

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

JUN 13 1990

H. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT
No. 89 C 1113

GROVE FRESH DISTRIBUTORS, INC.,
an Illinois corporation,

Plaintiff,

vs.

EVERFRESH INC.,
et al.,

Defendants.

Judge Zagel

GROVE FRESH DISTRIBUTORS, INC.,
an Illinois corporation,

Plaintiff,

vs.

AMERICAN CITRUS PRODUCTS CORP.

Defendant.

No. 89 C 1117

Judge Moran

GROVE FRESH DISTRIBUTORS, INC.,
an Illinois corporation,

Plaintiff,

vs.

OLYMPIC GOLD ORANGE JUICE, INC.,
and JESSE BASS, Individually,
Defendants.

No. 89 C 1118

Judge Rovner

**PLAINTIFF'S MOTION FOR A SCHEDULING
CONFERENCE AND TO ADVANCE TRIAL DATE**

Plaintiff Grove Fresh Distributors, Inc. ("Grove Fresh[™]) has moved the court for an order consolidating the captioned cases. If the court grants that motion, Grove Fresh further moves the court, pursuant to Fed. R. Civ. P. 16 and 40, to set the consolidated cases for a scheduling conference, with the ultimate objective of advancing the trial of the consolidated cases. In support of this motion Grove Fresh states as follows:

1. Under Rule 40, the court has broad discretion over the calendaring of cases for trial. See Seidenbera v. Seidenberg,

219 F.2d 769, 771 (D.C.Cir. 1955) (whether to advance a case for trial is within the discretion of the court).

2. One factor relevant to whether a case should be advanced for trial is the plaintiff's financial condition. Harnick v. Pennsylvania R. Co., 254 F. 748 (S.D.N.Y. 1918). Another relevant factor is the plaintiff's age. See Rice v. Superior Court for Los Anaeles County, 136 Cal. App. 3d 87, 185 Cal. Rptr. 853 (2d Dist. 1982) (construing as mandatory statute giving preference to trial of cases in which plaintiff is 70 years of age or older.)

3. The public policy behind the preference for aged plaintiffs is the risk that death might deprive them of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress. Rice, 136 Cal. App. 3d at 89, 185 Cal. Rptr. at 857.

4. For all practical purposes the plaintiff in this case is Cecil Troy. Mr. Troy owns about 90% of the plaintiff's shares. Thus, Mr. Troy will be the ultimate beneficiary of any recovery by plaintiff.

5. Mr. Troy is also the person who has born the brunt of the injury caused by defendants. In six out of the last ten years he has drawn no salary or only a nominal salary in order to keep Grove Fresh in business. In a seventh year he drew a salary, but after paying taxes on the salary, he loaned the balance back to Grove Fresh for working capital. That loan (and several others) is still outstanding. See discussion in Plaintiff's Memorandum In Support Of Its Motion To Consolidate For All Purposes, p. 5 (June 13, 1990).

6. Mr. Troy is also the chief witness for the plaintiff. While Grove **Fresh's** cause of action would theoretically survive Mr. Troy's death, as a practical matter the case would be exceedingly difficult to take to verdict without him.

7. Mr. Troy is a vigorous and healthy 75, but he is not getting any younger. His age and his financial circumstances would warrant as early a trial date as the court, in its discretion, can accommodate.

8. Unfortunately, Mr. Troy and Grove Fresh are not at a point where they can ask for a trial date. The defendants have thrown up every manner of obstacles to speedy discovery. Unless this court takes firm control over the scheduling of discovery and a trial date, the defendants will be able to prolong the resolution of these cases to a distant date that would effectively deprive Mr. Troy of any meaningful redress.

9. Plaintiff will cite just one example of the problems it faces. In the Everfresh case, plaintiff was served with a document request on April 18, 1990. The request covers a 16-year period, from 1974 to the present. Plaintiff produced for inspection every document requested by the defense. And in less than 60 days after first receiving the defense's written request, plaintiff had produced, number-stamped, copied, and delivered more than 11,000 pages of documents designated by the defense.

10. In contrast, as of today, June 13, 1990, plaintiff has not received a copy of a single document from the defendants. Plaintiff served its initial document request on December 1, 1989, more than six months ago. Thus, the defense has had ample time to work out the mechanics of production and copying.

Moreover, because the defense has refused to provide any discovery for the period prior to 1986, the scope of their task is far less daunting than the 16-year request that they asked for, and got, from plaintiff. In short, there is no excuse for their continued failure to give plaintiff the documents it needs to go forward with this case.

11. Plaintiff's December 1989 discovery requests have already been the subject of several motions. Plaintiff calls the court's attention to only the most recent difficulties that plaintiff has encountered in getting that discovery:

(a) Documents were first made available for plaintiff's inspection on May 12, 1990, at Everfresh's headquarters in Franklin Park. Defendants withheld from that production a group of allegedly confidential documents consisting of correspondence and orange juice formulas. Plaintiff was told that such documents had been removed to the downtown office of McDermott Will & Emery, and that the documents would not be available for inspection until after an order of confidentiality had been entered.

(b) An order of confidentiality was entered on May 25, 1990. On that same day, plaintiff's paralegal contacted Mr. Raynal of McDermott Will & Emery to arrange for an inspection of the allegedly confidential documents that were at McDermott's downtown office. Mr. Raynal refused plaintiff's request. Plaintiff was told that the documents were going to be shipped back to Franklin Park, and that plaintiff would have to go back

out to Franklin Park to inspect them. The earliest that plaintiff was permitted to go to Franklin Park was on June 6, 1990.

(c) A day or two before the June 6th inspection, plaintiff offered to arrange and pay for an independent messenger service to pick up the documents from the Franklin Park facility and deliver them to LaSalle Copy Service, plaintiff's designated agent for copying, which is in the Loop. Mr. Raynal declined this offer and stated that Everfresh wanted to control the delivery and return of its documents.

(d) Plaintiff went to Franklin Park on June 6. The allegedly confidential documents that had been withheld from the May 12th inspection consisted of about three inches of pages. This small volume of documents could easily have been copied by the staff at McDermott, Will & Emery and delivered to plaintiff's counsel.

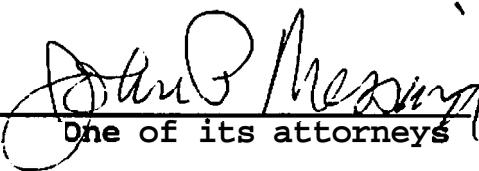
(e) plaintiff advised Mr. Raynal that it wished to have copies of all of the documents that had been produced, which amounted to less than five banker's boxes. plaintiff reiterated its request that the documents be delivered to LaSalle Copy Service. However, as of 2:30 p.m. on June 13, 1990, the designated documents had not been delivered to plaintiff's designated agent for copying.

12. With the sort of tactics that have been used to delay plaintiff's receipt of documents that were first requested more than six months ago, this case will be dragged into oblivion.

Plaintiff respectfully requests that the consolidated cases be set for a Rule 16 conference at an early date.

DATED: June 13, 1990 GROVE FRESH DISTRIBUTORS, INC.

BY:


One of its attorneys

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Judge Rovner

NOTICE OF MOTION

TO: All Parties on Attached Service List

PLEASE **TAKE** NOTICE, that on the 15th day of June, 1990, at
the hour of 9:45 a.m., we shall appear before the Honorable James
A. Zagel, Judge of the United States District Court for the
Northern District of Illinois, Eastern Division, at 219 South

Dearborn Street, Chicago, Illinois, and then and there present
PLAINTIFF'S MOTION FOR A SCHEDULING CONFERENCE AND TO ADVANCE
TRIAL DATE, a copy of which is hereby served upon you:

GROVE FRESH DISTRIBUTORS, INC.

BY:



One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on the 13th day of June, 1990, he served upon those parties named on the above service list, the NOTICE OF MOTION and PLAINTIFF'S MOTION FOR A SCHEDULING CONFERENCE AND TO ADVANCE TRIAL DATE, by causing a true and correct copy of to be hand-delivered before the hour of 4:00 p.m.



John P. Messina