Fordham Law Review

Volume 10 | Issue 1 Article 5

1941

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REQUESTS FOR ADMISSIONS UNDER RULE 36 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Rule 36 of the Federal Rules of Civil Procedure is an innovation in the Federal Courts. A very extensive discovery, by way or admission of particular facts and documents, is provided as part of the pre-trial procedure for a more economical and intelligent revelation of the facts.[1] The rule follows all of the Statutes which the authors had before them in drafting the Rule.[2] It is part of the scheme to secure the just, speedy and inexpensive determination of every action.[3] The purpose is to provide an effective and simple means of forcing admissions of matters which ought to be admitted, so that the time, trouble and expense required to prove them may be avoided.[4] The Rule has its origin from the English rules of the Supreme Court, 1883, Order 32, Rule 4.[5]

Rule 36 provides:

Admission of Facts and Genuineness of Documents

(a) Request for Admissions:

At any time after the pleadings are closed, a party may serve upon another party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth herein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

Underlying the use of admissions is essentially the same theory on which judgment may be directed on the opening statement of counsel. The ground for such a direction is the admission in counsel's opening statement that he has no substantial evidence with which to support his contention or that facts exist which preclude his party from recovery.[6]

To encourage admissions and safeguard the admitting party, the Rule pro-

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1. Compare Equity Rule 58 limited to documents.

2. ILL. REV. STAT. (1937) § 182 and Rule 18; ILL. REV. STAT. (1937) c. 110, § 259:18; MASS. GEN. LAWS (1932) c. 231, § 69; MICH. COURT RULES ANN. (1933) Rule 42; N. J. COMP. STAT. (2 Cum. Supp. 1911-1924) c. 163, § 294; N. Y. CIV. PRAC. ACT §§ 322, 323; WIS. STAT. (1935) § 327:22; ENGLISH RULES, JUDICATURE ACT (1937) § 0.32.

3. Rule 1, FED. RULES CIV. PRAC., 28 U. S. C. A. § 723 (c) post.

4. Gordon v. American Tankers Corp., 286 Mass. 349, 191 N. E. 51 (1934).

5. Banca Nazionale Di Credito v. Equitable Trust Co., 221 App. Div. 555, 557, 224 N. Y. Supp. 617, 620 (1st Dep't 1927).

6. Oscanyan v. Winchester Arms Co., 103 U. S. 261 (1880).

vides at subdivision (b) that "any admission made by the party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding." It sets at rest the question as to whether or not admission may be used against him in all subsequent litigation.[7]

The opinion of the courts has been uniform that under Rule 36, "matters of fact" not related to any document, as well as the genuineness of documents, may be presented to the other party for admission or denial.[8] Typical of such facts are delivery, ownership, master and servant relationship and other facts which would facilitate proof at the trial.[9] The request may cover to a large extent, if not entirely, the field of proof. The action is thus simplified and proof limited to the extent that counsel can agree. The court and the parties are enabled to ascertain what material facts exist without substantial controversy and what material facts are in good faith controverted. The call may go into any relevant matter and relevancy is determined from the pleadings.[10] The admissions of the party may disclose that there is no genuine issue of fact to be tried. In such a case one party or the other is obviously entitled to judgment as a matter of law. Rule 56 authorizes summary judgment at any time and has for its objective, a trial confined to controversial issues. Its wisdom is demonstrated in *Walsh v. Conn. Mutual Life Ins. Co.*[11] where there was summary judgment. In that case Judge Moscowitz discussed the rule at length and made clear that the rule is to be used to cover the entire case and practically any matter, not privileged, which was relevant. In another case Judge Moscowitz refused to permit the scope of the rule to be narrowed.[12] He denied a motion to dismiss a request for admissions of facts wholly within the specific and special knowledge of the party requested to make the admissions. To put upon the requested admissions any limitations other than that they must be confined to matters which would be received in evidence at the trial is to defeat the very intent of the rule. It would serve no useful purpose, if facts, which should be admitted, were denied merely to put an adversary to his proof. The court would be cluttered up with phantom issues, the proof of which would usurp and waste the time of the court and put an adversary to needless expense and delay.

