IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO.: 2014 CA 676
DIVISION: 49

LINDA BOLANTE,

Plaintiff,

Vs.

JAMES L. MANFRE, as the Sheriff of Flagler County,

Defendant.
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ORDER ON PLAINTIFF'S MOTION TO COMPEL AND DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS CAUSE came before the Court upon Plaintiff, LINDA BOLANTE's, Motion to Compel Defendant's Testimony and Production of Documents at Deposition and for Sanctions [Doc. 41], and on Defendant's Motion for Protective Order and for Sanctions [Doc. 42]. The Court has reviewed the Motions, the Court file, has heard arguments of counsel and being otherwise duly advised in the premises, finds as follows:

1. On August 21, 2015, Plaintiff's counsel served a Notice of Taking Videotaped Deposition Duces Tecum of James L. Manfre.[1] The Notice of Taking Deposition required the witness to bring with him four (4) categories of documents described on Exhibit "A" of the Notice. The deposition was scheduled to occur on October 28, 2015.

2. On October 27, 2015, the day before the scheduled deposition, Defendant filed his "Objection to Documents Requested in Exhibit A of Notice of Taking Videotaped Deposition Duces Tecum" [Doc. 40]. With respect to paragraphs 1 and 2 of the document request in the

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[1] The Court notes that the identical Notice of Taking Videotaped Deposition Duces Tecum was filed again on September 25, 2015 [Doc. 36]. This document, however, bears the original August 21, 2015 certificate of service date.

deposition notice, Defendant objected on the basis that each request was "overly broad, burdensome, oppressive, seeks information which is irrelevant to any claim or defense and is not reasonably calculated to lead to the discovery of admissible evidence...." Further, to the extent that paragraph 2 of the document request sought documentation or memoranda reflecting the Flagler County Sheriff's Office past or current policies regarding the use of "vehicles or other property," Defendant objected on the basis that same was "not the subject of this lawsuit."

3. The colloquy between counsel for the parties at Defendant's deposition makes clear that Defendant did not object to producing documents in paragraphs 1 or 2 of the document request in the deposition notice on the basis of any privilege. *See depo. Manfre, pp. 59*-65.[2] Equally clear from that colloquy is that Defendant withheld certain documents from production based upon an objection to their relevance. *See id.*

4. After the discussion between counsel regarding the production of documents, Plaintiff's counsel posed a question to the Defendant and the following colloquy ensured:

BY MR. MCLEOD, II:

Q: Sheriff, I'd like to now get into more of the heart of the matter, but it's going to be probably from an organization point of view for the rest of the direction of your deposition. I want to have an understanding of what your position is kind of in the global, and then we'll take about the detail of it.

But, if I understand right now your position with respect to the allegations involving Ms. Bolante's allegations both in ethics and in the lawsuit, the whistle blower, which arises from that -- which we've alleged arises from that, you don't believe, generally, you did anything inappropriate or wrong to cause either of those issues to proceed?

MS. EDWARDS: I'm going to object.

[2] The Court was favored at the hearing with a copy of the transcript of Defendant's deposition. The transcript does not, however, appear to have yet been filed with the Clerk.

MR. MCLEOD, II: Go ahead.

MS. EDWARDS: --on compound question, also as to relevance.

And, I'm going to instruct the Sheriff not to answer any questions as it relates to the ethics investigation, because it's irrelevant to this matter. The ethics complaint was filed after the termination. (emphasis added)

MR. MCLEOD, II: Are you advising him based upon privilege?

MS EDWARDS: I am not. I'm advising –

MR. MCLEOD, II: If you are advising him not to answer based on relevance, then we're done today. And I would have to, under the Florida Rules of Civil Procedure 1.330 [sic], I have to suspend then and get a ruling on that issue.

MS. EDWARDS: Okay.

MR. MCLEOD, II: Okay.

THE VIDEOGRAPHER: Off the record at 10:54 a.m.

5. *Fla. R. Civ. P.* 1.310(b)(5) provides:

> The notice to a party deponent may be accompanied by a request made in compliance with rule 1.350 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 1.350 shall apply to the request.

Fla. R. Civ. P. 1.350(b) requires that objections to a request for production be made within thirty days after service of the request.

6. The certificate of service on the Notice of Taking Videotaped Deposition Duces Tecum reflects that was served on August 21, 2015. Taking into account the additional five days permitted by *Fla. R. Jud. Admin.* 2.514(b), any objections Defendant wished to interpose were due to be served no later than September 25, 2015. Defendant's counsel has filed documents with this Court, however, indicating that she and others in her firm were "deselected" from

electronic service through the E-Filing Portal with respect to the August 21, 2015 Notice [Doc. 55]. It does appear, however, that Defendant's counsel was served with the Notice the second time it was filed, on September 25, 2015. Utilizing that date as the date of service, then Defendant's objections would be timely.

7. While Plaintiff's counsel states that Defendant's counsel has been properly served through the E-Filing Portal with all other filings, he also states that "Plaintiff has no knowledge or understanding of how Defendant's counsel was 'de-selected' from the list on that particular filing, and was completely unaware that occurred" [Doc. 56]. The Court does not dispute Plaintiff's assertion; however, it appears clear that Defendant was not served with the Notice of Taking Videotaped Deposition Duces Tecum until September 25, 2015. As such, Defendant's objections to the document request contained in the Notice were timely.

