

United States District Court
Northern District of California
Before The Honorable Jeffrey S. White

Robert Jacobsen,)
)
Plaintiff,)
)
vs.)
)
Matthew Katzer, et al.,)
)
Defendant.)
_____)

No. C06-1905 JSW

San Francisco, California
Friday, May 1, 2009

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Law Offices of Victoria K. Hall
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By: Victoria K. Hall, Esquire

For Defendant: Field & Jerger, LLP
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By: Robert Scott Jerger, Esquire

**Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California**

(Computerized Transcription By Eclipse)

1 Friday, May 1, 2009

1:30 p.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling case No. C-06-1905, Robert
4 Jacobsen versus Matthew Katzer.

5 Counsel, please step forward and state your
6 appearances.

7 **MS. HALL:** Victoria Hall for Robert Jacobsen.

8 **MR. JERGER:** Scott Jerger representing Matthew
9 Katzer and Kamind Associates.

10 **THE CLERK:** You need to change sides.

11 This is a dyslexic courtroom; it's flipped around,
12 so the jury box is to the right of the Court.

13 **MS. HALL:** Okay.

14 **(Counsel switch sides.)**

15 **THE COURT:** All right, counsel, welcome. I have
16 read the status report, conference report. And, I will say, in
17 the future, it would be very helpful if you filed a joint
18 report because it avoids some of the double reading that has to
19 be done. And, no matter how contentious a case is, I think, as
20 officers of the Court, you should be able to meet and confer
21 and file one joint document.

22 I realize that that is not, per se, a case
23 management conference, and literally, the Court's rules don't
24 require a joint report, but when it says "counsel shall file,"
25 I interpret that to mean both counsels. So, in the future, if

1 there is something like a status conference, then I would
2 appreciate getting a joint filing. And neither side needs to
3 comment on that.

4 I have a question for plaintiff's counsel, Ms. Hall,
5 what is a -- you've asked for a -- a Rule 26 hearing or Rule 16
6 hearing, what is that? How is that different than a case
7 management conference?

8 **MS. HALL:** I'm sorry, I meant by that that setting
9 some deadlines. And I had this in my original my -- my
10 original administrative motion setting the deadlines for a Rule
11 26 meet and confer with counsel. It was not a hearing in and
12 of itself -- and then, a week later -- this is just straight
13 following Rule 26, a week later filing the joint report with a
14 discovery plan, and then, two weeks after that, the full-blown
15 case management conference.

16 **THE COURT:** All right, well, I don't think -- I
17 understand now what you are saying, I don't think it's
18 necessary. I have done enough of these, and I am probably as
19 familiar with this case as I am with any of my cases because
20 it's been around so long and it's been heavily litigated.

21 So, what I intend to do is to set some dates based
22 upon my knowledge of the case, what the parties have presented
23 to me. And since the parties were unable to agree at this
24 point, it's just better that I do it.

25 So, if you get out your pencil, and I'll tell you --

1 and it will be in the minute order, anyway.

2 So discovery begins May 4th. And all these dates,
3 unless I specify -- until I specify otherwise, are in '09.

4 The close of nonexpert discovery, that is to say,
5 percipient discovery is October 5th. The last day for expert
6 disclosure will be October 20th. The last day of expert -- of
7 all expert discovery will be 11 -- November 4th. The last day
8 to hear dispositive motions will be December 4th, at 9:00 a.m.

9 The pretrial conference will be March 1st of 2010 at
10 2:00 p.m. That is a Monday. And, trial will be March 22nd,
11 2010, at 8:00 a.m.

12 **MR. JERGER:** Sorry? March 22nd?

13 **THE COURT:** Yes.

14 **MR. JERGER:** Thanks.

15 **THE COURT:** And again, as you heard me say in the
16 other -- preceding case, if there is going to be cross-motions
17 for summary judgment, cross-dispositive motions, I want counsel
18 to meet and confer. And, if you are going to discuss what
19 issues are going to be raised and if they are the same issues,
20 there ought to be four briefs rather than six. And I will read
21 every pearl of wisdom you have to submit to the Court. You
22 don't have to worry about the number of briefs, but I prefer
23 four briefs rather than six.

24 And, as I mentioned in the other case, please get a
25 copy of them and follow to the letter the Court's pre-trial

1 preparation order because it has its own dates and is going to
2 require a lot of meeting and conferring between counsel to get
3 everything filed in proper form and on proper time. That means
4 exchanging motions in limine, in advance, and the responses,
5 and getting them together in a package and getting -- and
6 meeting and conferring on exhibits and deposition excerpts and
7 getting everything -- everything going so it's ready -- the
8 case is ready to try, if it does go to trial.

9 Let me raise one other issue, which is the issue --
10 I know that there have been attempts to mediate or settle this
11 case, where does that stand and what additional ADR -- I
12 understand this issue about, you know, the defendant wanting
13 only narrow mediation for appellate mediation and there being
14 disputes about that, but what -- what's the status of
15 settlement discussion? I don't need to know the detail of
16 who's offering what to whom, but what can the Court do?

