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: January 23, 2013
Date Decided: April 16, 2013

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RE: *Cartanza v. Cartanza, et al.*
Civil Action No. 7618-VCP

Dear Counsel:

This action is before me on Plaintiff, Paul P. Cartanza, Sr.'s, motion to compel the deposition of Defendant Sandra L. Cartanza, Paul's[1] 74 year-old mother, and a related request under Court of Chancery Rule 37 for reimbursement of the attorneys' fees and costs Paul incurred in pursuing his motion. Sandra is the sole and managing member of Defendant Cartanza Storage, LLC, and purports to be the sole shareholder of Nominal

[1] First names are used throughout this Letter Opinion for clarity and without intending any disrespect or familiarity.

Defendant Cartanza Grain, Inc. Paul's claims stem from various allegedly wrongful actions of Sandra, including the alleged conversion of Paul's interest in Cartanza Grain, Inc. Because the bulk of Paul's motion to compel was mooted by the parties' agreement to take Sandra's deposition, the only issue that remains is Paul's request for reimbursement of his attorneys' fees and costs.

I. BACKGROUND

On September 14, 2012, Paul's counsel, John L. Williams, emailed Sandra's counsel, William E. Manning, requesting to take Sandra's deposition on one of three proposed dates. After receiving no response, John Williams again wrote Manning on September 18, stating that "if [he did] not hear back on that tomorrow, [he would] notice it at one of the times listed in [his] last email."[2] That night, Manning responded that Sandra was hospitalized and that he would not schedule her deposition until her physician and family were comfortable doing so. Manning also invited Plaintiff's counsel to explain his "critical need" for deposing Sandra, and questioned whether the request to depose Sandra was "designed to harass."[3]

On September 19, John Williams's colleague, David L. Williams, denied that Plaintiff was trying to harass Sandra and reiterated that there were questions that only she

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2 Pl.'s Mot. to Compel the Dep. of Def. Sandra L. Cartanza ("Pl.'s Mot.") Ex. B.

3 *Id.* Ex. C.

could answer. David Williams requested that Manning contact Sandra's physician to inquire when Sandra "w[ould] be ready for one or two hours of objective questions in a convenient and comfortable setting for her."[4] On September 21, Plaintiff noticed Sandra's deposition for October 5, the earliest of the three dates proposed in John Williams's first email. On September 25, Manning informed David Williams that Sandra still was hospitalized and could not be deposed on October 5, and again requested that Plaintiff's counsel explain their particularized need for deposing Sandra. John Williams declined to provide any such justification and reiterated that he expected Sandra to appear for her October 5 deposition. On September 28, Manning's colleague, Nichole C. Alling, emailed to Plaintiff's counsel a letter from Sandra's treating physician, generally stating that Sandra was not capable of "any court appearances, depositions, or jury duty, etc." due to having "recently suffered a serious medical illness, and [being] inpatient at the University of Pennsylvania."[5]

After exchanging several more emails, counsel agreed to schedule Sandra's deposition for November 13, but Defendants' counsel conditioned their agreement upon Sandra's "availability according to her attending physician."[6] On October 15, John

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4 *Id.* Ex. D.

5 *Id.* Ex. H.

6 *Id.* Ex. J.

Williams made the first of two written requests for an update on Sandra's availability for her November 13 deposition. On October 25, Manning responded that Sandra still was recuperating, and that he would forward a letter from her attending physician as soon as he had one. Plaintiff's counsel promptly requested a more specific update regarding Sandra's projected ability to sit for her deposition, her health status, and any accommodations she would require at her deposition. On November 2, Manning forwarded to John Williams a second letter from Sandra's physician, stating that Sandra was unable to sit for her deposition or any other "non-urgent" matters.[7] The letter did not state when Sandra might become available or what symptoms were preventing her from being deposed. Instead, the letter indicated only that Sandra was being treated on an outpatient basis and that "her next follow up [would] be within the next few weeks with repeat radiology studies."[8] Against this backdrop, it is interesting that in November 2012, Sandra evidently was healthy enough to move around to visit with family members and attend her daughter's wedding.[9]

After another fruitless attempt by Plaintiff's counsel to obtain more information regarding Sandra's condition and projected availability, Paul moved to compel on

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7 *Id.* Ex. U.

8 *Id.*

9 Sandra L. Cartanza Dep. 113–15.

November 21, 2012. Thereafter, on December 3, Sandra's counsel informed Paul's counsel that Sandra would be available to be deposed in January. Ultimately, Sandra's deposition was taken on January 10, 2013.

