

Boim v. Quranic Literacy Institute

Holding: The parents of a teenager killed in a terrorist attack in Israel sued the attackers, as well as various individuals and organizations who allegedly funded and otherwise supported the attack. One civil defendant individual, an alleged terrorist, refused to answer deposition questions, and raised a Fifth Amendment objection.

- The plaintiffs conceded that the defendant's answer might be used against him in a criminal prosecution, but claimed that by participating in the litigation, he waived his right to assert his Fifth Amendment rights.

Because the civil defendant was a target of a grand jury investigation, the parents' motion to compel his answers was denied. The Fifth Amendment not only protects an individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

- The judge added that "because this is a civil case, the Fifth Amendment does not shield [the defendant] from adverse inferences that may be drawn against him based upon his refusal to answer the deposition questions asked of him."

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

STANLEY BOIM,
Individually and as Administrator of
the Estate of DAVID BOIM, deceased,
and JOYCE BOIM,
Plaintiffs,

v.

QURANIC LITERACY INSTITUTE, et al.,
Defendants.

No. 00 C 2905
2004 U.S. Dist. Lexis 2060

February 9, 2004, Decided
February 9, 2004, Docketed

Also see 2003 U.S. Dist. Lexis 15689 (N.D. Ill. 2003) and 297 F.3d 542 (7th Cir. 2002).

MEMORANDUM OPINION AND ORDER

On May 13, 1996, David Boim was killed in a terrorist attack while waiting for a bus in Israel. His parents, both Israeli citizens and United States nationals, sued the attackers, as well as various individuals and organizations who they allege funded and otherwise

supported the attack. One of the organizations they sued was the Quranic Literacy Institute (QLI). According to the complaint, QLI purports to translate and publish sacred Islamic texts, but, in reality, it raises and launders money for the terrorist group Hamas. See Complaint, P5. The Complaint also names Mohammed Abdul Hamid Khalil Salah, who, according to the Complaint, was nominally employed [*3] by QLI as a computer analyst. Id. In their Complaint, the Boims allege that Mr. Salah is the admitted U.S.-based leader of the military branch of Hamas; he is named on the list of Specifically Designated Terrorists compiled by the U.S. Treasury Department's Office of Foreign Assets Control. Id., P11.

In the first year or so after the Boims filed their Complaint, Mr. Salah actively participated in the case; in December of 2000, he responded to document requests and interrogatories, and, on January 16, 2001, he filed an Answer to the Complaint. In his Answer, he admitted that he performed data entry and other related computer services for QLI, admitted that he had been prosecuted by the Israeli government for channeling money to Hamas, admitted that he had been jailed in Israel from January 1993 to November 1997, and admitted that his name appears on the list of terrorists. See Answer, PP5, 11. Mr. Salah denied that he is the admitted U.S.-based leader of the military branch of Hamas, and he denied that he ever channeled money to Hamas. Id., P11.

Mr. Salah's participation in the case came to a halt on April 1, 2003, when the Boims attempted to take his deposition. After [*4] answering questions about his full name, his address, his marital status, his educational background and his current occupation, Mr. Salah declined to answer any further questions, invoking his Fifth Amendment right not to incriminate himself.

On August 4, 2003, the Boims filed an Amended Complaint. At least with respect to Mr. Salah, the allegations of the Amended Complaint are substantively the same as the allegations of the original Complaint. Despite his assertion of the Fifth Amendment at his deposition, on October 24, 2003, Mr. Salah answered the Amended Complaint; his Amended Answer is substantively the same as his original Answer, though it adds several affirmative defenses. At no point in either his original Answer or his Amended Answer did Mr. Salah refuse to answer on the basis of the Fifth Amendment; nor did he raise any Fifth Amendment objections in his responses to the Boims' written discovery requests.

On November 21, 2003, the Boims moved to compel Mr. Salah to answer the questions asked at his April 1, 2003 deposition. The Boims argue that, by otherwise participating in the case, Mr. Salah has waived his right to hide behind the Fifth Amendment. Not surprisingly, [*5] Mr. Salah disagrees.

The Fifth Amendment not only protects [an] individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. ”” Baxter v. Palmigiano, 425 U.S. 308, 316, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973)). The Boims do not challenge the basis for Mr. Salah's assertion of the privilege; they apparently concede that the questions they asked of him could very well have required him to incriminate himself. They argue, however, that by answering the Complaint and the Amended Complaint, and by responding to their written discovery requests, he waived the right to assert the privilege at his deposition. Without question, the rights granted by the Fifth Amendment may be waived. But waiver is not to be lightly

inferred. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981). Indeed, courts must indulge every reasonable presumption [*6] against waiver of fundamental constitutional rights. *Emspak v. U.S.*, 349 U.S. 190, 198, 99 L. Ed. 997, 75 S. Ct. 687 (1955) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); *Glasser v. United States*, 315 U.S. 60, 70, 86 L. Ed. 680, 62 S. Ct. 457 (1942); *Smith v. United States*, 337 U.S. 137, 150, 93 L. Ed. 1264, 69 S. Ct. 1000 (1949)).

The question of whether the privilege has been waived in any given case depends upon the particular facts and circumstances surrounding that case. *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986). See also *Colorado v. Spring*, 479 U.S. 564, 573, 93 L. Ed. 2d 954, 107 S. Ct. 851 (1987); *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). In some cases - those presenting the most compelling of circumstances, where, for example, the person asserting the privilege has abused the process or otherwise conducted himself in a way that is likely to create a significant danger of distortion of the facts - a waiver of the privilege against self-incrimination will be inferred from a witness's prior statements on the subject matter of the case. See *Klein*, 667 F.2d at 287 [*7] (citing *Rogers v. United States*, 340 U.S. 367, 95 L. Ed. 344, 71 S. Ct. 438 (1951)). Certainly, where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details. ” *Rogers*, 340 U.S. at 373.

In this case, two key facts counsel against a waiver finding. First, nothing in the record suggests that Mr. Salah is attempting to use the Fifth Amendment as both a sword and a shield, that he is somehow abusing the privilege to disclose incriminating facts, while withholding the details in order to create a distorted version of the truth. It is true that Mr. Salah behaved in a manner that, at first blush, appears to be inconsistent with his assertion of the privilege, actively participating in the case at one point and then shutting down discovery by invoking the Fifth Amendment at his deposition. But, when viewed in the context of what was going on in the world, and in this case, his assertion of the privilege in 2003 seems quite reasonable, whereas, in 2000, it may not have. As an initial matter, given the nature of this case and the allegations of terrorism and terrorist ties that are central to the Boims' complaint, [*8] one can reasonably conclude that the September 11, 2001 attacks on the World Trade Center, and the attendant changes in the Justice Department's policies concerning such issues, could have impacted Mr. Salah's self-incrimination analysis. More importantly, between the time he answered the initial complaint and responded to discovery, and the time he sat for his deposition, Mr. Salah had been advised that the government had initiated an active grand jury investigation of his activities and that he is a target of the investigation. See Affidavit of Mary Rowland, PP2-3 (attached as Exhibit A to Mr. Salah's Response Regarding his Fifth Amendment Rights). These events - hardly foreseeable in December 2000 and January 2001, when Mr. Salah answered discovery and answered the Complaint - justify any inconsistencies in Mr. Salah's behavior, and persuade the Court that Mr. Salah legitimately asserted his Fifth Amendment rights. Accordingly, the Court rejects the Boims' argument that Mr. Salah's 2000 and 2001 conduct justifies compelling him to answer deposition questions. n1 [*9]

Second, although it is true that Mr. Salah answered the Amended Complaint - without invoking his Fifth Amendment rights - after the attacks on the World Trade Center and after learning that he was the subject of a government investigation, his amended answer simply parrots his initial answer. Accordingly, the Court rejects the Boims' argument that his amended answer amounts to a waiver of the privilege. Indeed, if Mr. Salah had invoked the privilege in answering the Amended Complaint, despite having already

answered the very same allegations, the plaintiffs would no doubt have claimed that he was abusing the privilege by doing so.

Nevertheless, the Court is mindful that Mr. Salah's assertion of the privilege prevented the Boims from exploring the statements Mr. Salah made in his Amended Answer. For example, in his Amended Answer, Mr. Salah stated that he worked for QLI, on a volunteer basis, for a period of time in the past; he stated that he merely performed data entry and other related computer services. See Answer to Amended Complaint, PP5. But he refused to answer questions posed at his deposition about the specifics of his work at QLI or about his supposed volunteer status. [*10] Given his refusal to answer questions at his deposition, it would be unfair to permit his substantive responses to the allegations of the Amended Complaint to stand; similarly, it would be unfair to the Boims to allow Mr. Salah to assert affirmative defenses, but refuse to engage in discovery concerning those defenses. Accordingly, although the Court will not infer a waiver of the privilege, it will strike Mr. Salah's answer and affirmative defenses to ensure that the Boims are not prejudiced by Mr. Salah's relatively late assertion of the privilege.

CONCLUSION

Based upon the facts and circumstances of this case, the Court finds that Mr. Salah has not waived his Fifth Amendment rights. His assertion of the privilege against self-incrimination at his deposition was valid, and the Court will not compel him to answer the questions asked of him. The Court, therefore, denies the Boims' motion to compel, but grants the motion to strike Mr. Salah's Amended Answer, including the Affirmative Defenses asserted therein.

February 9, 2004

Arlander Keys
United States Magistrate Judge

Note:

1. The impact of this decision is likely to be tempered somewhat over time. As Mr. Salah is no doubt aware, because this is a civil case, the Fifth Amendment does not shield him from adverse inferences that may be drawn against him based upon his refusal to answer the deposition questions asked of him. See [Baxter v. Palmigiano](#), 425 U.S. 308, 318, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976).