

In the United States Court of Federal Claims

No. 00-23C  
(Filed April 26, 2005)  
(Unpublished)

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KENNEDY HEIGHTS APARTMENTS  
LTD. I, and WILSHIRE-WASHINGTON  
HEIGHTS LIMITED PARTNERSHIP,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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**ORDER AND MEMORANDUM OPINION GRANTING  
DEFENDANT’S MOTION FOR LEAVE TO DESIGNATE  
EXPERT AND TO REOPEN DISCOVERY**

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WILLIAMS, Judge.

This matter comes before the Court on Defendant’s motion for leave to designate Richard Fries as an expert in security and to re-open discovery for the purposes of allowing both parties to designate and depose an expert in this field. Plaintiffs object to allowing this expert because his report was untimely filed. Specifically, although Defendant identified the expert on the last day of discovery, it did not file the expert report until one month after the discovery cutoff. Plaintiffs therefore assumed Defendant would not call a security expert and contend they would be prejudiced by having to rebut Mr. Fries’ testimony and secure their own expert at this late date.

Because Defendant put Plaintiffs on notice of its expert within the discovery period and the trial schedule will permit reopening discovery, the Court grants leave to both parties to designate security experts and conduct this expert discovery.

## **Background**<sup>1</sup>

In this action, Plaintiffs seek to recover surplus proceeds from the Department of Housing and Urban Development's (HUD) foreclosure sale of their low-income housing projects (Projects) pursuant to the Multifamily Mortgage Foreclosure Act (MMFA), 12 U.S.C. §§ 3701 et seq. In addition, they seek to recover rent subsidies on those Projects, which they allege HUD suspended in breach of their housing assistance payment contracts. On January 31, 2005, the Court denied Defendant's motion to dismiss or for summary judgment, concluding that this Court has jurisdiction over the action. Further, the Court found that genuine issues of material fact precluded entry of summary judgment on Plaintiffs' claims for unpaid rent subsidies and surplus foreclosure proceeds and on Defendant's counterclaim that Plaintiffs wrongfully retained project funds. Kennedy Heights Apts. Ltd. I v. United States, 63 Fed. Cl. 731 (2005).

## **Chronology of Discovery**

The original discovery cutoff was June 3, 2002. Subsequently, the Court granted two Motions to Extend Time to Complete Discovery, both filed by Defendant, with the last Order entered on August 1, 2002, extending the time for completing discovery until September 13, 2002.

In August 2002, Defendant first notified Plaintiffs of its intention to call Mr. Fries as an expert. Defendant represented:

During the latter part of discovery in this case, the United States informed plaintiffs' counsel during a deposition that the United States was in the process of securing a contract for the expert services of Richard Fries, a security expert. This conversation took place in late August 2002. At the same time, plaintiff's counsel informed counsel for the United States that he would be filing another amended complaint. Due to a delay in securing the contract for Mr. Fries' services, Mr. Fries' expert report could not be prepared and delivered to plaintiffs until several weeks following the close of discovery in September 2002. However, Mr. Fries['] name, address and phone number were disclosed to plaintiffs prior to that time and the Government even offered to enlarge the discovery period for the purpose of taking additional depositions.

Def.'s Mot. at 2 (quoting Def.'s Reply Brief in Support of the Motion to Dismiss, 19 n.18).

On the last day of discovery, Defendant formally disclosed its intention to call Mr. Fries

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<sup>1</sup> The background of this action is more fully set forth in the opinion denying Defendant's Motion to Dismiss or for Summary Judgment. Kennedy Heights Apts. Ltd. I v. United States, 63 Fed. Cl. 731 (2005).

as an expert at trial, responding to Plaintiffs' interrogatory requesting information about Defendant's potential experts as follows:

Richard J. Fries, 253 Pheasant Lane, Bloomingdale, IL, 60108, 620-620-8223. Security costs at Kennedy Heights Apartments while the property was MIP. The substance of the facts and options and summary of grounds for each opinion are being finalized and will be provided when available. Mr. Fries was first contacted in April 2002 and a contract for his expert services was authorized and approved by the Government in August 2002.

Def.'s Mot. at 1-2. Defendant provided Plaintiffs with a copy of Mr. Fries' expert report on October 11, 2002, approximately one month after the close of discovery. Id. at 2. In a joint status report dated Mar. 10, 2003, both counsel represented that "both parties have engaged in oral and written discovery and no additional discovery is necessary at this time." Joint Preliminary Status Rept. at 4.

Defendant filed a motion to dismiss or for summary judgment on July 3, 2003, relying, in part, on Mr. Fries' expert report. Def.'s Mot. to Dismiss, App. at 3298. Plaintiffs objected to the Court's consideration of Mr. Fries' report in support of Defendant's motion to dismiss on the ground that the report was untimely. Plaintiff's Opp. To Def.'s Mot. to Dismiss at 20 n.4 For purposes of the motion to dismiss or for summary judgment, the Court did not accept the report. Kennedy Heights, 63 Fed. Cl. 731, 736 n.11 (2005).

After Defendant's motion to dismiss or for summary judgment was denied, Defendant, during a scheduling conference with the Court, raised the issue of reopening expert discovery in order to allow the expert testimony of Mr. Fries. The Court directed Defendant to file a motion seeking leave of court for this purpose. Order of March 3, 2005. Based upon the availability of counsel and the Court, the Court scheduled trial for October 17, 2005, in Texas. Id.

