APPENDIX A

Motions, Pleadings and Filings

United States District Court,
N.D. California.

SEMITOOL, INC., Plaintiff,
v.
TOKYO ELECTRON AMERICA, INC., Tokyo Electron Kyushu Ltd., and Tokyo Electron Ltd., Defendants.
and
Related Counterclaims.

No. C-02-0288 CW (EMC).

April 19, 2002.

Owner of patent related to cleaning and processing of semiconductor wafers sued competitor for infringement. On plaintiff's motion for expedited discovery, the District Court, Chen, United States Magistrate Judge, held that: (1) test for expedited discovery is good cause; (2) good cause existed for expediting disclosure of defendant's documents and inspection of accused device; and (3) good cause did not exist for expedited discovery from third-parties.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure ⚷1261
170Ak1261 Most Cited Cases
Expedited discovery is available upon showing of good cause, i.e., where need for expedited discovery, in consideration of administration of justice, outweighs prejudice to responding party. Fed.Rules Civ.Proc.Rule 26(d), 28 U.S.C.A.

[2] Patents ⚷292.3(2)
291k292.3(2) Most Cited Cases
Good cause existed for permitting expedited discovery of details of accused device, in suit for infringement of patent related to cleaning and processing of semiconductor wafers; given patentee's lack of prior access to accused device, expedited disclosure of documents and physical inspection of device would permit it to determine if other patents were being infringed, and thus more promptly amend complaint, while not prejudicing defendant. Fed.Rules Civ.Proc.Rule 26(d), 28 U.S.C.A.

[3] Patents ⚷292.4
291k292.4 Most Cited Cases
Plaintiff suing for infringement of patent related to cleaning and processing of semiconductor wafers failed to establish good cause for permitting expedited discovery from third-party buyers of accused device; time gained by expediting discovery was marginal, and information sought was unlikely to materially change plaintiff's assessment of its claim. Fed.Rules Civ.Proc.Rule 26(d), 28 U.S.C.A.

***274** Robert M. Bodzin, Clark J. Burnham, Burnham Brown, Oakland, CA, Edgar H. Haug, Stephen J. Lieb, Grace L. Pan, Richard E. Parke, Frommer Lawrence & Haug LLP, New York City, for defendants.

Thomas J. Friel, Jr., Monica Kerstin Hoppe, Benjamin K. Riley, Cooley Godward LLP, San Francisco, CA, for plaintiff.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LIMITED EXPEDITED DISCOVERY (No. 8)

CHEN, United States Magistrate Judge.

Plaintiff Semitool, Inc. (hereinafter "Plaintiff") is a corporation of the state of Montana and the owner of several patents, including, *inter alia,* U.S. Patent Number 5,784,797 (hereinafter "the 797 patent"). The 797 patent relates to the centrifugal cleaning and processing of semiconductor wafers. (Compl. ¶ 14.)

Defendant Tokyo Electron Ltd. is a Japanese corporation and the parent company of subsidiaries (and co-defendants) Tokyo Electron Kyushu, Ltd.

and Tokyo Electron America, Inc. (hereinafter collectively "Defendants"). Defendants manufacture, sell and distribute a variety of tools for the centrifugal cleaning and processing of semiconductor wafers including their "PR200Z Cleaning System." (Compl. ¶ 16.)

Around the end of 2000, Plaintiff suspected that Defendants' PR200Z Cleaning System infringed one or more of Plaintiff's patents. (Thomas Friel Decl. ¶ 6; Masahiko Hamajima Decl. ¶ 5.) Plaintiff requested access to technical documents and an inspection of a PR200Z Cleaning System, and although Plaintiff and Defendants agreed in principle to permit such inspection, they failed to reach agreement on the terms of the inspection and disclosure. (Friel Decl. ¶¶ 6, 7; Richard Parke Decl. ¶¶ 2, 3.) Thus, the inspection never occurred and pre-litigation efforts failed to result in mutually satisfactory disclosures. (Friel Decl. ¶ 11; Hamajima Decl. ¶ 7.)

On January 16, 2002, Plaintiff filed suit against Defendants alleging that they had willfully infringed, and continue to willfully infringe, Plaintiff's 797 patent. Plaintiff maintains that some of its other patents may well be infringed but it is not in a position to advance any additional claims without access to the accused device and documents pertaining thereto.

On March 15, 2002, Plaintiff filed a motion for expedited discovery requesting: (1) the technical specifications, schematics, maintenance manuals, user or operating manuals, documents to show the physical configuration, documents to show the operation of the PR200Z Cleaning System; (2) a property inspection of any PR200Z Cleaning System; and (3) Rule 45 requests for documents and property inspections at two of Defendants' customers, International Business Machines (IBM) and Sematech, Inc. Plaintiff's motion was referred to this Court on March 20, 2002, by Judge Wilken.

Based on the record in this case, the parties' briefs and the April 17, 2002 hearing on the motion, the Court makes the following determinations:

[1] The Court will apply a good cause standard in determining whether expedited discovery is warranted

Defendants contend that this Court should consider the *Notaro* test in determining whether expedited discovery should be allowed. In *Notaro v. Koch,* 95 F.R.D. 403 (S.D.N.Y.1982), the district court of New ***275** York applied a four-prong test in determining whether expedited discovery was warranted. The *Notaro* court considered whether to allow the early deposition of the then mayor of the state of New York in conjunction with claims that the mayor intended to fire certain state employees if the mayor was elected governor. While the plaintiffs did not seek a preliminary injunction, the *Notaro* court required them to satisfy a standard akin to a preliminary injunctive relief:

> [1] irreparable injury; [2] some probability of success on the merits; [3] some connection between expedited discovery and avoidance of irreparable injury; and [4] some evidence that injury will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

Notaro, 95 F.R.D. at 405. The court noted that these requirements, parallel to those necessary to obtain a preliminary injunction, "have been established by courts to protect defendants from the potential damages of speeded up remedies." *Id.* at 405 n. 4. In the end, the court found that the plaintiff did not meet any of these requirements. *See id.* at 405-06.

While a few courts have applied the *Notaro* factors in varying contexts, *see, e.g., Irish Lesbian and Gay Organization v. Giuliani,* 918 F.Supp. 728, 731 (S.D.N.Y.1996); *Crown Crafts, Inc. v. Aldrich,* 148 F.R.D. 151, 152 (E.D.N.C.1993), other courts have declined to apply *Notaro's* four-prong test. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor,* 194 F.R.D. 618, 623 (N.D.Ill.2000); *Philadelphia Newspapers, Inc. v. Gannett Satellite Information Network, Inc.,* No. 98 CV 2782, 1998 WL 404820, *2 n. 1 (E.D.Pa.1998). In *Merrill Lynch, supra,* the court reasoned that employing a preliminary-injunction type analysis to determine entitlement to expedited discovery made little sense, especially when applied to a request to expedite discovery in order to prepare for a preliminary injunction hearing. *See Merrill Lynch,* 194 F.R.D. at 624. Rather, "it makes sense to examine the discovery request, as we have done, on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding

circumstances." *Id.* (emphasis in original).

The Ninth Circuit has not addressed the propriety of *Notaro* and only one district court within this circuit has even cited to the case. In *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612 (D.Ariz.2001), the district court for the state of Arizona mentioned *Notaro* and its four-prong test without explicitly endorsing or rejecting it. However, the court appears to have rejected *Notaro* in favor of the more general good cause standard for permitting expedited discovery in advance of the Federal Rule of Civil Procedure 26(f) scheduling conference: "[a]bsent credible authority to the contrary, the court adopts a good cause standard." *Yokohama Tire,* 202 F.R.D. at 614. Significantly, the court cited in support of its good cause holding, *Wirtz v. Rosenthal,* 388 F.2d 290 (9th Cir.1967) and *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604 (9th Cir.1992) which applied the general good cause standard employed in Rules 34 and 15, respectively. Other courts have employed the good cause standard without the strictures of *Notaro. See Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd. Liability Co.,* 204 F.R.D. 675, 676 (D.Colo.2002) ("Rule 26(d), Fed.R.Civ.P., allows me to order expedited discovery upon a showing of good cause").

[1] The Court rejects the rigid *Notaro* standard and is persuaded that the more flexible good cause standard applied in *Yokohama Tire, supra,* and other cases is the appropriate standard under Rule 26(d). It does so for several reasons.

First, *Notaro* was decided before the 1993 amendment to Rule 26. *Notaro* concerned leave of court to take a deposition within thirty days following commencement of the action, then otherwise barred by Rule 30(a). The driving concern of the *Notaro* court was undermining the Rule 30(a) provision which "protects defendants from unwarily incriminating themselves before they have a chance to review the facts of the case and retain counsel." *Notaro,* 95 F.R.D. at 404. Currently under Rule 26, the bar on discovery extends until the Rule 26(f) conference which often takes place three or four months into the litigation--after the defendant has retained ***276** counsel and responded to the complaint. The timing of discovery prescribed by Rule 26(d) focuses not on protecting the unwary and unrepresented defendant, but rather on orderly case management. The *Notaro* factors would not accommodate expedited discovery in circumstances even where such discovery would facilitate case management and expedite the case with little or no burden to the defendant simply because the plaintiff would not suffer "irreparable injury." Such a result is inconsistent not only with Rule 26(d), which requires the Court to consider, *inter alia,* "the interests of justice," but also the overarching mandate of Rule 1 which requires that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." It also unduly circumscribes the wide discretion normally accorded the trial court in managing discovery. *See Little v. City of Seattle,* 863 F.2d 681, 685 (9th Cir.1988).

Accordingly, the Court declines to apply *Notaro* and instead applies the conventional standard of good cause in evaluating Plaintiff's request for expedited discovery. Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party. It should be noted that courts have recognized that good cause is frequently found in cases involving claims of infringement and unfair competition. *See, e.g., Benham Jewelry Corp. v. Aron Basha Corp.,* No. 97 CIV 3841 RWS, 1997 WL 639037, *20 (S.D.N.Y. Oct. 14, 1997).

[2] Good cause exists for permitting limited expedited discovery

[2] The relevance of the requested discovery is not at issue here. The technical specifications, schematics, maintenance manuals, user or operating manuals and documents to show the physical configuration and operation of the PR200Z Cleaning System are core documents central to the underlying case. In fact, Defendants admitted at the April 17, 2002 hearing that Plaintiff would receive said information during the course of normal discovery. The issue is whether there is good cause to provide immediate access to the requested discovery rather than postponing its ultimate production during the normal course of discovery.

Judge Wilken has set the initial Case Management

Conference for May 24, 2002. Therefore, pursuant to the Federal Rules, Plaintiff may begin propounding discovery requests upon Defendants, twenty-one days prior, on May 3, 2002, the date by which the parties are to confer in preparation for the conference. *See* Fed.R.Civ.P. 26(f). Therefore, what Plaintiff proposes is to advance the propounding of discovery by approximately three weeks. Plaintiff also seeks to shorten the response time for production from Defendants from thirty to ten days. Plaintiff contends that obtaining expedited documents pertaining to the accused device will permit it to determine which, if any, of its other patents are infringed, thereby expediting possible amendment to its complaint, facilitating a more complete and informed Case Management Conference and permit it to comply with its disclosure obligations under North District of California Patent Local Rule 3. [FN1] If expedited discovery is not permitted, Plaintiff argues this increases the likelihood that disclosures under Rule 3 will have to be amended at a later date, thereby slowing the entire litigation.

FN1. Patent Local Rules 3-1 and 3-2, require that within ten days after the initial case management conference, Plaintiff must submit a disclosure of asserted claims, which must include, *inter alia,* a claim of each patent allegedly infringed, the identification of each apparatus involved in the infringement and documents evidencing the patent allegedly infringed.

Thus, while Plaintiff has not argued that it will be irreparably harmed if it does not receive expedited discovery, it contends expedited discovery would ultimately conserve party and court resources and expedite the litigation.

The Court weighs this benefit to the administration of justice against the possible prejudice or hardship placed on Defendants. Defendants concede the requested information is relevant and will be produced in the normal course of discovery. It also has had notice that Plaintiff has been seeking this information for over a year as there were ***277** pre-litigation disclosure requests made by Plaintiff, as well as extensive discussion between the parties regarding said requests. Moreover, Defendants have had notice of the instant motion and specific discovery sought for nearly a month.

Defendants contend it should not be subjected to expedited discovery without receiving the initial disclosures required by Patent Local Rule 3 and that it needs to know what patents are allegedly infringed before it should respond to discovery. Plaintiff argues, on the other hand, that it needs this limited discovery in order to know what other patents may be infringed. However, this "chicken or egg" dilemma is largely irrelevant at this stage. It is clear that the core documents currently sought by Plaintiff are relevant and discoverable under the current complaint; it will remain so whether or not the complaint is enlarged to add additional claims. In short, Defendants are not prejudiced by responding to this limited discovery in advance of any amendment to the complaint or disclosure under Patent Local Rule 3. [FN2]

FN2. It should be noted that Patent Local Rule 2-5 states that a party may not object to a discovery request as premature because of the Patent Local Rules, with the exception of requests for: [a] claim construction; [b] a comparison by the patent claimant of the asserted claims and the accused item; [c] a comparison by the accused infringer of the asserted claims and the prior art; and [d] counsel opinions and related documents that the accused infringer intends to rely on as a defense, which may be considered premature in light of the production timetable set forth by Patent Local Rules 3-1 through 3-6. The fact that the information requested by Plaintiff is not identified as subject matter that may be considered premature under the Patent Local Rules further supports the appropriateness of expedited discovery herein.

While Defendants claim some logistical inconvenience in responding to the request inasmuch as most of the documents are located in Japan and many may be in Japanese, the Court fails to see why given current communication technology, Defendants cannot respond quickly to the narrow requests propounded by Plaintiff, especially given that the request hardly comes as a

surprise and that the Case Management Conference and attendant disclosures are fast approaching. Nonetheless, in view of potential logistical problems, the Court, as indicated below, will afford Defendants twenty days within which to respond the Plaintiff's discovery request as narrowed herein.

The Court's finding of good cause for expediting discovery under the circumstances of this case does not, of course, imply that expedited discovery is appropriate under Rule 26(d) in every infringement case in which the plaintiff might benefit therefrom in framing its complaint. Here, Plaintiff has made a clear showing that the narrow categories of documents and physical inspection of the device not otherwise accessible will substantially contribute to moving this case forward and facilitating compliance with the Patent Local Rules. The request directed to Defendants is narrowly tailored to this benefit. It entails not, e.g., a free ranging deposition for which a representative of Defendants may not have had sufficient time or information with which to prepare, but existing documents and a physical inspection. Moreover, this is a case where the parties are both represented by sophisticated counsel and have engaged in pre-litigation discussion for over a year. Hence, the Court is unable to discern any real prejudice to Defendants in advancing discovery by a modest amount of time.

[3] The Court reaches a different conclusion as to the third-party discovery propounded to IBM and Sematech, Inc. The benefits of expediting this particular is not nearly as obvious. It is likely to be largely duplicative of the discovery permitted herein against Defendants. Even if it is not entirely duplicative (Plaintiff contends the accused device may be customized for each customer), Plaintiff has not made any showing how this additional discovery is likely to materially change its patent claims assessment. Moreover, Plaintiff concedes it cannot shorten the time within which IBM and Sematech, Inc. respond, so the net gain, at best, will be to advance discovery by three weeks. Given the likelihood of contention over these requests, it is doubtful this third-party discovery will be completed prior to the Case Management Conference and Patent Local Rule 3 disclosure. Balanced against the lack ***278** of any substantial incremental benefit is the risk of prejudice or disruption to Defendants' business relations with these customers. The Court finds insufficient cause to permit expedited third-party discovery.

ORDER

The motion by Plaintiff for limited expedited discovery (Docket No. 8) is **GRANTED IN PART and DENIED IN PART.**

Defendants shall produce within twenty days of the date of this Order, one set each of the technical specifications, schematics, maintenance manuals and user or operating manuals of the PR200Z Cleaning System. Defendants shall also produce one set of drawings and/or pictures showing the physical configuration of the PR200Z Cleaning System and a document (or documents) demonstrating how the PR200Z Cleaning System processes and cleans semiconductors. Defendants need not at this time produce "any and all documents" which are essentially duplicative of those ordered herein. Plaintiff may in the normal course of discovery propound a broader request for such documents under Federal Rule of Civil Procedure 26.

Defendants shall also provide access, within thirty days of the date of this Order, to a PR200Z Cleaning System at any of Defendants' facilities. Plaintiff will be permitted to inspect, observe, videotape and photograph any portion of the PR200Z Cleaning System.

Plaintiff will not be permitted to seek early discovery from Defendants' customers, IBM and Sematech, Inc., but may seek discovery from these entities in the normal course of discovery.

All discovery contemplated by the Court's Order shall be subject to the stipulated protective order to be entered into by the parties. In the absence of a stipulated protective order, all documents produced or generated by this discovery shall be treated as confidential pursuant to Patent Local Rule 2-2.

IT IS SO ORDERED.

208 F.R.D. 273

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- 2004 WL 545509 (Trial Motion, Memorandum

and Affidavit) Defendants and Counterclaimants Tokyo Electron America, Inc., Tokyo Electron Kyushu Ltd, and Tokyo Electron Ltd.'s Memorandum in Opposition to Semtool's Motion to Enforce and Modify Order (Apr. 19, 2004)

• 2003 WL 23335158 (Trial Motion, Memorandum and Affidavit) Re-Notice of Semitool's Motion and Motion for Partial Summary Judgment of Noninfringement of U.S. Patent No. 4,985,722 (Oct. 24, 2003)

• 2002 WL 32391601 (Trial Motion, Memorandum and Affidavit) Defendants and Counterclaimants Tokyo Electron Kyushu Ltd., and Tokyo Electron Ltd.'s Notice of Motion and Motion to Strike (Aug. 16, 2002)

• 2002 WL 32391603 (Trial Motion, Memorandum and Affidavit) Defendants Tokyo Electron Ltd., Tokyo Electron Kyushu Ltd., and Tokyo Electron America, Inc.'s Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Expedited Discovery (Apr. 17, 2002)

• 2002 WL 32391602 (Trial Motion, Memorandum and Affidavit) Declaration of Richard E. Parke in Support of Defendants' Opposition to Semitool's Motion for Expedited Discovery (Jan. 16, 2002)

• 2002 WL 32391604 (Trial Motion, Memorandum and Affidavit) Declaration of Service Via Facsimile of Defendants Tokyo Electron America, Inc., Tokyo Electron Kyushu Ltd and Tokyo Electron Ltd's Memorandum of Points and Authorties in Opposition to Semitool's Motion for Expedited Discovery and Supporting Declarat ions (Jan. 16, 2002)

• 2002 WL 32391605 (Trial Motion, Memorandum and Affidavit) Declaration of Masahiko Hamajima in Support of Defendants' Opposition to Semitool's Motion for Expedited Discovery (Jan. 16, 2002)

• 3:02CV00288 (Docket)
(Jan. 16, 2002)

END OF DOCUMENT

Motions, Pleadings and Filings

United States District Court,
D. Arizona.

YOKOHAMA TIRE CORPORATION, Plaintiff,
v.
DEALERS TIRE SUPPLY, INC., Defendant.

No. 01-1778 PHX LOA.

Sept. 26, 2001.

On plaintiff's ex parte application for expedited discovery, the District Court, Anderson, United States Magistrate Judge, held that plaintiff's ex parte motion for expedited discovery motion without notice and an opportunity for defendant to be heard would be denied, where motion failed to address why defendant's authorized representative should not be given notice of the motion and an opportunity to be heard, other than to present plaintiff's perception of an urgent need to obtain the subject documents.

Motion denied.

West Headnotes

[1] Federal Civil Procedure ⚷921
170Ak921 Most Cited Cases
Ex parte motions are rarely justified.

[2] Federal Civil Procedure ⚷921
170Ak921 Most Cited Cases
For an ex parte motion to be justified, the evidence must show: (1) that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures; and (2) it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect.

[3] Federal Civil Procedure ⚷1551
170Ak1551 Most Cited Cases
District court has the discretion to order the expedited production of documents if the appropriate circumstances exist.

[4] Federal Civil Procedure ⚷1615.1
170Ak1615.1 Most Cited Cases
District court would not entertain plaintiff's ex parte motion for expedited discovery motion without notice and an opportunity for defendant to be heard, where motion failed to address why defendant's authorized representative should not be given notice of the motion and an opportunity to be heard, other than to present plaintiff's perception of an urgent need to obtain the subject documents. Fed.Rules Civ.Proc.Rule 26(f), 28 U.S.C.A.

[5] Federal Civil Procedure ⚷1261
170Ak1261 Most Cited Cases
A showing of good cause is necessary to justify an expedited discovery order before the scheduling conference. Fed.Rules Civ.Proc.Rule 26(f), 28 U.S.C.A.

***612** P. Bruce Converse, Mariscal Weeks McIntyre & Friedlander, PA, Phoenix, AZ, for plaintiff.

ORDER

ANDERSON, United States Magistrate Judge.

Pursuant to General Order No. 98-62 of the United States District Court, District of Arizona and Local Rule 1.2(e), Rules of Practice, effective March 1, 1999, all civil cases are, and will be, randomly assigned to a U.S. District Judge or to a U.S. Magistrate Judge. This matter has been assigned to the undersigned U.S. Magistrate Judge.

