

STATE OF MINNESOTA
COUNTY OF RAMSEY

Judge Joanne Smith
DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Contract

DR. BA LAM,)
)
) Plaintiff,)
)
v.)
)
COUNTY OF RAMSEY, MINNESOTA,)
DANIEL SCHACHT, OFFICE OF THE)
RAMSEY COUNTY ATTORNEY, and)
DAVID MACMILLAN,)
)
) Defendants.)

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION FOR PROTECTIVE ORDER
AND TO QUASH SUBPOENAS**

Case No. 62-C8-05-012545

TO: HON. JOANNE SMITH, RAMSEY COUNTY DISTRICT COURT, 1530
COURTHOUSE, 15 W. KELLOGG BOULEVARD, ST. PAUL, MN 55102.

Plaintiff Dr. Ba Lam, through the undersigned attorney, submits this memorandum of law in opposition to defendants' untimely and otherwise frivolous motion for a protective order and to quash subpoenas.

SUMMARY OF ARGUMENT

Defendants' motion to quash subpoenas should have been brought at or before the time specified for compliance but was not. It was not filed until about 3:29 P.M. on April 10, 2007, whereas the times for compliance were 8:45 A.M., 9:30 A.M., 10:15 A.M., and 11:00 A.M. on April 10th. Defendants' motion papers do not include a proposed order as required by Minn. Gen. R. Prac. 115.04 and well-settled practice, and their attorney's factual statements are not supported by an affidavit. Service of the subpoenas was entirely consistent with the manner of service proposed by defendants' attorney himself, notice was reasonable by any measure, and defendants' attorney's asserted conflicts, if they existed at all, were of his own creation and thus meaningless.

FACTS AND BACKGROUND

- On April 10, 2007, defendants scheduled their motion at 8:42 A.M., filed their motion papers at 3:29 P.M. on April 10, 2007, and served their motion papers on plaintiff's attorney at about 5:00 P.M. Paragraph nos. 3 and 4 of Affidavit of Alfred Stanbury dated April 17, 2007 (hereinafter "Stanbury Aff. ¶ __ and/or Ex. __"). The motion papers filed with the court and served on plaintiff's attorney did not include a proposed order and an affidavit of counsel. *Id.*

- On March 6, 2006, plaintiff's attorney, in noticing the depositions of Jim Johnson and Kathy Jaschke, faxed and mailed a letter to defendants' attorney Dietz in which he said:

I understood you to say that you would accept service of the deposition subpoenas on behalf of deponents still employed by Ramsey County and that each such subpoena need not be accompanied by a *per-diem* check. **If that is incorrect, please advise.**

Stanbury Aff. Ex. 1 (emphasis added).

- On March 15, 2007, plaintiff's deposition was taken.
- On March 23, 2007, plaintiff noticed the depositions of Doug Meyer and Gary Clepper for March 30, 2007. Stanbury Aff. Ex. 2.
- On March 26, 2007, defendants' paralegal Feuerhake phoned plaintiff's attorney and left a message in which she declared that the Johnson and Jaschke depositions would have to be rescheduled because attorney Dietz was unavailable on March 30th. Stanbury Aff. ¶ 7 and Ex. 3.
- On March 28, 2007, plaintiff's attorney phoned paralegal Feuerhake and left a phone message in which he criticized the leaving of a message declaring an attorney's unavailability without at the same time proposing an alternative date. Stanbury Aff. ¶ 7.
- On March 29, 2007, plaintiff's attorney succeeded in reaching paralegal Feuerhake by phone and was told that attorney Dietz was available on April 5th.

Stanbury Aff. ¶ 7.

- A short while later and before plaintiff's attorney had a chance to call back and accept or reject the proposed date of April 5th, paralegal Feuerhake phoned to say that April 5th would not work because attorney Dietz had told her it would not allow him enough time to prepare the two deponents. Stanbury Aff. ¶ 7. Paralegal Feuerhake proposed scheduling the Meyer and Clepper depositions for April 9th or 10th. Stanbury Aff. ¶ 7 and Ex. 3.

