

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 61

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3 PEOPLE OF THE STATE OF NEW YORK,
4 By LETITIA JAMES, Attorney General of the
5 State of New York,

Plaintiff, Index No.
452044/2018

6 -against-

7 EXXON MOBIL CORPORATION,

Defendant.

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9 MOTION PROCEEDINGS 60 Centre Street
10 New York, New York
11 June 28, 2019

12 B E F O R E:

HONORABLE BARRY OSTRAGER,

Supreme Court Justice

14 A P P E A R A N C E S:

15 STATE OF NEW YORK
16 OFFICE OF THE ATTORNEY GENERAL
17 LETITIA JAMES
18 Attorneys For the Plaintiff
28 Liberty Street
New York NY 10005
19 BY: KEVIN WALLACE, ESQ.
KIM BERGER, ESQ.
20 MARC E. MONTGOMERY, ESQ.

21 (Whereupon, appearances continued on the following
22 page.)

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(Continued appearances)

PAUL WEISS RIFKIND WHARTON & GARRISON LLP
Attorneys For the Defendant
1285 Avenue of the Americas
New York NY 10019-6064
BY: THEODORE V. WELLS, JR., ESQ.
JUSTIN ANDERSON, ESQ.
NORA AHMED, ESQ.
DAN TOAL, ESQ.

ALSO PRESENT:
PATRICK J. CONLON
Coordinator of Compliance Litigation and
Investigations
Exxon Mobil Corporation

CHERYL-LEE LORIENT
SENIOR COURT REPORTER

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1 THE COURT: I believe there are four issues
2 that need to be resolved. The first is the Office of
3 the Attorney General's motion to dismiss the one
4 affirmative defense that I reserve decision on.

5 The second is the issue of whether or not the
6 Office of the Attorney General has satisfied the
7 requirement that the Court made with respect to former
8 Attorney General Schneiderman's e-mails.

9 The third is whether or not Exxon can take a
10 deposition of a representative of the Office of the
11 Attorney General.

12 And the fourth is whether or not the
13 documents that I reviewed, in-camera, relating to the
14 NYU student intern, created some conflict of interest
15 which would obligate the Office of Attorney General to
16 disclose those documents to Exxon.

17 Is there anything else that's on for this
18 morning?

19 MR. WELLS: Yes, your Honor. There are two
20 issues we want to discuss. We've tried to reach
21 agreement, I think, on one of the issues -- we're
22 close -- on a second, we are not.

23 The two issues relate to the third-party
24 witnesses that we discussed last time when we were
25 here. Your Honor had told them to cutdown the number

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1 of third-party witnesses.

2 Two days ago, on June 26th, they gave us an
3 amended list. They now are saying it's their good
4 faith estimate that they intend to call -- they might
5 want to call thirteen third-party witnesses.

6 THE COURT: Thirteen?

7 MR. WELLS: Thirteen. We got the letter two
8 days ago. We didn't call them yesterday. And, we
9 said, "One, we still think it's too long. But, the
10 most important thing to us is that we have the ability
11 to examine these thirteen people in a reasonable time.
12 And, that, to the extent you can cut it down that would
13 be better, because we have no desire to take thirteen
14 depositions."

15 What I believe we've agreed on is that we
16 will workout a schedule for us to take the thirteen
17 deps (sic) -- and, hopefully, fewer -- within the next
18 45 days, 30 and 45 days.

19 That would not effect the summary judgment
20 motion schedule nor will it effect the trial date.
21 But, both sides will agree that we'll get these deps
22 done. There are, probably, two or three hour deps.

23 There's one person we added to our witness
24 list -- a Mr. Higgins. We told him, we do not object
25 to their right to take his deposition. So we want to

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1 just put that on the record.

2 Ms. Berger, did I describe that fairly?

3 MS. BERGER: You did.

4 MR. WELLS: Okay. So, I think that issue is
5 put to the side, we're on the record, as to what we're
6 going to do, as long as your Honor is okay with that.

7 THE COURT: So, let me understand,
8 Mr. Wells, what you've just told me. The Office of
9 Attorney General was unable to pare its list of
10 third-party witnesses, who they will, likely, call at
11 trial, down to no fewer than thirteen people?

12 And, they've agreed that you can depose them.
13 And, you're going to depose them. And, the depositions
14 are not going to alter the trial?

15 MR. WELLS: Judge, with one amendment.
16 There are two buckets of witnesses that the AG's office
17 wants to call.

18 The main bucket are Exxon present or former
19 employees. That is a list of seventeen. Those
20 seventeen were never in play. We never knew. They
21 have deposed them. So deposing those people, we always
22 knew about. And that's not what's been going on, on
23 these third-party witnesses.

24 The third-party witnesses, all, are in a
25 separate bucket. And they all go to one issue. The

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1 issue of, "Did people who read Exxon's reports, who
2 were in the investing business, on the buy side sort to
3 speak, did they read Exxon's reports and rely on them?"
4 And "Did they find those reports material in terms of
5 the information and then with respect to their
6 investment decision?"

7 THE COURT: No, I understand what the
8 third-party witnesses might testify about.

9 MR. WELLS: Sure.

10 THE COURT: All I'm asking is, whether or
11 not you and the Office of Attorney General have agreed
12 that you could depose all thirteen of these people and
13 it won't effect the trial schedule?

14 MR. WELLS: Yes, that is our agreement.

15 THE COURT: All right. Is that acceptable
16 to the Office of Attorney General?

17 MR. WALLACE: Yes, as long as the trial
18 schedule is not effected, we're fine with Exxon Mobil.

19 THE COURT: All right. So then, you don't
20 have an issue for me to take any action with respect
21 to. You, mutually, agree that you may call these
22 thirteen third-party witnesses. And because you may
23 call these thirteen third-party witnesses, they could
24 depose those thirteen people and it won't effect the
25 trial schedule?

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1 MR. WELLS: Right.

2 MR. WALLACE: Yes.

3 MR. WELLS: We just agree to that and wanted
4 to get it on the record.

5 MR. WALLACE: That's breaking news, your
6 Honor.

7 THE COURT: It's on the record. It's not a
8 matter of contentiousness; and, more work for you and
9 more work for them, but everybody is happy.

10 MR. WELLS: Yes. But we're both hoping that
11 they will be able to cut the list down, so neither
12 party has to do that work and we could focus on the
13 Court and the case. Now, there's a second issue.

14 THE COURT: Okay.

15 MR. WELLS: When we appeared, back in
16 November, for the status conference and in front of
17 your law clerk, the issue was raised as to whether or
18 not the Attorney General's office was asking for a jury
19 trial.

20 And, they made a statement, back in November
21 "Well, we have a common law fraud claim and we haven't
22 really made a decision whether we want to do a jury
23 trial."

24 Your law clerk said, "Well, that's a lot of
25 work for the Judge in terms of getting people in. And,

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1 you need to tell us soon."

2 We've never heard anything from them since
3 that time. We asked them, this morning, "Is that issue
4 dead? We're assuming there's no jury trial." They
5 said they haven't decided yet. And, I said, I wanted
6 to raise that issue with the Court.

7 It's our position, under the law, because the
8 way the complaint is structured, it's mainly for
9 equitable relief. And, under the law, we do not
10 believe that they have a right to a jury trial on that
11 last common law fraud claim.

12 But, nonetheless, we said, "If you believe
13 you want a jury trial, we want to tee that up to have
14 it briefed." And also, we need to know, because if I'm
15 trying a bench trial in front of your Honor, without
16 the jury, I'm going to try my case one way. If I'm
17 trying a bench trial plus the jury sitting here, I need
18 to know that. And, I need to know it soon.

19 Also, I think, as a practical matter, for
20 your Honor, you probably have to do a lot of things if
21 there's going to a jury.

22 And they have told me that they haven't
23 decided that issue yet, if that's a fair
24 characterization. I'll let Mr. Wallace speak.

25 MR. WALLACE: Yeah, I think we, certainly,
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1 anticipated note of issue that would ask for a jury.

2 But that, you know, this issue was just raised in the
3 hallway. And, so, I haven't confronted this with
4 Mr. Wells, in full, but, I think, we'd be open to
5 hearing their pitch on why.

6 Our argument was to the extent that there are
7 common law claims and equitable claims included in the
8 complaint, the balance of those complaints is what
9 determines whether or not there's a jury trial.

10 And, they are intending to move to dismiss,
11 as they've indicated in their 11-F papers, that, they
12 intend to move to dismiss the common law claims, the
13 common law fraud claims. They don't believe those are
14 supported by the record.

15 So, I think our thought is that a lot of this
16 question, as to whether or not the jury trial is
17 appropriate, would be clear after a summary judgment.

18 Mr. Wells and Mr. Toal took the position that
19 even if those claims were to survive, there would not
20 be a basis for a jury trial in this action.

21 And, our thought was, that, if you guys
22 wanted to send us your argument on that, we'll consider
23 it before we file our note of issue, which is due in a
24 couple of weeks. Although, I think that date needs to
25 be moved.

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1 MR. WELLS: Yeah, we're talking that date
2 may move. I want this issue teed up, because I think
3 it effects both our trial preparation, it would effect
4 the work the Court has to do.

5 I think that the controlling case is a First
6 Department case, Zimmer versus Masiello --
7 M-A-S-I-E-L-L-O -- Inc. versus Zimmer -- Z-I-M-M-E-R
8 Inc., 559 NY2d 88 page 891 First Department 1990.

9 What that case, basically, says is that, when
10 the complaint either joins legal and equitable causes
11 of action arising out of the same alleged wrong or
12 seeks both legal and equitable relief, there's no right
13 to a jury trial.

14 But, I'm not trying to -- since I just raised
15 this in the hall, candidly, I'm not trying to tee it up
16 like it's an oral argument. But, I want a procedure to
17 get this done, get this decided quickly.

18 I was surprised that they were going to ask
19 for a jury trial, because your law clerk said, back in
20 November, if you're going to do this, that you should
21 do it soon.

22 THE COURT: Look, the normal procedure --
23 and I don't see any reason to depart from the normal
24 procedure -- is that when the note of issue is filed,
25 the plaintiff can request a jury trial. And, if the

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1 plaintiff doesn't request a jury trial, the defendant
2 can request a jury trial.

3 And, if the plaintiff requests the jury trial
4 and the defendant doesn't believe that the case can be
5 tried to a jury, because of the nature of the claims,
6 the defendant makes a motion to strike the jury demand.

7 Now, given the public interest in the case
8 and given the investment that the parties have made in
9 prosecuting and defending the case, it would be helpful
10 for the issue to be elevated for resolution earlier
11 than the normal practice.

12 But, I can't compel the Office of Attorney
13 General to declare, today or next week, whether they
14 are going to request a jury. And, it's also the case,
15 that, depending on what the opening pleadings look
16 like, the case could be tried to the jury on some
17 issues and to the Court on other issues. You all know
18 that.

19 So, this is an issue that is to be determined
20 at some subsequent period of time, but I appreciate
21 your flagging it for me as something that we're going
22 to be dealing with.

23 MR. WELLS: And that's all I was trying to
24 do, your Honor. At the end of the day, we're four
25 months away from trial. Exxon Mobil does not want to

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1 lose the trial date. We want to go to trial. And we
2 want to figure out, as soon as possible, to know the
3 nature of the trial, whether it's a pure bench trial or
4 a bench trial in front of a jury.

5 THE COURT: They can't file a note of issue,
6 if they designated thirteen third-party witnesses as,
7 likely, trial witnesses, and you're first going to
8 depose them in the next several weeks.

9 MR. WELLS: No, I think the agreement is
10 that the note of issue will not be withheld, because of
11 these thirteen third-party witnesses, that, the note of
12 issue will be filed either on the 26th or a few days --
13 the last expert deposition is the 26th.

14 And the agreement we have right now is that
15 the note of issue will either be filed on
16 July 26th or a few days after that and that the
17 parties will agree on.

18 The thirteen witnesses are going to be put on
19 a separate track and will not interfere with the filing
20 of the notice of issue.

21 Is that correct?

22 MS. BERGER: That is correct.

23 THE COURT: So, you're going to file a note
24 of issue at the end of July?

25 MR. WALLACE: Correct, your Honor.

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1 THE COURT: Okay. And, the note of issue
2 will indicate whether or not you're requesting a jury,
3 because if you don't request a jury and you file the
4 note of issue, you waive it.

5 MR. WALLACE: Correct.

6 THE COURT: All right.

7 MR. WELLS: And, we'll move. Is there a
8 procedure, your Honor, given the importance of the
9 issue, both in terms of our preparation for trial and
10 the need for your Honor to bring jurors in, is there a
11 way that we can brief that on an expedited basis and
12 get it in front of you?

13 THE COURT: I don't think so.

14 MR. WELLS: Okay.

15 THE COURT: I think that they are entitled
16 to either demand or not demand the jury when they file
17 their note of issue.

18 MR. WELLS: No, you misunderstood me, your
19 Honor or I was inartful. I mean, once they file a
20 notice of issue, if they ask for a jury trial, is there
21 a way for us to --

22 THE COURT: You will file an order to show
23 cause.

24 MR. WELLS: That's what I'm asking. Is
25 there a way to get in front of you, that issue,

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1 quickly, once they file the notice of issue if they ask
2 for a jury trial?

3 THE COURT: Yes. We'll resolve it as
4 expeditiously as possible. Okay. Let's get to today's
5 agenda. I've reviewed, in-camera, the documents that
6 the OAG has submitted with respect to the NYU
7 environmental intern.

8 To be blunt, there's no "there," there. But,
9 I'm going to give you those documents. And you'll see
10 that there's no, "there," there. So, that's the
11 resolution of that issue.

12 With respect to the request for EBT of the
13 Office of the Attorney General, I have reviewed the
14 June 19th letters of the parties and I'm satisfied
15 that there's no compelling or even appropriate reason
16 why Exxon needs to conduct a deposition of the OAG.

17 With respect to the Schneiderman e-mails, I
18 have reviewed the letter of June 19th from the Office
19 of the Attorney General, with the "Schneiderman"
20 affidavit and I've reviewed Mr. Wells
21 June 25th response.

22 And, I believe that the Office of the
23 Attorney General has satisfied me that there's no
24 further need for any further action with respect to the
25 Schneiderman e-mails.

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1 Now, with respect to the affirmative defense,
2 I have some questions. Is it the position of Exxon
3 that the affirmative defense of selective enforcement
4 is a complete defense to the Martin Act claim or is
5 this, simply, a vehicle for you to provide local color
6 into the Court or to assure it about meetings with
7 Mr. Pawa and meetings with other attorney generals and
8 meetings with the Rockefeller Foundation?

9 MR. ANDERSON: Your Honor, the defense would
10 be a complete defense to the charges. They would be a
11 basis for dismissing the complaint in its entirety,
12 because of the impropriety in which the investigation
13 was commenced and because of the improper purposes for
14 which the complaint was filed.

15 However, it would also be in the Court's
16 discretion to fashion whatever remedy it considered
17 appropriate in light of the violation falling short of
18 outright dismissal of the complaint.

19 THE COURT: Okay. I don't think that's
20 responsive to the question that I asked, if it's
21 Exxon's position that this affirmative defense is a
22 complete defense to the Martin Act claims that the
23 attorney general has filed.

24 I've read Judge Caproni's decision, in the
25 Southern District, where you raised these similar

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1 claims. And, she dismissed them.

2 I've read the proceedings in Texas and
3 Massachusetts where these same type of issues were teed
4 up. And, it's not, in my judgment, a complete defense
5 to the case.

6 So, I think, based on what you've told me,
7 I'm going to grant the Attorney General's motion to
8 dismiss this affirmative defense. But, I am not going
9 to preclude you, at trial, from questioning people
10 about, within reasonable constraints, the motivation
11 for the filing of the complaint. Understood?

12 MR. ANDERSON: Yes, Judge. It would be
13 appropriate to inquire with third-party witnesses, and
14 other witness that might be called, as to why the
15 complaint was filed while the investigation was
16 undertaken.

