

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

*****	*	CIVIL ACTION
THOMAS & MARY JEAN HYLAND	*	NUMBER 07-1842-ML-LDA
	*	
VS.	*	JUNE 15, 2015
	*	1:00 P.M.
	*	
DAVOL, INC. and	*	PROVIDENCE, RI
C.R. BARD, INC.	*	
*****	*	

BEFORE THE HONORABLE MARY M. LISI
DISTRICT JUDGE

(Plaintiff Hyland's Motion to Remand)

APPEARANCES:

FOR THE PLAINTIFF: (VIA TELEPHONE)	ERIC K. SCHWARZ, ESQ. SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO 120 Broadway 18th Floor New York, NY 10271
FOR THE PLAINTIFF:	DONALD A. MIGLIORI, ESQ. MOTLEY RICE LLC 321 South Main Street Providence, RI 02903
FOR THE DEFENDANT:	JOHN P. HOOPER, ESQ. REED SMITH LLP 599 Lexington Avenue New York, NY 10022
Court Reporter:	Denise P. Veitch, RPR One Exchange Terrace Providence, RI 02903

1 15 JUNE 2015 -- 1:00 P.M.

2 THE COURT: Hi, Mr. Schwarz.

3 MR. SCHWARZ: Hello. How are you?

4 THE COURT: Fine. I have Mr. Hooper here, and I
5 do have my court reporter here so we're on the record.

6 MR. SCHWARZ: Okay.

7 THE COURT: So if you would be good enough to
8 keep your voice up, I'd appreciate it.

9 This is the matter of Hyland versus Davol and
10 Bard, and the matter is before the Court this afternoon
11 on Plaintiff's motion to remand to the Eastern District
12 of New York.

13 Mr. Hyland, have you and Mr. Hooper discussed
14 this matter since you filed your motion?

15 MR. SCHWARZ: It's Mr. Schwarz, your Honor, --

16 THE COURT: I'm sorry.

17 MR. SCHWARZ: -- and we have not discussed this
18 specific motion.

19 THE COURT: You haven't. Okay.

20 MR. SCHWARZ: We have not discussed the motion
21 in particular, no.

22 THE COURT: Okay. I understand that you
23 attended a settlement conference here in Rhode Island;
24 is that right?

25 MR. SCHWARZ: In November of 2014, yes.

1 THE COURT: Okay. And have you and your client
2 also participated in a mediation?

3 MR. SCHWARZ: Yes. Three of them, your Honor.

4 THE COURT: Okay. And one of those was with
5 Carol Zangari; is that right?

6 MR. SCHWARZ: I'm looking at my list here.

7 THE COURT: That's what your motion says.

8 MR. SCHWARZ: Yes, that's correct.

9 THE COURT: Okay. And just tell me, what do you
10 want to do now?

11 MR. SCHWARZ: Well, your Honor, I mean,
12 obviously, you know, in keeping with how successful
13 this end deal has been, in large part due to your
14 Honor, I just -- at this point it seems like we're,
15 that this particular case is at an impasse in terms of
16 the value of the case, the settlement value for the
17 case.

18 I mean, I think both sides acknowledge that it's
19 a category one case, it's a strong case; however, it
20 seems like in our discussions that we can't agree on a
21 settlement number for the case.

22 So given that circumstance, my only -- the only
23 option I perceived was to try to move things along with
24 the remand and do some sort of additional case-specific
25 discovery and get the case headed towards a trial.

1 THE COURT: What have you -- hold on one second.
2 I see that you've done some case-specific discovery.
3 Have you identified your liability expert?

4 MR. SCHWARZ: Yes, we have.

5 THE COURT: And who is that?

6 MR. SCHWARZ: We've exchanged -- it's Paul
7 Ducheyne. We exchanged the report, your Honor, with --
8 (Interruption)

9 THE COURT: Okay. And you've provided the
10 Defendants with his report?

11 MR. SCHWARZ: Yes. We did a Rule 26 case report
12 some years ago.

13 THE COURT: Okay. What other case-specific
14 discovery do you think needs to be done?

15 MR. SCHWARZ: Well, in terms of there would need
16 to be experts' depositions, your Honor.

17 In the Defendant's opposition to my motion, they
18 indicated that they would want to take an additional
19 deposition of Mr. Hyland, my client, concerning his
20 medical condition over the last seven years since he's
21 been deposed; so there's that. I presume the
22 Defendants will be entitled to do that, and I have no
23 objection.

24 Additionally, to tell you the truth I'm not sure
25 who, if anyone, we would want in terms of -- aside from

1 Defendant experts -- who we want in terms of the rest
2 from the Defendants.

3 THE COURT: Okay.

4 MR. SCHWARZ: It may be someone, it may not be
5 someone, your Honor, and I need a little bit of time to
6 discern that.

7 THE COURT: Okay. And where does your client
8 live?

9 MR. SCHWARZ: My client lived in Seaford, New
10 York; Long Island.

11 THE COURT: Okay.

12 MR. SCHWARZ: However, since I made my motion
13 they moved to New Hampshire.

14 THE COURT: Oh.

15 MR. SCHWARZ: That's what I said.

16 THE COURT: Okay.

17 MR. SCHWARZ: My client is a retired vice
18 president for a community hospital out in Long Island.
19 His wife is a registered nurse, and they have an adult
20 daughter with special needs, and they have now moved up
21 to New Hampshire.

22 THE COURT: Given their proximity to Rhode
23 Island, do you think they'd be willing to waive *Lexecon*
24 and try the case here in Providence?

25 MR. SCHWARZ: I'll talk to them about that some

1 more, I should say, your Honor, because I did have
2 discussions with that about -- about that with them;
3 and they were not so -- they didn't give me a good
4 answer, put it that way. So I do want to talk to them
5 about it more since they moved, because last I spoke to
6 them they were in the process of moving. They weren't
7 sure if they were going to stay for some time of the
8 year in New York; so I think they're still working that
9 out.

10 THE COURT: All right.

11 MR. SCHWARZ: They weren't sure in terms of
12 their daughter's needs, if some of them could only be
13 met in New York, and they weren't sure if her needs
14 could be satisfied in New Hampshire, so they may be
15 spending some time in New York, may not.

16 So if they made a decision on that, I don't
17 quite know, and I'll speak to them after we get off the
18 phone to see where they are with that. They may, I
19 don't know, they may not; I mean, we'll talk about it.

20 THE COURT: All right. And without telling me
21 the numbers, if you can tell me generally how far apart
22 you are on settlement.

23 MR. SCHWARZ: I think we're pretty far, we're
24 pretty far apart.

25 THE COURT: Okay.

1 MR. SCHWARZ: I've kind of, I've kind of
2 indicated where the case needs to be in order for, you
3 know, my clients, for them to settle it.

4 THE COURT: Okay.

5 MR. SCHWARZ: They've been very, very particular
6 about that.

7 THE COURT: Okay. Are you --

8 MR. SCHWARZ: They said that he was going to
9 come up, but he never put a number on how high he would
10 come up.

11 THE COURT: Hold on one second.

12 MR. SCHWARZ: But the fact is he wouldn't be as
13 close as I need to settle the case.

14 THE COURT: Hold on. I read in your memo the
15 length of stay, both hospital and then confinement at
16 home.

17 MR. SCHWARZ: Yes.

18 THE COURT: And, as you know, we did try two
19 cases here, one of which was the *Thorpe* case, and that
20 was tried to verdict.

21 MR. SCHWARZ: Yes.

22 THE COURT: In many ways similar to what you've
23 indicated in your papers, although I can't say for sure
24 because I don't have all of the medicals in front of
25 me.

1 Are you familiar with that case?

2 MR. SCHWARZ: I am familiar with that case, your
3 Honor, and while your point is well taken that this
4 case is in some ways similar to the *Thorpe* case, in
5 many significant ways it is not; and the difference is
6 it's a stronger case to *Thorpe*. To name a few of those
7 instances is --

8 THE COURT: Well, I don't want you to tell me
9 those things because I'm not going to try to settle the
10 case today.

11 But I wanted to make sure that you were familiar
12 with the facts of that case.

13 MR. SCHWARZ: Absolutely.

14 THE COURT: Because I think it was instructive
15 for both sides as to the value and the difficulties,
16 frankly, for both sides presented by these cases where
17 people suffer some very, very serious long-term
18 injuries.

