

Bell v Stoddart

2020 NY Slip Op 34421(U)

June 24, 2020

Supreme Court, Bronx County

Docket Number: 28136/2019E

Judge: John R. Higgitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

-----X
BELL, CHRISTOPHER

Index No. **28136/2019E**

- against -

Hon. **JOHN R. HIGGITT,**

STODDART, PETER S.

J.S.C.

-----X
The following papers in the NYSCEF System were read on this motion to **COMPEL**, duly submitted as No. on the Motion Calendar of **June 22, 2020**

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	26-34
Notice of Cross-Motion – Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	35
Replying Affidavits and Exhibits	

Appearances of counsel:

The Lambrou Law Firm, P.C., New York, New York (Lucas B. Franken, of counsel), for plaintiff.

The Law Office of Leigh J. Katz & Associates, Garden City, New York (Anna-Lisa Bonventre, of counsel), for defendant.

Upon plaintiff’s June 11, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; defendant’s June 22, 2020 affirmation in opposition; and due deliberation; plaintiff’s motion for an order precluding defendant from offering evidence at trial and on dispositive motions if defendant does not appear for a deposition conducted by remote means is granted in part.

The parties’ depositions are required by the November 1, 2019 case scheduling order and the January 10, 2020 compliance conference order. Plaintiff appeared for his deposition in April 2020 via Zoom; defendant has advised plaintiff that because he lacks technological savvy, he is ready, willing and able to appear for an in-person deposition when same is permitted and can be conducted safely. It should be noted that plaintiff is 79 years old, and at increased risk for coronavirus infection accordingly to widely-accepted health metrics. An in-person deposition would presumably place defendant at greater risk, and “it is no longer safe and practical” to conduct in-person depositions, which carry with them their own potential health and personal safety dangers, during the pandemic (*Johnson v Time Warner Cable N.Y.C. LLC*, 2020 NY Slip Op 31592[U], at *3 [Sup Ct, N.Y. County 2020]).

Defendant’s counsel asserts that defendant’s lack of access to the electronic means to appear for a virtual deposition also prevents him from appearing remotely for discussions and preparation with counsel prior to appearing for any deposition. Defendant asserts that, given his lack of technological access and knowledge, to require him to appear for a video deposition would create, rather than alleviate, an undue burden. Defendant (correctly) asserts that the situation in question differs from that governed by CPLR 3117, where a third-party provider would administer and facilitate the electronic component of the deposition.

“The decision to *allow* a party or witness to testify via video conference link is left to a trial court’s discretion” (*American Bank Note Corp. v Daniele*, 81 AD3d 500, 501 [1st Dept 2011] [emphasis added]). Here, however, the court is confronted with the determination whether to *compel* a party to testify via video conference link (rendering most of plaintiff’s cited caselaw inapplicable) which, logically, is no less a function of the discretion of the Judge overseeing discovery.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Settle Order
- Submit Order

Pursuant to CPLR 3103(a), “[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device” (here, the notice of deposition). Plaintiff is reminded, however, that “[s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to *any* person or the courts” (*id.* [emphasis added]).

Both options – an in-person deposition to which defendant must travel and potentially come into contact with more people, and a video deposition requiring certain equipment, hardware, software and technological knowledge – carry with them some attendant risk.¹ While we have repeatedly been reminded, and it remains true, that vigilance is required to prevent the spread of the coronavirus, we are no longer in the initial stages of the pandemic, and litigation must, at some point and in whichever fashion is suitable to meet prevailing health and safety directives, continue (*see* Administrative Order AO/71/20).

Because defendant has not willfully refused to appear for deposition, but has merely resisted conducting his deposition in the manner urged by plaintiff, a sanction is inappropriate. Plaintiff is reminded that parties will not be penalized for delays in scheduling for “reasons relating to the coronavirus public health emergency” (*id.*). On balance, the appropriate exercise of the court’s “wide, inherent discretion to manage discovery” (*Hamilton v Miller*, 23 NY3d 592, 602 [2014]), under CPLR 3103(a), is to permit defendant to choose the manner in which he will be deposed.

Accordingly, it is

ORDERED, that plaintiff’s motion for an order precluding defendant from offering evidence at trial and on dispositive motions if defendant does not appear for a deposition conducted by remote means is granted solely to the extent that, within 90 days after service of a copy of this order with written notice of its entry, defendant shall inform plaintiff whether he elects to have his deposition conducted in person or by remote means, and shall submit to deposition within 30 days thereafter; and it is further

ORDERED, that, should defendant elect to have his deposition conducted by remote means, he and his counsel shall be responsible to secure and operate the technology required to do so; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the 9:30 a.m. September 4, 2020 status conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 24, 2020


Hon. John R. Giggitt, J.S.C.

¹ It may be that, given the foregoing discussion, defendant would require the in-person assistance of one or more persons to facilitate the taking of the video deposition, thus defeating the purpose of avoiding a traditionally-conducted deposition.