Smartmatic Must Produce Litigation Finance Docs In Fox Suit

By **Aaron West**

Law360 (March 27, 2023, 10:37 PM EDT) -- Voting tech company Smartmatic must turn over litigation finance agreements to Fox in its defamation lawsuit against the news network after a New York Supreme Court judge ruled Friday that the information was relevant, despite state case law that says such funding information isn't typically discoverable.

The finance agreements, which purportedly detail who is funding a defamation lawsuit Smartmatic filed against the network in 2021, wouldn't usually need to be disclosed due to New York case law that excludes such information from discovery. But New York Supreme Court Judge David Cohen said the case law shouldn't apply here because of a counterclaim Fox filed last year that alleges the voting company is trying to "censor and chill Fox News" from reporting a story of national importance in violation of New York anti-SLAPP laws.

"Here, defendants contend, and plaintiffs do not dispute, that the issue of their motivation to sue defendants is an element of defendants' anti-SLAPP counterclaim," Judge Cohen wrote in his **order**. "Since information contained in the LFA may lead to relevant evidence as to plaintiff's motivation, the information may be material and necessary to defendants' counterclaim and is thus discoverable."

A judicial hearing officer in December had previously granted Fox's motion to compel Smartmatic to turn over the funding information, a decision that Smartmatic disputed and brought to Judge Cohen, arguing that under the New York law the officer had abused his discretion.

New York case law provides that LFAs aren't generally discoverable unless shown to be necessary to a party's claim or defense, and federal courts are usually guided by the same principle.

Smartmatic's underlying $2.7 billion defamation suit alleged that Fox News, several of its on-air personalities and attorneys Rudy Giuliani and Sidney Powell dragged the Florida-based company into a false election fraud narrative when it aired unfounded accusations from President Donald Trump and his supporters that the company helped rig the 2020 election in favor of Joe Biden.

Fox in its counterclaim argued that Smartmatic was trying to "saddle Fox with billions of dollars of liability for covering all sides of a vigorous debate of profound national importance."

The case is one of several high-profile defamation lawsuits stemming from the 2020 election. Dominion Voting Systems Corp., another voting technology company, has also sued Giuliani and Powell over similar election fraud claims.

As part of Smartmatic's arguments against turning over the litigation funding agreements to Fox, the company said Fox had no basis for requesting the LFAs since nothing they had turned over so far suggested an LFA existed at all. Furthermore, Smartmatic also argued that the LFA isn't relevant to any claims or defense in the current action.

But Fox, which argued that the information was relevant to its anti-SLAPP claim, prevailed with that argument, Judge Cohen said.

"While plaintiffs correctly set forth New York law on the discoverability of LFAs, they cite no case law that prohibits LFA disclosure when a party's motivation is an element of a claim or defense," he wrote.

Smartmatic is represented by J. Erik Connolly and Nicole E. Wrigley of Benesch Friedlander Coplan & Aronoff.

Fox News, Lou Dobbs, Maria Bartiromo and Jeanine Pirro are represented by Paul D. Clement and Erin E. Murphy of Clement & Murphy PLLC, K. Winn Allen and Mark R. Filip of Kirkland & Ellis LLP and Steven G. Mintz of Mintz & Gold LLP.

Giuliani is represented by Adam S. Katz and Louis Arnold Russo of Russo Law LLC and Joseph D. Sibley IV of Camara & Sibley LLP.

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 151136/2021, in the Supreme Court of the State of New York, County of New York.

--Editing by Rich Mills.