

FILED
02-19-2024
CIRCUIT COURT
DANE COUNTY, WI
2022CV001178

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

KHARY PENEBAKER; MARY
ARNOLD; and BONNIE JOSEPH,

Case No. 22CV001178

Plaintiffs,

Case Code: 30106; 30701; 30956

v.

ANDREW HITT; ROBERT F.
SPINDELL, JR.; BILL FEEHAN;
KELLY RUH; CAROL BRUNNER;
EDWARD SCOTT GRABINS;
KATHY KIERNAN, DARRYL
CARLSON; PAM TRAVIS; MARY
BUESTRIN; JAMES R. TROUPIS;
KENNETH CHESEBRO; and ABC
DEFENDANTS,

Defendants,

and

STATE FARM FIRE AND CASUALTY
COMPANY,

Intervenor.

**PLAINTIFFS' OPPOSITION TO DEFENDANT TROUPIS'S
MOTION FOR PROTECTIVE ORDER**

Defendant Troupis's sharp discovery tactics have prejudiced Plaintiffs throughout the course of this litigation. His latest salvo—a last-minute effort to quash a properly noticed deposition—should be immediately rejected by this Court. Plaintiffs have attempted to schedule Troupis's deposition for months. Yet, as he has with document discovery, Troupis has failed to cooperate with Plaintiffs' efforts, ultimately seeking an excuse to refuse to appear for a properly noticed deposition on

February 22—the date the parties agreed upon—at Troupis’s counsel’s office in Troupis’s state of residence. Now, in a last-minute effort to avoid appearing, Troupis has asked this court for a protective order.¹ Troupis’s counsel offered Plaintiffs one option if they want to depose Troupis in person before their summary judgment deadline: they must travel to Arkansas and take the deposition on a date (February 26) that conflicts with Plaintiffs’ counsel’s schedule, rather than the date on which the parties initially agreed. Alternatively, after demanding that the Plaintiffs appear in person for their depositions, Troupis’s lawyer now suggests that Plaintiffs should settle for a remote deposition of Troupis. Neither of these options is viable, and Troupis’s refusal to accept any of the other options Plaintiffs have offered over the past weeks—instead demanding an inconvenient date in an inconvenient place—is not made in good faith.

Plaintiffs have been clear for months: Troupis’s deposition hinged upon the resolution of his failure to provide required discovery. As soon as it became apparent that this discovery issue would not be resolved in advance of the summary judgment deadline, Plaintiffs properly noticed his deposition for February 22, 2024, at Troupis’s counsel’s offices in Waukesha. Troupis does not, and cannot, argue that Plaintiffs’ notice is insufficient to trigger his in-person deposition. The law is clear that Plaintiffs are entitled to compel Troupis to appear in person for a deposition within 100 miles of his residence in Wisconsin. Wis. Stat. § 804.05(3)(b)(1).

¹ The Notice of Hearing has scheduled this motion to be heard after Troupis’s deposition will commence. Plaintiffs have secured a court reporter and intend to conduct Troupis’s deposition until he secures relief that removes his obligation to attend.

Accordingly, this Court should order—in sufficient time to ensure compliance with the 9:00 am start time—Troupis’s appearance in person for the properly noticed deposition. If this Court cannot hear this motion before the date and time scheduled for Troupis’s deposition, then Plaintiffs respectfully request that this matter be transferred to a duty judge for timely resolution.

In the alternative, Plaintiffs request that the Court (1) order Troupis to notify Plaintiffs and the Court as to when, in the next two weeks, Troupis can travel to Wisconsin for a deposition and compel his appearance on that date and (2) amend the Third Amended Scheduling Order (Dkt. 382) to add the number of days that elapse between February 22 and whatever date Troupis is compelled to appear to the deadline for Plaintiffs to file any Motion for Summary Judgment, while keeping all other dates (including any date applicable to Defendants’ Motions for Summary Judgment) the same.

BACKGROUND

Counsel for the Plaintiffs and Troupis first discussed scheduling depositions on December 5, 2023. (Thompson Aff. ¶3) During that conversation, Counsel for Troupis mentioned that he 1) intended to serve subpoenas on Plaintiffs’ expert witnesses and 2) would be requesting dates for the depositions of the Plaintiffs. (*Id.* ¶5) Counsel for Troupis indicated that these depositions needed to take place in

person because of the significance of the witness (a party). (*Id.*) Plaintiffs' counsel agreed with the propriety of in-person depositions for parties. (*Id.*)²

Plaintiffs approached Troupis's counsel about a deposition date on December 19, 2023. (Dkt. 372 Ex. E)³ At that time, Plaintiffs' counsel noted that the timing of the deposition of Troupis was inextricably linked to Troupis's failure to provide other relevant discovery: "We hope that we will only have to depose Mr. Troupis one time, so it our hope that we can resolve the outstanding issues with his privilege log before that takes place." (*Id.*) Plaintiffs have never wavered from this position.

On December 26, 2023, this Court denied Troupis's motion⁴ to stay proceedings. (Dkt 347) On January 11, 2024, after attempting informal resolution, Plaintiffs sent Troupis's counsel a meet-and-confer letter regarding Troupis's deficient document production. The parties conferred on January 17, 2024, agreeing to provide Troupis until January 19 to produce documents and avoid a motion to compel. (*See generally* Dkt. 372) Troupis did not acquiesce, so Plaintiffs moved to compel on January 24. (Dkt. 370) At a hearing held the next day, January 25, 2024, on other motions, the Court granted Troupis's request for 30 days to respond to Plaintiffs' Motion to Compel and asked the parties to meet and confer regarding a special master to expedite the discovery dispute process. A hearing to resolve the motion to compel was set for March 21, 2024. (Dkt. 380) The parties conferred the

² In fact, the in-person deposition of Plaintiff Khary Pennebaker took place in Madison, Wisconsin, on January 24, 2024. The in-person deposition of Plaintiff Mary Arnold took place in Madison, Wisconsin, on February 6, 2024.

³ Although Plaintiffs approached Troupis's counsel in mid-December to request Troupis's availability for deposition, Troupis's counsel apparently did not broach the subject with his client until late January. (Dkt. 426 ¶ 2)

⁴ This motion was filed November 13, 2023 (Dkt. 306); Plaintiffs did not oppose. (Dkt. 329)

next day (a Friday), and Troupis indicated through counsel that he would, in no way, agree to a special master. The following Monday, Plaintiffs filed a letter with the Court expressing their continued support for a special master, while also noting Troupis's refusal. (Dkt. 386)

By the next Wednesday, January 31, with no order for a special master, it became evident that the dispute over Troupis's documents would not be resolved before the summary judgment deadline. That same day, Plaintiffs noticed Troupis's in-person deposition for February 16, 2024. (Dkt. 428) In the email serving the notice, Plaintiffs offered alternative dates, but made it clear that the deposition must be conducted in person. (*Id.*) After some negotiation, the parties agreed that the deposition would be held February 22, 2024. (Dkt. 472 (Fernholz Aff.) ¶6) An amended notice, again setting the deposition for Troupis's counsel's offices in Waukesha, was issued on February 7, 2024. (Dkt. 429)

During the meet-and-confer call on February 13, 2024, initiated at Troupis's counsel's request, Plaintiffs' counsel did not indicate that they were unavailable to travel on February 21 (Thompson Aff. ¶8) but also did not agree to a deposition in Arkansas (*Id.*) Instead, when Troupis's counsel indicated that he would consult his client to propose a February 26, in-person deposition, Plaintiffs' counsel reiterated that Plaintiffs preferred to hold the deposition on February 22, at Attorney Fernholz's office, in line with the deposition notice (*id.* ¶9), but in the spirit of compromise indicated that Plaintiffs could travel to Arkansas on February 22 or February 26, if Troupis would cover our costs in doing so. (*Id.* ¶ 10) Plaintiffs

subsequently followed-up to clarify that counsel had a conflict on February 26, Dkt. 433, but reiterated that the deposition could be held February 22 in Arkansas if Troupis was willing to reimburse Plaintiffs' travel costs. (Thompson Aff. ¶11). Throughout, Plaintiffs' counsel maintained the importance of conducting Troupis's deposition in person.

Troupis filed his motion for a protective order on February 16, 2024. That same day, the Court scheduled a hearing on the motion for February 22, 2024, at 1:30 pm, more than four hours after Troupis's properly noticed deposition is scheduled to begin.⁵

ARGUMENT

I. Plaintiffs are Entitled to Compel Troupis to Appear for a Deposition Within 100 Miles of his Wisconsin Residence.

Wis. Stat. § 804.05 provides that “any party may take the testimony of any person including a party by deposition upon oral examination. ... The attendance of a party deponent ... may be compelled by notice to the named person or attorney ...” Wis. Stat. § 804.05(1). Per the rule, any person “may be compelled by notice ... to give a deposition at any place within 100 miles from the place where that party resides ...” *Id.* § 804.05(3)(b)(1). Troupis resides in Cross Plains, Wisconsin, Dkt. 107 ¶14; Dkt. 228 ¶14. Waukesha, Wisconsin, is fewer than 100 miles from Cross Plains. Wisconsin rules plainly permit Plaintiffs to compel Troupis's deposition in

⁵ Wis. Stat. § 804.12(4) provides that failure to appear at a properly noticed deposition “may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01 (3).” Troupis has sought a protective order, but, to be clear, Troupis does not assert that the “discovery sought is objectionable,” only that his deposition is not noticed for his preferred place or through his preferred mechanism.

Waukesha.⁶ *See also Reid v. Temple Univ. Hosp., Inc.*, 329 F.R.D. 531, 532 (E.D. Pa. 2019) (“[T]he party taking the deposition usually selects the place where the deposition will be conducted.”); *Buzzeo v. Bd. of Educ., Hempstead*, 178 F.R.D. 390, 392 (E.D.N.Y. 1998) (“[T]he party noticing the deposition usually has the right to choose the location” (internal quotation marks omitted, quoting 7 Moore's Federal Practice—Civil § 30.20)); *Turner v. Prudential Ins. Co. of Am.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988) (The party initiating the deposition “may unilaterally choose the place for deposing an opposing party”). The Court should order Troupis’s deposition to proceed as noticed.

II. Plaintiffs Are Entitled to Take Troupis’s Deposition in Person.

Troupis insisted on taking the Plaintiffs’ depositions in person, and Plaintiffs have consistently maintained the importance of taking Troupis’s deposition in person. Troupis is a defendant in this case and a critical witness to the facts underlying Plaintiffs’ claims that he, along with others, conspired to harm them and the State of Wisconsin through the development and implementation of the fraudulent elector scheme. Troupis has information about his own actions, communications, and intent that third-party witnesses do not have. This alone supports deferring to Plaintiffs’ choice to depose Troupis in person. *See Huddleston*

⁶ Plaintiffs’ willingness to take the deposition in Waukesha at Troupis’s counsel’s offices is itself a concession. Troupis lives in Cross Plains, less than 15 miles from Madison (but more than 85 miles from Waukesha), and counsel at Law Forward and Stafford Rosenbaum work out of offices in Madison, where Plaintiffs are amenable to hosting Troupis’s deposition. On February 5, Plaintiffs’ counsel asked Troupis’s counsel if Troupis would prefer to do the deposition in Madison because of Troupis’s residence in Cross Plains. Troupis’s counsel responded, “You can do it for our office, but as I said, I need to find out if Mr. Troupis is going to be in Arkansas on that date.” (Dkt. 431 at 3-4.)

v. Bowling Green Inn of Pensacola, Inc., 333 F.R.D. 581, 586 (N.D. Fla. 2019)

(“Relatively unimportant witnesses typically can be deposed telephonically or via videoconference without causing prejudice to either party. But [the party opposing the in-person deposition] is not a mere witness. ... her testimony likely will be a key piece of evidence for both parties. If feasible, a [party] generally should be afforded an opportunity to depose such a [party opponent] in person.”).

Moreover, it is critical to the eventual trial of this case that Plaintiffs be able to assess Troupis’s credibility, his demeanor, and his mannerisms, so that they can evaluate how he will present himself as a witness at trial and how they might approach his cross-examination when he is called to the stand. And, as this Court has noted, evidence of Troupis’s good faith, if it exists, is critical to the resolution of this case. *See, e.g.*, Dkt. 226 at 18-20. Such assessments can be difficult to make remotely. *See also Huddleston*, 333 F.R.D. at 587 (“experienced questioners find that witnesses (and particularly adverse or hostile witnesses) will more readily yield admissions to a live questioner” (citing BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 24:13 (4th ed. 2016))).

Good cause exists to require an in-person deposition of Troupis. While courts have recognized, especially during the years of the COVID-19 pandemic, that deposition by video-conference may be a substitute for in-person deposition testimony, *see, e.g., Rouviere v. DePuy Orthopaedics, Inc.*, 471 F.Supp.2d 571, 574-76 (S.D. Fla. 2020), and Wisconsin rules similarly recognize that deponents may participate by telephone unless the Court orders otherwise for good cause shown,

Wis. Stat. § 804.05(8), these general principles should not overcome Plaintiffs' preference to hold Troupis's deposition in-person.

Plaintiffs have good cause to seek an in-person deposition of Troupis. First, the Notice of Deposition requests, as Wis. Stat. § 805.04(2)(a) allows, the production of documents at the deposition; Plaintiffs are entitled to receive those documents from Troupis when he appears. More importantly, Troupis has produced a nearly 5,000-line privilege log on which Plaintiffs will need to question him, an untenable exercise if done over Zoom. Second, Troupis's conduct in discovery has been less than above-board and Plaintiffs have good reason to want to assess his appearance in person. He has withheld thousands of relevant documents; made spurious allegations of privilege (Dkt. 371);⁷ refused to consent to straightforward procedures (such as a special master to review withheld discovery documents (Dkt. 386) or a shorter time to respond to admissions (Dkt. 395, 396)),⁸ which would have provided Plaintiffs with some of the information that they need to litigate their case; and, as described above, was uncooperative in Plaintiffs' efforts to negotiate a date for his deposition. He has filed a motion to seal, making arguments—like the claim that the privilege log is itself privileged—that approach the frivolous. He has declined Plaintiffs' request to engage in discussions about stipulations regarding document authenticity. And now he has refused to appear in response to a proper deposition

⁷ As demonstrated in greater detail in Plaintiffs' motion for immediate in camera review of privileged documents, newfound evidence further calls into doubt whether documents listed on Troupis's privilege log are withheld in good faith. For example, Plaintiffs have learned that one of the documents withheld under assertions of both attorney-client privilege and work-product protection was simply a published press release sent to Troupis.

⁸ Plaintiffs' motion seeking to shorten the time in which Troupis should be required to respond to admissions (Dkt. 395) remains pending; no briefing schedule or hearing has been set.

notice and filed an eleventh-hour motion for a protective order that effectively will require Plaintiffs to file for summary judgment in this case without having received any useful discovery information from any remaining defendant, *see* Dkt. 370, 371, 418, 419. If discovery exists to allow “the ascertainment of truth,” *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶18-19, 312 Wis. 1, 754 N.W. 2d 439, and summary judgment serves as a tool “to avoid trials where there is nothing to try.” *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis.2d 460, 470, 304 N.W.2d 752, 757 (1981), Troupis’s conduct in this litigation has flouted both goals at every turn. Plaintiffs’ preference to take Troupis’s deposition in person should be given weight.

Troupis’s motion does not establish that he has good cause to conduct the deposition remotely and he does not allege any prejudice to himself. Instead, he complains that Plaintiffs have scheduled Chesebro’s deposition over Zoom/video conference and thus there is no reason Plaintiffs cannot accede to the same for Troupis. But this is neither here nor there. Troupis is a party-opponent in this case, and Plaintiffs have a right to demand that Troupis appear in person whatever they may voluntarily choose to do with any other witness or party. Moreover, there are multiple reasons why Plaintiffs chose to notice Chesebro’s deposition remotely. First, unlike Troupis, although Chesebro is clearly subject to the jurisdiction of this Court for purposes of Plaintiffs’ lawsuit (Dkt. 419 at 12), Chesebro does not reside in Wisconsin. Thus, unlike Troupis, he is not subject to Wis. Stat. § 804.05(3)(b)(1), which allows Plaintiffs to compel attendance at a deposition within 100 miles of a

Wisconsin residence. Second, Plaintiffs' current information is that Chesebro resides in Puerto Rico, and travel to Puerto Rico is an inconvenience and expense that Plaintiffs' counsel did not consider worth taking. This is especially true because, third, unlike Troupis, Chesebro has invoked his privilege against self-incrimination in response Plaintiffs' lawsuit.⁹ Flying to Puerto Rico only to have Chesebro assert a Fifth Amendment privilege in response to every question asked of him is not a good use of resources; Plaintiffs can adequately preserve a record of Chesebro's answers through videoconference and then seek to have them used against him adversely, as allowed by Wisconsin law, see *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 240-41, 172 N.W.2d 812 (1969). None of this, however, has any bearing whatsoever on Plaintiffs' properly noticed in-person deposition of Troupis. The Court should order his in-person appearance as noticed.

III. A Duty Judge Should Compel Troupis to Appear for an In-Person Deposition as Scheduled on February 22, 2024, or Grant Alternative Relief.

For the reasons noted above, Plaintiffs respectfully request that this Court cancel the February 22, 2024, hearing on Troupis's Motion for a Protective Order and reassign this matter to a duty judge who can order Troupis to appear for his deposition as noticed at 9:00 a.m. on February 22, 2024. Alternatively, the Court should order Troupis to notify Plaintiffs and the Court when, within the next two

⁹ As Plaintiffs have noted in their brief in support of the pending Motion to Compel as to Chesebro (Dkt. 419), Chesebro has almost entirely refused to comply with his discovery obligations in this case. He has refused to answer a single interrogatory, refused to answer most requests for admission, and refused to provide even a single page in response to Plaintiffs' requests for production of documents.

weeks, he can appear in Wisconsin and compel him to appear on that date. Should Troupis's deposition be compelled on any date other than February 22, 2024, the Court should amend the Third Amended Scheduling Order to add the number of days that elapse between February 22 and whatever date Troupis is compelled to appear to the deadline for Plaintiffs to file any Motion for Summary Judgment, while keeping all other dates (including any date applicable to Defendants' Motions for Summary Judgment) the same.

CONCLUSION

For the reasons stated herein, Troupis's Motion for a Protective Order should be denied, and Troupis should be ordered to appear for deposition, as noticed, on February 22, 2024, at 9 a.m.

Dated February 19, 2024

Respectfully submitted,

Electronically signed by Scott B. Thompson

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