Volume 65 | Issue 3 Article 12

April 1963

Procedure--Rule 36--Request for Admissions

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P brought an action against *D* under a fire insurance policy. Prior to the trial of the case *P* served *D* with a request for the admission of certain facts under the provisions of a Virginia statute which was taken verbatim from Rule 36 of the Federal Rules of Civil Procedure. *D* failed to answer the request and, upon the motion of *P,* the lower court entered a summary judgment for *P. Held,* reversed. Rule 36, as followed in federal practice, may not be used to obtain the admission of facts which are in real dispute. The request of *P* was therefore improper and no admission resulted from the failure of *D* to reply to the request. *General Accident Fire & Life Assur. Corp. v. Cohen,* 127 S.E.2d 299 (Va. 1962).

At common law and under the earlier codes a party to an action who sought to prepare for trial had recourse to interviews with witnesses, the pleadings in the particular case, or a bill of particulars to discover the claims or defenses asserted by his opponent. The Federal Rules of Civil Procedure supplement the pleadings with many devices by which a party may familiarize himself before trial with information which was sought by the above manners prior to the Rules. Among these is the request for admissions provided by Rule 36. The purpose of the rule is to expedite the trial and to relieve the parties of the cost of proving facts which will not be disputed at the trial and the truth of which can be ascertained by reasonable inquiry. *Strasser v. Fascination Candy Co.,* 7 F.R.D. 267 (N.D. Ill. 1947); *Van Horne v. Hines,* 31 F. Supp. 346 (D. D.C. 1940); 4 MOORE, FEDERAL PRACTICE, ¶ 36.02 (2d ed. 1950); LUGAR & SILVERSTEIN, W. VA. RULES 287 (1960).

A request for admissions under this rule may be used to require definite admissions with respect to facts formerly sought by a motion for a bill of particulars. For example, a request for admissions can be used for obtaining information as to hospital bills and the bodily functions claimed to have been affected by a personal injury. *Hibbits v. Thompson,* 7 F.R.D. 454 (W.D. Mo. 1947).

For the purposes of this comment, the material provisions of West Virginia and Federal Rule 36 and the Virginia statutory equivalent provide that "Each of the matters of which an admission is requested shall be deemed admitted unless . . ." the party of whom an admission is requested serves on the party requesting the admission either ". . . a sworn statement denying specifically

the matters of which an admission is requested . . ." or ". . . written objections . . ." on the basis that any or all of the requested admissions are irrelevant or privileged, or that the request is improper. Under these rules the admission results automatically from a failure to take affirmative action to avoid it, and the burden is on the party from whom the admission is requested to protect himself against the admission by a sworn denial or an objection. 4 MOORE, FEDERAL PRACTICE, ¶ 36.05 (2d ed. 1950); Sunderland, *The New Federal Rules,* 45 W. VA. L.Q. 5 (1939).

In the principal case the Virginia court held that the request for admissions was improper and that, this being true, no reply was required under such circumstances. In so ruling, that court apparently ignored the express provisions of the rule which require either a denial or an objection to the request. The federal cases on this point are clear. The rule is self-sufficient and clearly defines its purpose and effect. *Bailey v. New England Mut. Life Ins. Co.,* 1 F.R.D. 494 (S.D. Cal. 1940), and should be liberally construed to this end *Bowles v. Soverinsky,* 65 F. Supp. 808 (E.D. Mich. 1946). The court has, if such is necessary, ample discretion to suppress unnecessary and unwarranted requests for admissions. *Sulzbacher v. Travelers Ins. Co.,* 2 F.R.D. 491 (W.D. Mo. 1942).

The requirement is clear that a party of whom an admission is sought must either deny specifically or object to the request. No other construction has been placed on the rule. A party who has failed either to deny the admissions submitted on the request by the opposing party or to interpose objections to the request is not entitled to have the request quashed. *Chicago, R.I. & P. Ry. v. Williams,* 245 F.2d 397 (8th Cir. 1957).

There exists, in fact, a split of authority in the federal cases as to the basis upon which the Virginia court held the plaintiff's request to be improper. For example, the case of *Tillman v. Fickencher,* 27 F.R.D. 512 (E.D. Pa. 1960), held that a request for admissions was not objectionable because controverted issues of fact are included within the request. In *Demmert v. Demmert,* 115 F. Supp. 430 (D. Alaska 1953), it was held that facts which are in real dispute are not the proper subjects of a request for admissions. Professor Moore would agree with the latter case and the Virginia court on this point. He points out that the procedure for obtaining admissions should be used to obtain admission of facts as to which there is no real dispute and which the adverse party can admit clearly and without qualification. 4 MOORE, FEDERAL

PRACTICE, ¶ 36.04 (2d ed. 1950). Obviously, the Virginia court is not bound by the federal decisions on this question; however, the primary question of that court's ignoring the necessity of an objection to the request for admissions still exists.

The Virginia court may have been led astray in its reasoning in the principal case because of the language of Professor Moore. He takes the position that all admissions under Rule 36 are subject to all pertinent objections to admissibility which may be interposed at the trial. 4 MOORE, FEDERAL PRACTICE, ¶ 36.08 (2d ed. 1950). This concept is further supported by Form 25. LUGAR & SILVERSTEIN, W. VA. RULES, 553 (1960). What the Virginia court may have overlooked here, however, is that a proper objection at the trial stage presupposes a proper admission, denial, or objection at the time the request for admissions was served and not merely silence on the part of the party of whom the admission was sought. In the principal case *D* could have objected to the request or specifically denied the averments contained in the request, or he could have attacked the request by a proper motion. When he did none of these things, his inaction resulted in an admission. 4 MOORE, FEDERAL PRACTICE, ¶ 36.05 (2d ed. 1950). After conforming to the rule in this respect, any objection at the trial stage would have been proper.

One further consideration worthy of mention with regard to the rule is the fact that any response made to a request for admissions must be under oath. This should necessarily reduce to a minimum any attempts to treat such a request frivolously, since the penalties for false swearing attach to a false statement of reason or a false denial. This should certainly impress upon a party of whom an admission is requested the gravity of his responsibility.

In summation, the burden of making the proper responses or objections under Rule 36 rests squarely upon the party to whom the request is directed, and that party must decide for himself the propriety of each given response, in the knowledge that if it fails to meet the literal test of the rule, such response will be deemed an admission as a matter of law. *Dulansky v. Iowa-Ill. Gas & Elec. Co.*, 92 F. Supp. 118 (S.D. Iowa 1950). "The denial must be either an absolute denial or a denial on information and belief, with the sources thereof given." 4 MOORE, FEDERAL PRACTICE, ¶ 36.05 (2d ed. 1950). In this respect there are no exceptions to the explicit mandates of the rule.

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