Admissions are intended to simplify the issues, limit the number of wit-

7. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 1075.

8. Smyth v. Kaufman, 114 F. (2d) 40 (C. C. A. 2d, 1940), citing Walsh v. Connecticut Mutual Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939); McCrate v. Morgan Packing Co., 26 F. Supp. 812 (N. D. Ohio 1939); Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y. 1939); Booth Fisheries v. General Foods Corp., 27 F. Supp. 268 (Del. D. C. 1939); Modern Foods Co. v. Chester Packing Co., 29 F. Supp. 405 (E. D. Pa. 1939). See also Cleveland Symposium, p. 289; see also Form 25.

9. McCrate v. Morgan Packing Co., 26 F. Supp. 812 (N. D. Ohio 1939).

10. Walsh v. Connecticut Mutual Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939).

11. 26 F. Supp. 566 (E. D. N. Y. 1939).

12. French v. Carleton, 1 F. R. D. 178 (E. D. N. Y. 1940).

nesses, aid the disposition of the cause, eliminate congested calendars, unnecessary delay and expense and further the prompt administration of justice. It is interesting to note that should attorneys fail to invoke Rule 36 to obtain admissions, then under Rule 16, "the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider . . . (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. . . . " Of Rule 16, which is entitled "Pre-trial Procedure: Formulating Issues", District Judge Laws said before the American Bar Association: "One of the vital, if not the outstanding, advantages of pre-trial procedure is to take the trial of actions out of the realm of surprise and maneuvering, whereby an unwary counsel might see the just cause of his client lost. It may be romantic and charming to watch the skillful trial lawyer as he lies in wait to pounce upon an uninformed and less skillful counsel, but the results frequently are not just."[13] The administration of justice intended by the rules requires the admission of every relevant and material matter not genuinely in controversy.

The Rule does not contain any limitation concerning matters that have been denied or answered in the pleadings. It has been held in Massachusetts that the admission rule applies even to a defendant that has already answered by allegations that the signature of the document referred to was not genuine.[14] Since the draftsmen of the Rule had the Massachusetts Statute and experience before them, it seems reasonable to assume that the same construction will be applied to the Federal Rule. A request will not be vacated on the ground that the admission has already been made in the answer.[15]

Rule 36 is one of the means for discovery[16] provided by Article V of the new Federal Rules. The courts have zealously carried out the spirit of the Federal Rules by allowing unlimited discovery. A party may request admission under Rule 36 and at the same time serve a notice to take the deposition of any person upon oral examination under Rule 30.[17] An admission should not be withheld merely because the facts could be revealed by a discovery. So narrow a construction and such an abortive interpretation would be hostile to the spirit and do violence to the intent of the rules as well as conflict with Rule 37. "These rules should not be whittled away by strained judicial interpretations."[18] Everything should be done by the courts to encourage admission of uncontroverted facts.

The usual statute requires affirmative action to constitute an admission, but

13. 1 F. R. D. 397, 399 (1940).

14. Boston Morris Plan v. Barrett, 272 Mass. 487, 172 N. E. 603 (1930).

15. *In re* Independent Distillers of Kentucky, 34 F. Supp. 724 (W. D. Ky. 1940); Horne v. Hines, 31 F. Supp. 346 (D. C. D. C. 1940); Treasure Imports v. Andur, 6 U. S. L. W. 866 (1940).

16. Pelelas v. Caterpillar Corp., 113 F. (2d) 629, 632 (C. C. A. 7th, 1940).

17. Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y. 1939).