Pending before the Court is Plaintiff's Ex Parte Application For Expedited Discovery (doc. # 2), filed on September 21, 2001, with the Complaint. Contrary to the language of the motion, no proposed form of Order has been provided to the undersigned with Plaintiff's motion. Plaintiff seeks an order, pursuant to Rule 26(d), FED.R.CIV.P., granting Plaintiff leave to obtain the expedited production of documents from Defendant consisting to two limited categories of documents. Plaintiff also requests that Defendant be ordered to produce the responsive documents within 30 days after service

of the Complaint, the Ex parte Motion and the signed Order on the Defendant.

The subject motion presents two issues to the Court: (1) whether the Court should entertain an *ex parte* discovery motion without notice and an opportunity for the Defendant to be heard, and (2) whether the Court, ***613** using the appropriate standard, should exercise its broad discretion to grant the discovery request. The subject motion is not a dispositive motion. Therefore, it may be properly resolved by the undersigned as a pretrial matter without the consent of all or any of the parties. See, 28 U.S.C. § 636(b)(1).

Ex parte Motion

[1][2][3] *Ex parte* motions [FN1] are rarely justified. *Mission Power Engineering Company v. Continental Casualty Company,* 883 F.Supp. 488, 490 (C.D.Cal.1995). To be justified, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. Secondly, it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect. *Id.* at 492. Moreover, the Federal Rules of Civil Procedure require that "every pleading" and "every written motion other than one which may be heard ex parte" subsequent to the complaint be served upon each of the parties. See, Rule 5(a), FED.R.CIV.P. Plaintiff has cited to the Court no procedural rule regarding the production of documents that may be heard on an *ex parte* basis. In fact, Rule 34, FED.R.CIV.P., is silent on the propriety of such a request. Nevertheless, the Court opines that it has the discretion to order the expedited production of documents if the appropriate circumstances exist.

FN1. Those motions or hearings in which the court hears only one side of the controversy. See, Black's Law Dictionary, sixth edition, 1991.

[4] Other than Plaintiff's perception of the urgency to obtain the subject documents, the subject motion wholly fails to address why the Defendant's authorized representative should not be given notice of the motion and an opportunity to be heard even if the oral argument on the subject motion were scheduled by the Court substantially before the Rule 26(f) Scheduling Conference.

The Propriety of Expedited Discovery

Rule 26(d), FED.R.CIV.P., provides, in part, as follows:

> Timing and Sequence of Discovery. *Except .. when authorized* under these rules or *by order* or agreement of the parties, *a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery. (Emphasis added).

There is scant authority on the standards governing the availability of expedited discovery before the Rule 26(f) scheduling conference in civil cases. *Philadelphia Newspapers, Inc., v. Gannett Satellite Information Network, Inc.,* 1998 WL 404820 (E.D.Pa.1998). The district court in *Ellsworth Associates, Inc. v. United States* commented that "[e]xpedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings." 917 F.Supp. 841, 844 (D.D.C.1996) (citing *Optic-Electronic Corp. v. United States,* 683 F.Supp. 269, 271 (D.D.C.1987); *Onan Corp. v. United States,* 476 F.Supp. 428, 434 (D.Minn.1979)). Expedited discovery has been ordered where it would "better enable the court to judge the parties' interests and respective chances for success on the merits" at a preliminary injunction hearing. *Edudata Corp. v. Scientific Computers, Inc.*, 599 F.Supp. 1084, 1088 (D.Minn.1984), aff'd. in part, rev'd in part on other grounds, 746 F.2d 429 (8th Cir.1984); *Ellsworth Assocs.,* 917 F.Supp. at 844 (ordering expedited discovery where it would "expedite resolution of [plaintiffs'] claims for injunctive relief").

An often-cited case on the subject of expedited discovery is *Notaro v. Koch,* 95 F.R.D. 403 (S.D.N.Y.1982), decided substantially before the

1993 amendment of today's version of Rule 26(d), FED.R.CIV.P. There, the district court enumerated four factors for determining the propriety of expedited discovery: (1) irreparable injury, (2) some probability of ***614** success on the merits, (3) some connection between expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. *Id.* at 405. The court in *Notaro* "borrowed the test for granting a preliminary injunction and applied it to requests for expedited discovery." *Crown Crafts, Inc. v. Aldrich,* 148 F.R.D. 151, 152 (E.D.N.C.1993).

[5] One respected treatise provides that "[a]lthough the rule does not say so, it is implicit that some showing of good cause should be made to justify [discovery before the Rule 26(f) conference] such an order; the Advisory Committee Notes suggest that relief would be appropriate in cases involving requests for a preliminary injunction or motions challenging personal jurisdiction." See, Federal Practice and Procedure, 8 *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus,* § 2046.1, p. 592.

Absent credible authority to the contrary, the Court adopts a good cause standard to warrant the granting of any expedited discovery prior to the Rule 26(f) scheduling conference to which the adverse party shall be presumptively entitled to notice and an opportunity to be heard prior to any ruling thereon. See, *Wirtz v. Rosenthal,* 388 F.2d 290 (9th Cir.1967); *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604 (9th Cir.1992); Rule 30(a)(2)(C), FED.R.CIV.P.,(this rule adds the qualification for an expedited deposition that "the person to be examined is expected to leave the United States and be unavailable for examination in this country").