- Plaintiff's attorney thereupon noticed the Meyer and Clepper depositions for April 5th but moved the respective starting times from 9:00 A.M. and 10:15 A.M. to 2:00 P.M. and 3:15 P.M. "to allow for time to prepare the deponents." Stanbury Aff. Ex. 4.

- Despite the fact that all discovery was to be commenced in time to be completed by April 22, 2007, Defendant's Request for Production of Documents was served by mail on March 29, 2007. Stanbury Aff. Ex. 5.

- On Friday, March 30, 2007, plaintiff's attorney noticed the depositions of Brian Grundtner, Tom Engh, Terry Noonan, and Jerry Auge for April 10th at 8:45 A.M., 9:30 A.M., 10:15 A.M., and 11:00 A.M., respectively. Stanbury Aff. Ex. 6.

- On Monday, April 2, 2007, attorney Dietz sent an email to plaintiff's attorney in which he said:

I am not available for any depositions in the week of April 9-13. Brian Grundtner is in Iraq. Terry Noonan is not available the morning of April 19. Jerry Auge is not available on the 20th. I am available most days for the week of April 16-20. We are not sure of Tom Engh's availability because he is out of the office this week. Please contact me with alternative dates for these depositions.

Stanbury Aff. Ex. 7.

- On April 2, 2007, paralegal Feuerhake asked plaintiff's attorney if it would be possible to reschedule the Clepper deposition to 1:00 P.M. on April 5th (from 3:15 P.M.). Stanbury Aff. Ex. 8. Plaintiff's attorney responded that he would agree to that if he could start the Meyer deposition at, *e.g.*, 11:45 A.M. Stanbury Aff. Ex. 9. On April 3d,

paralegal Feuerhake confirmed that the Meyer and Clepper depositions could be taken at 11:45 A.M. and 1:00 P.M., respectively. Stanbury Aff. Ex. 11.

- After receiving attorney Dietz' April 2d email (Stanbury Aff. Ex. 7), plaintiff's attorney faxed and mailed the following letter to attorney Dietz:

Dear Mr. Dietz:

As far as I am concerned, the depositions of Messrs. Engh, Noonan, and Auge will be taken as scheduled on April 10, 2007, your email of this date to the contrary notwithstanding. Last Monday, Ms. Feuerhake left a phone message in which she simply declared that the Meyer and Clepper would have to be rescheduled because you would not be available on March 30th. When I spoke with her on March 29th, she proposed taking those depositions on April 5th but phoned shortly thereafter to say that April 5th would not work because you would not have enough time to prepare the deponents. I nevertheless rescheduled the Meyer and Clepper depositions for April 5th but changed the times to 2:00 P.M. and 3:15 P.M. so as to provide you with time to prepare the deponents. Those amended deposition notices were faxed in the afternoon of March 29th, as was a letter from Ms. Feuerhake in which she said:

This letter is a follow-up to our conversations today regarding the depositions of Doug Meyer and Gary Clepper which were originally scheduled for March 30, 2007. As you know from my voicemail to you on Monday, March 26, 2007 and from our discussions today, Mr. Dietz is not available on March 30, 2007 and the depositions need to be rescheduled.

At this time, we are proposing either Monday, April 9th or Tuesday, April 10th for the depositions of Mr. Meyer and Mr. Clepper. Please advise if either of these dates will work.

That clearly meant that you would be available on April 9th or April 10th, so on March 30th I appropriately scheduled the depositions of Messrs. Grundtner, Engh, Noonan, and Auge for April 10th. Now, strangely enough, you say that you (but not those deponents) are 'not available for any depositions in the week of April 9-13' and suggest, imprecisely, that you will be available 'most' days for the week of April 16-20. In a sense I guess that is good to know since I have already planned to schedule additional depositions for that week in the order I wish to take them, and under the circumstances it now appears that I probably will be forced to seek leave of court

to take depositions beyond the discovery completion deadline of Sunday, April 22d.

Sincerely,

- *After* the Meyer and Clepper depositions were completed on April 5, 2007, attorney Dietz declared that he and Engh, Noonan, and Auge would not attend the depositions scheduled to be taken on April 10th, that any deposition subpoena served in the future should be accompanied by a *per-diem* check, and if plaintiff's attorney did not like it, he should "bring a motion." Stanbury Aff. ¶ 17.

