UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FIRESTONE FINANCIAL CORP.,

Plaintiff,

v.

AB MARKETING, LLC d/b/a The Sphere of Cincinnati, et al.,

Defendants.

Case No. 1:12-cv-446

Weber, J.
Bowman, M.J.

MEMORANDUM ORDER

I. Background

The parties have completed written discovery in this case. Plaintiff has completed oral discovery, but Defendants have not taken any depositions to date. Although the deadline for completion of discovery has now passed, prior to the expiration of that deadline Defendant Darroll W. Alexander filed a motion seeking to compel Plaintiff to produce two of its employees for deposition in this district. Plaintiff filed a response in opposition, to which Defendant filed a reply. The Court deferred ruling on the motion until following the completion of a court-facilitated settlement conference, which, regrettably, was not successful. (Doc. 42).

II. Analysis

Defendant's pending motion seeks an order compelling Plaintiff to produce two of its employees for deposition, ostensibly pursuant to Federal Rule of Civil Procedure "30(b)(5)." Although that rule clearly is not applicable, it appears that Defendant actually seeks to depose the two witnesses under either Rule 30(b)(1) as a "party" or under Rule

30(b)(6) as "officers, directors, or managing agents." As Plaintiff notes, a motion to compel discovery, including attendance at a deposition, ordinarily must be filed pursuant to Rule 37. In addition, such a motion should not be filed in this district absent exhaustion of good faith attempts to resolve the discovery dispute without Court intervention. *See* Local Rules 37.1 and 37.2.

Defendant's motion to compel the attendance of the two witnesses for a deposition to be conducted in Ohio will be denied on multiple grounds. First, prior to compelling a deposition, Rule 30(b)(6) anticipates the issuance of notice of deposition or subpoena – neither of which occurred in this case. A motion to compel the deposition of a party also ordinarily is not filed prior to a formal notice of deposition. Here, defense counsel's paralegal merely sent an email inquiring whether she could set up dates for the witnesses' depositions in Ohio – a request that was denied. Plaintiff alternatively offered the two witnesses for deposition at their place of employment and Plaintiff's principal place of business in Massachusetts, or via telephone (or presumably video) if Defendant wished to avoid travel expenses. Defendant did not respond to the Plaintiff's alternative offer before filing his motion, and has failed to explain even in his reply memorandum why Plainitiff's alternative proposal is inadequate. *See Bricker v. R & A Pizza, Inc.*, 2011 WL 3941982 at *3 (S.D. Ohio, Sept. 6, 2011)(holding that "[i]n the context of compelling a party to appear for a deposition, such an order may be issued only if a proper deposition notice is served.").

Second, Rule 30 generally authorizes only the deposition of a corporate party's officers, directors, or managing agents. Defendant alleges that the two employees were intimately involved in processing the loan that is at issue in this lawsuit, and on that

basis should be deemed to be "managing agents" of the corporate Plaintiff. However, Plaintiff has offered evidence that the two witnesses are lower level employees, neither of whom Plaintiff intends to call as its witness. (*See* Doc. 36-1).

It is Defendant's burden to show that the witnesses are, in fact, managing agents. *E.E.O.C. v. Honda of America Mfg., Inc*., 2007 WL 682088 at *2 (S.D. Ohio, Feb. 28, 2007). Moreover, "[t]he determination of whether a deponent is an officer, director, or managing agent of a corporate party is made at the time the deposition is noticed, rather than at the time the events in question occurred." *Id.* If Plaintiff intended to call either witness, a different result likely would be obtained. *See Novovic v. Greyhound Lines, Inc.*, 2012 WL 252124 (S.D. Ohio, Jan. 26, 2012)(noting that employees who have been identified on Plaintiffs' witness list who had managerial responsibilities qualified as "managing agents"). However, notwithstanding Defendant's plea to liberally construe the two employees as "managing agents" subject to being hailed across the country for deposition by Defendant at Plaintiff's expense, the Court is not persuaded. Defendant admits that the employees are not officers or directors, and has offered no evidence to contradict Plaintiff's representation that the two employees did not have any managerial responsibility. The burden to show that employees are managing agents has been described as "modest," but it is not non-existent. As low level employee witnesses ostensibly involved in gathering information relating to the loan at issue, the witnesses may (or may not) prove to have relevant information that is favorable to the defense, but Defendant cannot shift the burden of travel expenses merely by creatively arguing that the witnesses are managing agents.[1]

[1]Defendant argues that the witnesses are Plaintiff's "primary factual witnesses," and that if they do not testify, Plaintiff "likely loses on the basis that their hearsay statements will not be permitted." (Doc. 38 at

As a final basis for denying Defendant's motion, Rule 34 provides that a court must quash or modify any subpoena that requires a person who is neither a party nor an officer to travel more than 100 miles from where that party resides, is employed, or regularly transacts business in person. *See* Rule 45(c)(3)(A)(ii).

III. Conclusion

Accordingly, **IT IS ORDERED**:

Defendant's motion to set deposition (Doc. 31) is **DENIED** but without prejudice to Defendant's right to depose the same witnesses in Massachusetts within thirty (30) days, or alternatively, to depose the same witnesses either by telephone or video.

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge

3-4). Any such risk remains the Plaintiff's to take; Defendant may not force Plaintiff to name as testifying witnesses employees that Plaintiff does not otherwise intend to call.