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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIRGINIA L. GIUFFRE,

Plaintiff,

v.

15 Civ. 7433 (RWS)

GHISLAINE MAXWELL,

Defendant.

Oral Argument

New York, N.Y.
February 2, 2017
12:04 p.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

BOIES, SCHILLER & FLEXNER LLP

Attorneys for Plaintiff

BY: SIGRID S. McCAWLEY, ESQ.

HADDON, MORGAN AND FOREMAN, P.C.

Attorneys for Defendant

BY: LAURA A. MENNINGER, ESQ.

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(Case called)

MS. McCAWLEY: Yes, your Honor. We're here today on the plaintiff's letter motion --

THE COURT: Yes.

MS. McCAWLEY: -- to add a new witness. May I begin?

THE COURT: Yes.

MS. McCAWLEY: I'm going to refer, since there are other individuals in the courtroom, to the individual as the witness, if that's all right with the Court, and attempt not to disclose any confidential information.

We're seeking to add a new witness that we would like to use at trial. We have revised our Rule 26 disclosures to disclose that witness, and we immediately told the defendants that we would make the witness available for deposition in New York at a time that was convenient for them. We believe that this witness is somebody that should have been on the defendant's Rule 26 disclosures as an initial matter, this particular individual.

With respect to the process that we're seeking here today, your Honor, we would request that the Court allow a deposition to go forward so that we can use this witness at trial. As the Court knows, the plaintiff has been very diligent in discovery in this case. We've produced over 10,000 pages of documents, we've tracked down witnesses wherever we could in order to gather information that was relevant to the

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1 trial in this matter. You held, in your case of *MBIA v.*
2 *Patriarch*, which is 2012 WL 2567892, that "this Court and other
3 courts have adopted the taking of deposition as the appropriate
4 mechanism to address late-disclosed witnesses." So your Honor,
5 we believe that this is the appropriate way to resolve any
6 prejudice to any of the parties by producing this witness for
7 deposition. This witness is in Europe, and we agreed to fly
8 her over as swiftly as possible to allow that to occur. We
9 acted diligently with respect to this witness once we were
10 informed of the witness. We then conducted a due diligence
11 investigation to ensure that she had information that was
12 highly relevant to the case. We flew our lawyers to meet with
13 her in person and had her sign an affidavit at the embassy, the
14 US embassy in Europe, which has been submitted in this matter
15 confidentially. We believe she's critical to the issues in
16 this case. She directly contradicts a number of the
17 defendant's statements under oath that relate to what we
18 contend was the sexual trafficking organization and also one of
19 the witnesses that they intend to propose at trial.

20 So your Honor, we believe we meet the test. As the
21 Court knows, there's a six-prong test that you can look at in
22 this process, and we believe we meet that test and that it
23 would be prejudicial to the plaintiff to not allow this witness
24 in. If we had known about her earlier, we certainly would have
25 had her on our Rule 26 disclosures. We believe she is

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1 necessary for the trial in this matter, and we believe that the
2 case law supports that in this instance.

3 Thank you, your Honor.

4 THE COURT: Thank you.

5 MS. MENNINGER: Good morning, your Honor. Laura
6 Menninger on behalf of defendant Ghislaine Maxwell.

7 Ms. Maxwell, your Honor, absolutely denies these new
8 allegations relating to events that purportedly occurred more
9 than a decade ago and, moreover, do not bear directly on the
10 defamation claim at issue in this case.

11 I'd like to make four points, your Honor, in
12 addressing what is essentially plaintiff's request to call this
13 new witness at trial for which they urge the Court a simple
14 deposition would cure any prejudice.

15 First of all, simply permitting a deposition of this
16 late-disclosed witness does not cure the significant prejudice
17 to Ms. Maxwell based on the facts and procedural posture of
18 this case. The deposition, your Honor, would be the beginning
19 of the process of defending against this new claim, this new
20 allegation by this new witness, related to a time period that
21 is not at all overlapping with the plaintiff's allegations in
22 this case. One affidavit has been submitted, your Honor. It
23 is four paragraphs in length, of which one paragraph actually
24 mentions my client. The witness is apparently a South African
25 national who lives in Europe. She was present, according to

