

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CASCADE LIQUOR, INC.,

Plaintiff,

vs.

MAHMOUD F. ALZOUBI; EL-REEMS
CASCADE LIQUOR, LLC; S.D. BENNER,
LLC; and STATE OF MICHIGAN,

Defendants.

Case No. 15-05058-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER PERMITTING PLAINTIFF TO
PRESENT TESTIMONY VIA ELECTRONIC MEANS

On June 8, 1789, in the United States House of Representatives, James Madison proposed an amendment to the United States Constitution to guarantee due-process protection for the Lockean natural rights of life, liberty, and property. Soon thereafter, courts began the long struggle to define the contours of due process in American law. Perhaps Mr. Madison would be surprised to learn that, in 21st-century Michigan practice, the civil litigants in this pedestrian dispute about promissory notes and liquor licenses are entitled to a foreign-language interpreter at court expense, see MCR 1.111(B), but Mr. Madison surely would be flabbergasted to find out that one party – Plaintiff Cascade Liquor, Inc. (“Cascade Liquor”) – has suggested taking testimony by telephone from a witness presently in Canada. The Framers of our Constitution insisted upon eyeball-to-eyeball confrontation in criminal prosecutions, see US Const, amend VI, but not in civil proceedings, so the possibility of telephonic testimony does not offend constitutional norms. The question remains, however, whether Michigan law permits telephonic testimony from a witness in this case. The Court finds that it does so.

Plaintiff Cascade Liquor has asked to use telephonic communication equipment to present the testimony of Khalid Yasin¹ at an ongoing hearing on damages.² On the first day of that hearing, which took place on May 1, 2017, Cascade Liquor's attorney advised the Court that Mr. Yasin was in Canada and unavailable to travel to the United States because of some murky immigration issues. The Court explained to counsel that MCR 2.402 provides for telephonic testimony, but only under limited circumstances, so counsel would have to submit a written request to enable the Court to give its blessing to such testimony. Cascade Liquor filed its written request on May 2, 2017, which led to an immediate objection from Defendants Mahmoud Alzoubi and El-Reems Cascade Liquor, LLC. On May 19, 2017, the Court heard oral arguments on Cascade Liquor's request and considered the factual background of the request.

According to MCR 2.402(B), the Court may "direct that communication equipment be used for a motion hearing, pretrial conference, scheduling conference, or status conference." Noticeably absent from that list of proceedings is any mention of a trial. But MCR 2.402(B) further explains that "[t]he court may, with the consent of all parties or for good cause, direct that the testimony of a witness be taken through communication equipment." In rejecting a challenge to such telephonic testimony at a trial, our Court of Appeals held (albeit in an unpublished decision) that MCR 2.402(B) not only "permits motion hearings and conferences to be conducted by communication equipment,"

¹ Although Khalid Yasin is no longer in the United States, he apparently lived in this country long enough to be given the nickname of "John," which the attorneys, parties, and witnesses have used throughout the trial to identify Mr. Yasin.

² On December 31, 2015, the Clerk of the Court entered defaults against two defendants – Mahmoud Alzoubi and El-Reems Cascade Liquor, LLC – so Plaintiff Cascade Liquor has already established the liability of those two defendants by default. See Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79 (2000). As a result, the Court is conducting a hearing simply to decide the amount of damages that Cascade Liquor is entitled to recover from those two defendants.

but “also allows the testimony of a witness to be taken through communication equipment.” Affeldt v Lake Court Beach Ass’n, No 315277, slip op at 8 n9 (Mich App Jan 29, 2015), citing 2 Longhofer, Michigan Court Rules Practice, p 559. In addition, the 1998 Staff Comment to MCR 2.402 explains that “[t]he amendment [to MCR 2.402(B)] permits a court to arrange for a witness to testify through communication equipment ‘for good cause,’ as well as if all parties consent.” Therefore, the weight of authority indicates that the telephonic testimony of a witness may be presented at trial when good cause supports such a request.

To be sure, Plaintiff Cascade Liquor’s explanation of “good cause” has been cryptic, but the Court nonetheless finds that Khalid Yasin cannot return to the United States to offer trial testimony without a substantial risk either to himself or others. But Mr. Yasin apparently is ready, willing, and able to provide telephonic testimony from Canada, where he currently resides. Thus, the Court finds that Cascade Liquor has satisfied the requirements prescribed by MCR 2.402(B) for the telephonic testimony of Mr. Yasin. Today, however, MCR 2.402 does not serve as the only guide for testimony from a remote location. Indeed, technological developments since the adoption of MCR 2.402 have engendered additional court rules such as MCR 2.407 governing the use of videoconferencing. With all due respect to Alexander Graham Bell, the Court believes that modern technology affords more helpful methods for presenting testimony from a remote location than the old telephone system that is mentioned in MCR 2.402.³ Therefore, the Court has discussed with counsel the use of Skype or FaceTime to enable the participants to see Mr. Yasin’s face while he testifies from Canada.

³ The Court acknowledges that MCR 2.407(B)(3) makes clear that the videoconferencing rule “does not supersede a participant’s ability to participate by telephonic means under MCR 2.402.” As a result, the Court can only direct Plaintiff Cascade Liquor to do the best it can to present Khalid Yasin’s testimony through some enhanced telecommunication system.

“In the classic phrase of Lord Chancellor Hardwicke, ‘the public has a right to every man’s evidence.’” United States v Monia, 317 US 424, 432 (1943) (Frankfurter, J, dissenting). Here, the ability to obtain one man’s evidence depends upon the use of some method of telephonic testimony. Without question, Plaintiff Cascade Liquor has established the basis necessary to present testimony from Khalid Yasin *via* telephone equipment pursuant to MCR 2.402(B), but the Court will work with the parties, their attorneys, and Mr. Yasin to obtain that testimony in a manner that will enable the participants in the hearing on damages to observe Mr. Yasin while he testifies.

IT IS SO ORDERED.

Dated: May 19, 2017



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge