

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

KATHLEEN A. SENESE	:	
	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	NO. 01-5190
KATHLEEN G. JOHNSTON	:	
	:	
Defendant	:	
	:	

Newcomer, S.J. May , 2002

**O P I N I O N**

Presently before the Court is defendant's "Motion to Enforce Subpoena." For the reasons stated below defendant's motion is DENIED.

**BACKGROUND**

At approximately 11:00 AM on Friday, May 24, 2002, with trial in this matter scheduled to begin on Tuesday, May 28, 2002, this Court was notified of plaintiff's difficulty in obtaining the videotaped deposition of Dr. Delasotta, one of the plaintiff's witnesses. Several hours later the Court was made aware of a conflict between counsel with regard to the date on which Dr. Delasotta's deposition would be taken under subpoena. At that time this Court notified counsel that it would enforce a subpoena to take testimony on either Friday or Saturday but not

Sunday or Monday (Memorial Day). Plaintiff's counsel later learned that Dr. Delasotta was unavailable for testimony on Friday and Saturday, due to his surgical commitments, but was available on Monday. Plaintiff's counsel immediately contacted defense counsel, told him of the predicament and asked that defense counsel agree to a Monday deposition in New Jersey.<sup>1</sup> Defense counsel agreed and plaintiff's counsel relied on that representation by arranging the deposition. Shortly after receiving the official notice of deposition, defense counsel contacted plaintiff's counsel and informed him that he no longer agreed to a deposition being taken outside the Philadelphia area. Defense counsel mistakenly believed that the site proposed by plaintiff's counsel was closer to Philadelphia than it actually is. In an attempt to accommodate defense counsel's concerns, plaintiff's counsel offered to move the deposition closer to Philadelphia. However, in the end, the two were unable to successfully renegotiate their original agreement. Ultimately, the deposition took place on Monday without defense counsel's attendance.

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<sup>1</sup> Although this Court is unaware of which town was originally chosen to host the deposition, Counsel was specific in his representations to defense counsel regarding the exact location in New Jersey.

Defense counsel subpoenaed Dr. Delasotta to appear in Court and testify during each of the first two days of trial (May 29,30). Both of the subpoenas were issued and served on Dr. Delasotta hours before the start of proceedings for each day. Dr. Delasotta did not appear and defense counsel moved this Court orally, at first, and then formally to enforce the subpoena. This Court denied the oral motion on the record and answers the written motion here.

#### **DISCUSSION**

Defense counsel's Motion to Enforce Subpoena is, in essence, a request for another opportunity to cross-examine Dr. Delasotta. Defense counsel had ample opportunity to conduct such a cross-examination on May 27, 2002, at the time the witness' videotaped testimony was taken. Instead, counsel refused to participate. While it is true that this Court indicated it would not schedule a Monday deposition of Dr. Delasotta, it is also true that defense counsel, at some point, subsequently agreed to a Monday deposition. Plaintiff's counsel relied on this agreement to schedule and notice the deposition. When defense counsel realized he had mistaken the geographic location of the town in which the deposition was to be conducted he reneged on his agreement. It was at this time that plaintiff's counsel

moved the deposition closer to Philadelphia and offered to arrange for defense counsel's transportation. Defense counsel was apprised of the resulting change in location and time. In the end, defense counsel chose not to cross-examine the witness at that time.

This Court is unwilling to enforce a subpoena to appear at trial stemming from these circumstances. First, doing so would violate the spirit of Fed.R.Civ.P. 45(C)(1) which indicates that an "attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena."

Clearly, defense counsel could have traveled to New Jersey the day before and cross-examined the witness during the plaintiff's deposition rather than dragging him into Court the day after he was deposed by plaintiff's counsel. In addition, defense counsel issued the subpoena and served it on the same day the witness was to appear and testify. Granting defense counsel's motion runs contrary to the notions espoused by the Federal Rules of Civil Procedure.

In addition, granting such a motion would afford defense counsel an unwarranted second chance to cross-examine Dr. Delasotta. Defense counsel's conscious decision not to appear at Dr. Delasotta's deposition served as a waiver of his right to

cross-examine the witness. Enforcing the subpoena would undeniably give counsel an impermissible second bite at the apple.

Finally, on a procedural note, counsel's motion lacks a proper certificate of service. The accompanying "Certification of Service" indicates that a copy of defendant's "Motion to Compel Plaintiff's Answers to Plaintiff's Interrogatories and Response to Request for Production of Documents" was served on the other side. While counsel certifies that these unrelated documents were served, no proof is offered that the Motion to Enforce Subpoena was served on the other side. Therefore, in addition, without a proper certificate of service, said motion must fail.

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Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this day of May, 2002, upon consideration of defendant's Motion to Enforce Subpoena it is hereby ORDERED that said motion is DENIED for the reasons as set forth in the accompanying Opinion.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.