

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DELIVERANCE POKER, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:10-CV-00664-JRN
	§	
MICHAEL MIZRACHI and	§	
TILTWARE, LLC,	§	
	§	
Defendants.	§	

**DEFENDANT MICHAEL MIZRACHI’S MOTION FOR
PROTECTIVE ORDER PRECLUDING A DEPOSITION UNDER FED. R. CIV. P. 30(B)**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

1. Please take notice that on March 4, 2011, or as soon thereafter as the matter may be heard in this Court, Defendant Michael Mizrachi will and hereby does move for a Protective Order pursuant to Fed. R. Civ. P. 26(c) precluding a deposition pursuant to Fed. R. Civ. P. 30 or otherwise by Plaintiff Deliverance Poker, LLC of Defendant Mizrachi.
2. Defendant’s motion is based on this notice of motion and motion and all other pleadings and matters of record in this case.
3. Pursuant to Fed. R. Civ. P. 26(c)(1), Defendant Mizrachi certifies that on March 4, 2011, counsel for Defendant conferred in good faith with Plaintiff’s counsel in an effort to resolve the dispute without Court action, but was unable to reach agreement.

PRELIMINARY STATEMENT

4. The underlying action in this case is a breach of contract claim by Plaintiff Deliverance Poker, LLC against Defendants Michael Mizrachi and Tiltware, LLC.

5. Counsel for Defendant Tiltware, LLC conducted a conference call with counsel for Plaintiff on March 4, 2011. During the call, counsel for Tiltware, LLC informed Plaintiff's attorneys that:

a. There is no diversity of citizenship sufficient to confer jurisdiction upon this Court.

b. Counsel for Plaintiff has not provided disclosure responses to Defendant Tiltware as required by the Fed. R. Civ. P.; and

c. Tiltware objected to the deposition of Mizrachi based upon the two foregoing reasons.

6. Further, Plaintiff's deposition notice of Mizrachi originally attempted to request the deposition of Defendant Mizrachi for 9:00 a.m., Monday, March 7, 2011. Subsequently, Plaintiff agreed to the postponement of the deposition until some undetermined time later on Monday, March 7, 2011.

7. Defendant Mizrachi's motion for protective order precluding deposition should be granted. Plaintiff's claims against Mizrachi and Tiltware should be dismissed pursuant to Defendant Tiltware's motion to dismiss. Plaintiff's attorneys could not provide any substantive response to Tiltware's position that there is no diversity jurisdiction to allow prosecution of this lawsuit.

8. Further, Mizrachi originally agreed to be deposed in Austin, Texas, for the convenience of Plaintiff, notwithstanding that he is not obligated to do so. Mizrachi requested that Plaintiff postpone the deposition for only one week to address Tiltware's objections to the deposition and for this Court to address the jurisdictional matters at issue. Counsel for Tiltware refused to do so without providing reasons therefore.

LEGAL STANDARD

9. Under Rule 26(c)(1), any person from whom discovery is sought may move for a protective order in the Court where the action is pending. On such motion, the 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).

ARGUMENT

10. The Court should grant Mizrachi’s motion for protective order for several reasons.

11. First, this Court should first address Tiltware’s motion to dismiss all causes of action because there is no diversity of citizenship. Plaintiff provided no facts or law to contest Tiltware’s assertion during the conference call addressing this issue. It would be extremely inefficient for both this Court and the parties to require Mizrachi to give a deposition in the final days before this Court dismissed the lawsuit.

12. Further, counsel for Tiltware objected to the deposition of Mizrachi because Plaintiff failed to provide disclosure responses to Tiltware as required by the Fed. R. Civ. P.

13. Mizrachi has agreed to present himself for deposition in Austin during the Court’s current discovery deadlines, but after the aforementioned jurisdictional and procedural issues have been resolved. Plaintiff refused.

14. Thus, there is good cause for a protective order when it will subject a party, here Mizrachi, to “undue burden or expense.” Fed. R. Civ. P. 26(c).

PRAYER

15. For the foregoing reasons, Defendant Mizrachi requests that the Court grant his motion for a protective order preventing Plaintiff from taking the deposition of Mizrachi during the week of March 7, 2011.

Respectfully Submitted,

/s/ John P. Henry

John P. Henry

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ATTORNEYS FOR

DEFENDANT MIZRACHI

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2011, I caused the foregoing document to be delivered via facsimile to the following parties, through their attorney of record:

/s/ John P. Henry _____
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