

Subpoenas issued pending appeal are governed by Federal Rule of Civil Procedure 27(b), which authorizes the "taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court." However, "Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost." Ash v. Cort, 512 F.2d 909, 911 (3d Cir. 1975), quoted in Foy v. Dicks, 1996 WL 745501, *2 (E.D. Pa. Dec. 20, 1996). It is not intended to serve as a substitute for discovery. See Ash, 512 F.2d at 912. Moreover, a party desiring to proceed under Rule 27 must first obtain permission from the district court. See City of El Paso v. S.E. Reynolds, 887 F.2d 1103, 1105 (D.C. Cir. 1989) (subpoenas for deposition pending appeal are allowable only upon motion and with leave of court).

Plaintiff has not complied with Rule 27 having not requested court approval before issuing the subpoenas. Nor does it appear that plaintiff could so proceed in that the information sought is

228944, *1 (E.D. Pa. April 15, 1999) (citation omitted), there is authority for a court to act to curb a Rule 27 violation. See Central Bank of Tampa v. Transamerica Ins. Group, 128 F.R.D. 285, 285 (M.D. Fla. 1989) (granting defendant's motion to quash and for protective order as to subpoena directed at non-party that did not comply with Rule 27); cf. United States v. Reyes, 162 F.R.D. 468, 471 (S.D.N.Y. 1995) ("If ex parte applications [for subpoenas] were prohibited, the adverse party would be able to challenge subpoenas issued to third parties without any claim of privilege or proprietary interest in the requested material."). Alternatively, this court could quash the subpoenas sua sponte. See Haywood v. Hudson, 1993 WL 150317, *4 (E.D.N.Y. April 23, 1993) (even when defendant lacks standing to challenge subpoenas issued to non-parties under Rule 45, court must still review issuance for abuse of process).

not likely to be lost and is not in need of perpetuation.² See Ash, 512 F.2d at 911; In re Hopson Marine Transp., Inc., 168 F.R.D. 560, 564 (E.D. La. 1996); 6 Jeremy C. Moore, et al., Moore's Federal Practice § 27.33 at 27-33 (3d ed. 1999).

Accordingly, there was no basis for the issuance of the subpoenas, and they shall have no force and effect.

Edmund V. Ludwig, J.

²Plaintiff was granted leave to proceed with discovery as to defendant's domicile prior to dismissal of the action. Order, Nov. 12, 1998, ¶ 2. This militates against the requisite finding that depositions are proper "to avoid a failure or delay of justice." City of El Paso v. S.E. Reynolds, 887 F.2d 1103, 1105 (D.C. Cir. 1989); 6 James C. Moore et al., Moore's Federal Practice § 27.34 at 27-34 (3d ed. 1999). Cf. Schreier v. Weight Watchers Northeast Region, Inc., 872 F. Supp. 1, 5 (E.D.N.Y. 1994) (denying motion under Rule 27 to supplement record of plaintiff's trial with documents not admitted into evidence at trial); Central Bank of Tampa v. Transamerica Ins. Group, 128 F.R.D. 285, 286 (M.D. Fla. 1989) (plaintiff had opportunity to develop the record at the initial deposition and should not be allowed under Rule 27 to explore arguments that were previously, intentionally omitted).