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1 the affidavit, for a six-month period, more than a decade ago.
2 In order to investigate, as we would be obligated to do and
3 entitled to do, your Honor, we would be forced to engage in
4 cross-border discovery. A simple Rule 45 subpoena would not
5 suffice, your Honor. Does she have a criminal record? In
6 which countries has she lived? Does she have a history of
7 fabricating stories? Has she participated in other litigation?
8 Does she have a motive to depart from the truth for financial
9 gain? Over the last ten years has she mentioned these
10 allegations to anyone? Who are they? How can they be
11 contacted? Plaintiff's Rule 26 disclosure doesn't even give
12 the woman's address. The Rule 26 disclosure, your Honor, says
13 that she can be reached care of one of plaintiff's attorneys.
14 They gave no other documents to support her claims -- no
15 photos, no travel documents, no names of other witnesses. So
16 apparently, your Honor, apart from her testimony, the only
17 thing they intend to introduce at trial is her testimony.

18 Contemporaneous with taking her deposition, indeed to
19 prepare for her deposition, your Honor, we would need to engage
20 in other discovery. There are, as your Honor is well aware,
21 some 25 witnesses who have been deposed in this case. And fact
22 discovery closed last July. Any one of those witnesses who
23 supposedly had contact with this witness would either need to
24 be reinterviewed or redeposed. Expert discovery closed, your
25 Honor, more than two months ago. Plaintiff has engaged an

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1 expert in what she calls human trafficking, the law related to
2 human trafficking. This woman's allegations differ in material
3 respects from those of the other complainants and I believe
4 would require the reopening of that expert's deposition.
5 Depending on the results of our investigation, your Honor,
6 there may be other witnesses in other countries, and I doubt
7 any of them are here in New York who would be required to be
8 deposed in order to preserve their trial testimony.

9 Your Honor, over the next five weeks, between now and
10 trial, as you know, there is a significant amount of litigation
11 that needs to occur, primarily in this courtroom. We have our
12 reply to summary judgment due next week, we have our 702
13 replies due next week, we have our joint pretrial order due
14 next week, we have arguments here on February 16th on all of
15 those motions, we have arguments here on February 23rd in
16 relation to all of our objections to deposition designations,
17 which are voluminous. It would be a substantial, significant
18 imposition to both investigate a decades-old allegation that
19 occurred by someone who didn't overlap with plaintiff at the
20 same time we are preparing for a trial next month of two weeks
21 in length.

22 I'd like to next address plaintiff's argument that
23 somehow we should have disclosed this witness in our Rule 26
24 disclosures.

25 THE COURT: Yes.

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1 MS. MENNINGER: Plaintiff omitted from her recitation
2 of Rule 26 the second half of the same sentence, which requires
3 disclosure of individuals with discoverable information, and
4 I'll supply the rest of the sentence now, your Honor, "that the
5 disclosing party may use to support its claims or defenses,
6 unless the use would be simply for impeachment." Your Honor,
7 obviously, the defense has no intention of using this woman to
8 support its claims or its defenses.

9 Third, the information disclosed, your Honor,
10 demonstrates the very limited information -- the four
11 paragraphs of information demonstrate that this witness'
12 evidence is neither relevant nor material to this defamation
13 action.

14 Your Honor, this particular witness is an adult woman.
15 She was an adult woman in her 20s when she claims to have met
16 the gentleman who serves as the backdrop of this litigation.
17 She met him, she says, by virtue of being introduced by a
18 completely different person, not by my client, your Honor. She
19 says she met him in the year 2006, which was four years after
20 plaintiff had moved to another country and had stayed in that
21 country for a decade. They haven't met each other. They don't
22 know each other. She has no direct evidence with regard to
23 plaintiff and plaintiff's action. She also alleges facts that
24 are significantly different from plaintiff's and therefore
25 would make them ineligible to be admitted vis-à-vis Rule

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1 404(b). In her declaration, the only paragraph in which she
2 mentions my client at all is all inadmissible evidence, your
3 Honor. It's speculative. She's guessing about things. I'm
4 hesitant to recite them because I know that plaintiff has
5 marked that declaration confidential, but if your Honor checks,
6 she is saying things that are based purely on her speculation.
7 There is no evidence, including the evidence included in the
8 letter motion --

9 THE COURT: You know, oddly enough, I don't seem to
10 have any affidavit from her.

11 MS. MENNINGER: It was in the plaintiff's reply
12 motion, attached to the plaintiff's reply motion in the copy I
13 received, your Honor.

14 MS. McCAWLEY: Your Honor, if I can approach, I can
15 hand you a copy of that.

16 THE COURT: Okay. Fine. Thanks. I'll take it.

17 Oh, yes. My apologies. I did have it. Yes. I
18 didn't realize that. Hold on just a second.

19 Yes. Yes. Thank you.

20 MS. MENNINGER: In paragraph 3, she talks about what,
21 quote-unquote, "became clear to me" and what "appeared to be"
22 things and she recalls seeing things that she believes
23 indicated ages of other individuals there but has no direct
24 knowledge of that information. Upon a full briefing, your
25 Honor, I believe your Honor would be led to conclude that this

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1 is impermissible 404(b) evidence. It's not direct evidence
2 that goes to the heart of this defamation case, your Honor,
3 brought by plaintiff.

4 Your Honor, plaintiff has been represented by current
5 counsel for approximately six years. During those six years
6 they have had these flight logs for the entire time. There are
7 some hundreds and hundreds of flight log pages with individuals
8 named on them. My client denies knowing this woman, and
9 there's nothing on the flight logs that indicate they were
10 together at any point in time.

11 While plaintiff has argued they have acted diligently
12 after learning of this witness, your Honor, in none of their
13 pleadings, neither in court today, have they told your Honor
14 when they first were contacted by her, first met her, or the
15 like. All we know is that in the last 30 days, they've had
16 enough time to go to Europe to meet with her, to draft a
17 separate complaint which they filed. They said they've done
18 due diligence. As I pointed out already, your Honor, the
19 Rule 26 doesn't even give her address, much less any initial
20 disclosures under Rule 26 of corroborating evidence, like her
21 own travel records, or her own photographs, or anything else
22 that they would use to support this claim. So waiting, your
23 Honor, for more than 30 days to seek to reopen discovery,
24 frankly, when we are 39 days from trial, is too long.

25 Your Honor, we absolutely object to having this new

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1 witness called at trial. We've been litigating for a year and
2 a half vigorously litigating for a year and a half, and
3 discovery has been closed, fact discovery has been closed for
4 six months and expert discovery for more than two. We have not
5 had sufficient time since we received this one week ago to
6 investigate these allegations -- certainly not to prepare for a
7 deposition, and we do not have time going forward to both do
8 that and simultaneously engage in the very complicated,
9 rigorous pretrial depressed schedule that we have set between
10 now and March 13th. If, however, your Honor is inclined to
11 allow this witness to testify at trial, then, in addition to
12 her deposition, we will need at least 90 days to do all of the
13 things that I've outlined above. We don't know how long
14 plaintiff has been engaging in their due diligence, but as your
15 Honor knows, when someone makes an allegation about events
16 occurring more than ten years ago, it takes more than 39 days
17 to look into contrary facts and to do what is appropriate for
18 any lawyer to do to defend against these claims.

19 Thank you.

20 MS. McCAWLEY: Your Honor, may I be heard?

21 THE COURT: Yes.

22 MS. McCAWLEY: Your Honor, this witness is obviously
23 critical to the case. We would not have brought this witness
24 to the Court in this circumstance unless that was the
25 situation.

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1 The idea that discovery has been closed since July is
2 a bit inaccurate in that there have been subsequent depositions
3 of witnesses -- in fact one was taken just last week -- of
4 witnesses who were not cooperative in the discovery process, so
5 we had to get orders in order to compel their testimony. So
6 that discovery has been ongoing for those bits and pieces that
7 we needed to shore up.

8 While I appreciate the concern over the fact that the
9 Rule 26 disclosures has her name, it does identify counsel,
10 which is appropriate in a Rule 26 disclosure if the individual
11 is represented by a lawyer so that they're not directly
12 contacted.

13 With respect to the deposition, of course we said we'd
14 fly her over right away to have that take place. We're not
15 objectionable to receiving a subpoena, to the extent that's a
16 concern because she is a foreigner. We want to comply with
17 discovery here.

18 We feel that this is definitely critical information.
19 I know that you've heard a parade of horrors from the
20 defendants, but really, this is just a situation where a
21 witness was not disclosed previously. We did not know of her.
22 Of course if we had known of her, she would have been number
23 one on our list, because we believe she is absolutely critical
24 to the allegations in this case. While this is referenced as a
25 defamation case a number of times, the defamation at issue was

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1 about whether or not there was a sexual trafficking and sexual
2 abuse situation occurring. She corroborates that directly,
3 your Honor, so she is critical to the case in that regard. She
4 has directly observed things that other individuals had not
5 observed, so we believe she is not at all duplicative and is
6 necessary for us to be able to try this case.

7 I appreciate the concerns about timing, your Honor.
8 In fairness, if that is the concern of the Court, we're happy
9 to accommodate that in some way. We just do want to make sure
10 that we're able to bring this witness' testimony forward,
11 because we believe that's very important to the jury with
12 respect to this issue. We were diligent with respect to this
13 witness. We did, as soon as she was able to meet with us, get
14 on a plane and go to Europe, and we then, within the week,
15 disclosed her and said we would produce her for deposition,
16 your Honor. So while I appreciate those concerns, we will bend
17 over backwards to allow discovery in order to get this witness
18 before the Court.

19 So we appreciate the Court entertaining our motion,
20 and we hope that you will allow this witness to testify at
21 trial.

22 THE COURT: Considering the factors which have to be
23 considered with respect to such an application, the trial is
24 imminent. The request is opposed. As to the prejudice of the
25 nonmoving party, the defendant, I understand that it would put

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1 a burden upon them to do the things that they think is
2 necessary in the event that the deposition goes forward, but
3 that kind of prejudice is the prejudice created by this lawsuit
4 and that's unavoidable, so I don't think that there is any
5 prejudice in the sense of impropriety of the deposition.

6 And of course, I make no determination at this time as
7 to whether or not this witness has anything to say that would
8 be material in the case which we have. I reach no conclusion
9 on that, and I understand that that can be a subject of some
10 considerable discussion at a later time.

11 As far as the diligence of the plaintiff is concerned,
12 I think under all the circumstances set forth in the letters
13 and today, I think they were reasonably diligent with respect
14 to this witness.

15 As to whether it leads to relevant evidence or not, I
16 have no idea. It has been stated that it will contradict a
17 direct statement by the defendant. Maybe yes, maybe no. I
18 just don't know. I don't know whether the testimony by this
19 witness is going to involve a statement by the defendant or
20 what it's going to involve. But it is conceivable, it seems to
21 me, that it may lead to relevant evidence.

22 Therefore, considering all these factors, I will grant
23 the motion. The deposition may go forward. The discovery is
24 open for this limited purpose of dealing with this witness and
25 her deposition. I anticipate that it may generate, as

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1 everything in this case manages to generate, another motion,
2 but if that happens, it happens.

3 So is there anything further that I need to decide to
4 make things easier for you all?

5 MS. MENNINGER: Just to clarify, your Honor.

6 THE COURT: Sure.

7 MS. MENNINGER: Since you're saying that discovery is
8 open for this limited purpose, I assume that any rebuttal
9 witnesses or subpoenas or discovery requests --

10 THE COURT: No, no. I'm just talking about this
11 woman's deposition at the moment. Now quite obviously, if she
12 comes up with something that's material and that you think
13 needs further investigation and you want to have additional
14 discovery, that's certainly something we'll deal with at that
15 time. Again, I don't know what this relevant evidence is
16 that's going to be produced, and maybe there won't be any. I
17 don't know. So I will permit the deposition for discovery
18 purposes, and we'll stop there, without reaching any conclusion
19 as to whether additional discovery may be necessary. Okay?

20 MS. MENNINGER: Typically, your Honor, for a
21 third-party witness such as this woman, we would serve her with
22 a subpoena to appear at a deposition along with relevant
23 documents that we could examine her on at that deposition.

24 THE COURT: Sure.

25 MS. MENNINGER: So I'm just making sure, under the

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1 Court's ruling, we are permitted to serve her with such
2 subpoena so she would bring the relevant documents to or in
3 advance of her deposition and we could ask her then.

4 THE COURT: Sure. And just to make things clear, I
5 take it, since she's represented by counsel --

6 MS. MENNINGER: Yes, plaintiff's counsel.

7 THE COURT: Yes, plaintiff's counsel. -- that you can
8 agree right now that you'll accept that subpoena on her behalf.

9 MS. McCAWLEY: Yes. We'll accept the subpoena on her
10 behalf and make sure she appears.

11 THE COURT: I assumed you'd do that.

12 MS. McCAWLEY: Yes.

13 THE COURT: But a very wise judge once told me, never
14 assume a goddamn thing. So there you are. Yes. That's J.
15 Edward Lumbard's maxim.

16 Anything else?

17 MS. McCAWLEY: Thank you.

18 MS. MENNINGER: Not on this motion, your Honor. Thank
19 you.

20 THE COURT: Thank you, all.

21 (Adjourned)