18. Smyth v. Kaufman, 114 F. (2d) 40 (C. C. A. 2d, 1940); Walsh v. Connecticut Mutual Life Ins. Co., *supra*. p. 75.

under the Federal Rule affirmative action is necessary to avoid the admission. If the facts are relevant, any party served with a request to admit is deemed to have admitted the matter in question unless within a period designated in the request, not less than ten days after the service thereof or with such other period as the Court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission, a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny these matters. Admission of the genuineness of a document does not constitute an admission of the contents, in the absence of a request specifically designating the relevant facts therein sought to be admitted as true.[19] A requested party having failed to deny, a request cannot controvert the matter on the trial.[20] So far as its terms indicate the Federal Rule does not permit any qualification in answering.

The rule does not authorize the court to strike qualified admissions on the ground that they are irresponsive to the call or demand. An admission of the requested matter is optional with the adverse party subject, of course, to liability to the penalty under Rule 37 (c).[21] A qualified admission of fact, under particular circumstances may be treated as a neglect or refusal to comply with the demand under Rule 36.[22]

The opinion of the courts, except one, is that a request for admissions is not subject to a motion to strike, set aside, vacate, modify or limit.[23] All the court can do is to extend the time in which compliance with the request may be made or refused or to allow a party permission to withdraw or amend any admissions

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19. Kraus v. General Motors Corp., 29 F. Supp. 430 (S. D. N. Y. 1939).

20. Smyth v. Kaufman, 114 F. (2d) 40 (C. C. A. 2d, 1940); Walsh v. Connecticut Mutual Life Ins. Co., *supra* p. 75.

21. FED. RULES CIV. PRAC. Rule 37 (c): "If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the Court for an order requiring the other party to pay him the reasonable expense incurred in making such proof, including reasonable attorney's fees. . . ."

The English experience in regard to the proper application of the practice is shown in a quotation from an English judge in Clarke v. Clarke, 34 W. N. 130, 131 (1899): "If the demand is limited to facts not really in dispute, that is, which can be admitted clearly or subject to some simple qualification, I find that it has been acceded to, and the power which the Court has of throwing the costs on anyone who has increased them by declining reasonable admissions is not forgotten."

22. Corr. v. Hoffman, 128 Misc. 713, 220 N. Y. Supp. 65 (Sup. Ct. 1927).

23. Securities & Exchange Comm. v. Payne, 1 F. R. D. 118 (S. D. N. Y. 1940); Unlandherm v. Park Construction Co., 1 F. R. D. 122 (S. D. N. Y. 1940); Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y. 1939); Modern Food Process Co. v. Chester Packing Co., 29 F. Supp. 405 (E. D. Pa. 1939); Banca Nazionale Di Credito v. Equitable Trust Co., 221 App. Div. 555, 224 N. Y. Supp. 617 (1st Dep't 1927).

on terms. The court cannot compel a party to make or alter an admission or make a fuller compliance.[24]

In relieving a party from complying with requests for admissions in a patent case Judge Nields, who stands alone, does not quote any authority for his action; certainly, none is found in the Federal Rules.[25] "On June 5, 1939, the Supreme Court amended Copyright Rule 1, to bring such proceedings within the Federal Rules of Procedure."[26]

The Federal Rule, imposes on the requested party, before denying, the same affirmative duty to ascertain the truth of the facts as it does of the genuineness of documents, sought to be admitted. On the other hand, in New York, the obligation of the requested party is less as to facts than it is as to documents. This may be attributed to the fact that usually, there should not be any dispute as to the genuineness of documents. New York, to a lesser degree than the Federal Rule, requires the requested party, before denying, to ascertain the genuineness of the documents sought to be admitted.

