

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County CourtHouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

Date Submitted: September 29, 2008

Date Decided: December 16, 2008

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Re: *Case Financial, Inc. v. Eric Alden*,  
Civil Action No. 1184-VCP

Dear Counsel:

On July 24, 2008, Defendant, Eric Alden, moved to recover his expenses and attorneys' fees in connection with the aborted deposition of nonparty witness John Irvine, pursuant to Court of Chancery Rule 30(g)(2). Alden argues that Plaintiff, Case Financial, Inc. ("Case Financial"), never subpoenaed Irvine and that, as a result, Irvine failed to appear for deposition in Delaware on the date and time noticed. Case Financial counters that Rule 30(g)(2) does not apply because Irvine's failure to appear did not result from the lack of a subpoena. For the reasons stated below, I deny Alden's motion.

Rule 30(g)(2) states:

If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the

witness because of such failure does not attend, and if another party attends in person or by an attorney because that party expects the deposition of that witness to be taken, the Court *may order* the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(Emphasis added). The Rule does not mandate relief, but rather leaves the decision to impose attorney's fees and costs to the discretion of the Court. The decision in each case depends on the surrounding circumstances.

Here, the noticed deponent, Irvine, is not a party to this litigation and apparently resides in Canada. Case Financial's attorneys had obtained Irvine's agreement to appear voluntarily for his deposition in Delaware. On or about April 10, 2008, Irvine agreed in writing to accept service of a notice electronically and to submit to the jurisdiction of Delaware for his deposition as though he were a resident of Delaware. A Case Financial attorney, Roderick Barnes, later emailed Irvine a document informing him of the May 5, 2008 deposition, and Irvine confirmed by email that he would be there. In addition, on May 1, \$500 was wired to Irvine to cover his travel expenses, and Irvine collected that money. Nevertheless, on May 4, the day before the deposition, Case Financial's counsel learned that Irvine would not appear. By that time, Case Financial's out-of-state counsel already had traveled to Delaware for the deposition.

Defendant and his California co-counsel traveled from Los Angeles to Delaware for the Irvine deposition on May 4, 2008. Defendant went with his Wilmington and

California counsel to the offices of Case Financial's counsel on the morning of May 5 for the deposition, where they were told, for the first time, that Irvine would not be attending. Thereafter, Defendant filed the pending motion for attorney's fees and costs.

No Delaware court could have compelled Irvine to appear for deposition in Delaware. He is a Canadian citizen and lives in Canada. Furthermore, Defendants have not provided any evidence that Irvine has any connection to this state. At most, he worked for a corporation that might be incorporated in Delaware. Indeed, Defendant admits that Irvine "as a Canadian citizen . . . most likely could not have been compelled to attend a deposition in Delaware."<sup>1</sup>

As previously noted, whether to assess attorney's fees and costs in a situation like this under Rule 30(g)(2) lies within the discretion of the Court. Based on the circumstances of this case, I do not consider an assessment of fees and costs appropriate. Case Financial and its representatives had a good faith basis to believe Irvine would appear voluntarily for his deposition and proceeded consistently with that belief. There is no evidence they received any indication to the contrary until sometime on Sunday, May 4, 2008, the day before the deposition was to occur. Moreover, Defendant knew or

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<sup>1</sup> Def.'s Mot. for Expenses ¶ 9. Because the deposition was to occur in Delaware and Irvine resided in Canada, I do not view this as a situation in which the witness failed to appear because of a failure to serve a subpoena, as referred to in Rule 30(g)(2). That condition might have existed, for example, had the deposition been scheduled for Canada and Case Financial had proceeded informally without obtaining the benefit of court process to compel Irvine's attendance.

should have known that Irvine would be attending his scheduled deposition in Delaware voluntarily, and not as a result of any court order.

Against this background, the eleventh hour notification received by Case Financial's counsel that Irvine would not attend his deposition reflects an unfortunate development that apparently was beyond Case Financial's control. The fact that Case Financial did not inform Defendant of this development until the following day does not evidence bad faith or suggest that Defendant suffered any material prejudice as a result. By the time Case Financial learned of the situation, Defendant and his California counsel already were on their way to Delaware. Thus, the circumstances do not warrant an assessment of fees and costs.

For the foregoing reasons, Defendant's Motion for Expenses and Attorneys' Fees Pursuant to Chancery Court Rule 30(g)(2) is denied.

**IT IS SO ORDERED.**

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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