17 And I will start with Ms. Hall.

18 **MS. HALL:** Other than encourage the defendants to
19 participate in the Federal Circuit mediation program to discuss
20 the entire dispute, I can't think of anything else.

21 **THE COURT:** All right.

22 What do you have to say?

23 **MR. JERGER:** Well, we went to a second judicial
24 settlement conference with Judge Laporte at the end of
25 February, and, at that point, it became clear that we are on

1 different planets in terms of --

2 **THE COURT:** But, in the same solar system?

3 **MR. JERGER:** I don't think so.

4 **THE COURT:** Okay.

5 **MS. HALL:** I don't -- oh.

6 **THE COURT:** I'm not going to force anybody back to a
7 settlement conference. I do think that there is no harm in,
8 you know, in going to a mediation with the Federal Circuit
9 without any preconditions about, you know, it's -- kind of
10 sounds like, you know, some of our international figures about
11 having preconditions to even going to the negotiating table.

12 But they have some pretty good mediators there, and,
13 if nothing else, it would be educational for the clients, not
14 to mention the lawyers, to get an independent person's view,
15 another one of the merits of the case because nobody is bound
16 by whatever goes on.

17 I would urge defense counsel to reconsider their
18 position on that because, if nothing else, it gives your client
19 a forum, you know, to tell -- your client a forum to tell their
20 story and the plaintiff a forum to tell his story and getting
21 an independent review of that.

22 Because I will tell you that in this Court it's been
23 my practice, almost invariably no later than after the pretrial
24 conference, if the case gets that far, to send you to some sort
25 of a dispute resolution, be it another magistrate judge, be it

1 another District Court judge, or a private mediator, because at
2 that time I find that the parties are at their highest state of
3 readiness in terms of the dispositive motions having been
4 litigated, and the parties getting ready for trial and knowing
5 -- and having heard the Court's rulings in limine and on jury
6 instructions, and the like. But I would like to see a case
7 that has been litigated this long and has occupied the time and
8 resources of the parties, if it's going to settle, settle
9 sooner rather than later.

10 Now, it's possible that the next sort of gateway
11 might be, should mediation before the Federal Circuit not be
12 successful, be the decision by the Federal Circuit. That may
13 very well -- I may very well bring you back at that point and
14 say, okay, whatever the decision is and whatever words are used
15 by the Federal Circuit, you know, does anybody have -- is
16 anybody more willing to consider a settlement?

17 I would think so, because they tend to be a little
18 bit more into putting some things in there that, you know, help
19 the parties understand the dispute and help the people reading
20 the decision understand the dispute.

21 So, we'll take that as it comes. I'm not going to
22 order you there at this point, but I do, particularly for the
23 defendants, encourage you not to have preconditions and just --
24 when I was practicing law, I always found these appellate
25 mediations to be very helpful, if for no other reason, it's yet

1 another opportunity, privately, to get myself and my client and
2 my opponent, to get a reality check on, you know, how good or
3 how bad a position am I in this case. I'm not going to order
4 you to do it, obviously, but, shall we say, I'm exhorting you
5 to do it, just because I think it's value.

6 So, other than set dates, is there anything else
7 that the parties wish to bring before the Court at this time?

8 **MS. HALL:** Just for clarification, this is, in
9 effect, acting as -- if we had not had all these motions to
10 dismiss, this is, in effect, acting as the Rule 16 conference?

11 **THE COURT:** Yes, it is.

12 I take that the Rule 16 conference as -- I mean, the
13 way it has worked in my almost seven years on the bench, and
14 probably with most judges, is Rule 16 requires the parties to
15 meet and confer and come up with dates, a discovery plan, and,
16 you know, just figure out how they are going to work the case.

17 In the absence of that, either I will send them back
18 or, if I know the case well enough, which I do in this case, I
19 will set dates that I think make sense and send the parties on
20 to do, you know, great things.

21 Remind me -- I should know this because I know all
22 about this case -- have I referred discovery out yet in this
23 case?

24 **MS. HALL:** Yes, you have.

25 **THE COURT:** To which magistrate judge?

1 **MS. HALL:** Chief Magistrate Larson.

2 **THE COURT:** Okay. So you've got a magistrate judge.

3 And if there is issues -- typically, I used to require a
4 written discovery plan in detail, the Court as a whole has done
5 away with that as a requirement, so I've deferred to the entire
6 court. But, if you want -- what I think you want to have,
7 Ms. Hall, is, if you cannot agree on where you are now as a
8 discovery plan, really, and the parties can't get together, I
9 would suggest you then schedule a hearing or a meeting with
10 Chief Judge -- Magistrate Judge Larson to help you work out a
11 discovery plan. And he's very good at doing that.

12 I would hope you all would make an attempt to do
13 that, you are required to do that. But, I'm not going to hold
14 anything that I'm going to specially require because the result
15 of it could be a conference. And although hope springs
16 eternal, you won't agree, and we're back to the same place.

17 And, I think these dates are -- I've taken into
18 account everything you have said or implied in your papers, and
19 I think this is a rational way to go. And now you just need to
20 have it and see what the facts are and go for it.