The New York statute absolves the refusing party from the payment of the penalty for requiring the requested party to prove the facts specified in the demand, if the court finds that the refusal to admit was "reasonable."[27]

In the case of admissions with respect to the genuineness of documents, New York imposes the penalty unless there is "good reason" for the refusal.[28] New York makes a distinction between discovery of documents and of parties.[29] "Reasonable" and "good reason" do not mean the same thing. The words "reasonable" and "ordinary" are synonymous and are descriptive of diligence.[30] "Reasonable" is a relative term.[31] The conclusion is inescapable that in New York while as to facts ordinary prudence would avoid the penalty, as to documents the refusing party must go further and ascertain by an investigation as would give knowledge to sustain the "good reason" for refusal.[32] Had no such

24. Corr v. Hoffman, 128 Misc. 713, 220 N. Y. Supp. 65 (Sup. Ct. 1927); Colonial Knitting Mills, Inc. v. Hosiery Mfg. Co., 120 Misc. 558, 199 N. Y. Supp. 854 (Sup. Ct. 1923).

25. Booth Fisheries v. General Foods Corp., 27 F. Supp. 268 (Del. D. C. 1939).

26. Borden v. General Motors Corp., 28 F. Supp. 330 (S. D. N. Y. 1939).

27. N. Y. Civ. Prac. Act § 323; Banca Nazionale Di Credito v. Equitable Trust Co., 221 App. Div. 555, 224 N. Y. Supp. 617 (1st Dep't 1927); Corr v. Hoffman, 128 Misc. 713, 220 N. Y. Supp. 65 (Sup. Ct. 1927).

28. N. Y. Civ. Prac. Act § 322.

29. Citizens Trust Co. v. Prescott, 221 App. Div. 420, 223 N. Y. Supp. 184 (4th Dep't 1927).

30. Tompert v. Hastings Pavement Co., 35 App. Div. 578, 55 N. Y. Supp. 177 (1st Dep't 1898).

31. *In re* Nice & Schreiber, 123 Fed. 987, 988 (E. D. Pa. 1903).

32. "Good reason" under the New York statute has never been judicially construed. In support of our interpretation see State v. Welty, 65 Wash. 244, 118 Pac. 9 (1911), where, in a criminal prosecution, a bank officer was charged with having accepted a deposit in violation of a statute, which provided that every officer of a banking corporation who shall accept a deposit when he knows or shall have "good reason" to believe that such corporation is insolvent shall be punished. The court held that, "'Good reason to

distinction been intended the language of both New York statutes would have been identical. The Federal Rule does not make any distinction between facts and documents. Federal Rule 37 (c), somewhat like the New York statute relating to documents, requires imposition of the penalty unless the court finds that there were "good reasons" for the denial or that the admissions sought were of no substantial importance. The logical inference is that the authors of the Federal Rule intended something different from the meaning conveyed by "reasonable." When it is noted that the word "reasonable" is one with a judicial construction which attributes thereto something different from "good reason" (singular) it is clear that by the use of "good reasons" (plural) the draftsmen of the Federal Rule intended to place an affirmative duty on the requested party to ascertain by investigation into facts as would give knowledge before denying facts.

In New York, where an adversary was called upon to admit certain of the facts of which it had no knowledge, it was subjected to one half the cost of taking depositions in Calcutta.[33] The rationale of the court's determination is that the refusing party must pay for revelation of the facts by discovery. The party proving the matter after an adversary's refusal to admit, is entitled to receive from his adversary the reasonable expense incurred in making such proof including reasonable counsel fees, regardless of the outcome of litigation.[34]

Rule 37 (c) provides that if the party requesting admissions thereafter proves genuineness of any such document or proof of any fact, he may apply to the court for an order requiring the other party to pay him. Judge Moscowitz directed judgment to be entered in favor of the defendant unless plaintiff moved the court, for further time within which to comply with defendant's request for admissions. The defendant sought alternate relief. (1) It asked for summary judgment dismissing the complaint. (2) It requested the court to examine the pleadings and evidence before it, and interrogate counsel, ascertain what material facts exist without controversy, and what material facts, if any, are actually and in good faith controverted, and that the court make an order specifying the facts that exist without controversy and directing such further proceedings in the action as are just under Rule 56 (d). (3) It asked that the matters set forth in the Defendant's Request for Admissions be deemed admitted on the ground that the plaintiff had not served or filed a sworn statement either denying specifically the matters of which admission was sought or setting forth in detail the reasons why plaintiff could not either admit or deny those matters as required by Rule 36. It is interesting to note that alternate relief was asked and allowed to the requesting party prior to the date of trial.

believe' implies not only knowledge, but an investigation into such facts as would give knowledge."