19 MR. SCHWARZ: Yes.

20 THE COURT: So, and frankly when I ask that
21 question, a lot of plaintiffs' lawyers say no, they
22 never, you know, they didn't read the transcript, they
23 didn't read the facts, they didn't know about the case.
24 So if you tell me that you've done that, then I think
25 you've done your homework.

1 So now I'm going to ask Mr. Hooper to weigh in,
2 and we'll see where we go from there.

3 MR. HOOPER: Sure. I'll start, your Honor, that
4 we have an excellent relationship with counsel,
5 Mr. Schwarz. Although we haven't settled the case,
6 it's not because there's not a lot of respect.

7 And frankly with respect to his clients, who
8 I've now met at least once, I think my partner had met
9 them before, this is a case where -- because I've been
10 doing this so long, Mr. Schwarz, I actually don't think
11 we're that far apart. But that's the job I have in the
12 litigation; I'm an optimist.

13 I did tell you we would try to get back to you.
14 I was hoping that you could give me more so I could go
15 get more authority.

16 So just to answer your first question, your
17 Honor, I think the parties are still open to
18 discussions. I know we are, and Mr. Schwarz has been
19 nothing but straight with us. It's just a difference
20 in opinion on the numbers.

21 With respect to remanding the case, your Honor,
22 however, I think that if the parties were to go forward
23 with case-specific discovery under the jurisdiction of
24 this Court, that we would move things much more quickly
25 through the process than going to a new judge who

1 doesn't know the litigation.

2 And as I might make the point, your Honor, every
3 case that we have done that with so far has actually
4 resolved short of a trial when your Honor has kept
5 those cases; with one exception, and that's one case
6 that we're currently litigating and continuing to see
7 if we can resolve.

8 So, your Honor, I would argue that; one, you
9 have the authority to keep the case, case-specific
10 discovery; two, this court is the best court for it,
11 and frankly with counsel's clients now in New Hampshire
12 it probably eliminates some of the concerns about
13 travel time. We'd certainly go up to New Hampshire to
14 make things easier on them, as we would to the Eastern
15 District of New York.

16 So for all the reasons, your Honor, I don't
17 think that what counsel actually wants is as achievable
18 by going to the Eastern District of New York as keeping
19 this case here.

20 And I will make one representation to the Court
21 and to counsel, and that is we will continue to try and
22 negotiate this case even if or as we're doing
23 discovery.

24 And Mr. Schwarz, I would just offer this to you
25 because we're further along in the process than we were

1 when we met with you.

2 MR. SCHWARZ: Okay.

3 MR. HOOPER: We have roughly about 25 cases
4 left, and maybe after today or tomorrow only 20 cases,
5 so it becomes easier to sort of see the forest from the
6 trees from our standpoint.

7 MR. SCHWARZ: Okay.

8 MR. HOOPER: We're going to be scheduling some
9 mediations with a bunch of counsel. I wouldn't suggest
10 your client necessarily come to another mediation.
11 They've been here; I get it.

12 But perhaps you would consider you and I either
13 continuing on the phone, or perhaps you and I getting
14 together during these sessions and see if we can make
15 one more run at it. I'm happy to do that, in addition
16 to doing case-specific discovery on a parallel track,
17 or I'm happy to do that on the next possible date,
18 which is probably in July, before we go out and spend
19 some money on case-specific discovery.

20 So, your Honor, with respect to our response, we
21 would like the Court to keep this. We think you have
22 the authority. We think it's the right place for it.
23 And if we move forward on case-specific discovery, that
24 it will be better for all parties if this Court would
25 keep it for that duration.

1 THE COURT: Okay. Mr. Schwarz, here is what I
2 think will work for all concerned, particularly now
3 with your clients now residing in the First Circuit, --

4 MR. SCHWARZ: Right.

5 THE COURT: -- which I think makes the possible
6 waiver of *Lexecon* much easier. Frankly, if I needed to
7 try the case in New Hampshire, I'll go to New
8 Hampshire. Not in February.

9 MR. SCHWARZ: Right.

10 THE COURT: Yes. Nobody wants to be there.

11 MR. SCHWARZ: You a skier, Judge?

12 THE COURT: No.

13 MR. SCHWARZ: Okay.

14 THE COURT: So let's do this. I would like you
15 to get together with Mr. Hooper to do two things. One
16 is to discuss with him the possibility of your getting
17 together with him in the next 30 days to try to come to
18 a resolution of the case. As he says, the case is in a
19 little bit different posture, and hopefully you have
20 more information to share with him.