ARGUMENT

I Defendants' Motion Must Not Be Heard For Failure To Comply With Minn. Gen. R. Prac. 115.04(a).

Minn. Gen. R. Prac. 115.04(a) provides:

No motion shall be heard until the moving party pays any required motion filing fee, serves a copy of the following documents on the other party or parties, and files the original with the court administrator at least 14 days prior to the hearing:

- (1) Notice of motion and motion;
- (2) Proposed order;
- (3) Any affidavits and exhibits to be submitted in conjunction with the motion; and
- (4) Any memorandum of law the party intends to submit.

Defendants did not serve a proposed order on plaintiff's attorney and did not file one with the court as required. Moreover, defendants' motion is said to be brought "[p]ursuant to Rules 26, 37, 45 and other applicable rules of Minnesota *Federal* Rules of Court" and "will be supported by the appropriate papers to be filed and served in accordance with *Local Rule 7*." See Defendants' Notice of Motion and Motion for Protective Order and to Quash Subpoenas at 1 and 2 (emphasis added). This case, of course, is a state court case, but even if defendants' attorney cannot keep that straight, he should at least know that D. Minn. Loc. R. 7.1(a)(1) also requires the service and filing of a proposed order at least 7 days before the hearing of a non-dispositive motion,

to wit:

Moving Party, Supporting Documents, Time Limits. No motion shall be heard by a Magistrate Judge unless the moving party files pursuant to LR 5.2 and serves the following documents at least 14 days prior to the hearing:

- (A) Notice of Motion
- (B) Motion
- (C) Proposed Order
- (D) Affidavits and Exhibits
- (E) Memorandum of Law

Affidavits and exhibits shall not be attached to the memorandum of law, but shall be filed separately. Exhibits filed without a corresponding affidavit must contain a separate title page.

Defendants' failure to serve and file a proposed order as mandated by Minn. Gen. R. Prac. 115.04 should cause the court to refuse to hear defendants' motion and instead proceed directly to the hearing of plaintiff's first-scheduled motion for an order to show cause, to compel discovery, to modify the scheduling order, and for sanctions.

II. Defendants' Motion To Quash Subpoenas Must Be Disregarded As Untimely.

Minn. R. Civ. P. 45.02 provides in pertinent part:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein; but the court, **upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith**, may (1) quash or modify the subpoena if it is unreasonable or oppressive, or

Defendants' motion to quash was not made promptly or at or before the time specified in the subpoenas. Plaintiff's attorney has learned from the court's case manager that defendants' motion was scheduled at 8:42 A.M. on April 10, 2007, their motion papers were filed at 3:29 P.M. and served on plaintiff's attorney at about 5:00 P.M. on April 10th. The times specified in the Grundtner, Engh, Noonan, and Auge subpoenas for compliance therewith were 8:45 A.M., 9:30 A.M., 10:15 A.M., and 11:00 A.M. on April 10th, respectively. Defendants' motion thus was not served and filed at

or before the times specified in the subpoenas for compliance therewith and thus was untimely. Their untimely motion to quash subpoenas must be denied for failure to comply with Minn. R. Civ. P. 45.02.

III. Plaintiff's Service Of The Subpoenas Was Absolutely Proper Under The Circumstances.

On December 11, 2006, attorney Dietz *volunteered* to accept service of subpoenas on behalf of non-party deponents who were still employed by defendant Ramsey County, and he *volunteered* to waive the customary tendering of *per-diem* fees. Plaintiff's attorney did not have to bargain for that and did not. Additionally, attorney Dietz did not respond in any way when asked if plaintiff's attorney had correctly understood him to say that he would accept service of the deposition subpoenas on behalf of deponents still employed by Ramsey County and that each such subpoena need not be accompanied by a *per-diem* check. *I.e.*, in his March 6, 2007 letter to attorney Dietz, plaintiff's attorney wrote the following:

I understood you to say that you would accept service of the deposition subpoenas on behalf of deponents still employed by Ramsey County and that each such subpoena need not be accompanied by a *per-diem* check. **If that is incorrect, please advise.**

In sum, defendants' attorney Dietz voluntarily relieved plaintiff from any need to comply with the service requirements of Minn. R. Civ. P. 45.02(a) up to *and through* the service of the Grundtner, Engh, Noonan, and Auge subpoenas.

IV. The Grundtner, Engh, Noonan, And Auge Subpoenas Allowed A Reasonable Time For Compliance, And Defendants, Because They Cannot, Have Not Shown Otherwise.

The Grundtner, Engh, Noonan, and Auge subpoenas were served by fax on March 30, 2007, and thus eleven days before the April 10, 2007 time for compliance. Attorney Dietz concedes that no fixed rule determines what is or is not reasonable notice, and he concedes that there is no Minnesota case law regarding what is a reasonable time for compliance. He cannot even show that notice was unreasonable by citing the irrelevant

Fed. R. Civ. P. 32(a) since that rule provides that a deposition may not be used against a party if that party receives “less than eleven” days notice of the deposition *and* “promptly files” a protective order motion seeking rescheduling. As shown, Grundtner, Engh, Noonan, and Auge did not receive “less than eleven” notice, and defendants did not timely file, let alone “promptly” file, a protective order motion seeking rescheduling. Live by the sword, die by the sword. Matthew 26:15.

Defendants’ reliance on an irrelevant and factually inapposite decision of a federal magistrate judge in *Medmarc Casualty Insurance Co. v. Angeion Corp.* (D. Minn. No. 04-cv-4081) is wholly misplaced where, notably, in *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 327 (N.D. Ill. 2005), the magistrate judge is quoted by defendants herein as saying in pertinent part that “just as negligence in the air does not exist, neither does reasonableness: the analysis is necessarily case-specific and fact intensive.” Comparing this case to an antitrust case or a case in which a party was attempting to take 85 depositions in two weeks or a case in which a party was giving only three days notice or a case in which a party was giving four days notice at a distant locale is hardly justified.

Minn. R. Civ. P. 45.04 indicates that ten or fewer days notice is not unreasonable *per se*. If it were otherwise, Rule 45.04(b) would not provide in pertinent part:

The person to whom the subpoena is directed may, within 10 days after service thereof or **on or before the time specified in the subpoena for compliance if such time is less than 10 days after service**, serve upon the attorney designated in the subpoena **written** objection to the production, inspection or copying of any or all of the designated materials.

At base, defendants never objected to the subpoenas on the grounds that they did not provide a reasonable time for compliance. Attorney Dietz’ April 2, 2007 email was not by any stretch of the imagination a “written” objection of the sort required by Rule 45.04. Defendants’ failure to comply with Minn. R. Civ. P. 45.04 is yet another ground for denying defendants’ motion.

V. Attorney Dietz' Unsworn "Testimony" Must Be Disregarded.

Attorney Dietz' *unsworn* factual statements and asserted conflicts must be disregarded but in any event prove nothing while being beyond silly. The court is asked to consider what its reaction would have been if, upon the issuance of the First Amended Scheduling Order, plaintiff's attorney had claimed to be unable to attend the scheduled pretrial settlement conference on June 4, 2007, because he planned to spend that day preparing for an upcoming mediation in another case; or because on that date he planned to prepare a presentation to an associate on the change in Federal Rules regarding E-Discovery (pretend for the moment that plaintiff's attorney has an associate); or because June 4th was his deadline to send an appellate brief to the printer; or because a summary judgment motion memorandum (in this case no less!) would be due on that date. *See* Defendants' Memorandum of Law in Support of Protective Order at (unnumbered) p. 2. And with characteristic disingenuity, attorney Dietz says that "Stanbury was informed of the change when Dietz appeared for the April 5th depositions." He knows that is not true. He did not inform plaintiff's attorney of the change until *after* the Meyer and Clepper depositions had been completed, *i.e.*, not "when" he appeared for the depositions. *See* Stanbury Aff. ¶ 17.