33. Hart v. Automobile Ins. Co. of Hartford, 140 Misc. 399, 246 N. Y. Supp. 586 (Sup. Ct. 1930).

34. Gelderman v. Munson S.S. Line, 232 App. Div. 776, 249 N. Y. Supp. 921 (2d Dep't 1931).

While it is true that summary judgment which may be granted at any time under Rule 56 is not a penalty under Rule 37 (c) for failure to comply with Rule 36, we are impressed with the imposition of a penalty before the date of trial. Judge Moscowitz in *Walsh v. Conn. Mutual* did not delay imposition of a penalty until the party requesting the admission thereafter proves the facts of which the admission was sought. The question arises when the Federal Court shall exact the penalty.

The New York statute expressly provides that "the expenses incurred in proving such fact or facts must be ascertained at the trial", thus deferring to the time of the trial the time when the court shall determine the penalty. With full knowledge of the provision and construction of the New York statute which was before them, the authors of the Federal Rule did not so defer until the trial, the date of determining and enforcing the sanctions. Motions are usually prior to the time of trial. Just when the motion shall be made would depend upon when the court could determine that the refusal to admit was unreasonable. There is nothing to the contrary in either the rule or the discussions of the rule at the reported symposiums. The penalty would be in reimbursement of proof by discovery.[35]

There is no specific rule prescribing the time when the court shall determine and impose the penalty. Rule 1 requires that the rules "shall be construed to serve the just, speedy and inexpensive determination of every action". Rule 16 dealing with "Pre-Trial Procedure: Formulating Issues", including the obtaining of admissions, requires the court to "make an order which shall recite the action at the conference." The rule continues that "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent injustice." The pre-trial conference order might estimate and require immediate payment of the penalty, thereby imposed on a party, refusing to admit facts and documents, which ought to be admitted. The trial Judge would then adjust the difference between the actual and the estimated penalty. Or, the court might require the refusing party to file a bond indemnifying the requesting party for any subsequent penalty which may be determined at the trial. Otherwise, formal pleadings would be a means of putting an adversary to proof of undisputed facts and documents, thus continuing the evils which the rules abolish. Otherwise, the just, speedy and inexpensive determination of the action would be thwarted. The principle of requiring admissions was devised to eliminate unnecessary delay, expense and to further the prompt administration of justice.

In *Walsh v. Conn. Mutual* Judge Moscowitz said that "Rule 36 provides a drastic remedy." The plaintiff having failed to comply with this Rule, the court would be authorized to grant a summary judgment under Rule 56 of the Rules of Civil Procedure—as the facts alleged in the complaint stand admitted.

35. Hart v. Automobile Ins. Co. of Hartford, 140 Misc. 399, 246 N. Y. Supp. 586 (Sup. Ct. 1930).

The earlier action of the court would avoid unnecessary delay and would aid the further and prompt administration of justice. If with advance partial payment of the estimated expense and attorneys' fees, the requesting party subsequently obtained proof through discovery, the court, if the proof so required, could enter summary judgment without waiting to the date of trial. Summary judgments, where sham defenses had been interposed, had been granted in the Federal courts long before the adoption of the rules.

The formulation of the rules and the development of the procedure hasten the day when the outcome of litigation will depend less upon the skill and strategic maneuvering of counsel and more upon the merits of the issues involved. So ambitious and worthy an effort itself demands judicial support. That support can best be administered by a liberal construction of the rules which were carefully prepared to expedite the economic and speedy determination of every action.