Accordingly,

IT IS ORDERED that Plaintiff's Ex Parte Application For Expedited Discovery (doc. # 2) is **DENIED** without prejudice solely because Defendant was not served with the motion and given an opportunity to be heard. The Court expresses no opinion whether good cause exists to grant the motion on its merits.

IT IS FURTHER ORDERED that Plaintiff shall serve Plaintiff's Ex Parte Application For Expedited Discovery and this Order upon Defendant at the same time that the subject Complaint is served.

202 F.R.D. 612

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- 2:01CV01778 (Docket)
  (Sep. 21, 2001)

END OF DOCUMENT

340 Ark. 365

Lona McCASTLAIN

v.

Barbara ELMORE.

No. 99–541.

Supreme Court of Arkansas.

Feb. 10, 2000.

Candidate for prosecuting attorney who lost election by one vote brought election contest. The Circuit Court, Lonoke County, John Bertran Plegge, J., dismissed complaint without prejudice. Winner of election appealed. The Supreme Court, Imber, J., held that election contest could not be dismissed voluntarily or without prejudice; savings statute permitting the refiling of an action within one year of taking a nonsuit would not apply.

Affirmed as modified.

1. Elections ⚷296

Limitation of Actions ⚷130(5)

Election contest could not be dismissed voluntarily or without prejudice; savings statute permitting the refiling of an action within one year of taking a nonsuit would not apply. A.C.A. §§ 7-5-801(d), 16-56-126.

2. Elections ⚷269

The right to contest an election is purely statutory. A.C.A. § 7-5-801(d).

3. Elections ⚷269

Because election contests are special proceedings, the rules of civil procedure do not apply. Rules Civ.Proc., Rule 81.

4. Elections ⚷278

The statutory provision requiring an election contest to be filed within a certain number of days of the certification is mandatory and jurisdictional. A.C.A. § 7-5-801(d).

5. Elections ⚷275

In light of the fact that statutory proceedings to contest an election are special and summary in nature, the statutory requirements to secure jurisdiction must be strictly observed, and the jurisdictional facts must appear on the face of the proceedings.

6. Elections ⚷288

Arkansas law does not allow an election-contest complaint that was deficient when filed to be later amended and corrected to allege a cause of action after the 20-day time period for filing the complaint has elapsed. A.C.A. § 7-5-801(d).

7. Elections ⚷288

When a complaint fails to allege sufficient facts to state a cause of action in an election contest, it may not be subsequently amended by pointing to facts outside the complaint after the time for contesting the election has expired. A.C.A. § 7-5-801(d).

Sloan–Rubens, by: Kent J. Rubens, West Memphis; and Stuart & McCastlain, by: J. Michael Stuart, Lonoke, for appellant.

Barbara Elmore, Lonoke, pro se.

ANNABELLE CLINTON IMBER, Justice.

This is an election-contest case. On appeal, Lona Horne McCastlain argues that the trial court erred when it dismissed Barbara Elmore's complaint without prejudice. Ms. McCastlain contends that the trial court should have dismissed Ms. Elmore's election contest with prejudice because the statutory time for filing an election-contest complaint had expired. We agree that the complaint should have been dismissed with prejudice, and affirm the trial court's order as modified.

Lona Horne McCastlain and Barbara Elmore were candidates in the 1998 general election for the office of Prosecuting Attorney in the Seventeenth Judicial District (West). On November 13, 1998, the

Lonoke County Board of Election commissioners certified the election results and declared Ms. McCastlain the winner by a vote of 6,651 to 6,650, a margin of only one vote. Ms. Elmore filed an election-contest complaint on December 2, 1998, against Lona McCastlain, Myrtle Finch in her official capacity as Lonoke County Clerk, the Lonoke County Board of Election Commissioners and Clayton Shurley, Mickey Stumbaugh, and Jimmie Taylor in their official capacities as Lonoke County Election Commissioners. The complaint signed by Ms. Elmore and her attorneys reflected the following jurat executed by the notary public: "Subscribed and Sworn to before me this 2nd day of December, 1998."

Ms. McCastlain initially asserted that the court was without jurisdiction to hear the matter and moved for dismissal of the complaint pursuant to Ark. R. Civ. P. 12(b)(1). Specifically, Ms. McCastlain alleged that Ms. Elmore failed to timely file an affidavit in which she verified that she believed the statements in her complaint to be true, as required by Ark.Code Ann. § 7–5–801(d) (Repl.1993), thereby depriving the trial court of subject matter jurisdiction. The trial court held a hearing and ruled that Ms. Elmore's notarized signature and the "statement of verification" quoted above satisfied the affidavit requirement in section 7–5–801(d) and denied Ms. McCastlain's motion to dismiss.

[1] The trial court scheduled the case for trial on May 18, 1999; however, on May 10, 1999, Ms. McCastlain's attorneys were notified by Ms. Elmore's attorneys that she wished to dismiss her complaint. That same day, the attorneys for both parties advised the trial court's case coordinator that Ms. Elmore was dismissing her complaint and that an order of dismissal would be sent to the trial court for its signature. The attorneys also confirmed with the case coordinator that the two days scheduled for trial, May 18 and 19, 1999, were released. Later that day, Ms. McCastlain's attorneys were notified that Ms. Elmore had changed her mind and would not dismiss her complaint. One of Ms. Elmore's attorneys indicated that he would seek the court's permission to withdraw, and her other attorney contacted the trial court's case coordinator about keeping the trial dates previously released. Following a conference call with the attorneys on May 17, 1999, the trial court entered an order on May 20, 1999, in which it ruled that Ms. Elmore could not withdraw her request for a dismissal or nonsuit. However, the trial court dismissed Ms. Elmore's complaint without prejudice and gave her the option to refile her election contest. Ms. McCastlain now appeals and asserts two grounds: (1) it was error for the trial court to dismiss Ms. Elmore's complaint without prejudice; and (2) it was error for the trial court to deny the motion to dismiss for failure to comply with the affidavit requirement in section 7–5–801(d). Because we find merit in Ms. McCastlain's first assertion of error, we need not address her second argument.

[2–5] The right to contest an election is purely statutory. *Casey v. Burdine,* 214 Ark. 680, 217 S.W.2d 613 (1949). Because election contests are special proceedings, the rules of civil procedure do not apply. *See* Ark. R. Civ. P. 81(1999); *Womack v. Foster,* 340 Ark. 124, 8 S.W.3d 854 (2000); *Rubens v. Hodges,* 310 Ark. 451, 837 S.W.2d 465 (1992). The provision requiring an election contest to be filed within a certain number of days of the certification is mandatory and jurisdictional. *See Jenkins v. Bogard,* 335 Ark. 334, 980 S.W.2d 270 (1998); *Gay v. Brooks,* 251 Ark. 565, 473 S.W.2d 441 (1971); *Moore v. Childers,* 186 Ark. 563, 54 S.W.2d 409 (1932); *Gower v. Johnson,* 173 Ark. 120, 292 S.W. 382 (1927). We have also held that "[T]he right to contest a[n] . . . election is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial." *Gower v. Johnson,* 173 Ark. at 122, 292 S.W. at 383. In light of the fact that such statutory proceedings are special and summary in nature, the statu-

tory requirements to secure jurisdiction must be strictly observed, and the jurisdictional facts must appear on the face of the proceedings. *Casey v. Burdine, supra.*

The General Assembly has specifically mandated that election-contest proceedings be expedited with abbreviated deadlines for initiating an election contest and appealing a trial court's determination of an election. *See* Ark.Code Ann. § 7–5–801(Repl.1993)(twenty-day time period for filing a complaint); Ark.Code Ann. § 7–5–810 (Supp.1999)(seven-day time period for filing an appeal). Statutory provisions also require the trial courts and the Supreme Court to hear and decide election-contest cases promptly. *See* Ark.Code Ann. § 7–5–804 (Supp.1999)("It shall be the duty of the Supreme Court to advance the hearing of any such appeal."); Ark. Code Ann. § 7–5–802 (Repl.1993)(requiring circuit court to "proceed at once" to hear the case, and the case shall be given "precedence and be speedily determined"). In this regard, we have noted the legislature's mandate for speedy determination and this court's condemnation of "fishing expeditions" in the context of election contests. *See Cartwright v. Carney,* 286 Ark. 121, 690 S.W.2d 716 (1985).

[6, 7] Additionally, Arkansas law does not allow an election-contest complaint that was deficient when filed to be later amended and corrected to allege a cause of action after the twenty-day time period for filing the complaint has elapsed. *Cowger & Stewart v. Mathis,* 255 Ark. 511, 501 S.W.2d 212 (1973); *Jones v. Etheridge,* 242 Ark. 907, 416 S.W.2d 306 (1967); *Wheeler v. Jones,* 239 Ark. 455, 390 S.W.2d 129 (1965); *see also, King v. Whitfield,* 339 Ark. 176, 5 S.W.3d 21 (Glaze, J., concurring). Furthermore, where a complaint fails to allege sufficient facts to state a cause of action in an election contest, it may not be subsequently amended by pointing to facts outside the complaint after the time for contesting the election has expired. *King v. Whitfield, supra; Rubens v. Hodges, supra; see also Wheeler v. Jones, supra.* These cases demonstrate a strict adherence to the statutory time constraints articulated for election contests.

Finally, we have previously addressed the applicability of the savings statute in the context of an election contest. *Casey v. Burdine,* 214 Ark. 680, 217 S.W.2d 613 (1949). Pursuant to the savings statute, a claimant may refile an action within one year after taking a nonsuit upon the original action brought within the statutory limitations period. Ark.Code Ann. § 16–56–126 (1987). In *Casey v. Burdine,* we specifically held that the savings statute applies only to actions governed by a general statute of limitations, and not to proceedings, such as election contests, in which the right to file is limited to a very short period:

> Both the continuity of administration, as well as the sanctity of the acts of a person holding office and exercising its powers, require the strict enforcement of a short period for contesting the right to hold the office.

214 Ark. at 683, 217 S.W.2d at 615. Likewise, the election contest in this case must be governed by our holding in *Casey v. Burdine* because the statutory time limit for filing an election contest is jurisdictional. We also note that the case law cited by Ms. Elmore, *Walton v. Rucker,* 193 Ark. 40, 97 S.W.2d 442 (1936), does not address the applicability of the savings statute to election-contest proceedings, and is therefore inapposite.[1]

We have also refused to permit nonsuits in analogous special proceedings where the legislature has expressly provided for expedited proceedings. *See In re Adoption of Martindale,* 327 Ark. 685, 940 S.W.2d 491 (1997)(holding that a petition to set aside an adoption decree could not be dis-

1. Although not cited by the parties, our decisions in *Spires v. Election Comm'n Union County,* 302 Ark. 407, 790 S.W.2d 167 (1990)(*Spires I*) and *Spires v. Compton,* 310 Ark. 431, 837 S.W.2d 459 (1992)(*Spires II*) are also inapposite for the same reason.

missed without prejudice); and *Screeton v. Crumpler,* 273 Ark. 167, 617 S.W.2d 847 (1981)(holding that a will contestant could not take a nonsuit). In *Screeton v. Crumpler,* we stated:

> The appellant's brief implies that the dismissal should have been without prejudice, but we do not think that procedure . . . was available. A proceeding to probate a will is a special proceeding, not an "action" as that term is ordinarily used. It does not constitute a civil action within [the Arkansas Rules of Civil Procedure], Rules 2 and 3. A will contestant cannot take a nonsuit under Rule 41, because such a contest is not an independent proceeding in itself. It would seriously disrupt the administration and distribution of estates if a will contest could be dismissed, voluntarily or without prejudice, and refiled at some indefinite later date. Hence the dismissal in the probate court was necessarily with prejudice.

273 Ark. at 168, 617 S.W.2d at 848 (citations omitted). While these cases involve probate proceedings, the principles enunciated therein apply equally to election-contest proceedings. If an election contest could be dismissed voluntarily or without prejudice, it would seriously disrupt the administration of government and would effectively subvert the time limitations established by the legislature. We therefore hold that Ms. Elmore's complaint should have been dismissed with prejudice.

Affirmed as modified.

THORNTON, J., not participating.

340 Ark. 351

BNL EQUITY CORPORATION (Formerly Known as United Arkansas Corporation), BNL Financial Corporation (Formerly Known as United Iowa Corporation), Wayne E. Ahart, Kenneth Tobey, and Barry N. Shamas

v.

Myra Jo PEARSON, Paul Pearson, and James Stilwell.

No. 99-78.

Supreme Court of Arkansas.

Feb. 10, 2000.

Stock buyers brought action against sellers for securities fraud in two stock prospectuses and in scripted sales presentation. The Circuit Court, Pulaski County, John Ward, J., granted class certification. Sellers appealed. The Supreme Court, Brown, J., held that: (1) class action was appropriate; (2) Supreme Court would not look to the merits of claims or defenses; and (3) laches defense did not require dismissal of action at law or a transfer of the entire case to the chancery court.

Affirmed.

Thornton, J., dissented and filed opinion.

1. Parties ⚷35.37

Supreme Court will not look to the merits of the class claims or the defenses in determining the procedural issue of whether the factors are satisfied for a class action. Rules Civ.Proc., Rule 23.

2. Parties ⚷35.85

Stock buyers' allegations of misrepresentations in two offering prospectuses and the scripted sales presentation stated a common wrong affecting every class member and satisfied typicality requirement for class action in securities fraud suit, despite claim of substantial questions relating to unique defenses applicable to

Westlaw.

AMJUR ELECTIONS § 391
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Elections

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XII. Election Contests
B. Practice and Procedure
1. In General

Topic Summary; Topic Contents; Parallel References; List of Topics;

§ 391. GENERALLY

Research References

West's Key Number Digest, Elections ⚷269

Because the right to contest an election exists only under constitutional and statutory provisions, [FN1] the procedure prescribed by statute or by the legislature must be followed; [FN2] some courts have said that the procedure prescribed by statute must be strictly followed [FN3] and strictly construed. [FN4]

The procedures prescribed for election contests are exclusive [FN5] and the rules of civil procedure may not apply [FN6] as election contests are special proceedings. [FN7] By specifically making the rules of civil procedure applicable as to one area of contested elections, the legislature may mean not to do so in all other areas. [FN8]

[FN1]. § 382.

[FN2]. Barrett v. Monmouth County Bd. of Elections, 307 N.J. Super. 403, 704 A.2d 1053 (Law Div. 1997), decision aff'd, 307 N.J. Super. 191, 704 A.2d 945 (App. Div. 1997); Wilson v. Denver, 1998 -NMSC- 016, 125 N.M. 308, 961 P.2d 153 (1998); Broadhurst v. City of Myrtle Beach Election Com'n, 342 S.C. 373, 537 S.E.2d 543 (2000).

Strict rules embodied in the elections code govern a court's review of a properly contested election. Friends of Sierra Madre v. City of Sierra Madre, 25 Cal. 4th 165, 105 Cal. Rptr. 2d 214, 19 P.3d 567 (2001), as modified, (May 2, 2001).

[FN3]. Broadhurst v. City of Myrtle Beach Election Com'n, 342 S.C. 373, 537 S.E.2d 543 (2000).

[FN4]. In re Election Contest of Democratic Primary Held May 4, 1999 for Clerk, Youngstown Mun. Court, 88 Ohio St. 3d 258, 2000 -Ohio- 325, 725 N.E.2d 271 (2000).

[FN5]. In re Election Contest of Democratic Primary Held May 4, 1999 for Clerk, Youngstown Mun. Court, 88 Ohio St. 3d 258, 2000 -Ohio- 325, 725 N.E.2d 271 (2000).

[FN6]. McCastlain v. Elmore, 340 Ark. 365, 10 S.W.3d 835 (2000).

[FN7]. McCastlain v. Elmore, 340 Ark. 365, 10 S.W.3d 835 (2000).

[FN8]. Bauman v. Maple Valley Community School Dist., 649 N.W.2d 9 (Iowa 2002).

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