IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS, individually, and
L.M., individually,

Defendant,
_____/

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF BRADLEY EDWARDS' MOTION TO DETERMINE ENTITLEMENT TO ADVERSE INFERENCE AND PRECLUDING EPSTEIN FROM OFFERING EVIDENCE AT TRIAL

The question of withdrawing privilege objections arises most often in the context of the Fifth Amendment privilege against self-incrimination. The applicable law has been summarized in the Criminal Practice Manual: "Generally, a litigant may not assert the privilege and then seek to withdraw it in order to gain a tactical advantage." The Fifth Amendment - Withdrawal, 1 Crim. Prac. Manual § 16:12 (2008) (collecting cases).

The best known and most cited case on point is United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y., 55 F.3d 78 (2d Cir. 1995). The government therein followed a drug conviction with a civil forfeiture action against property owned by the defendant. The defendant (Tapia-Ortiz) asserted his Fifth Amendment privilege in refusing to answer interrogatories about drug dealing activities. Six months later, the government moved for summary judgment, asserting that the property was used for drug deals

and pointing out the defendant had refused to provide any information on that topic. The defendant responded that he would like to withdraw his privilege objections and revise his interrogatory answers. See 55 F.3d at 81.

The district court refused the defendant's request to withdraw his privilege objections, ruled that the defendant could not submit any materials in opposition to the motion for summary judgment that he had previously claimed to be privileged, and entered summary judgment for the government. Id. On appeal, the defendant conceded that, absent his withdrawal of privilege of submission of an affidavit, he had no evidence to defeat the summary judgment motion. "Consequently, the only issue we face on this appeal is whether the District Court erred when it prevented Tapia-Ortiz from opposing the Government's motion for summary judgment with affidavits involving matters previously claimed to be within his Fifth Amendment privilege." Id. at 82.

The Second Circuit Court of Appeals began by discussing a litigant's right to invoke privilege, the "substantial problems" that privilege claims can pose for the adverse party's search for truth, and a trial court's need to strike a balance that accommodates both parties' interests. Id. at 82-84. The court then directly addressed the issue of withdrawal:

> In some instances, however, a litigant in a civil proceeding who has invoked the Fifth Amendment may not seek any accommodation from the district court, and may instead simply ask to withdraw the privilege and testify. In other cases, a litigant may ask to give up the privilege rather than accept the accommodation that the court has offered. The district court should, in general, take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur. The court should be especially inclined to permit withdrawal of the privilege if there are no grounds

> for believing that opposing parties suffered undue prejudice from a litigant's later-regretted decision to invoke the Fifth Amendment.
>
> This does not mean that withdrawal of the claim of privilege should be permitted carelessly. Courts need to pay particular attention to how and when the privilege was originally invoked. Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties. If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions. [S]ee Wehling [v. Columbia Broadcasting System], 608 F.2d [1084,] 1089 [(5th Cir. 1979)] (stressing that courts must be "free to fashion whatever remedy is required to prevent unfairness"). **In such circumstances, particularly if the litigant's request to waive comes only at the "eleventh hour" and appears to be part of a manipulative, "cat-and-mouse approach" to the litigation, a trial court may be fully entitled, for example, to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege.**
>
> As courts and commentators have noted, opposing parties will frequently suffer prejudice (at the very least from increased costs and delays) when a litigant relies on the Fifth Amendment during discovery and then decides to waive the privilege much later in the proceeding.

4003-4005 5th Ave., 55 F.3d at 84-86 (other citations omitted) (emphasis added).

Applying these principles, the Second Circuit held that the district court did not abuse its discretion in refusing the defendant's attempt to belatedly waive the privilege. The defendant had persisted in his privilege objections for six months, changing his position only after the government had moved for summary judgment. "On these facts, the District Court was entitled to conclude that Tapia-Ortiz ought not to be allowed to block the Government's action through such means, and especially ought not, without sanctions, to be allowed to use the Fifth Amendment to further his obstructionist purposes." Id. at 86.

Less than two weeks after 4003-4005 5th Avenue was decided, the Southern District of New York entered a similar order in SEC v. Grossman, 887 F. Supp. 649 (S.D.N.Y. 1995), preventing the defendants (the Hirschbergs) from offering exculpatory evidence in opposition to a summary judgment motion, which evidence they had previously refused to disclose during discovery. "The Hirschbergs decided not to provide discovery to the Commission, choosing to let stand their prior refusal to provide information based on their Fifth Amendment privilege against self-incrimination. Having done so, the Hirschbergs cannot now complain that they are precluded from offering evidence on the very issues for which they have declined to provide discovery for several years." 887 F. Supp. at 660. The court noted that, during those several years, the burden lay with the defendants to come forward if they wished to change their position on privilege. Id.; see also SEC v. Zimmerman, 854 F. Supp. 896, 899 (N.D. Ga. 1993) ("By waiting, the defendant has made his decision.").

The trial court's decision in Grossman was affirmed on appeal under the name SEC v. Hirshberg, 173 F.3d 846 (Table), 1999 WL 163992 (2d Cir. 1999). The Second Circuit held that the Hirschbergs had engaged in "precisely the type of 'eleventh hour' and 'manipulative, cat-and-mouse approach' to the use of privilege that we warned in 4003-4005 5th Ave. would justify a district court's decision to preclude testimony with respect to matters shielded from discovery through the assertion of the privilege." 1999 WL 163992, *2. The court turned to the question of prejudice, focusing on the tactical advantage that would be gained by the defense:

> Moreover, on the circumstances of this case, we believe that the SEC would have suffered prejudice had the District Court considered the defendants' submissions. In particular, because George Hirshberg had passed away in January 1992, the

> SEC would not be able to depose him or to use his testimony in any deposition of Alan Hirshberg. Alan Hirshberg, having waited four years to respond to the SEC's motion, could simply tailor his affidavit to create an issue of fact requiring a trial. And, the fact that the SEC had taken the Hirshbergs' testimony prior to the institution of this lawsuit would not lessen this prejudice, since the investigative testimony was plainly preliminary.

Id. at *3.

In United States v. Private Sanitation Industry Assoc. of Nassau/Suffolk, Inc., 914 F. Supp. 895 (E.D.N.Y. 1996), the court cited 4003-4005 5th Avenue when rejecting a defendant's effort to withdraw his privilege objection and submit testimony in opposition to a motion for summary judgment. "Mr. Ferrante's attempt to testify comes after more than two years of repeatedly invoking his Fifth Amendment rights in response to lengthy deposition questions posed to him by the government. His repeated assertion of the Fifth Amendment has greatly extended this litigation and has undoubtedly given him a 'strategic advantage' over his opposing party." 914 F. Supp. at 900.

In SEC v. Softpoint, Inc., 958 F. Supp. 846, 856-57 (S.D.N.Y. 1997), the SEC simultaneously filed a motion for summary judgment and a motion to preclude the defendant from introducing any evidence that he previously withheld on a claim of privilege made six months earlier. The court granted the preclusion order, holding that a defendant may not invoke privilege to impede discovery efforts and then seek to wave the privilege when faced with the consequences of his decision. Id. at 857. "By asserting and waiving the privilege when convenient, [defendant] has engaged in the type of conduct that the Second Circuit described as 'a manipulative cat and mouse approach to the litigation' – the type of conduct that warrants

barring a defendant's testimony in opposition to summary judgment." Id. In finding actual prejudice to the SEC, the court noted that the defendant's tactics would "delay[] the resolution of this litigation," "put[] the SEC to enormous and unnecessary expense," and "provide him an unfair strategic advantage in this litigation, allowing him to effectively ambush the SEC with evidence, defenses, and denials that he concealed until after the government moved for summary judgment." Id.[1] The Second Circuit concluded, "for substantially the same reasons set forth in the district court's thoughtful opinion and order, that [defendant's] affidavit was properly precluded and that in the absence of this affidavit, summary judgment was appropriately entered for the SEC." 159 F.3d 1348 (Table), 1998 WL 537522, *1 (2d Cir. 1998) (citation omitted).

SEC v. Merrill Scott & Assocs., Ltd., 505 F. Supp. 2d 1193 (D. Utah 2007), provides one of the most recent, and one of the most thoughtful, analyses of the prejudice inherent in a long-delayed waiver of privilege. The defendant therein (Mr. Brody) invoked privilege in refusing for three years to answer deposition questions, but then sought to waive the privilege and offer an affidavit in opposition to a motion for summary judgment. The court held that, although the defendant properly invoked his Fifth Amendment privilege three years earlier, "the timing and context within which Mr. Brody waived his privilege is troubling. Mr. Brody did not submit his sworn 'testimony' until approximately one year after the period for fact discovery had concluded. More importantly, he waived the privilege after the SEC had moved for summary

[1] The defendant relied upon SEC v. Graystone Nash, Inc., 25 F.3d 187 (3d Cir. 1994), in which the appellate court reversed a preclusion order that flowed from the assertion of privilege during deposition. The district court in Softpoint distinguished Graystone Nash on two key grounds. First, the defendants in Graystone Nash appeared *pro se*, and were not presumed to know the consequences of asserting privilege. Second, the Graystone Nash court found an inadequate showing of prejudice to the SEC, unlike the clear showing of prejudice in Softpoint. See 958 F. Supp. at 856; see also Christopher V. Blum, Self-Incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Graystone Nash, Inc., 61 Brook. L. Rev. 275 (Spring 1995).

judgment, and, consequently, had an **opportunity to tailor his response** to the motion." 505 F. Supp. 2d at 1209 (emphasis added).

The court specifically noted that the defendant's offer to submit to another deposition "is not sufficient to remedy the problems created by his 'eleventh hour' waiver," id. at 1210 n. 13, as the SEC would face having to completely reopen its case in light of the new deposition testimony:

> This case has been pending for over five years. SEC has taken over seventy depositions throughout the United States and Canada.... The SEC no doubt incurred significant costs and expenses in connection with that discovery. Indeed, arguably the SEC took more depositions as a result of Mr. Brody's refusal to testify in 2003. But SEC took many of the depositions without the benefit of Mr. Brody's version of events. While the SEC developed its own case, it did not have the opportunity to rebut Mr. Brody's newly presented case. It certainly would be prejudicial to the SEC to allow Mr. Brody to testify at trial without first being deposed. And it would be prejudicial to require SEC to rely on discovery that was developed without the benefit of knowing Mr. Brody's assertions.... To allow SEC the opportunity to rebut Mr. Brody's case through additional discovery would not only open a Pandora's box but would result in substantial additional costs and delay.

505 F. Supp. 2d at 1211.

Because Mr. Brody waited over three years from the date of his deposition to waive the privilege and offer evidence in his defense, never previously indicated that he intended to waive the privilege, and allowed the SEC to build its case based upon his refusal to testify, the court struck his response in order to avoid prejudice to the SEC. 505 F. Supp. 2d at 1211-12. The court wrote that "[o]ther courts have done the same in similar circumstances," then described the holdings in 4003-4005 5th Avenue and six other published decisions. Id. at 1210.

In the most recent published decision on preclusion, SEC v. Brown, 579 F. Supp. 2d 1228 (D. Minn. 2008), the court addressed a slightly different factual setting. In Brown, the defendant had provided broad interrogatory responses, but thereafter invoked his Fifth Amendment privilege, thus preventing the SEC from exploring his answers in deposition. 579 F. Supp. 2d at 1234-35. The court held that, "in order to prevent unfairness to the SEC," the defendant could not rely on his interrogatory responses in opposing the SEC's motion for summary judgment. The court cited a number of cases analyzing the consequences of privilege assertions in civil cases, including SEC v. Benson, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987) (defendant prevented from offering evidence in support of positions on which he had invoked the Fifth Amendment), and In re Edmond, 934 F.2d 1304, 1308 (4th Cir. 1991) (approving the striking of a self-serving affidavit where a party had invoked privilege to prevent a deposition).[2]

Florida Law: the Binger Test

There is no Florida authority directly addressing the consequences of raising, and then belatedly attempting to waive, a claim of privilege. But, in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), and its progeny, Florida courts have similarly focused on prejudice and fairness when considering the appropriate sanction for violation of a pretrial order.

In Binger, the plaintiff attempted to call an expert witness to testify at trial who had not been identified on a court-ordered witness list. The trial court permitted the expert witness to

[2] The trial court in Edmond referred to the defendant's maneuvering as trying to "have peanut butter on both sides of his bread." 934 So. 2d at 1307. "Although such a statement is somewhat simplistic, it properly and succinctly explains the rationale for striking the affidavit." Cahaly v. Benistar Prop. Exch. Trust Co., Inc., 2001 WL 35836851, p. 10 n.20 (Mass. Super. Ct. 2001).

testify, but the Fourth District Court of Appeal reversed. The Florida Supreme Court, approving the district court decision, wrote:

> [A] trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

401 So. 2d at 1313-14 (footnotes omitted).

In Metropolitan Dade County v. Sperling, 599 So. 2d 209, 210-11 (Fla. 3d DCA 1992), the appellate court cited Binger in affirming the exclusion of an expert witness who was disclosed before trial, but 25 days after the court-ordered deadline for listing witnesses. The court specifically rejected the argument that any prejudice could be cured by deposing the expert before trial. "Although a deposition might have been possible, [defendant's] counsel would not have had adequate time to prepare. See Gustafson v. Jensen, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) ('While a hastily scheduled deposing of the husband's surprise expert may have been possible, the time frame for assimilation and analyzation of refuting testimony and documents was too highly compressed to allow the wife a fair presentation.')."

In Florida Marine Enterprises v. Bailey, 632 So. 2d 649, 651-52 (Fla. 4th DCA 1994), the Fourth District Court of Appeal applied Binger in affirming the trial court's decision to strike an expert witness who was untimely listed. "[T]he trial judge's chief concern was to afford the parties an opportunity for the fair, orderly and efficient preparation and trial of the lawsuit." 632 So. 2d at 652. The appellants argued that a continuance of the trial obviated any prejudice, but the Fourth District made clear that a trial delay is itself prejudicial:

> Where, as here, a party without good cause improperly discloses witnesses, and by virtue of the improper disclosure gains an unfair advantage over the opposing party who is in compliance with the pretrial order, Binger gives the trial court discretion to strike those witnesses to prevent the objecting party from being forced to choose between frantic last-minute discovery and an unjustified delay of her trial. This is not a fair manner in which to "cure the prejudice" caused by the defendants' failure to timely prepare their case, and we hold that Binger does not require such a result here.
>
> In the instant case, the trial court properly found that unfair prejudice to Plaintiff existed because she would be unable to counter testimony offered so late in the game. See Grau v. Branham, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party.").
>
> Binger does not mean that trial courts are obligated to automatically grant last minute continuances to parties who choose not to timely prepare their cases for trial. The trial court's discretion under Binger includes the power to appropriately enforce pretrial orders, as the court below did in this case.

632 So. 2d at 652.

In Menard v. University Radiation Oncology Associates, LLP, 976 So. 2d 69, 72-74 (Fla. 4th DCA 2008), the Fourth District Court of Appeal reversed a trial court decision to allow a party to change the position that it had taken throughout discovery regarding basic factual issues. In so doing, the court revisited, and reaffirmed, the notions of fundamental fairness upon which

the Binger line of cases is based. The court reviewed in detail three of its post-Binger decisions: Department of Health and Rehabilitative Servs. v. J.B., 675 So. 2d 241 (Fla. 4th DCA 1996); Grau v. Branham, 626 So. 2d 1059 (Fla. 4th DCA 1993); and Office Depot, Inc. v. Miller, 584 So.2d 587 (Fla. 4th DCA 1991). "J.B., Grau and Office Depot all stand for the proposition that it is an abuse of discretion to allow a party at trial to change, in this manner, the substance of testimony given in pretrial discovery." 976 So. 2d at 71. In discussing Office Depot, the Fourth District quoted Judge Anstead's closing observation that the trial court decision to exclude testimony "sends out a strong message to those who do not adhere to the code of fair play advanced by Binger," then added: "Our warning, issued more than 15 years ago, has never been withdrawn." Id. at 73. The court also noted that "our holding is in the nature of an estoppel, which in fact is the real principle underlying the holdings in J.B., Grau and Office Depot." 976 So. 2d at 74 n.3.

Conclusion

Epstein made a conscious decision to adopt, and adhere to, a hard-line position on Fifth Amendment privilege for nearly four years.

In the words of the Second Circuit, this case has reached its "eleventh hour," and Epstein must not be permitted to play "cat and mouse" with the privilege. 4003-4005 5th Ave., 55 F.3d at 86. This Court has every right to preclude such a ploy by rejecting any attempt by Epstein to offer testimony that he has consistently withheld throughout the pretrial discovery phase of these proceedings.

WHEREFORE, Bradley J. Edwards asks that this Court grant his motion to preclude Epstein from offering testimony or other evidence previously withheld on the basis of privilege, and grant such further relief as may be just.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 16th day of September, 2013.

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