17 THE COURT: Within narrow bounds, yes.

18 MR. ANDERSON: Your Honor, may I have just a
19 moment?

20 THE COURT: Yes.

21 (Pause in proceedings.)

22 MR. ANDERSON: Thank you, Judge. We
23 understand the Court's ruling.

24 THE COURT: All right. Anything from the
25 AG?

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1 MR. WALLACE: I guess since the procedure is
2 now, in this case, that, we're providing preliminary
3 witness lists, to the extent Exxon plans to call
4 third-parties to testify on these issues, we would just
5 ask that they update their witness list to indicate, to
6 us, who the people are that they plan to call.

7 THE COURT: All right. You'll work this
8 out. I mean, this is the fourth forum in which these
9 types of assertions are being made by Exxon. And,
10 nobody has found them to be compelling.

11 MR. ANDERSON: Your Honor, may I be heard on
12 that point? The Court in Texas did find the
13 allegations compelling and wrote findings of fact that
14 concluded that the Attorney General's Office did
15 conspire, with Matthew Pawa and others, to bring
16 pretextual lawsuits against the company.

17 We won that in the trial court. That is now
18 being challenged, on appeal, in the intermediate
19 appellate Court in Texas. So, that Court did find it
20 compelling.

21 And, the other trial court, in Texas, before
22 the case was transferred to Judge Caproni found the
23 allegations disturbing and determined that if they were
24 true, if they could be proven, with evidence which we
25 have never had access to, that, they would constitute

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1 bad faith, a basis again to challenge. So, we had
2 Court rulings going in both directions on this issue.

3 THE COURT: And that's it. I think what
4 Judge Caproni has said -- and, I don't, necessarily,
5 agree or disagree with what she said. I think it's a
6 thin read. But, we're running a violation of the
7 Martin Act claim.

8 And, you contend that the only reason their
9 bringing it is for bad motives and because they were
10 influenced by Mr. Pawa and the Rockefeller Foundation
11 and the NYU intern and other attorneys general who are
12 activists.

13 And, there's a place for that in your
14 defense, but it's not what the trial is going to be
15 about.

16 The trial is going to be about whether or not
17 the attorney general can meet its burden of proof that
18 there has been a violation of the Martin Act. And you
19 understand my ruling.

20 MR. ANDERSON: We understand, Judge.

21 THE COURT: All right.

22 MR. WALLACE: I'll just say, the case they
23 won in Texas, there was no opposing party at that time.
24 I don't care about what the Texas Court did. I, quite
25 frankly, think these are a distraction. At best,

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1 they're local color. They have nothing to do with the
2 Martin Act claim.

3 I think we'd be happy to spend less time on
4 these, because that's been the majority topic that
5 we've talked about since we've been here during the
6 trial. So, we are happy to put these aside. And we
7 also understand your ruling. So, I'll just sit down,
8 at this point, your Honor.

9 THE COURT: Okay. Fine.

10 MR. ANDERSON: Your Honor, just so the
11 record is clear, we were opposed by about a dozen
12 parties in that lawsuit, including sophisticated
13 parties like Matt Pawa, the city of San Francisco, the
14 city of Oakland --

15 THE COURT: We are not going to re-litigate
16 what happened in other courts. I've given you a
17 certain amount of rope. Don't hang yourself with it.

18 MR. ANDERSON: Thank you, Judge.

19 MR. MONTGOMERY: Your Honor, just from an
20 administrative point, our expectation was not that
21 Exxon would take possession of the documents we
22 submitted in camera. We're fine with your decision on
23 that. We just would like to go on the record and make
24 clear that we are designating those documents as
25 confidential.

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THE COURT: Yes, they are confidential, but I made it very clear that there's no "there," there.

MR. MONTGOMERY: Understood, your Honor.

THE COURT: Okay. If there's nothing further, have a nice weekend.

MR. MONTGOMERY: Thank you, your Honor.

COURT REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the proceedings.

(Not certified unless signed in blue ink.)

Cheryl Lee Lorient
Cheryl Lee Lorient
Senior Court Reporter

SO ORDERED
Barry H. Ostrager
BARRY H. OSTRAGER, J.S.C.

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