II. ANALYSIS

Court of Chancery Rule 37(a)(4)(A) provides that if a

> motion [to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the Court *shall*, after affording an opportunity to be heard, require the party whose conduct necessitated the filing of the motion . . . to pay to the moving party the reasonable expenses incurred . . . , including the attorney's fees, *unless* the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.[10]

In addition, this Court "has the power to issue sanctions for discovery abuses under its inherent equitable powers, as well as the Court's 'inherent power to manage its own affairs.'"[11] In the event this Court determines that sanctions for discovery abuses are appropriate, the sanction must be tailored to the culpability of the wrongdoer and the harm suffered by the complaining party.[12]

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10 Ct. Ch. R. 37(a)(4)(A) (emphasis added).

11 *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009).

12 *Id.*

Discovery is intended to be a cooperative and self-regulating process.[13] Discovery should be managed by the parties with very little judicial oversight. Indeed, "[t]his Court does not relish the opportunity to resolve discovery spats that likely could have been resolved by the parties on their own."[14] To avoid such situations, "cooperation and communication among the parties" are essential during discovery.[15]

Unfortunately, communication and cooperation between opposing counsel in this matter were less than ideal. In some respects, Plaintiff's counsel may have been unduly confrontational, but Defendants bear most of the responsibility for the parties' failure to agree upon a date for Sandra's deposition until after Paul filed his motion to compel. In particular, Defendants continually ignored or evaded Plaintiff's requests for information regarding Sandra's availability for her deposition. For instance, on October 15, Plaintiff requested an update on whether Sandra had been discharged from the hospital, how her recovery was proceeding, and whether she would need any special accommodations (which Plaintiff offered to make) for her November 13 deposition. Defendants did not respond. On October 25, Plaintiff again inquired as to Sandra's location, *i.e.*, whether she

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13 *Amerisaleh v. Bd. of Trade of City of New York, Inc.*, 2008 WL 241616, at *3 (Del. Ch. Jan. 17, 2008).

14 *Id.*

15 *Id.*

remained an inpatient at the hospital, health, and any accommodations she might need at her upcoming deposition. Defendants' counsel responded later that day as follows:

> John – I spoke to Chris Cartanza most recently on Monday. He reports that his mother remains in recuperation and has not returned home. I asked for a letter from her attending physician and he will see to that. I will forward it as soon as it is in hand.[16]

Notably, Defendants did not state whether Sandra would be able to sit for her November 13 deposition, whether she would need accommodations and, if so, what those would be, or, if she could not sit for her deposition, when she might become available to be deposed.

Dissatisfied with Defendants' vague response, in a November 13 email, Plaintiff again requested an update regarding Sandra's health and ability to be deposed. In response, Defendants forwarded to Plaintiff a second doctor's letter excusing Sandra from all "non-urgent" matters, including her November 13 deposition.[17] The letter was highly conclusory and provided little objective information relevant to Plaintiff's inquiries. As Defendants' counsel noted, it is sometimes difficult to obtain requested information from busy physicians. Privacy concerns and requirements further complicate this process. Nevertheless, in the circumstances of this case, Defendants and their

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16 Pl.'s Mot. Ex. S.

17 *Id.* Ex. U.

counsel could and should have done more to promote constructive and meaningful communications with Plaintiff's counsel regarding the availability and condition of a key witness like Defendant Sandra.

Moreover, Defendants repeatedly requested that Paul explain his "particularized need" to "interrogate" Sandra and asked Plaintiff to be specific regarding the information he sought.[18] Yet no such "particularized need" standard exists under Delaware law, even where, as here, the deponent is suffering from a medical ailment.[19] Rather, a party has a

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[18] *Id.* Ex. A ("For the record, I don't believe you have a critical need for that deposition and wonder if your demand for her deposition is designed to harass."), Ex. F ("Recall that I invited John to explain your client's particularized need for interrogating Mrs. Cartanza in her current condition. If there is some information only she possesses, I think counsel are obliged to discuss how best to satisfy your legitimate discovery needs . . . I again invite you to be more specific regarding the information you seek."), Ex. W ("[T]he court will want to make a judgment about whether the proponent has information which is critical and unavailable elsewhere.").

[19] *See* Ct. Ch. R. 26; *Taglialatela v. Galvin*, 2012 WL 6681871, at *1 (Del. Ch. Dec. 7, 2012) ("The request for a protective order therefore carries a substantial burden for the movant."); *McCarthy v. Cablevision Sys. Corp.*, 2007 WL 1309399 (Del. Ch. Apr. 24, 2007) (ORDER) (ordering the deposition of a party notwithstanding that party's "physical condition"); *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004) ("[O]bjections to discovery requests, in general, will not be allowed unless there have been clear abuses of the process which would result in great and needless expense and time consumption."); *see also Lindsey v. St. Paul Fire & Home Ins. Co.*, 202 Fed. Appx. 137, 2006 WL 3044427 (7th Cir. 2006) (holding that a doctor's note that was inconsistent with the witness's recent physical activity and that "did not show sufficient familiarity with the factual requirements of a deposition" was not sufficient to meet the heavy

right to take a deposition regarding "any matter . . . which is *relevant* to the subject matter involved in the pending action."[20] The information sought need not be "critical," as Plaintiff's counsel reminded Defendants' counsel on no less than three occasions.[21] Plaintiff also offered to make all reasonable accommodations needed for Sandra to be deposed.[22] Yet Defendants continued unilaterally to postpone Sandra's deposition without providing meaningful information to Plaintiff regarding her whereabouts or the seriousness of her condition. Similarly, Defendants and their counsel, perhaps at the behest of Sandra's family, made no serious attempt to have a constructive dialogue with opposing counsel about the possibility of allaying Plaintiff's reasonable concern that Sandra's testimony might be lost if her deposition did not go forward promptly. Moreover, despite providing assurances that they would "advise periodically" regarding Sandra's medical availability,[23] Defendants' counsel dribbled out information only

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burden to avoid a deposition); 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3027 (1986 Supp.).

20 Ct. Ch. R. 26(b)(1) (emphasis added).

21 Pl.'s Mot. Exs. G, K, T.

22 *Id.* Ex. G ("If she has a location more preferable . . . please let us know."), Ex. K ("If needed, we can extend the deposition over multiple days under the supervision of a physician."), Ex. U (requesting that Defendants inform Plaintiff of "any special accommodations you or her physician(s) anticipate requesting.").

23 *Id.* Ex. O.

grudgingly. Far from being communicative and cooperative, therefore, Defendants either ignored or provided empty responses to Plaintiff's legitimate inquiries.

Defendants contend that they justifiably relied on two doctor's letters in postponing Sandra's deposition and that they made her available for deposition as soon as she was able medically to be deposed.[24] On the record before me, however, I am not persuaded that Defendants' refusal to commit to a date for Sandra's deposition until after Plaintiff moved to compel on November 21 was substantially justified. The evidence shows that during the time Sandra was too sick to be deposed, she was healthy enough to travel to visit family and to attend her daughter's small wedding in November.[25] Moreover, Sandra's doctor's letters contained virtually no information regarding her medical status other than that she was unable to be deposed.[26] This does not mean that a party or her physician must divulge private medical information simply to reschedule a deposition. Where, as here, a doctor's letter merely states in conclusory terms that a party is unable to be deposed for medical reasons, however, it is not surprising that opposing counsel might demand to know more. In such circumstances, counsel resisting

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[24] Def.'s Letter to the Court dated Dec. 13, 2012, at 3.

[25] Sandra L. Cartanza Dep. 113–15.

[26] Pl.'s Mot. Exs. H, U. This is particularly so where, as here, the doctor's letter "does not show sufficient familiarity with the factual requirements of a deposition." *Lindsey v. St. Paul Fire & Home Ins. Co.*, 202 Fed. Appx. 137, 2006 WL 3044427 (7th Cir. 2006).

the deposition must do more than was done here to convince the Court that there is substantial justification for their opposition.[27]

Therefore, I conclude that Defendants' actions have obstructed Plaintiff's legitimate discovery requests and wasted unnecessarily both Plaintiff's and this Court's time and resources. Accordingly, I conclude that an award of a portion of Plaintiff's reasonable expenses, including attorneys' fees, is appropriate in this case.

In an affidavit, Plaintiff asserts that he has incurred $20,877.20 in attorneys' fees and costs in pursuing his motion to compel. Those fees and costs date back to September 25, 2012, and seem rather high. In addition, I do not consider Defendants' initial responses to the requests for Sandra's deposition, including their submission of the first letter from the attending physician, to have been problematic. Defendants' later conduct, however, was not substantially justified. Thus, I conclude that an award of $5,000 is appropriate under Rule 37(a)(4)(A) to reimburse Plaintiff for the expenses he reasonably incurred in pursuing the motion and direct Defendants to pay that amount to Plaintiff within ten (10) days. Based on all the circumstances, including the fact that Defendants' conduct was not egregious, I find that any higher award would be unjust.

For the foregoing reasons, I grant Plaintiff's request for its reasonable fees and expenses in the amount of $5,000.

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[27] *See supra* note 19.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp