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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KABITA CHOUDHURI,
Plaintiff,
v.
WELLS FARGO BANK, N.A., et al.,
Defendants.

Case No. 15-cv-03608-VC (KAW)

**ORDER GRANTING MOTION TO
COMPEL DEPOSITION**

Re: Dkt. No. 138

Plaintiff Kabita Choudhuri brought the instant suit against Defendant Wells Fargo Bank, N.A., alleging violations of the Real Estate Settlement Procedures Act ("RESPA") and the California Homeowner Bill of Rights ("HBOR"), as well as bringing claims of promissory estoppel and breach of the implied covenant of good faith and fair dealing. (Second Amended Compl. ("SAC"), Dkt. No. 74.)¹ Plaintiff alleges that on January 13, 2016, Plaintiff had two calls with Defendant, in which she "was assured that if there was a second income to support the household, a loan modification would be approved." (SAC at 7.) A third-party, Ronjon Sen, was present on the calls. (Id.)

Defendant now moves to compel the deposition of Mr. Sen. (Def.'s Mot., Dkt. No. 138.) The Court previously deemed the matter suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b) and vacated the hearing set for October 5, 2017. (Dkt. No. 145.) Upon review of the parties' filings, the Court GRANTS Defendants' motion to compel.

¹ On January 25, 2017, the presiding judge dismissed all claims against Defendant Treena Berlinsky with prejudice, and dismissed the claim for breach of the implied covenant of good faith and fair dealing against both Defendants with prejudice. (Dkt. No. 92 at 2.)

I. BACKGROUND

1 On April 18, 2017, Defendant retained Quest Discovery Services ("Quest") for the purpose
2 of serving Mr. Sen with a deposition subpoena for May 3, 2017. (Patao Decl. ¶ 2, Dkt. No. 138-
3 3.) On April 28, 2017, Quest's process server personally served Mr. Sen with the deposition
4 subpoena, but failed to report to his manager that service had been completed. (Patao Decl. ¶ 3.)
5 As a result, Quest erroneously informed Defendant's counsel on May 1 and May 2, 2017 that Mr.
6 Sen had not been served with the deposition subpoena. (Patao Decl. ¶ 4.)

7 On May 3, 2017, Mr. Sen presented himself for deposition. (Kelly Decl. ¶ 2, Dkt. No.
8 138-2.) Defendant's counsel asserts that based on Quest's representations, it believed Mr. Sen had
9 not been served, and had therefore not prepared for the deposition to proceed or retained a court
10 reporter. (Kelly Decl. ¶ 2.) Plaintiff alleges that Mr. Sen had previously contacted Defendant's
11 counsel to reschedule the deposition, but was told that he would be sanctioned if he did not
12 appear.² (Plf.'s Opp'n at 2, Dkt. No. 140.) Ultimately, Defendant's counsel informed Mr. Sen that
13 the deposition would not proceed and requested his contact information; Mr. Sen confirmed his
14 address, but would not provide a telephone number. (Kelly Decl. ¶¶ 2-3.)

15 On June 20, 2017, Defendant again retained Quest to serve Mr. Sen with the deposition
16 subpoena for August 22, 2017. (Patao Decl. ¶ 6.) Defendant also retained two private
17 investigators to perform service. (Vukovic Decl. ¶¶ 6, 8, Dkt. No. 138-1.) After multiple attempts
18 to serve and several stake-outs, the second private investigator served Mr. Sen with the deposition
19 subpoena on August 10, 2017. (Vukovic Decl. ¶ 9.)

20 On August 22, 2017, Mr. Sen did not appear for his deposition. (Vukovic Decl. ¶ 10.)
21 Defendant's counsel called the phone number on file for Mr. Sen, and was informed by a woman
22 they believe to be Mr. Sen's wife that Mr. Sen was ill and unable to take any calls. (Vukovic Decl.
23 ¶ 11.) Defendant's counsel asserts that prior to this, Mr. Sen had never objected to his scheduled
24 deposition date or informed Defendant's counsel of his illness. (Vukovic Decl. ¶ 12.) Defendant's
25 counsel informed the woman that they wished to reschedule Mr. Sen's deposition and would
26 follow up. (Vukovic Decl. ¶ 11.) Following Mr. Sen's non-appearance, Defendant's counsel left
27

28 ² Plaintiff provides no evidence in support of this contention, such as a declaration by Mr. Sen.

1 multiple voicemails and sent multiple e-mails to Mr. Sen, requesting that he provide dates for his
2 deposition. (Vukovic Decl. ¶ 13.) Mr. Sen did not respond, and on August 30, 2017, Defendant
3 filed the instant motion.

4 On September 11, 2017, Plaintiff filed an opposition to Defendant's motion, arguing that
5 the motion was designed "to mislead this court into thinking that Mr. Sen is avoiding being
6 deposed." (Plf.'s Opp'n at 2.) Plaintiff further asserts that Mr. Sen had assured her "that he will
7 appear for a deposition at a date convenient to all parties." (Id.) Plaintiff therefore contends there
8 is no need for a hearing, and that the Court should deny the motion and order Defendant to
9 formally contact Plaintiff to set up a date for a deposition. (Id.) Mr. Sen, in turn, has not filed an
10 opposition to the instant motion.

11 On September 20, 2017, Defendant filed its reply. (Def.'s Reply, Dkt. No. 142.)
12 Defendant states that despite having reached out multiple times to Mr. Sen, and after serving Mr.
13 Sen with the instant motion, as of the date of the reply brief, Mr. Sen still had not responded to any
14 of counsel's requests to reschedule his deposition. (Supp. Vukovic Decl. ¶ 2, Dkt. No. 142-1.)

15 **II. LEGAL STANDARD**

16 Under Rule 26, in a civil action, a party may obtain discovery "regarding any non-
17 privileged matter that is relevant to any party's claim or defense and proportional to the needs of
18 the case considering the importance of the issues at stake in the action, the amount in controversy,
19 the parties' relative access to relevant information, the parties' resources, the importance of the
20 discovery in resolving the issues, and whether the burden or expense of the proposed discovery
21 outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Additionally, the court must limit the
22 frequency or extent of discovery if it determines that: "(i) the discovery sought is unreasonably
23 cumulative or duplicative, or can be obtained from some other source that is more convenient, less
24 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to
25 obtain the information by discovery in the action; or (iii) the proposed discovery is outside the
26 scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C).

27 Federal Rule of Civil Procedure 45 governs discovery of non-parties by subpoena. Rule 45
28 provides, among other things, that a party may command a non-party to testify at a deposition.

1 Fed. R. Civ. P. 45(a)(1)(A)(iii). The scope of discovery through a Rule 45 subpoena is the same
2 as the scope of discovery permitted under Rule 26(b). *Beaver Cty. Employers Ret. Fund v. Tile*
3 *Shop Holdings, Inc.*, No. 3:16-mc-80062-JSC, 2016 WL 3162218, at *2 (N.D. Cal. June 7, 2016)
4 (citing Fed. R. Civ. P. 45 Advisory Comm.'s Note (1970); Fed. R. Civ. P. 34(a)).

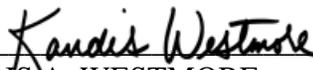
5 **III. DISCUSSION**

6 As Defendant states, Mr. Sen is an important third-party witness, who can verify Plaintiff's
7 claim that Defendant promised her a loan modification if she obtained a second income. (Def.'s
8 Mot. at 7; see also SAC at 7.) Plaintiff does not dispute that Mr. Sen's deposition may be taken,
9 but instead argues that there is no need for the instant motion because Mr. Sen has assured her that
10 he will appear for a deposition at a date convenient to all parties. (Plf.'s Opp'n at 2.) Plaintiff also
11 makes general complaints about how discovery has proceeded in this case, which are not relevant
12 to the merits of the instant motion.

13 In light of the above, the Court GRANTS Defendant's motion to compel. While Plaintiff
14 states that Mr. Sen has assured her that he will appear for a deposition, Defendant has presented
15 evidence that Mr. Sen has, in fact, not been cooperating with Defendant, having failed to respond
16 to Defendant's multiple attempts to reschedule the deposition. The Court therefore ORDERS Mr.
17 Sen to appear for his deposition; Mr. Sen shall immediately contact Defendant's counsel to set up a
18 deposition, at which he must attend.³ The Clerk of the Court is directed to serve this order on Mr.
19 Sen. Failure to comply may result in the Court issuing an order to show cause, requiring Mr. Sen
20 to explain why he should not be held in contempt of court.

21 IT IS SO ORDERED.

22 Dated: October 5, 2017

23 
24 KANDIS A. WESTMORE
25 United States Magistrate Judge

26 _____
27 ³ With respect to Plaintiff's contention that Defendant should have to formally contact Plaintiff to
28 set up the deposition, the Court disagrees. (See Plf.'s Opp'n at 2.) Plaintiff is not an attorney and
does not represent Mr. Sen, and has no authority to set up or refuse a deposition on behalf of Mr.
Sen. As a party, however, she may wish to attend Mr. Sen's deposition and should meet and
confer regarding a date that works for everyone.