

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

J. TRAVIS LASTER
VICE CHANCELLOR

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

August 9, 2010

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RE: Phillips v. Firehouse Gallery, LLC, *et al.*, C.A. No. 3644-VCL

Dear Counsel:

This is a non-expedited matter set for trial on September 27 and 28, 2010. The parties twice have sought my immediate assistance with scheduling the deposition of Scott Welker, a non-party who previously served as the president of the nominal defendant. For the reasons discussed below, Mr. Welker's deposition will go forward, if at all, on August 28 or 29, 2010. Plaintiff's counsel will bear expenses of \$5,000, an amount which I determine to be a reasonable and conservative estimate of the costs his scheduling antics inflicted on defense counsel.

FACTUAL BACKGROUND

On July 29, 2010, plaintiff's counsel emailed defense counsel to say Mr. Welker's deposition would take place on Monday, August 2 or Wednesday, August 4. On August 2, plaintiff's counsel noticed the deposition for August 4 at 3:00 p.m. These communications announced an abrupt change in Mr. Welker's role in the litigation. In May, plaintiff's counsel indicated that he would not depose Mr. Welker.

Defense counsel reacted to the last-minute deposition notice with some consternation, because he was then in the middle of a two-week vacation with his family. Defense counsel had not previously discussed his vacation plans with plaintiff's counsel, nor did he have a colleague on call to handle any discovery emergencies. While in another case this might amount to an oversight, in this matter it was reasonable. There was nothing on the calendar when defense counsel left, and although the dispute is obviously important to the parties, the case is not a high-dollar matter that can rationally support a large team of attorneys or (albeit a closer question) an attorney getting up to speed to stand by as backup.

August 9, 2010

Page 2 of 4

In the face of defense counsel's objection to the sudden deposition, plaintiff's counsel insisted on pressing forward. He did not seek or provide alternative dates. Part of his justification appears to be that Mr. Welker was busy and that the questioning would be short, lasting perhaps an hour. Leaving aside that an hour of testimony for one side may elicit multiple hours of questioning by the other, brevity provided as much justification for rescheduling as for combatively digging in. Confronted by the plaintiff's intransigence, defense counsel contacted me. Through my assistant, I advised the attorneys that this was a matter they should work out and that if they did not, one of them would be unhappy.

Plaintiff's counsel then presented his colleague with the following options:

- 1) You can call in tomorrow[;]
- 2) An associate of yours can call in tomorrow[;]
- 3) I'll postpone the dep until next week if you agree to make yourself available EVERY day of the week at ANY time that Mr. Welker can make himself available.

If you go with #3, I want an absolute written commitment from you, and an understanding that you will not bother the Court about this in the event that you are unavailable when Mr. Welker is available (assuming he is available next week).

This was not constructive, and defense counsel understandably declined this scheduling ukase. Among other things, there were additional non-party depositions scheduled for the following week, and defense counsel had oral argument in another matter before the United States District Court for the Southern District of New York. The impasse persisted until defense counsel contacted Mr. Welker directly and obtained August 9, 10, 28 and 29 as alternative dates.

The August 9 and 10 dates conflict with other non-party depositions in this case, but everyone can attend on August 28 or 29. Plaintiff's counsel objects that the current *draft* scheduling order has his pre-trial brief due on August 27, but defense counsel offered to revise the schedule to accommodate him. Unmollified, plaintiff's counsel asked me on Friday, August 6 to let him proceed with the deposition on August 9 or 10.

LEGAL ANALYSIS

Court of Chancery Rule 30(b)(1) provides that “[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action.” Delaware lawyers are expected to (and customarily do) approach deposition scheduling with due regard for the ethic of civility that animates practice in this jurisdiction. Deposition scheduling is a cooperative endeavor. Counsel openly discuss witness availability and their own calendars so that depositions can take place at times convenient for all parties. When initially issued, deposition notices typically contain nominal dates and are designed to provide notice of the identity of the witness to be deposed, rather than unilaterally setting the date, time, and place when the deposition will go forward. *See La. Mun. Police Empl. Ret. Sys. v. Fertitta*, 2009 WL 3806216, at *1 (Del. Ch. Oct. 27, 2009) (noting similar practice with motions for commission). The parsimonious and begrudging proffer of one or perhaps two dates is not an acceptable approach to deposition scheduling. The surprise deposition notice certainly is not.

Of course there are many times when the facts require (or can accommodate) scheduling a deposition on short notice. It may be necessary for counsel to subject themselves to personal inconvenience when cooperatively preparing a matter for responsible consideration by the Court. This is not one of those times.

Under the circumstances of this case, the plaintiff did not give reasonable notice as required by Rule 30(b)(1). Plaintiff’s counsel did not act in good faith by attempting to extract a deposition on the plaintiff’s preferred schedule by not asking the witness for alternative dates. Defense counsel in a non-expedited case should not have to contact a witness directly while on a family vacation to verify what plaintiff’s counsel was telling him about when the witness could be deposed. Plaintiff’s counsel may take Mr. Welker’s deposition on August 28 or 29, when all counsel are available. If plaintiff’s counsel opts not to proceed on those dates, then he will forego Mr. Welker’s deposition.

Although this remedy addresses the current scheduling dispute, it is not a sufficient consequence for the burdens plaintiff’s counsel imposed on his colleague. Plaintiff’s counsel therefore shall pay \$5,000, representing what I determine to be a reasonable and conservative measure of the expense plaintiff’s counsel inflicted as a result of his improvident approach to deposition scheduling. I could well set the amount higher. Sadly, this amount does not address the unnecessary burden placed on the Court. Payment is due within five business days. I impose these costs on plaintiff’s counsel personally rather than on the plaintiff, because it is incumbent upon Delaware attorneys to uphold the expectations for practitioners before this Court. This includes resisting importunate demands for aggressive litigation tactics, whether those demands originate

August 9, 2010

Page 4 of 4

externally with a client or internally from the belligerent emotions that inevitably cloud at times the judgment of those engaged in the adversary process.

IT IS SO ORDERED.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw