

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

PRESENT:

BY: MR. PETER V. BUSTAMANTE
150 North Michigan Avenue, Suite 690
Chicago, Illinois 60601
(312) 346-2072
pvbust@bustamantelaw.com

appeared on behalf of the Plaintiff;

RACHLIS DURHAM DUFF & ADLER, LLC
BY: MR. KEVIN B. DUFF
MR. JOHN E. MURRAY
542 South Dearborn Street, Suite 900
Chicago, Illinois 60605
(312) 733-3390
kduff@rddlaw.net
jmurray@rddlaw.net

appeared on behalf of the Defendants.

1 (Proceedings in open court.)

2 MR. BUSTAMANTE: Good morning, your Honor.

3 Peter Bustamante on behalf of the plaintiff.

4 MR. DUFF: Good morning, your Honor.

5 Kevin Duff on behalf of the defendants.

6 MR. BUSTAMANTE: Your Honor, this is the
7 plaintiff's motion to quash a notice and a subpoena for
8 the continued evidence deposition of a Mr. Larry Carver.

9 Mr. Carver is a witness to this defamation
10 case, and his evidence deposition was taken in July of
11 2009. At that point, your Honor, over 150 pages of
12 testimony were taken. The defense had approximately 44
13 pages of cross-examination and at the end of that said,
14 that's all we have. Thereafter, there was a redirect and
15 a short recross.

16 Now they have issued a notice, attaching a
17 Cook County subpoena for a witness that lives in Virginia.
18 We don't even know if the witness is going to accept that
19 subpoena. And if he doesn't, how are they going to
20 enforce it? We will be forced to travel to Virginia for
21 naught based on this notice. The notice is also defective
22 in that it says it may be recorded by video. They don't
23 name the videographer.

24 They are, frankly, seeking to reopen

1 discovery -- I mean, not reopen testimony -- to reopen
2 testimony. And they haven't provided the Court with the
3 information of the facts upon which the Court can exercise
4 discretion to determine if this witness' testimony should
5 be reopened and, if so, into what areas.

6 For all those reasons, Judge, we ask that you
7 quash the notice and the subpoena for this witness.

8 MR. DUFF: Your Honor, Kevin Duff for the
9 defendants.

10 As Mr. Bustamante indicated, this was a
11 deposition that was taken as an evidence deposition in
12 July of 2009. At that time, this was the first deposed
13 witness in the entire case.

14 Subsequently we had 18 months of discovery,
15 and this case is set for trial on April 11, 2011. As I
16 say, most of all the discovery in this case took place
17 after Mr. Carver's deposition was noticed as an evidence
18 deposition and taken. And this was noticed at the
19 plaintiff's instance, not the defendants'.

20 At that time that we took -- that the
21 evidence deposition was taken, it was known by both sides
22 that the deposition had not been concluded. In fact, both
23 sides knew that there were questions that the witness had
24 refused to answer.

1 And on the record at the close of the
2 deposition, my associate who was present for the
3 deposition indicated that she was going to reserve the
4 right to recall the witness. And if your Honor would like
5 to see that on the record, I can show your Honor. So it
6 was clear to everybody that this deposition was not
7 completed.

8 And in addition to that, the effort here is
9 to try to foreclose --

10 THE COURT: What's this witness' position in the
11 case?

12 MR. DUFF: The witness is a third party, your
13 Honor.

14 THE COURT: What's his involvement?

15 MR. DUFF: His involvement is he was a former top
16 manager of my corporate client defendant. And actually,
17 since the time he was deposed, we've come to develop our
18 understanding of what his significance to this case is,
19 including after the point he was deposed we learned that
20 he was providing confidential and privileged information
21 from one of the defendants to plaintiff's counsel. We
22 need an opportunity to ask him about that.

23 we also know that based on evidence that this
24 particular witness provided to plaintiff's counsel, a new

1 defendant was added to the case.

2 So, you know, the opportunity -- we're
3 talking about an evidence deposition. If plaintiff wishes
4 to make objections to any questions that we ask, they can
5 make that on the record or they can bring a motion in
6 limine.

7 We have 60 days before trial is going to take
8 place in this case. Yes, it's true that this witness is
9 out in Virginia, but we actually noticed the deposition to
10 take place in Virginia for the witness' convenience so he
11 wouldn't have to travel back to Illinois. In fact, this
12 witness already consented to the jurisdiction of this
13 Court, because when the evidence deposition was originally
14 taken, he voluntarily came to Illinois.

15 THE COURT: Did you serve an Illinois subpoena on
16 this witness?

17 MR. DUFF: Initially he was served with an Illinois
18 subpoena by the plaintiff's counsel in 2009. He accepted
19 that, came to Illinois, and his evidence deposition was
20 initiated.

21 THE COURT: Here?

22 MR. DUFF: Here. We have simply reissued a new --

23 THE COURT: Have you been in touch with this
24 witness?

1 MR. DUFF: They are in touch with this witness.

2 THE COURT: How about you?

3 MR. DUFF: No, this witness hasn't communicated
4 with us.

5 MR. BUSTAMANTE: Judge, he did issue an Illinois
6 subpoena. It's an attachment to the motion.

7 One other thing I forgot, your Honor, is that
8 through the subpoena, they attached a rider duces tecum.
9 They're seeking to reopen discovery.

10 This witness is -- it's supposed to be an
11 evidence deposition testimony as in trial. They can't use
12 a subpoena duces tecum to bring new things that they never
13 obtained during a long period of discovery, which closed
14 January of this year, to get new information.

15 THE COURT: No, no, wait. They could do another
16 evidence deposition of the same witness as their witness.

17 MR. BUSTAMANTE: But they haven't done that. Yes,
18 you're right, they can do that, but that's not what
19 they're doing. They want to reopen --

20 THE COURT: I thought they were going to take
21 another deposition.

22 MR. BUSTAMANTE: That's not what they want.

23 MR. DUFF: We are, your Honor.

24 THE COURT: Reopening or taking another dep?

1 MR. DUFF: Well, I'm not sure that that's a
2 meaningful distinction.

3 THE COURT: The other one -- it is. The other one
4 is over with, because there you could cross-examine.

5 MR. DUFF: And on the record in that --

6 THE COURT: If you're calling him as your witness
7 for another deposition, you can do direct examination; you
8 can't cross.

9 MR. DUFF: Okay. On the record in the previous
10 deposition, we reserved the right to continue the
11 deposition.

12 THE COURT: I'm not sure you can do that.

13 MR. DUFF: Well, it was --

14 THE COURT: What was the reason for reserving the
15 right to ask more questions?

16 MR. DUFF: Well, there were a few reasons. One,
17 that it was the end of the day, and the witness had to
18 return to Washington.

19 THE COURT: That's not good enough. What else?

20 MR. DUFF: In addition to that, the witness refused
21 to answer questions on the record that we reserved the
22 right to ask the Court to ask him to answer should he --

23 THE COURT: Well, maybe he shouldn't have to. Have
24 we argued that out?

1 MR. DUFF: We haven't argued that, because we
2 didn't want to have to come in to the Court in a piecemeal
3 fashion. We wanted to finish the deposition and come back
4 to the Court.

5 THE COURT: Well, I haven't heard a good enough
6 reason to reopen the deposition yet.

7 MR. DUFF: Well, as I say, in addition to that
8 fact, you know, this witness -- as I indicated, this
9 evidence deposition was taken, you know, 18 months ago
10 before all the discovery in this case took place. You
11 know, we've discovered subsequently information that we
12 feel we need to be able to ask this witness about.

13 Now, you know, I think it would be
14 appropriate to allow us to continue the deposition which
15 was never concluded and on the record stating so, but if
16 your Honor is going to not allow us to do it in that
17 fashion, then absolutely we would like to call the witness
18 ourselves and ask him these points.

19 We need the opportunity, your Honor, to ask
20 this witness all the questions that we didn't ask him.

21 THE COURT: Yes, take another deposition. The
22 other one is closed. That's over.

23 MR. BUSTAMANTE: Thank you, your Honor.

24 MR. DUFF: So, your Honor, in terms of -- the

1 motion before the Court is to quash the subpoena that we
2 issued. My understanding is that's being denied. We can
3 take his deposition.

4 THE COURT: Uh-huh.

5 MR. DUFF: Thank you, your Honor.

6 THE COURT: The second thing is if you have an
7 impeachment that you can use on this witness --

8 MR. DUFF: Absolutely.

9 THE COURT: -- the new rules seem to give you the
10 right to impeach the witness, even though you're calling
11 the witness, if it's damaging to your case.

12 MR. DUFF: I agree with that, your Honor.

13 MR. BUSTAMANTE: Your Honor, clarification, please.

14 This subpoena is for the continued evidence
15 deposition.

16 THE COURT: No, that's --

17 MR. BUSTAMANTE: That's quashed?

18 THE COURT: -- not what we're doing.

19 MR. BUSTAMANTE: That's right.

20 THE COURT: He's going to be able to take an
21 evidence deposition to cover the points that he thinks he
22 wants to use this witness for.

23 MR. BUSTAMANTE: I understand that. He should
24 issue a new subpoena for that, because this subpoena is no

1 good, right? This is for the continued evidence
2 deposition --

3 THE COURT: It's not enforceable.

4 MR. BUSTAMANTE: Okay. Very good.

5 THE COURT: The --

6 MR. BUSTAMANTE: So motion to quash is granted, and
7 he can issue a new subpoena for whatever --

8 THE COURT: well, no. All you have to do is just
9 serve a notice for this deposition.

10 MR. DUFF: we did already.

11 THE COURT: Send that to the clerk of the
12 courthouse in Virginia, and they'll give you a number
13 where a subpoena can be issued, and that subpoena can be
14 issued and used on the person.

15 This is the Uniform Taking of Foreign
16 Depositions Act, nothing more than that.

17 MR. BUSTAMANTE: All right. Okay.

18 THE COURT: And it's a very simple process. And
19 what you do is you've got to hire a court reporter. I
20 used to just -- give this to the court reporter, who would
21 get the subpoena served and make that a part of their
22 charge, you see.

23 MR. DUFF: Just for clarification of our record,
24 your Honor, the motion that was up this morning was to

1 quash the subpoena. I understand that you're denying that
2 because it's with respect to -- in other words, we are not
3 foreclosed from taking this witness' new deposition.

4 THE COURT: Okay. You can go ahead and operate on
5 the subpoena that you've done. But if the witness doesn't
6 appear, they travel to Virginia, and you're going to have
7 to pay their legal fees and their travel expenses for a
8 deposition that doesn't go ahead.

9 MR. DUFF: I understand. We're not going to do
10 that, obviously. We're going to --

11 THE COURT: If you have a local subpoena served,
12 then you're going to be insulated from the witness not
13 appearing, and he's not going to be able to charge you
14 with funds.

15 MR. DUFF: No, I agree. That's the way we'll
16 proceed.

17 THE COURT: Okay.

18 MR. BUSTAMANTE: Thank you, your Honor.

19 MR. DUFF: Thank you, your Honor.

20 (Proceedings concluded.)
21
22
23
24

1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)
4
5
6

7 I, NANCY L. BISTANY, a Certified Shorthand
8 Reporter of the State of Illinois, do hereby certify that
9 I reported in shorthand the proceedings had at the hearing
10 aforesaid, and that the foregoing is a true, complete and
11 correct transcript of the proceedings of said hearing as
12 appears from my stenographic notes so taken and
13 transcribed under my personal direction.

14 IN WITNESS WHEREOF, I do hereunto set my hand
15 February 21, 2011, at Chicago, Illinois.
16
17
18

19 Certified Shorthand Reporter
20 Registered Professional Reporter
21 Federal Certified Realtime Reporter
22 CSR No. 84-1857
23
24