINZIANO HEINTZ & SMITH, P. C.

BY: LISA Di POALA HABER

DAVIS WRIGHT TREMAINE LLP

Attorneys for Defendant Rita Cosby

BY: ELIZABETH A. McNAMARA

ELISA L. MILLER

AKIN GUMP STRAUSS HAUER & FELD LLP

Attorneys for Defendant Hachette Book Group

BY: DOUGLASS B. MAYNARD

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(Case called)

THE COURT: I have the papers. I have read the papers, and I wanted to conference the matter before we embark on more briefing because I thought that some of this we could agree to, for example, I assume there is no real opposition to an order that prohibits tampering with witnesses or destruction of evidence.

MS. McNAMARA: In fact, that's where we were going precisely today, your Honor. I was just retained yesterday, but I have investigated this enough to be able to underscore

11 and represent to the Court unequivocally and to plaintiff's
12 counsel that Ms. Cosby has done nothing to interfere with
13 witnesses and intends to do nothing to interfere with any fact
14 witness in this litigation. And, similarly, she has not
15 destroyed any evidence in this action, relevant evidence, and
16 she will not destroy any relevant evidence in this action.

17 And so we have no objection to the Court entering an
18 order that would be consistent with the obligations under the
19 rules as well as the law, and we would just ask that if an
20 order is so entered, that it be entered on behalf of all
21 parties, not simply the defendants. But we have no objection
22 to the entry of that order.

23 THE COURT: What about Hachette?

24 MR. MAYNARD: We also have no objection. We live
25 under those obligations happily and we will continue to do so.

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1 THE COURT: Mr. Wood.

2 MR. WOOD: I don't have any problem with the
3 stipulated order as long as it does not deprive this Court of
4 the opportunity to come back after we have discovery on what
5 has happened here to determine whether or not the order needs
6 to be modified, specified or deal in some fashion directly with
7 the conduct that has taken place over the last couple of
8 months.

9 THE COURT: That's fine. And I don't mean to preclude
10 going back to revisit any of it. Obviously, I have only seen
11 transcripts and I don't know if they are accurate. I don't
12 know if they are correct, but they are troubling. They are
13 troubling.

14 MR. WOOD: They are.

15 THE COURT: So without making any findings and without
16 making any decision as to what happened, it seemed to me that
17 the proper course is to make sure we have an order in place so
18 that there is something above and beyond the usual obligations,
19 and then we can see what happened later on.

20 MR. WOOD: We would just not want to have the
21 stipulated order be an excuse to try to say that somehow we do
22 not need this discovery in order to develop a full record, your
23 Honor.

24 THE COURT: That is a second part of it.

25 So the first part is that we should have an order that
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1 prohibits -- and it can apply both ways, and there is no reason
2 that it should not apply both ways -- that says the parties may
3 not interfere with witnesses. They may not destroy evidence.
4 They shall preserve evidence. And the parties can work out the
5 appropriate language.

6 The second part which may require some discussion is
7 the request for expedited discovery. Is there an objection to
8 expedited discovery?

9 MS. McNAMARA: We are happy, again, to brief the
10 issue, if the Court wants to hear it, but I think that our
11 position is that, with the entry of that order, that expedited
12 discovery would become superfluous. The purpose of the
13 expedited discovery as set forth in the plaintiff's paper is
14 really to support the entry of the order, largely. And to
15 ensure preservation of the documents with the obligations that

16 were already in place and reaffirmed by the Court's order, I
17 think we can be assured that there will be maintenance of all
18 records and documents, and we would submit that discovery
19 should proceed in the normal course.

20 We also wish to underscore that we believe that once
21 all of the evidence is produced in the normal course, that
22 there will be a decidedly different picture than the Court has
23 been presented at this time. But we would object to the
24 expedited discovery.

25 And if I may make one other observation on that, your
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1 Honor, it seems to me that, if there is any basis for concern
2 about retention of evidence and expedited discovery, it has to
3 do with the discovery where much of the evidence on this
4 incident occurs, which is in the Bahamas with third parties.
5 And, rather notably, plaintiff's counsel has not sought any
6 expedited discovery with regard to those witnesses which are
7 the witnesses which have, to my understanding, all of the tapes
8 and evidence.

9 THE COURT: Let me ask you this. Without getting into
10 whether the transcript is completely accurate, does Ms. Cosby
11 deny the overall accuracy of the transcript that is attached to
12 the plaintiff's papers?

13 MS. McNAMARA: Your Honor, we understand -- and again
14 I want to underscore that I was just retained yesterday and we
15 are just getting into the facts, but we think that is only a
16 partial transcript, and it does not accurately in any way
17 portray all of the facts.

