IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM MUT. AUTO. INS. CO., ET AL.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	NO. 15-cv-5929
LEONARD STAVROPOLSKIY, ET AL.,	:	
Defendants.	:	
EASTERN APPROACH REHABILITATION, LLC, ET AL.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	NO. 16-cv-1374
STATE FARM MUT. AUTO. INS. CO., ET AL.,	:	
Defendants.	:	

MEMORANDUM

Joyner, J. July 20, 2017

Before the Court are Defendants' Motion to Compel the Depositions of Richard Castagna, Esquire, Matthew Moroney, Esquire, and Warren Holland, Esquire (Doc. No. 55) and Plaintiffs' Response in Opposition thereto, and Motion for Protective Order (Doc. No. 67), along with various replies and supplemental briefing (Doc. Nos. 68, 72, and 74). For the

following reasons, we will deny Defendants' Motion to Compel and grant Plaintiffs' Motion for a Protective Order.[1]

I. Background and Applicable Law[2]

Defendants seek to compel the depositions of Plaintiffs' attorneys of record in this case in order to discover information regarding the nature of any investigations into Defendants that Plaintiffs conducted prior to November 2013. (Doc. No. 55, at ¶¶ 1-28, 64). Because Plaintiffs filed their lawsuit on October 30, 2015, such information may be relevant to Defendants' argument that Plaintiffs' fraud claims are barred by Pennsylvania's two-year statute of limitations. See 42 Pa.C.S.A. § 5524(7); Doc. No. 55, at ¶ 67. Plaintiffs, meanwhile, seek a protective order precluding Defendants from seeking depositions of their counsel.[3]

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[1] For purposes of this Memorandum and accompanying Order, "Plaintiffs" means State Farm Auto Insurance Company and State Farm Fire and Casualty Company, while "Defendants" means Dr. Leonard Stavropolskiy, Dr. Joseph Wang, Eastern Approach Rehabilitation, LLC, and Aquatic Therapy of Chinatown, Inc.

[2] We write primarily for the parties and do not repeat here the facts and allegations, which are set forth in E. Approach Rehab.,LLC v. State Farm Mut. Auto. Ins. Co., No. 16-CV-1374, 2016 WL 3078036, at *1 (E.D. Pa. June 1, 2016), State Farm Mut. Auto. Ins. Co. v. Stavropolskiy, No. 15-CV-5929, 2016 WL 2897427, at *1 (E.D. Pa. May 18, 2016), and State Farm Mut. Auto. Ins. Co. v. Stavropolskiy, No. 15-CV-5929, 2016 WL 627257, at *1 (E.D. Pa. Feb. 17, 2016).

[3] A court may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(A). "Rule 26(c) is broader in scope than the attorney work product rule, attorney-client privilege and other evidentiary privileges because it is designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense not just to protect confidential communications." Boughton v. Cotter Corp., 65 F.3d 823, 829-30 (10th Cir. 1995).

Generally speaking, "material that is relevant to the subject matter involved in the action is discoverable as long as it is not privileged." Premium Payment Plan v. Shannon Cab Co., 268 F.R.D. 203, 204 (E.D. Pa. 2010); see also Fed. R. Civ. P. 26(b)(1). Although depositions of opposing counsel are "generally disfavored in federal courts," Guantanamera Cigar Co. v. Corporacion Habanos, S.A., 263 F.R.D. 1, 8 (D.D.C. 2009) (citing Hickman v. Taylor, 329 U.S. 495, 513 (1947)), it is nevertheless clear that opposing counsel will sometimes possesses relevant non-privileged information. Accordingly, opposing counsel are not automatically immune from deposition obligations.

The parties disagree on the applicable law for determining whether to allow a party to depose opposing counsel, and courts in this district have applied various tests. See Cambs v. Am. Express Co., Inc., No. CV 15-428, 2016 WL 4735022, at *2-3 (E.D. Pa. Sept. 12, 2016) (collecting cases). Defendants ask us to follow Frazier v. Se. Pa. Transp. Auth., in which this Court held that a party may shield its counsel from deposition only by showing an "undue burden or oppression measured by (1) the extent to which the proposed deposition promises to focus on central factual issues, rather than peripheral concerns; (2) the availability of the information from other sources, viewed with an eye toward avoiding cumulative or duplicative discovery; and (3) the harm to the party's representational rights resulting

from the attorney's deposition." 161 F.R.D. 309, 313 (E.D. Pa. 1995); see also Premium Payment Plan, 268 F.R.D. at 204 (applying Frazier).

Plaintiffs, meanwhile, contend that the controlling standard is the "Shelton rule," named for the Eighth Circuit's opinion in Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986). Under the Shelton line of cases, "depositions of opposing counsel are permissible only if: '(1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information sought is crucial to the preparation of the case.'" In re Linerboard Antitrust Litig., 237 F.R.D. 373, 385 (E.D. Pa. 2006) (alteration omitted).

We agree with Plaintiffs that the Shelton rule provides the appropriate framework for analysis in these cases. By placing the burden on the party seeking to depose opposing counsel, the Shelton rule better safeguards the considerable policy concerns that arise when a litigant attempts to depose its opponent's counsel of record. See Shelton, 805 F.2d at 1327 ("Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation."); Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co., 276 F.R.D. 376, 380-81 (D.D.C. 2011) ("Allowing depositions of opposing counsel, even if these depositions were limited to

relevant and non-privileged information, may disrupt the effective operation of the adversarial system by chilling the free and truthful exchange of information between attorneys and their clients."). And unlike Frazier, the Shelton rule has been endorsed by three Courts of Appeals. See Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628 (6th Cir. 2002); Boughton v. Cotter Corp., 65 F.3d 823, 830 (10th Cir. 1995) (holding that a trial court "has the discretion to issue a protective order against the deposition of opposing counsel when any one or more of the three Shelton criteria for deposition . . . are not met") (emphasis deleted); Shelton, 805 F.2d 1323; see also Chao v. Aurora Loan Servs., LLC, No. C 10-3118 SBA LB, 2012 WL 5988617, at *3 (N.D. Cal. Nov. 26, 2012) ("District courts in this district and elsewhere in the Ninth Circuit recognize Shelton as the leading case on attorney depositions."); but see In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 72 (2d Cir. 2003).[4]

[4] Writing for the Second Circuit, then-Judge Sotomayor rejected Shelton and, in dicta, proposed a more flexible approach, whereby a trial court "takes into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship." Friedman, 350 F.3d at 72. "Such considerations may include the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted." Id. To date, the Second Circuit's approach has not been adopted by any other circuit. Although Friedman has been favorably cited by at least one sister court in our circuit, see Sandvik Intellectual Prop. AB v. Kennametal, Inc., No. 2:10-CV-00654, 2012 WL 2288554, at *1 (W.D. Pa. June 18, 2012),

II. Analysis

Our analysis begins and ends with the first Shelton prong—that is, whether other means exist to obtain the information than to depose opposing counsel. Defendants argue that State Farm's attorneys of record are the only persons capable of testifying as to what State Farm knew and did regarding its investigations into the Defendants' alleged fraud prior to November 2013. (Doc. No. 55, at ¶¶ 2-18). In principle, there is no reason State Farm's counsel of record would be uniquely qualified to testify as to what *their clients* knew and did. But, pointing to State Farm's "astounding lack of recall and extraordinary lack of documentation," id. at ¶ 71, Defendants contend that the information they seek cannot be obtained from State Farm directly. Because of that, Defendants contend that outside counsel must be deposed because they are the only available fact witnesses.

Plaintiffs initially offered two arguments in response. First, they asserted that they had already disclosed substantial information regarding their pre-2013 investigative efforts. And, indeed, Defendants' Motion outlines in detail various investigative efforts undertaken throughout the relevant time

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neither party asks us to consider it. In any case, because of the lack of need to oppose deposing counsel and the risk of encountering privilege and work-product issues, the Court finds that the outcome under Friedman would be the same.

period. Id. at pp. 6-12. Second, Plaintiffs argued that the Defendants' Motion to Compel was premature since Defendants had not yet explored their questions about State Farm's pre-2013 investigative efforts with State Farm's corporate designee. Because that avenue could be an alternative means to obtaining the requested information, Plaintiffs asked us to deny Defendants' Motion on that basis alone. (Doc. No. 67). In a reply, Defendants requested that the Court withhold ruling on the present Motion until after the deposition of Plaintiffs' corporate designee was complete. (Doc. No. 68). That deposition has now occurred, and Defendants have since filed under seal a Supplement to its Motion to Compel, with a transcript of the deposition testimony attached thereto. (Doc. No. 72).

The transcript of that deposition shows that Plaintiffs' opposition was well-founded. State Farm's corporate designee testified, *inter alia*, that around September 2011, Warren Holland, Esquire, one of the attorneys in this case who Defendants wish to depose, identified a potential issue in Defendant Eastern Approach's medical records while defending a personal injury lawsuit on behalf of one of State Farm's insureds. (Doc. No. 72, Ex. A, at pp. 198-210). In particular, that patient's medical records noted the same unique range of motion findings on each physical examination over the course of treatment. Id. That was concerning, State Farm's corporate

designee testified, because it may indicate the range of motion findings were simply cut and pasted across different visits and could be an indicator of fraud. Id. State Farm then requested that Mr. Holland's law firm review other Eastern Approach medical records to determine whether that phenomenon existed elsewhere. Id. In or around January 2012, State Farm independently reviewed three or four claims and found that the range of motion issue identified by Mr. Holland was not present in those claims. Id. At or around that point, early in 2012, State Farm "moved on" from its investigation. Id.

Defendants have failed to demonstrate any additional relevant non-privileged information that outside counsel could provide that it did not learn (or could not have learned) from State Farm's corporate designee. In their supplemental briefing filed after the deposition was complete, Defendants now indicate that they wish to depose outside counsel for purposes of determining to what extent they worked on their own to generate more information which they could use to convince State Farm to target the Defendants with a fraud accusation. Although Defendants are correct that such independent work performed by outside counsel would not be privileged, it is also irrelevant to any issues in this case.

Because Defendants have failed to carry their burden under the first Shelton prong, it is unnecessary for the Court to

determine whether the information sought from outside counsel is both non-privileged and crucial to Defendants' preparation of their case, and we decline to do so.

III. Conclusion

For the foregoing reasons, Defendants' Motion to Compel is denied, and Plaintiffs' Motion for a Protective Order is granted. An appropriate Order follows.