UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

514 BROADWAY INVESTMENT TRUST, UDT Dated 8/22/05, by and through its TRUSTEE, ROBERT A. BLECHMAN, Plaintiff,	:	
v.	:	CA 08-369 S
CRAIG F. RAPOZA; BAINBRIDGE REALTY CORP. a/k/a BAINBRIDGE REALTY, INC.; PETER P. D'AMICO; D'AMICO & TESTA, ATTORNEYS AT LAW, P.C.; MICHAEL F. BEHM; HELEN R. COUPE d/b/a RE/MAX METRO; MICHAEL J. MIALE, SR.; STATEWIDE REAL ESTATE APPRAISAL, LLC a/k/a STATEWIDE REAL ESTATE APPRAISAL CORPORATION; and JOHN DOES 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, Defendants.	:	

MEMORANDUM AND ORDER

DENYING MOTION FOR ATTORNEYS' FEES

Before the Court is Plaintiff's Motion for Award of Attorneys' Fees and Costs (Document ("Doc.") #71) ("Motion for Attorneys' Fees" or "Motion"). A hearing was held on October 19, 2009.

Facts and Travel

On September 29, 2009, Defendants Michael J. Miale, Sr., Statewide Real Estate Appraisal, LLC, Peter P. D'Amico, D'Amico & Testa Attorneys at Law, P.C., Craig Rapoza, and Bainbridge Realty Corp. a/k/a Bainbridge Realty Inc., ("Defendants") filed an emergency motion which sought a protective order forbidding the

videotaped deposition of Robert A. Blechman ("Mr. Blechman") on October 1, 2009. See Joint Emergency Motion for a Protective Order and Request for Hearing by Defendants Michael J. Miale, Sr., Statewide Real Estate Appraisal, LLC, Peter P. D'Amico, D'Amico & Testa Attorneys at Law, P.C., Craig Rapoza and Bainbridge Realty Corp. a/k/a Bainbridge Realty Inc. (Doc. #65) ("Emergency Motion"). At a hearing held on September 29, 2009, the Court denied the Emergency Motion. See Order Denying Joint Emergency Motion for Protective Order (Doc. #70) ("Order of 9/30/09"). The resulting order stated that if Plaintiff wished to press its request for attorneys' fees and costs in connection with its opposition to the Emergency Motion, a motion requesting such award should be filed by October 5, 2009. See id. at 3. Plaintiff filed the instant Motion by this deadline. Defendants Michael J. Miale, Sr. and "Statewide Real Estate Appraisal, LLC a/k/a Statewide Real Estate Corporation" ("Objecting Defendants") have filed an objection to the Motion for Attorneys' Fees.[1] See Objection of Defendants Michael J. Miale, Sr. and "Statewide Real Estate Appraisal, LLC a/k/a Statewide Real Estate Corporation" to Plaintiff's Motion for Award of Attorneys Fees and Costs (Doc. #76) ("Objection").

[1] At the October 19, 2009, hearing, Plaintiff's counsel indicated that Plaintiff was withdrawing the Motion for Attorneys' Fees as to Defendants Peter P. D'Amico and D'Amico & Testa, but that Plaintiff continued to press the Motion as to the remaining Defendants.

Law

Fed. R. Civ. P. 37(a)(5)(B) provides in relevant part that if a motion for a protective order is denied, the court:

> after giving an opportunity to be heard, *must* require the party filing the motion for protective order to pay the party who opposed the motion for protective order the reasonable fees and expenses that it incurred in opposing the motion for protective order, unless (1) the motion for protective order was substantially justified, or (2) other circumstances make an award of fees and expenses unjust.

Miller v. Union Pacific R.R. Co., Civil Action No. 06-2399-JAR-DJW, 2008 WL 4724471, at *7 (D. Kan. Oct. 24, 2008); see also ICE Corp. v. Hamilton Sundstrand Corp., No. 05-4135-JAR, 2008 WL 833509, at *1 ("[T]he court may award attorney's fees and expenses upon the denial of a motion for protective order under Rule 26(c), if the court finds that the making of the motion was not substantially justified."). The Supreme Court has held in a similar context that "substantially justified" does not mean "justified to a high degree," but only "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 12 (1st Cir. 2005)(quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988)).