21 And the reason why I say that is because the
22 second part of the order is to lift the stay in this
23 case, to permit full case-specific discovery, which
24 means that we advance the case. I think that's really
25 what you're interested in doing, is advancing the case,

1 so that if you're not able to resolve it, it is ready
2 for trial. And I'll ask you and Mr. Hooper to work out
3 a schedule and present me with an order to that effect.

4 The third part of the order will be a denial of
5 the motion for remand, without prejudice, and what that
6 means is if at the conclusion of all discovery in the
7 case your clients are not willing to waive *Lexecon*,
8 then I've got to figure out what to do with it. And if
9 they are, then the motion may be moot, so we'll be
10 talking about setting a trial date at that point.

11 MR. SCHWARZ: Right.

12 THE COURT: So you can go back and tell your
13 clients that we had this hearing today on your motion,
14 that the case is going to move, that the Court
15 encouraged counsel to give it one last try to try to
16 resolve it before you have to start spending a lot of
17 money on case-specific discovery, which will start in
18 about 30 days from today if you're not able to resolve
19 the case.

20 MR. SCHWARZ: Understood, your Honor. Just if I
21 may, you know, January 9th I sent a letter to
22 Mr. Hooper asking that we schedule another settlement
23 meeting, and Jacqueline Fidel called me and said, well,
24 you know --

25 MR. HOOPER: Don't put numbers on the record.

1 MR. SCHWARZ: I'm sorry?

2 MR. HOOPER: Don't put numbers on the record.

3 MR. SCHWARZ: I'm not. No.

4 MR. HOOPER: I just want to make sure.

5 MR. SCHWARZ: It's just she called me and said,
6 well, this, you know, the next round of settlement
7 meetings were really scheduled for, were scheduled for
8 cases that hadn't had them; we had one on Hyland so we
9 wouldn't schedule another one; and, from what you told
10 me, Eric, it sounds like it wouldn't be fruitful. So I
11 said okay --

12 THE COURT: He's John.

13 MR. HOOPER: He's talking about --

14 THE COURT: Oh, you're talking about Eric. All
15 right. Okay.

16 MR. SCHWARZ: I did, in January I tried to do it
17 again, but I guess maybe things have changed since
18 then. I just wanted to alert the Court to another
19 effort that was made.

20 THE COURT: Okay.

21 MR. SCHWARZ: If things have changed since then,
22 great. And I completely agree with John, you know,
23 we've nothing but gotten along terrifically with
24 Mr. Hooper and his colleagues. Just as to a number we
25 can't seem to get our heads together.

1 But I'm certainly happy with the Court's order.

2 THE COURT: Okay.

3 MR. HOOPER: Mr. Schwarz, the thing that's
4 changed is we actually completed all 95 of those
5 conferences last month.

6 MR. SCHWARZ: Okay. Fair enough.

7 MR. HOOPER: And that's what changed.

8 THE COURT: So you and Mr. Hooper are going to
9 get together and come up with a date for another
10 conference, do it by phone, however which way you think
11 is most effective.

12 If in 30 days you're not able to resolve the
13 case then -- but what I want you to present me now, I
14 don't want to wait, is your agreed case management
15 order that sets specific deadlines for the closure of
16 fact discovery, specific deadlines for the disclosure
17 of expert reports. I know you say you've got your
18 liability expert, but you're going to need other
19 experts as well and a discovery closure deadline for
20 the experts. Just get it ready for trial. So that
21 case management order ought to be geared toward getting
22 it ready for trial.

23 Mr. Schwarz, don't take this the wrong way.

24 MR. SCHWARZ: Okay.

25 THE COURT: But I'm hoping not to see or hear

1 you.

2 MR. SCHWARZ: Understood. And I don't take it
3 the wrong way.

4 THE COURT: Okay. Anything else we need to do
5 today?

6 MR. SCHWARZ: No. I think that covers it, your
7 Honor, from my end anyway.

8 THE COURT: Okay. Great. Go forth and settle.

9 MR. SCHWARZ: All right. Thank you, Judge.
10 I'll be in touch.

11 MR. HOOPER: Okay.

12 (ADJOURNED)

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Denise P. Veitch

Denise P. Veitch, RPR

June 30, 2015

Date