UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY SETTLES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:13-CV-662 (CEJ)
	)	
BRIAN K. LIVENGOOD, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the court on the motion of defendants Brian K. Livengood and Hogan Transports, Inc., for a motion to quash and/or for protective order barring plaintiff from re-deposing witnesses. Also before the court is the plaintiff's motion for leave to take second depositions.

I. Background

Counsel for defendants scheduled the depositions of Dr. Victoria Johnson and Dr. Philbert Chen, plaintiff's treating physicians, for February 18, 2015, in Urbana, Illinois. Prior to that date, plaintiff's counsel indicated that he intended to take the video depositions of the witnesses, but stated that he wanted to do so on a different date than the regular deposition. Pl. Ex. 1 (emails dated Feb. 9, 2015). Defendants' depositions of the witnesses proceeded as scheduled on February 18th. On March 19, 2015, plaintiff served notices to take a second deposition of the witnesses in Urbana, Illinois.

On April 7, 2015, defendant conducted a deposition of witness Marty Rosmanitz, in Springfield, Missouri. Counsel for plaintiff participated by telephone. During the deposition, Mr. Rosmanitz stated that he would be on vacation at the

scheduled trial date. Plaintiff seeks leave to conduct a second deposition of Mr. Rosmanitz to preserve his testimony for trial.

II. Discussion

Generally, a party may obtain a deposition simply by serving a notice or subpoena. Fed.R.Civ.P. 30(a)(1). At one time, this was also true even if a party was seeking to reopen or retake a deposition. Kleppinger v. Texas Dep't of Transp., 283 F.R.D. 330, 332-33 (S.D. Tex. 2012). Under the 1993 amendments, Rule 30 now requires that "[a] party must obtain leave of the court, . . . if the parties have not stipulated to the deposition and . . . the deponent has already been deposed in the case." Rule 30(a)(2)(A)(ii). Leave must be granted "to the extent consistent with Rule 26(b)(2)." Rule 30(a)(2).[1]

Under Rule 26(b)(2), the court must limit discovery if it is: (1) unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome or less expensive; (2) the person seeking the discovery has had ample opportunity already to obtain the same information; or (3) the burden or expense of taking the discovery outweighs its likely benefit. Rule 26(b)(2)(C). The purpose of Rule 26(b)(2) is "to minimize redundancy and encourage attorneys to be sensitive to the comparative costs of different methods of securing information." Rule 26 advisory committee's note, 1983 amendments. In addition, the rule "seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition." Id.

[1]Leave is not required when a deposition is temporarily recessed for convenience of counsel or the deponent or when it is necessary to gather additional materials before resuming. Rule 30 advisory committee's note, 1993 amendments. This exception does not apply here.

Typically, a party may conduct a second deposition of a witness if new information comes to light relating to the subject of that deposition, new parties are added to the case, new allegations are made in pleadings, or new documents are produced. Keck v. Union Bank of Switzerland, No. 94CIV.4912(AGS)(JCF), 1997 WL 411931, at *1 (S.D.N.Y. July 22, 1997)). Under these circumstances, the second deposition is limited to the new information. A second deposition may also be ordered if the examining party was inhibited from conducting a full examination as a result of obstructive conduct at the first deposition. Id.

None of these circumstances apply in this instance: plaintiff elected not to pose questions to Drs. Johnson and Chen during their depositions out of concern for their demeanor and appearance and may not now impose the expense of second depositions on defendants. See State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc., 254 F.R.D. 227, 236 (E.D. Pa. 2008) (granting protective order where defendant opted to "conduct depositions seriatim, thereby shifting costs to the opposing side"). Plaintiff protests that he had only five minutes on February 18th in which to ask Dr. Johnson questions, but that is the result of his decision not to secure her presence for a longer period of time on that date.

Plaintiff seeks leave to secure the videotaped trial testimony of Mr. Rosmanitz. "[T]here is no right to a 'trial deposition' separate and apart from the 'deposition' rules expressly found in Rules 30 through 32. Parties who make the tactical decision not to preserve deposition testimony during the discovery phase take the risk that the testimony will not be presented if the witness is unable or unwilling to appear at trial." Smith v. Royal Caribbean Cruises, Ltd., 302 F.R.D. 688, 692 (S.D. Fla. 2014). If Mr. Rosmanitz is unavailable to testify at trial, the

parties may introduce testimony from his April 7th deposition.

Defendants indicate their willingness to participate in second depositions of these witnesses, but not to bear the expense of doing so. While the court will grant plaintiff leave to take second depositions of Dr. Chen, Dr. Robinson, and Marty Rosmanitz, plaintiff will be required to pay the reasonable attorneys' fees and costs incurred by the defendants in connection with attending the depositions.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion to quash and/or for protective order [Doc. # 59] is **granted**.

IT IS FURTHER ORDERED that plaintiff's motion for leave to take videotaped depositions [Doc. # 60] is **granted.**

IT IS FURTHER ORDERED that plaintiff shall pay the reasonable attorneys' fees and costs incurred by defendants in connection with the second deposition of the witnesses.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 4th day of May, 2015.