Discussion

In their opposition to the Motion, Objecting Defendants' correctly note that Fed. R. Civ. P. 30(a)(2)(A)(ii) requires leave of court for a party to take the deposition of a person who

has already been deposed in the case. See Objection at 4; see also Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 192 (1st Cir. 2001); Presidio Components, Inc. v. Am. Technical Ceramics Corp., Civil No. 08cv335 IEG (NLS), 2009 WL 861733, at *4 (S.D. Cal. Mar. 25, 2009)("Rule 30(a)(2)(A)(ii) requires a party to obtain leave of court before deposing a person that has already given a deposition in the case."). They further correctly note that a second deposition issued without leave of court is invalid. Objection at 4 (citing Ameristar Jet Charter, Inc., 244 F.3d at 192).

Plaintiff's response to this argument (made at the hearing) is that leave of court is not required when the parties have stipulated to the deposition, see Fed. R. Civ. P. 30(a)(2)(A), and that here Plaintiff and the Objecting Defendants had an agreement that the deponent, Mr. Blechman, was going to be deposed by them on different dates. While there is no formal stipulation memorializing this agreement, Plaintiff attached to its objection to the Emergency Motion copies of emails which are supportive of its contention that such an agreement existed. See Plaintiff's Objection to Defendants' Joint Motion for Protective Order and Plaintiff's Emergency Motion for Leave to Conduct Videotaped Deposition (Doc. #69) ("Objection to Emergency Motion"), Exhibit ("Ex.") A (emails). Plaintiff argues that if Defendants objected to the second deposition of Mr. Blechman,

they were obligated to make that objection known to Plaintiff early enough so that Plaintiff could seek leave of court as required by Rule 30(a)(2)(A) and not be blindsided at the eleventh hour by an emergency motion to preclude the deposition. The Court agrees. To the extent the Objecting Defendants contend that they were substantially justified in filing the Emergency Motion because Plaintiff lacked leave of court to conduct a second deposition of Mr. Blechman, such argument is unpersuasive.

Objecting Defendants also argue that Plaintiff did not provide any indication prior to Mr. Blechman's deposition that it would produce any new, additional or relevant information. See Objection at 5. Accordingly, they contend that they were substantially justified in seeking the Emergency Order because of this omission. See id. (citing Ameristar Jet Charter, Inc., 244 F.3d at 193 (affirming order quashing second Rule 30(b)(6) subpoena where appellant had not shown that the information sought "would be anything but cumulative or duplicative")). Again, however, Objecting Defendants could have raised this objection much earlier as they had been on notice of Plaintiff's intent to conduct the second deposition of Mr. Blechman since approximately August 13, 2009, see Objection to Emergency Motion, Ex. B (Notice of Deposition of Robert A. Blechman). Accordingly, the Court finds this argument similarly unpersuasive with respect to the Emergency Motion being substantially justified.

Objecting Defendants, however, have a stronger argument with respect to their claim that the Emergency Motion was necessary because Plaintiff's counsel refused to designate whether Mr. Blechman's video deposition would be offered as trial testimony. See Objection at 7. They argue that this refusal was highly prejudicial to the Defendants because it left defense counsel in the untenable position of choosing between either (1) treating the videotaped deposition as mere factual discovery and not engaging in a full cross examination, or (2) revealing their cross examination strategy and mental impressions well in advance of trial, prior to the conclusion of factual discovery, prior to Plaintiff's disclosure of experts, prior to completion of Defendants' deposition discovery, and prior to Defendants' investigation of matters first revealed by Mr. Blechman during his discovery deposition. See Objection at 7-8. Objecting Defendants cite Battle v. Memorial Hospital at Gulfport, 228 F.3d 544 (5th Cir. 2000), as supportive of this argument.

In Battle, the plaintiffs noticed the video deposition of an expert witness because of his unavailability for trial. See id. at 553-54. The day before the scheduled deposition the plaintiffs filed a motion to continue the trial because of the unavailability of another expert for trial or deposition. See id. at 554. The defendants objected to revealing their cross examination strategy if the first expert witness was deposed and

later allowed to testified live. See id. The trial court held a hearing on the motion for continuance just prior to the start of the first expert witness's deposition. See id. A few days later the trial court issued an order granting the motion for continuance and ruling that the first expert witness's testimony could be presented only by his video deposition which had occurred a few days earlier. See id. On appeal, the plaintiffs contended that the district court had abused its discretion in requiring the expert witness's testimony to be presented by video deposition rather than live. See id. The Court of Appeals rejected this claim of error, finding that the district court had "attempted to balance the competing interests of [d]efendants in protecting their cross examination strategy against [p]laintiffs' need for [the first expert]'s testimony in light of [p]laintiff's [sic] dilatory tactics." Id.

The Court concludes that the Battle case provides support for Defendants' contention that Plaintiff's unwillingness to disclose whether it intended to use the videotaped deposition in lieu of live testimony was prejudicial, see Memorandum in Support of Joint Emergency Motion for a Protective Order and Request for Hearing by Defendants Michael J. Miale, Sr., Statewide Real Estate Appraisal, LLC, Peter P. D'Amico, D'Amico & Testa Attorneys at Law, P.C., Craig Rapoza and Bainbridge Realty Corp. a/k/a Bainbridge Realty, Inc. (Doc. #66) ("Defendants' Emergency

Motion Mem.") at 3. Thus, although the Emergency Motion was filed late, it now appears that legal support for it exists.[2]

While Defendants' tardiness in filing the Emergency Motion remains a concern, Plaintiff's failure to disclose the reason why it believed that Mr. Blechman might not be available to testify at trial increased Defendants' uncertainty and made it more difficult for them to assess the problem with which they were confronted.[3] This information was not provided to Defendants until several hours into Mr. Blechman's September 30, 2009, deposition when he disclosed that he was a convicted felon facing sentencing.[4]

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[2] Defendants did not cite any caselaw in support of the Emergency Motion, an omission which the Court noted in denying the motion. See Order Denying Joint Emergency Motion for Emergency Relief (Doc. #70) at 2.

[3] Defendants' frustration with Plaintiff is evident in the memorandum which they filed in support of the Emergency Motion: "If the plaintiff, or plaintiff's counsel, is privy to information regarding Mr. Blechman's availability for live testimony at trial, th[e]n justice so requires that ... the plaintiff, or plaintiff's counsel disclose that information." Defendants' Emergency Motion Mem. at 3. Defendants further argued that "Rule 32 was not designed as a tactical procedure for counsel, but seemingly, as an equity for the court to admit into evidence testimony that may have otherwise not been available." Id.

[4] Mr. Blechman has been convicted in the United States District Court for the District of Kansas of mail fraud and conspiracy to commit mail fraud. See United States v. Isaac Yass and Robert Andrew Blechman, No. 08 40008 JAR (D. Kan. July 6, 2009), Memorandum and Order (granting in part and denying in part motions for judgments of acquittal and denying motions for new trials). He is currently facing sentencing. See also id. (Oct. 7, 2009) Order Granting Motion to Bifurcate Sentencing (scheduling sentencing hearing for 10/19/09 to hear objections to presentence report that are applicable to both defendants and stating that a second hearing will be held separately for each defendant to hear "argument on 18 U.S.C. § 3553(a) factors as

The Court agrees with Defendants that a party should not be allowed to utilize the procedure available pursuant to Rule 32(a)(4) in a manner which enables the party to gain an unfair tactical advantage over his opponent. See Defendants' Emergency Motion Mem. at 3. Plaintiff's failure to disclose the reason for Mr. Blechman's possible unavailability for trial placed Defendants at a disadvantage as they grappled with a difficult procedural problem. This lack of information may have been a contributing cause of their inaction as the October 1st deposition approached and their belated decision to file the Emergency Motion. An award of attorneys' fees and costs here would indicate to other litigants that a party who holds its cards close may succeed not only in prevailing on a given motion but get attorneys' fees to boot. This Court declines to send such a message.

Conclusion

The Court concludes that the existence of some support in the caselaw for the relief sought by the Emergency Motion, see Battle, and Plaintiff's failure to disclose the reason why Mr. Blechman might not be available to testify at trial constitute circumstances making an award of attorneys' fees and expenses in this matter unjust. See Fed. R. Civ. 37(a)(5)(B). Accordingly,

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well as any objections to the Presentence Report unique to each defendant").

the Motion is denied.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
October 21, 2009