

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Civil Action No. 11-cv-00520-PAB-BNB

HEALTH GRADES, INC.,

Plaintiff,

v.

MDX MEDICAL, INC., d/b/a Vitals.com,

Defendant.

ORDER

This matter arises on **Health Grades' Expedited Motion to Enforce Trial Subpoenas** [Doc. # 694, filed 12/23/2014] (the "Motion"), which is DENIED.

This case was set for trial beginning February 3, 2014. The matter was not ready for trial, however, the trial date was vacated, and no new trial date has been set.

The dispute presented by this Motion arises from the following events:

Health Grades gave MDx notice in the Pretrial Order that it intended to call Mitchel Rothschild--MDx's Chief Executive Officer; Erika Boyer--MDx's Vice President, Database and Product Development, and; Larry West, MDx's Chief Technology Officer, at trial, and MDx did not object in the Pretrial Order. Instead, MDx proposed the Court enter an order that "absent trial subpoenas" witnesses would not have to be present at trial. On October 15, 2013, counsel for MDx accepted service of trial subpoenas for Mr. Rothschild, Ms. Boyer and Mr. West. . . . [O]n December 13 counsel for MDx agreed to produce Ms. Boyer and Mr. West during Health Grades' case-in-chief. MDx would not agree, however, to produce Mr. Rothschild, the MDx CEO, during Health Grades' case-in-chief. When Health Grades informed MDx's counsel that Health Grades would file a motion to compel Mr. Rothschild's attendance at trial during its case-in-chief, MDx's

counsel withdrew its agreement to produce Ms. Boyer and Mr. West.

Motion [Doc. # 694] at pp. 1-2.

At the time of these events, MDx intended to call all three of the disputed witnesses at the trial, although perhaps reserving their presence until the defense presented its case-in-chief. Subsequent to the filing of the Motion, MDx stated that (1) it will not call Mr. West to testify at trial and (2) it voluntarily will make Ms. Boyer available for testimony during Health Grades' case-in-chief provided MDx may "fully examine Ms. Boyer during Health Grades' case-in-chief, if MDx deems this is necessary." Response [Doc. # 707] at pp. 5-7.

Under Rule 45(c)(1), Fed. R. Civ. P., I can compel the attendance of a party's corporate officer pursuant to a subpoena only "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or "within the state where the person resides, is employed, or regularly transacts business in person. . . ."¹ The MDx witnesses live and work in New York and New Jersey. Consequently, I cannot compel them to comply with the subpoenas commanding an appearance in Colorado.

It is commonplace for trial judges, in ordering and expediting trials, to require witnesses to testify only once. Thus, if both Health Grades and MDx expect to elicit live testimony from a witness, the trial judge may say that all testimony must occur in a single sitting. That is a decision for the district judge at an appropriate time.

Although MDx currently employs (and thus controls) Messrs. Rothschild and West and

¹Rule 45 was amended effective December 1, 2013, and the amendments applied only to actions commenced after that date or where application is just and practicable. I find that application of the amended rule is just and practicable here because the case is not yet set for trial and probably will not be for some time.

Ms. Boyer, the action currently is not set for trial, and the trial is likely to occur many months from now. In the meantime, although MDx currently says it will voluntarily produce Ms. Boyer for live testimony during Health Grades' case-in-chief, its ability to do so may change between now and the time of the trial. I cannot compel Ms. Boyer's compliance with the subpoena, and I not will impose an obligation on MDx to which it ultimately may not be able to comply.

IT IS ORDERED that the Motion [Doc. # 694] is DENIED.

Dated April 30, 2014.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge