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Discovery of Documents and Property Before Issued Joined - Eastern States Corp. v. Eisler

Vincent R. Groh

Discovery Of Documents And Property Before Issued Joined

Eastern States Corp. v. Eisler[1]

Charles Eisler, the appellee stockholder, filed an amended bill of complaint in The Circuit Court of Baltimore City, alleging fraud and incompetency on the part of corporate officials, and seeking the appointment of a receiver to institute legal proceedings against said officials. Subsequently he filed a motion under Discovery Rule 4 of The General Rules of Practice and Procedure[2] for a court order giving him access to records and documents in the possession of the appellant corporation. A few days later, the appellant corporation filed a demurrer to the amended bill of complaint. Prior to ruling upon this demurrer, the Chancellor granted the motion and issued an order for discovery. Appellant took an immediate appeal from the order so entered,[3] contending, among other things, that the discovery order could not be issued until after issue had been joined in the proceeding.[4] Upon this contention, the Court of Appeals held:

> ". . . cases might conceivably arise where discovery might be ordered before issue joined and this court does not intend to hereby flatly rule that the remedy of discovery as provided for by Rule 4, *supra,* should never be granted until issue is joined, but the instant case is not one of these."[5]

The Court of Appeals found the instant case not a proper one for early discovery because discovery may only be had if there is a genuine proceeding before the court. It

[1] 181 Md. 526, 30 A. 2d 867 (1943).

[2] G.R.P.P., Pt. Two, II, Rule 4.

[3] Note, *Appealability of Denials of Motions to Implead and Related Discretionary Orders in Maryland,* 12 Md. L. Rev. 145, 151 (1951), discusses appealability of discovery orders and the reason for allowing the direct appeal from the court order in the instant case.

[4] A cause shall be deemed at issue upon the filing of the answer; Gen. Eq. Rule 21.

[5] *Supra,* n. 1, 534.

was, therefore, held reversible error to allow discovery in the instant case without first dismissing the demurrer, if proper, and thereby establishing the actual existence of a justiciable cause of action. The true basis for the denial of discovery was the failure of the procedure used in the case to satisfy the conditions of the Discovery Rule and not because of any actual or supposed rule prohibiting discovery before answer has been filed.

The controlling discovery rule provides in part:

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court may, at any time in any proceeding, (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which may constitute or contain evidence material to any matter involved in the proceeding and which are in his possession, custody, or control; . . ."[6]

This rule is patterned after Federal Rule 34, which in regard to time of discovery merely specified that discovery may be ordered by "the court in which an action is pending".[7] Neither the Federal Rule nor the Maryland Rule expressly states that discovery of documents and property may or may not be had before issue has been joined. To some commentaries on the Federal Rule, the above quoted phrase from that rule signifies the possibility of such early discovery,[8] and on the basis of this it would seem to follow that the words in the Maryland Rule that "the court may at any time in any proceeding" would even more strongly support such an interpretation. The different wording of the Maryland Rule would also tend to reduce the weight of the argument of the Federal cases which find an implied limitation upon the power of the courts to permit such early discovery before joinder of issue from the requirement that matter produced by use of the rule be material.[9]

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[6] *Supra*, n. 2.

[7] Federal Rules of Civil Procedure, Rule 34, 28 U. S. C. A. (1950), 281.

[8] 4 MOORE, FEDERAL PRACTICE (2d ed., 1950), 2438. See: Bough v. Lee, 29 F. Supp. 498 (S. D. N. Y., 1939); Kulich v. Murray, 28 F. Supp. 675 (S. D. N. Y., 1939); Price v. Levitt, 29 F. Supp. 164 (E. D. N. Y., 1939).

[9] The following cases were decided on the theory that discovery should not be permitted until answer is filed, arguing that until issue is joined, it is impossible to determine what matters are material: Piest v Tide Water Oil Co., 26 F. Supp. 295 (S. D. N. Y., 1938); Employers Mut. Liability Ins. Co. v. Blue Line T. Co., 2 F. R. D. 121 (W. D. Mo., 1941); Hartford Nat. Bank & Trust Co. v. E. F. Drew & Co., 13 F. R. D. 127 (D. Del., 1952).

The federal courts have been in accord with the Court of Appeals in refusing to interpret the discovery rules as making it impossible to have discovery in an appropriate case before joinder of issue[10] and have both permitted such discovery and denied it, according to the circumstances of the particular cases. In the instant case the Court of Appeals recognized the similarity between the Maryland and the federal rules relating to discovery and the resulting possibility of looking to the federal decisions for precedent.[11] The tendency in the federal courts has been to refuse or at least postpone discovery unless they have reasonable certainty that the information so obtained will have occasion to be used.[12] If determination of certain preliminary questions may dispose of the case before joinder of issue, discovery will usually be deferred until such questions have been settled. Therefore, if there is a demurrer to the pleading of the plaintiff, or a plea of limitations,[13] or the propriety of the plaintiff's cause of action is challenged in any other manner,[14] the court should rule thereon before doing anything else in the furtherance of the suit. Where the plaintiff seeks discovery, he must satisfy the court as to the existence of a possible cause of action and show sufficient grounds to entitle him to an available remedy,[15] and only after it has been ruled or conceded that he has met these requirements will the court be justified in allowing to him the privileges of discovery.[16] Such an interpretation is necessary in the interest of economy and for the faithful exercise of the power conferred by the discovery

[10] United States v. North Coast Transp. Co., 8 F. R. D. 62 (W. D. Wash., 1947); C. F. Simonin's Sons, Inc. v. American Can Co., 24 F. Supp. 765 (E. D. Pa., 1938); Courteau v. Interlake S.S. Co., 1 F. R. D. 525 (W. D. Mich., 1941); Fishman v. Marcouse, 32 F. Supp. 460 (E. D. Pa., 1940).

[11] *Supra*, n. 1, 530.

[12] 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Rules Ed., 1950) 519, Sec. 800: ". . . it is not the purpose of the rule (34) to encourage unnecessary and vexatious discovery. There is no good purpose to be served by extensive discovery as to matters which will not be contested." Parenthetical material added.

[13] Momand v. Paramount Pictures Distributing Co., 36 F. Supp. 568 (D. Mass., 1941).

[14] Pyle v. Pyle, 81 F. Supp. 207 (W. D. La., 1948).

[15] Before granting discovery the plaintiff must convince the court that there is reasonable ground to believe a cause of action exists which can be proven if the facilities are afforded him; Columbia Pictures Corporation v. Rogers, 81 F. Supp. 580 (S. D. W. Va., 1949); C. F. Simonin's Sons v. American Can Co., *supra*, n. 10; Fishman v. Marcouse, *supra*, n. 10. In Swarthmore Junior, Inc. v. Miss Breeley Junior Frocks, 52 F. Supp. 992 (S. D. N. Y., 1943), discovery was deferred until the judge could rule whether or not there was actually a question of design patent infringements for the jury.

[16] Daves v. Hawaiian Dredging Co., 114 F. Supp. 643 (Hawaii, 1953).

rule, which power exists only if there is an actual suit pending.[17]

The power to grant discovery being also limited by the rule to the production of matter that is material to the case at hand, tends to limit the instances in which discovery may be had before issue. Although the test of relevancy in a motion for discovery of documents and property is not as strict as that which governs admissibility of evidence upon trial,[18] the court nevertheless may defer discovery until pleadings have progressed to a point where the issues are more clearly defined. In this area the court has a greater degree of freedom, and thus, some will be fairly liberal in construing this condition so as to allow discovery before issues are really defined.[19]

In the final analysis it appears that discovery is not being denied because the rule is interpreted as prohibiting discovery before joinder of issue, but because certain conditions precedent to discovery have not been met so that the court has not the power to grant discovery. If an action is pending and the court has jurisdiction and all requirements of the discovery rule are met to the satisfaction of the court, it will have ample authority and discretion to allow discovery before answer has been filed.[20]

VINCENT R. GROH

[17] Egan v. Moran Towing & Transportation Co., 26 F. Supp. 621 (S. D. N. Y., 1939); United States v. American Locomotive Co., 6 F. R. D. 35 (N. D. Ind., 1946). In Evans v. Hudson Coal Co., 84 F. Supp. 740 (M. D. Pa., 1949), a motion for discovery was held improper where a court order had temporarily suspended the court proceedings.

[18] Federal Rules of Civil Procedure, Rule 34, 28 U. S. C. A. 296, n. 23.

[19] Woods v. Kornfeld, 9 F. R. D. 678 (M. D. Pa., 1950); Sutherland Paper Co. v. Grant Paper Box Co., 8 F. R. D. 416 (W. D. Pa., 1948); Piest v. Tide Water Oil Co., *supra*, n. 9; Employers Mut. Liability Ins. Co. v. Blue Line T. Co., *supra*, n. 9; Hartford Nat. Bank & Trust Co. v. E. F. Drew & Co., *supra*, n. 9; Hallman v. Gross, 190 Md. 563, 59 A. 2d 304 (1948).

[20] *Supra*, n. 10.