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Reino de Espana v. The American Bureau of Shipping Inc. United States District Court for the Southern District of New York Slip Copy, 2008 WL 3851957 (Decided August 18, 2008)

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FAILURE OF PLAINTIFF TO COMPLY WITH ORDERS RELATING TO DISCOVERY OF ELECTRONIC DOCUMENT RESULTS IN SANCTIONS.

Failure of Spain to comply with orders relating to discovery of electronic document results in sanctions including attorney's fees incurred for filing motion to compel and motion for sanctions.

Reino de España v. The American Bureau of Shipping Inc.
United States District Court for the Southern District of New York
Slip Copy, 2008 WL 3851957
(Decided August 18, 2008)

This action arises from the 2002 sinking of Greek-owned oil tanker *Prestige* off the coast of Spain. Litigation between the plaintiffs, Reino de España ("Spain"), and the defendants American Bureau of Shipping, ABS Group of Companies, Inc., and ABSG Consulting Inc. ("ABS") was referred to Magistrate Judge Ellis for general pre-trial supervision. On November 2, 2006 Judge Ellis granted a motion by ABS to compel Spain to disclose electronic documents. Judge Ellis denied Spain's request for reconsideration of said motion, and on January 25, 2007 he granted in part ABS' motion for sanctions against Spain related to costs incurred for filing the motions. The U.S. District Court for the Southern District of New York overruled Spain's objections to these Orders in their entirety.

The first discovery request filed by ABS sought certain non-privileged electronic documents created during a nine-day period in 2002 in which Spain took control of the *Prestige*. Judge Ellis granted the parties a two-day evidentiary hearing in February 2006, including a full briefing on ABS' motion to compel, as an opportunity to present its positions. A post-hearing briefing of all issues raised was granted.

After consideration of the evidence, Judge Ellis found that sanctions against Spain were appropriate due to its failure to conduct discovery in accordance with both Federal and New York rules. Spain was found to have failed to preserve the electronic documents because of a failure to place a timely litigation hold on its relevant agencies. ABS' request for electronic documents was found to be both reasonable and limited. The sanctions granted were in the form of attorneys' fees and costs incurred in making the motion to compel.

Spain moved to limit the scope of the February 2006 hearing to a strict discussion of technical issues regarding its email systems. Spain argued that inadequate notice of the court's intent to hear evidence on preservation and spoliation denied them an opportunity to properly prepare for and present evidence toward such issues at the hearing.

The District Court found that Spain had adequate notice by the time of the February 2006 hearing. The court record demonstrated that Spain had been aware of ABS' concerns regarding preservation and spoliation since at least December 2004. Furthermore, the court was not convinced of Spain's contention that its witnesses were ill-prepared to testify about preservation issues. Affidavits of the witnesses were found to demonstrate an awareness of preservation issues specifically related to electronic discovery.

In addition to its substantive objections, Spain also objected to Judge Ellis' procedural approach toward determining the resulting sanctions. Spain argued that the court was obliged to follow the three-step analysis put forth in *Zublake v. UBS Warburg*,¹ when considering remedies for spoliation. Upon review, the District Court found that *Zublake* did not apply. In a post-hearing brief, Spain had attacked an alleged attempt of ABS to draw a comparison of the facts at hand to *Zublake*. The District Court

¹ 382 F.Supp.2d 536 (S.D.N.Y., 2005).

found that because Spain had violated the discovery obligations mandated by the Federal Rules of Civil Procedure, the Court had broad discretion to consider sanctions and was under no duty to follow the *Zublake* test.

Finally, Spain objected that ABS should not be awarded attorneys' fees because Spain had been substantially justified in its opposition to ABS' motion to compel. Federal Rule of Civil Procedure 37 allows a court to impose broad sanctions for discovery-related abuses. The District Court found that because Spain was negligent in its failure to comply with discovery, its failure was not substantially justified. The award of attorneys' fees was therefore appropriate.

The District Court found that throughout the hearing Judge Ellis had conducted a careful and thorough examination of all applicable legal standards. As such, all of Spain's objections were overruled in their entirety.

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