### Discussion

In the instant motion, Defendant urges the Court to allow Mr. Fries' expert testimony, arguing that given the substantial amount of time that the report has been in the hands of Plaintiffs -- some two and a half years -- and that trial is six months away, allowing Mr. Fries to testify will not prejudice Plaintiffs. The Government also asserts that Mr. Fries is "an expert in the field of building security" and that his testimony will assist the Court because one of the issues is whether the security expenses incurred after HUD foreclosed on the Properties, were reasonable and should be offset against any surplus owed to Plaintiffs under 12 U.S.C. § 3712(6). See Def.'s Reply at 2, 5.<sup>2</sup>

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<sup>2</sup> In support of this motion, the Government states that "[Mr. Fries] has 37 years of experience in the security industry, including 12 years of experience with housing properties similar to Kennedy-Heights Apartments and Wilshire Washington Apartments. That experience includes surveying, assessing, and developing the security guard requirements for Chicago Housing Authority

Plaintiffs oppose reopening discovery arguing that the Court should not sanction “Defendant’s flouting of the Court’s deadlines and the Defendant’s obligations under the Rules.” Pls’ Opp. at 2. Plaintiffs also contend that they will be unable to secure a credible expert at this late date, almost seven years after the timeframe when the Project security costs were incurred.

“A trial court ‘has wide discretion in setting the limits of discovery.’” Schism v. United States, 316 F.3d 1259, 1300 (Fed. Cir. 2002) (internal citation omitted). Trial courts are guided by Rule 26(b)(2) in making discovery determinations.<sup>3</sup> Rule 26(b)(2) provides in part:

The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

With respect to the first criterion, there is no other mechanism for securing this expert testimony, and it would not be cumulative or duplicative and could aid the Court. The Court denied Defendant’s motion for summary judgment in part because there were conflicting accounts of whether security costs incurred after HUD took over the Properties as Mortgage in Possession (MIP) were reasonable. See Kennedy Heights, 63 Fed. Cl. at 736-37.

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properties such as Cabrini Green, the Robert Taylor Homes, and the Ida B. Wells homes. He is licensed by the State of Illinois as a private security contractor, and was appointed by the governor to the Illinois Private Detective, Private Alarm and Private Security Board.” See Def.’s Reply at 2-3.

<sup>3</sup>Rule 26(a)(2) governs expert discovery generally and provides that a “party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.” RCFC 26(a)(2)(A)(1). Moreover, Rule 26(a)(2) provides that “[e]xcept as otherwise stipulated or directed by the court, this disclosure shall . . . be accompanied by a written report prepared and signed by the witness.” RCFC 26(a)(2)(B). RCFC 26(a)(2)(C) provides that “[t]hese disclosures shall be made at the times and in the sequence directed by the court. In the absence of other direction from the court or stipulation by the parties, see Appendix A ¶¶ 5, 8, the disclosures shall be made at least 70 days before the scheduled close of discovery . . .” It is undisputed that Defendant did not make the requisite disclosures within the timeframe contemplated by the Rules.

With respect to the second criterion, Defendant had ample time to designate its expert here and its former counsel failed to follow proper procedure for ensuring this witness' ability to testify. Serving his report a month late without seeking an extension of the discovery deadline left the matter of his testimony up in the air. However, Plaintiffs are equally at fault -- they could have objected to the report and asked to strike it at the time or sought an extension to designate their own expert. Counsel for Defendant had notified counsel for Plaintiff a month prior to the discovery cutoff that she was in the process of securing a discovery expert and offered to extend the discovery period. Neither party raised this matter with the Court until much later when Defendant attempted to rely on Mr. Fries' report in support of its motion for summary judgment. Plaintiffs' counsel contributed to their current problem by not clarifying earlier whether Defendant's expert would be accepted. In short, neither party here has comported itself in the manner contemplated by the discovery rules. On balance, the Court deems it appropriate to allow the expert to be designated, accept his report and reopen discovery to permit Plaintiffs to designate a security expert of their own.

The Court is not persuaded that Plaintiffs will be unable to secure a credible security expert because so much time has passed since the security costs at the Project were incurred. Rather, it is often the case that experts must review evidence of record in formulating their opinions and rarely the case that experts have contemporaneous personal knowledge of the circumstances underlying their opinions. Nor is the previously established trial schedule an impediment to reopening discovery on any security experts.

Finally, testimony by an expert in security could assist the Court in making a determination of whether the security costs incurred after HUD became MIP were necessary. In sum, the Court finds that the burden and expense in reopening discovery will be outweighed by the benefit that security-related expert testimony will provide for the resolution of this action.

### Conclusion

1. Defendant's Motion for Leave to Designate Mr. Fries as an Expert and to Reopen Expert Discovery is **GRANTED**. Plaintiffs may also designate an expert in security by **June 1, 2005**, and submit an expert report by **July 1, 2005**.
2. The parties shall have until **July 20, 2005**, to complete expert discovery, including depositions of Mr. Fries and any security expert identified by Plaintiffs.
3. The Court will conduct a telephonic status in this action on **July 21, 2005 at 11:00 a.m.**

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**MARY ELLEN COSTER WILLIAMS**  
**Judge**