8. Having ascertained that Defendant's objections were timely, the next question is whether they were well-founded. Dealing first with paragraph 1, while Plaintiff's use of the phrase "concerning any matter relating to the subject matter of this lawsuit" is inartful, it seems clear that this request seeks documents related to Defendant's use of the Sheriff Office's credit card and property, and documents related to Plaintiff's employment, termination, or retirement. When limited in this fashion, paragraph 1 is not objectionable.

9. Paragraph 2, which seeks documents pertaining to the Sheriff's Office's "past or current policy regarding use of agency credit cards, vehicles or other property, or concerning procedures or requirements for providing receipts, reimbursements or documentation of such use", is, as Defendant's counsel correctly points out, overly broad as to time. Presumably Plaintiff does not want such documents going back to the inception of the Sheriff's Office itself. If limited in time from Defendant's first term in office forward, the objection to temporal breadth

is remedied. As to Defendant's objection that "'use of agency vehicles or other property' is not the subject of this lawsuit", the Court believes that it is premature to reach this conclusion. This is so because there may well be interplay or overlap between the use of the agency's credit card and an agency vehicle, or the use of the agency's credit card and the use (or acquisition) of other property." Keeping in mind that "[t]he concept of relevancy has a much wider application in the discovery context than in the context of admissible evidence at trial", *Board of Trustees of Int. Imp. Trust Fund v. American Educational Enterprises, LLC*, 99 So. 3d 450, 458 (Fla. 2012), this objection must be overruled.[3]

10. With respect to Defendant's counsel's preemptive instruction to Defendant "not to answer any question as it relates to the ethics investigation, because it's irrelevant to this matter", such instruction was clearly improper. *Fla. R. Civ. P.* 1.310(c) states, "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d)".[4]

11. None of those circumstances enumerated in rule 1.310(c) were present when Defendant's counsel instructed her client not to answer. It is clear from the colloquy quoted above that defense counsel's instruction not to answer was not based upon a privilege. Likewise, the Court had not previously imposed a limitation on evidence; thus the instruction not to answer could not be based on that ground. Finally, Defendant's counsel did not instruct her client not to answer so that she could file a motion terminate or limit examination under rule 1.310(d). To the contrary, Plaintiff's counsel was simply told that certain areas of inquiry were essentially off

[3] Defendant's counsel did not dispute at the hearing that Plaintiff could obtain these same documents through a public records request.

[4] Defendant's counsel also objected to the question on the basis that it was compound. While this objection was well-taken, Defendant counsel did not base her instruction not to answer on this objection.

limits, which put Plaintiff in the position of suspending the deposition and filing the instant Motion to Compel.

12. If Defendant's counsel believed that Plaintiff's counsel was conducting the deposition "in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party," Defendant could have suspended the deposition himself in order to seek an order limiting the scope and manner of the questioning. *See Fla. R. Civ. P.* 1.310(d). Rather than do so, Defendant's counsel gave her client a blanket instruction not to answer certain areas of inquiry, thus forcing Plaintiff to file a Motion to Compel because "objection and instruction to a deponent not to answer [were] being made in violation of rule 1.310(c)". *Id.*

13. Clearly, the fact that a deposition question may be irrelevant does not support an instruction not to answer. Further, assuming that such an instruction would ever be proper, the court has no way of determining whether a given question is relevant until it has been asked. It bears repeating that "[t]he concept of relevancy has a much wider application in the discovery context than in the context of admissible evidence at trial." *Board of Trustees of Int. Imp. Trust Fund*, 99 So. 3d at 458.

14. Each party has requested that the Court impose sanctions upon the other. The Court denies Defendant's request for sanctions without further comment. As to the Plaintiff's request, the Court likewise declines to impose sanctions, based on its belief that this Order will provide the appropriate guidance for the continuation of Defendant's deposition. The Court notes, however, that future improper instructions to a deponent not to answer a question may result in the imposition of monetary sanctions against both Defendant and Defendant's counsel.

See Griffith v. Ramzey's A Plus, Inc., 2016 Fla. App. LEXIS 3360 (Fla. 5th DCA March 4, 2016).

Accordingly, it is hereby ORDERED as follows:

A. Plaintiff's Motion to Compel Defendant's Testimony and Production of Documents at Deposition and for Sanctions shall be, and the same is hereby GRANTED IN PARTY AND DENIED IN PART.

B. Defendant shall produce to Plaintiff all documents in his possession, custody or control which are responsive to the "Notice of Taking Videotaped Deposition Duces Tecum" (to the extent not already produced, and subject to the limitations set forth above) within twenty (20) days from the date of this Order.

C. Following production of the aforementioned documents, Plaintiff may resume the deposition of Defendant. At the continuation of Defendant's deposition, counsel may instruct Defendant not to answer a question only to the extent permitted by *Fla. R. Civ. P.* 1.310(c). Otherwise, evidence objected to shall be taken subject to the objections. In the event Defendant believes his deposition is being conducted "in bad faith or in such manner as unreasonably to annoy, embarrass or oppress" him, *see Fla. R. Civ. P.* 1.310(d), Defendant may suspend the deposition in order to seek relief under rules 1.280(c) and 1.310(d).

D. To the extent the Plaintiff's motion seeks sanctions against Defendant, the motion is DENIED.

E. Defendant's Motion for Protective Order and for Sanctions shall be, and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Bunnell, Flagler County, Florida, this 8th day of March, 2016.

MICHAEL S. ORFINGER
CIRCUIT JUDGE

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