18 THE COURT: But it is a conversation between Mr. Bain
19 and Ms. Cosby?

20 MS. McNAMARA: As I understand it, it is. I don't
21 know, and I cannot vouch for its accuracy. But I do understand
22 that there was such a conversation and I have no reason to
23 believe that it is a manufactured tape, your Honor. But I
24 think since that time another tape has come out, other evidence
25 has come out that shows that Mr. Bain's position is a

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1 diametrically opposed position than those stated in that
2 transcript. So as I have underscored, I think when the full
3 evidence comes out in due course, it will be a decidedly
4 different picture.

5 THE COURT: Here is my concern about this. If the
6 tape is accurate, it does suggest that Ms. Cosby was trying to
7 interfere with witnesses, at least what I have seen. I think a
8 fair reading of what I have of what has been presented to me is
9 that there appears to be an effort to interfere with witnesses,
10 and that is troubling. Even with an order in place -- in some
11 sense, the order is unnecessary because, obviously, it is
12 unlawful and people should know that they can't interfere with
13 witnesses and we have now formalized it, but I think there is
14 some cause for concern.

15 MS. McNAMARA: Your Honor, if I may, I just wish to
16 underscore what I already stated which is, Ms. Cosby had
17 absolutely no intent to interfere with any witnesses. And I
18 think that, when all of the evidence comes out, I trust the
19 Court will reach that same conclusion.

20 THE COURT: I have what I have in front of me, and

21 that's why I ask if there is any suggestion that the tape is
22 manufactured. The question is whether there is sufficient
23 cause to grant the plaintiff's application to expedite
24 discovery.

25 Let me ask Mr. Wood.
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1 With the order in place, why did you need to proceed
2 on such a fast track, particularly if some of the witnesses are
3 in the Bahamas?

4 MR. WOOD: Because, your Honor, this goes to the very
5 core of our system of justice. Because it goes to Mr. Stern's
6 constitutionally protected right to a fair trial. Your Honor
7 needs a fully developed factual record before the trail grows
8 cold to find out exactly what was done.

9 THE COURT: I am going to sign an order that prohibits
10 the destruction of evidence and that provides, hopefully, yet
11 another layer of protection. So then the question is, why
12 shouldn't we deal with these things in the normal course?

13 We could put the case on a fast track too; it doesn't
14 have to drag on for years. We could put the case on a fast
15 track and get it done with.

16 MR. WOOD: Because your Honor needs to know exactly
17 what happened here. Ms. McNamara has highlighted the fact that
18 she takes the position, apparently, that there are other tapes,
19 and I believe there are a number of other tapes. She takes the
20 position that the total picture, when presented, will not show
21 what this transcript we presented shows, which is clearly an
22 attempt to obstruct justice and influence witnesses.

23 And every pleading in this case will be tainted until
24 your Honor has a fully developed factual record about what Ms.
25 Cosby and her representatives attempted to do because we do not

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1 know whether it is limited to these two nannies. We do not
2 know whether it involves other witnesses.

3 The limited discovery that we seek is on the issue of
4 whether she has in fact attempted to influence witnesses beyond
5 the nannies and including the nannies. The discovery that we
6 seek does not necessarily include traveling to the Bahamas, but
7 it does seek to have Ms. Cosby testify under oath about what
8 she has done, a representative that was with her is another
9 individual -- these are third parties that are involved too,
10 your Honor. We have got laws, and we shouldn't have to be in
11 front of your Honor asking you to enter an order telling people
12 to do what the law says you must do or not do. But we are here
13 in an extraordinary situation. There are third parties
14 involved and we need to know who they are and what they may
15 have done because they are not in this courtroom at the moment.

16 Your Honor may find after the development of the
17 record that there needs to be additional sanctions imposed,
18 that there may need to be more specific injunctive relief
19 granted. But until we get the record and the facts in front of
20 your Honor, I submit that we can't trust any paper that is
21 filed in this case. And it is a high profile case, and I think
22 it needs to send a message from Day 1 that this Court will not
23 tolerate even the suggestion that someone has tried to
24 interfere with Mr. Stern's right to a fair trial.

25 THE COURT: It is a high profile case, but I think one

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1 thing that I have learned is, you ought to try to handle things
2 in the way they are usually handled. In the long run, that
3 works for the best.

4 There was another transcript that I looked at cited in
5 the brief, and there was, apparently, a clip of a tape of a
6 conversation between Elizabeth Thompson and an attorney that
7 also raises some further questions.

8 MR. MAYNARD: On behalf of the publisher, our concern
9 is the case really has not even begun. And I am concerned that
10 this turns into a whole sideshow. I don't think that this
11 issue is fully developed, could be done fairly just by deposing
12 Ms. Cosby or someone else. It would provide a full area, and I
13 am sure very complicated facts involving witnesses in other
14 countries. We would like to brief this issue, and I think that
15 our position would be that, we think that the case ought to
16 proceed on its normal course. This issue, like all the
17 evidence, will be developed in the normal, appropriate way
18 during discovery.

19 THE COURT: Brief the issue. How much time do you
20 need to respond?

21 MR. MAYNARD: I think that we can respond by next
22 Wednesday.

23 THE COURT: So, obviously, we are only talking now
24 about the question of expedited discovery.

25 MR. MAYNARD: That's right.

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1 THE COURT: Opposition by Wednesday 10/24.

2 Reply papers by the following Monday; how is that?

3 MR. WOOD: That is fine, your Honor.

4 THE COURT: October 29.

5 You don't need to come back. I will rule on the
6 papers.

7 In the meantime, Mr. Wood, you can submit a proposed
8 order or speak with counsel and agree on an order.

9 MR. MAYNARD: I suggest that we can work out something
10 in common.

11 THE COURT: If you can work out the language, that
12 would be great. If for some reason you cannot agree on the
13 language, submit two competing versions. Agree on as much of
14 it as you can, and I will resolve the differences.

15 MS. McNAMARA: Thank you very much, your Honor.

16 MR. WOOD: Thank you.

17 THE COURT: Do you have anything else?

18 MR. WOOD: I am troubled because I hear the phrase let
19 this case move in the normal course of proceeding, and I know
20 that the normal course of proceeding is to delay discovery --

21 THE COURT: What I am suggesting, I didn't mean in
22 terms of discovery. I will decide whether there should be
23 expedited discovery. I don't think we should do things
24 differently because it is a high profile case.

25 MR. WOOD: I agree.

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1 THE COURT: That is what I am saying. If there is
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2 good cause for expedited discovery, I will grant it. But I am
3 not going to grant expedited discovery because it is a high
4 profile case. That's what I was saying.

5 MR. WOOD: I understand. I was not commenting on the
6 Court's statement as much as I was the defendants' statement
7 about going through the normal course, because the normal
8 course would be to try to file motions and put discovery off
9 for months, if not longer. And I think it is important for the
10 evidence developed here with respect to criminal activity to be
11 discovered at the earliest possible moment.

12 THE COURT: I have no difficulty with putting the case
13 on a fast track. I think, in some ways, the best way to
14 control a case is to make it move relatively quickly.

15 How much time do you want for discovery?

16 MR. WOOD: We could do discovery in three to six
17 months.

18 MR. MAYNARD: I can't imagine that is possibly true.
19 I can't answer that question. We have witnesses overseas. I
20 think Mr. Wood's own papers talked about the length of time
21 required to get evidence from witnesses overseas.

22 I think that we ought to address that after we have
23 had a chance to think about discovery, think about the case.
24 My understanding is that Mr. Wood has to file an amended
25 complaint. We have not really begun this case. We are not in

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1 a position to answer a question like that with any degree of
2 accuracy without having considered the matter.

3 THE COURT: I don't see why not.

4 MR. MAYNARD: I don't know enough about the underlying
5 circumstances. I am also fairly new to the case and haven't
6 thought about what would be required to prove our defenses or
7 investigate the matter.

8 THE COURT: As cases go, libel cases are not that
9 complicated. There are not 10 million documents involved. I
10 think what complicates this case is that there are witnesses
11 all around the country and out of the country. I think that
12 makes it a little bit more complicated, but the book is the
13 book.

14 MR. MAYNARD: Truth is a defense, independent of what
15 may have been known to the author at the time it was published,
16 and these matters can in fact be complicated. I don't want to
17 prejudge it either, but it is not necessarily just
18 straightforward.

19 MS. McNAMARA: I'm sorry.

20 If I might suggest, I think that since we have the
21 opportunity to brief the issue before the Court on the issue of
22 the expedited discovery, I think as part of that briefing we
23 can seek to try to address and give the Court a further sense
24 of what we view as to the needs of discovery and timing.

25 THE COURT: I don't see why we can't make a decision
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1 today as to a reasonable period for discovery, obviously,
2 subject to adjustment as things come up. But it seems to me
3 that we should be done within six months.

4 All discovery, fact and expert shall be complete by
5 April 18, 2008.

6 I will set it down for a pretrial conference the same

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day, 11 a.m.

Now, I am going to rule on this other matter when I get it, but in the meantime if there are any issues, difficulties, problems, write me a letter. Don't wait until April 18. And, obviously, if there are complications along the way and if you need more time, write me a letter. But I think it is better to put it on a schedule, and I think that six months is reasonable.

Anything else to discuss on the record?

MR. MAYNARD: No, your Honor.

MS. McNAMARA: No. Thank you, your Honor.

THE COURT: May I see counsel off the record inside.
(Discussion off the record in the robing room)

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