21 **MS. HALL:** Three points. We do have some concerns
22 about foreign discovery. Mr. Bouwens, we are not sure how that
23 is going to work out, but that could cause some delays. And he
24 is an important witness for us, he is the one who did the work
25 for Mr. Katzer.

1 **THE COURT:** Right.

2 **MS. HALL:** We'll be looking at that and seeing if we
3 can depose him or how we will be able to get discovery from
4 Mr. Katzer -- I'm sorry Mr. Bouwens. And Scott and I will talk
5 a little bit about that. But that is something we will work
6 out. We'll try to make it into the schedule. I wanted to let
7 the Court know about that; we may come back to make alterations
8 so that we can ensure that we get discovery on that was one
9 point.

10 There are about 120 developers at JMRI, and while we
11 are relying upon the presumption from the registration for
12 ownership and copyrightability, if defendants put that in
13 issue, we could face what would be voluminous discovery as well
14 as a number of depositions.

15 What I would like to do is cap the depositions:
16 instead of at the standard ten, to make it thirty. I think
17 that should be able to make it -- address any issues that come
18 up. And we'll revisit it if it turns out to require more. And
19 interrogatories up from 25 to 50 interrogatories.

20 **THE COURT:** What is the third point?

21 You had three fingers there.

22 **MS. HALL:** Foreign discovery, depositions,
23 interrogatories.

24 **THE COURT:** All right.

25 My response to that reaction is I'm going to leave

1 that in the hands of your discovery judge.

2 **MS. HALL:** Okay.

3 **THE COURT:** Rather than my making arbitrary
4 assumptions because what is required here or permissible, I
5 would rather have him do that because he needs to take into
6 account, you know, every good lawyer wants to take every
7 deposition and depose every witness who might have some
8 knowledge about the case, but I think this has to be an
9 iterative process. And so --

10 I hear what you are saying, there may be issues that
11 stretch the schedule, but I'm not going to do that until an
12 attempt has been made by all, with the supervision of Judge
13 Larson, to try to fit within the schedule. But I hear what you
14 are saying. There is nothing for me to do now, and I won't, I
15 won't second-guess him.

16 If you come to an impasse with him, which I doubt
17 you will, then come see me, and I'll consider changing it, all
18 right?

19 **MS. HALL:** Okay.

20 **THE COURT:** Do you have anything to say?

21 **MR. JERGER:** No, Your Honor.

22 **THE COURT:** Yes, Ms. Ottolini?

23 **THE CLERK:** Is it a court or jury trial?

24 **THE COURT:** Good point.

25 **MS. HALL:** Jury.

1 **THE COURT:** Important. There are some equitable
2 issues -- there are some equitable defenses.

3 **MS. HALL:** Thank you.

4 **THE COURT:** I would imagine.

5 **MS. HALL:** Yes, there are some.

6 **THE COURT:** Because there will be issues about
7 permanent injunction and --

8 **MS. HALL:** Yes.

9 **THE COURT:** -- willfulness.

10 **MS. HALL:** Estoppel as well.

11 **THE COURT:** Right.

12 Do you agree it will be a mixed jury and bench
13 trial?

14 **MR. JERGER:** I agree.

15 **THE COURT:** The next time we have a -- what I will
16 probably do is I'm not going to set a date now. My thought is,
17 just in terms of the events in the case, after the -- the
18 Federal Circuit seems to rule more quickly than the Ninth
19 Circuit, so once they have ruled, I'll probably have you folks
20 in for another status conference, maybe a phone conference to
21 see where you are, after you have had a chance to absorb it
22 with your clients.

23 But, the point I was going to try to make is it's
24 really important in the pre-trial that you all figure out what
25 the contours of the trial is going to look like because there

1 may be some evidence that the jury doesn't get to hear, for
2 example, on willfulness -- and we need to figure out; what is
3 that; how much time do we have to allow when the jury is not
4 here at the end of the day, or is in overlapping evidence that
5 the jury hears which the Court also hears; what are the issues
6 to be tried to the Court versus the jury?

7 I have found that lawyers don't really give enough
8 attention to what is the trial actually going to look like in
9 terms of these mixed triers of fact. And, I want counsel to be
10 thinking about those issues because they are important to the
11 parties.

12 **MS. HALL:** To make the case more simple, perhaps it
13 would be best to bifurcate liability from damages.

14 **THE COURT:** It may well be. And that is something
15 which we will consider at the pretrial. I don't rule on that
16 in advance, but that is something to consider. Or even to
17 bifurcate some court issues and have the Court make its
18 findings after the jury has returned.

19 I recently had a case, a trademark case, where I had
20 the jury do an advisory verdict on issues where the Court had
21 to decide, and it was very helpful to all parties. And then
22 the Court simply drafted its order, its findings and
23 conclusions, after the jury verdict was returned. And it
24 worked out very well. Something to consider as we get down the
25 pike to see where the case is after dispositive motions.

1 So, anything further?

2 **MR. JERGER:** No, Your Honor.

3 **THE COURT:** Ms. Hall?

4 **MS. HALL:** No.

5 **THE COURT:** Okay, thank you very much. Have a nice
6 weekend.

7 (Proceedings adjourned at 1:52 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Friday, May 5, 2009