

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

GENERALE BANK NEDERLAND N.V.	:	CIVIL ACTION
	:	
v.	:	
	:	
FIRST STERLING BANK	:	
	:	
v.	:	
	:	
ELECTRICAL STEEL INTERNATIONAL, INC.	:	
	:	
v.	:	
	:	
IEH GROUP, B.V.	:	NO. 97-2273

MEMORANDUM AND ORDER

HUTTON, J.

December 17, 1997

Presently before this Court is the Motion by Plaintiff Generale Bank Nederland N.V. for a Protective Order Pursuant to Federal Rule of Civil Procedure 26(c). For the reasons set forth below, the Plaintiff's Motion is **GRANTED**.

I. BACKGROUND

On March 2, 1997, plaintiff, Generale Bank Nederland N.V. ("Generale Bank"), filed suit in the United States District Court for the Eastern District of Pennsylvania against the defendant, First Sterling Bank ("First Sterling"). On September 29, 1997, First Sterling forwarded a Notice of Deposition to Generale Bank, stating that First Sterling intended to take the depositions of certain Generale Bank employees and witnesses on

November 5, 1997. The witnesses listed were: F. Van Driest, R.J. de Haas, J.P. Stellema, Ronald Preng, S.R. Sand, Peter Harms and Rene Peek (the "deponents"). All deponents are residents of the Netherlands. On October 15, 1997, Generale Bank filed the instant motion, seeking a protective order preventing the depositions from being taken in Pennsylvania. Alternatively, Generale Bank requests an order allowing the defendant to obtain information from the deponents only by written interrogatories.

II. DISCUSSION

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). In its self-executing disclosure, Generale Bank identified the deponents as persons reasonably likely to have information that bears significantly on its claim. In fact, Generale Bank attached R.J. de Haas's affidavit in support of its Motion for Summary Judgment. Accordingly, this Court finds that the deponents have information which may be relevant to the subject matter involved in the pending action.

Although the depositions are allowable under Rule 26(b), Generale Bank asserts that they should be precluded under Rule 26(c). "Rule 26(c) authorizes a court to issue a protective order where justice so requires and upon good cause shown. The party seeking a protective order bears the burden of

demonstrating 'good cause' required to support such an order." Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 391 (E.D. Pa. 1991). To meet its burden, Generale Bank states that "the burden and expense to Generale Bank's employees and/or witnesses in traveling from the Netherlands to Philadelphia for depositions clearly outweighs First Sterling's need for oral depositions." Pl.'s Brief at 4. Generale Bank argues that the deponents "will incur substantial burden and expense if they are required to travel from the Netherlands to Philadelphia for the sole purpose of being deposed." Id.

This Court will grant the plaintiff's motion, but for different reasons than those set forth by Generale Bank. Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to clarify witnesses' rights. Fed. R. Civ. P. 45 advisory committee's notes. Together with Rule 26(c), Rule 45(c)(3)(A)(ii) limits a Court's power to compel depositions of out of state witnesses and provides protections to certain witnesses who reside or work more than 100 miles from the place of deposition. Under Federal Rules of Civil Procedure 26(c) and 45(c)(3)(A)(ii), this Court cannot require that the deponents travel to Pennsylvania to be deposed. As Judge Waldman stated in Trans Pacific Ins. Co.:

If the person to be deposed is a party to the action, or an officer, director, or managing agent of a party to the action, a subpoena is not required and a notice is

sufficient to require his attendance. C. Wright & A. Miller, Federal Practice & Procedure §§ 2107, 2112 (1970). If the deponent is not a party and does not consent to attend, then his attendance can be compelled only by a subpoena issued under Fed. R. Civ. P. 45.

A person under subpoena may be required to attend "at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court." Fed. R. Civ. P. 45(d)(2) [currently Fed. R. Civ. P. 45(c)(3)(A)(ii)]. If the deponent is a party, then the discovering party may set the place for deposition wherever he wishes subject to the power of the court to grant a protective order under Rule 26(c)(2) designating a different place. The general rule, however, is that the deposition of a corporate officer or agent should be taken at the corporation's place of business. Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Oxford Industries, Inc. v. Luminco, Inc., 1990 WL 269728, 1990 U.S. Dist. LEXIS 17392 (E.D. Pa. Dec. 21, 1990); Farquhar v. Shelden, 116 F.R.D. 70, 72 (E.D. Mich. 1987); Zuckert v. Berkliff Corp., 96 F.R.D. 161, 162 (N.D. Ill. 1982); Mitchell v. American Tobacco Company, 33 F.R.D. 262 ([M.D. Pa.] 1963). See also Mill Run Tours v. Khashoggi, 124 F.R.D. 547, 550 (S.D.N.Y. 1989); Work v. Bier, 107 F.R.D. 789, 792 n. 4 (D.D.C. 1985) (plaintiffs cannot complain if discovery at distant locations is required). The court has considerable discretion in determining the place of a deposition, may consider the relative expenses of the parties and may order that expenses be paid by the opposing party. Wright & Miller, supra, § 2112.

Trans Pacific Ins. Co., 136 F.R.D. at 392-93.

In the instant matter, neither party contends that the deponents are officers, directors, or managing agents of the

plaintiff. In fact, S.R. Sand, Peter Harms and Rene Peek are not even employed by the plaintiff. Def.'s Brief Ex. A. Thus, this Court concludes that a subpoena is necessary to compel attendance by the deponents. See M.F. Bank Restoration Co. v. Elliott, Bray & Riley, No.CIV.A. 92-0049, 1993 WL 512802, at * 2 (E.D. Pa. Dec. 7, 1993) (absent subpoena, only certain categories of corporate personnel are required to be produced without subpoena, including officers, directors, managing agents or other employees with authority to speak for the corporation).

Moreover, although the defendant has not subpoenaed the deponents, an attempt to do so would be futile. Under Rule 45(c)(3)(A)(ii), "the court . . . shall quash or modify the subpoena if it . . . (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person." Fed. R. Civ. P. 45(c)(3)(A)(ii). The notice stated that the depositions would occur in Pennsylvania, clearly more than 100 miles from where the deponents reside. Moreover, the deponents all are employed in the Netherlands. Neither party argues that the deponents regularly transact business in person within 100 miles from the proposed location. Considering Rule 45(c)(3)(A)(ii)'s limitations, this Court would be forced to quash or modify any subpoena served on the deponents.

Accordingly, the plaintiff's motion is granted.

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O R D E R

AND NOW, this 17th day of December, 1997, upon consideration of the Motion by Plaintiff Generale Bank Nederland N.V. for a Protective Order pursuant to Federal Rule of Civil Procedure 26(c) (Docket No. 15) and the Defendant's response thereto, IT IS HEREBY ORDERED that the Plaintiff's Motion is **GRANTED**.

BY THE COURT:

HERBERT J. HUTTON, J.