VI. The Affidavit of Jeniffer Feuerhake Is An Example Of A Loyal Employee In Action.

Paralegal Feuerhake's affidavit reveals an uncertainty as to whether she should fall on her sword for the team as she apparently was asked to do or blame plaintiff for her and attorney Dietz' incompetence and inability to communicate clearly to each other. She appears to have decided to do both. In ¶ no. 5 of her affidavit, *e.g.*, she swears that attorney Dietz was not entirely clear about the date or dates to which it would be appropriate to reschedule the Meyer and Clepper depositions. Then, in ¶ no. 6 of her affidavit, she claims that plaintiff's attorney's "badgering" caused her to provide April 5th as a possible date for the Meyer and Clepper depositions even though she knew

that attorney Dietz had instructed her to do otherwise. What he instructed her to do she does not say. At ¶ no. 9 of her affidavit and so as to facilitate attorney Dietz' pretextual argument that those subpoenas did not provide a reasonable time for compliance, paralegal Feuerhake purposely omits mentioning that the Grundtner, Engh, Noonan, and Auge deposition notices and subpoenas were served by fax on March 30, 2007, . At ¶ no. 10 of her affidavit, she swears that attorney Dietz and plaintiff's attorney reached an agreement as to when the Meyer and Clepper depositions would take place, whereas, in truth and as correctly described at Stanbury Aff. ¶¶ 13-14 and 16, that agreement was reached between plaintiff's attorney and paralegal Feuerhake. At ¶ no. 12 of her affidavit, she swears that it was incorrect for plaintiff's attorney to write in his April 2, 2007 letter that she called him back on March 29th to say that April 5th would not work for Clepper and Meyer. What plaintiff's attorney wrote in that regard was this:

When I spoke with her on March 29th, she proposed taking those depositions on April 5th but phoned shortly thereafter to say that April 5th would not work because you would not have enough time to prepare the deponents.

Whether in a second conversation or in a phone message on March 29th, paralegal Feuerhake communicated that to plaintiff's attorney, which was the reason plaintiff's attorney wrote the following in his March 29, 2007 letter to attorney Dietz:

I have changed the times to 2:00 P.M. and 3:15 P.M. **to allow for time to prepare the deponents.** The previously-served subpoenas remain in force. (Emphasis added.)

That was an accommodation. And finally, in ¶ no. 6 of her affidavit, she swears in no more than a conclusory way that plaintiff's attorney was "extremely rude, disrespectful, unprofessional, and verbally aggressive" toward her during their phone conversation on March 29th. He was all that in a 2-3-minute conversation? Wow.

VII. Defendants' Untimely And Otherwise Frivolous Motion Warrants An Award Of Costs And Attorney's Fees To Plaintiff.

Defendants' unmistakably frivolous motion must be denied, and, accordingly,

plaintiff must be awarded his costs and reasonable attorney's fees pursuant to Minn. R. Civ. P. 26.03 and 37.01(d).

Minn. R. Civ. P. 26.03 provides in pertinent part:

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide discovery. Rule 37.01(d) applies to the award of expenses incurred in connection with the motion.

Minn. R. Civ. P. 37.01(d) provides:

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and; persons in a just manner.

As and for the reasonable expenses, including attorney fees, incurred as a result of attorney Dietz' misconduct, plaintiff requests \$1,805.00, consisting of 4 hours of his attorney's time @ \$350 preparing the opposition to the instant motion plus an estimated 1.0 hours of his attorney's time @ \$350 appearing at the hearing of the instant motion plus the \$55 motion filing fee. Stanbury Aff. ¶ 18.

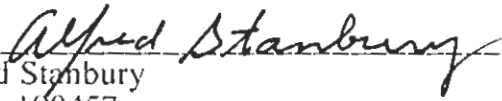
CONCLUSION

For *any* of the foregoing reasons, defendants' motion should be denied and plaintiff should be awarded the costs and attorney's fees incurred in having to defend against it.

Respectfully submitted.

STANBURY LAW FIRM P.A.

Dated: April 17, 2007.



Alfred Stanbury
A.I.N. 190457
2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
ATTORNEY FOR PLAINTIFF