

United States District Court  
Eastern District of New York

MINUTE ORDER

09cv1777 (ENV) (MDG) S.W., et al. v. CITY OF NEW YORK, et al.

This Order sets forth rulings made on the record at a conference on February 5, 2013 granting in part and denying in part plaintiff's motion for a protective order (ct. doc. 396), denying the Agency defendants' cross-motion for a protective order (ct. doc. 399) and granting the Agency defendants' motion for an extension of time (ct. doc. 397).

1. Plaintiffs' motion for a protective order is granted in part and denied in part. The Agency defendants are encouraged to confer with plaintiffs' counsel in advance of issuing subpoenas for depositions. Although such coordination is not required by the Federal Rules of Civil Procedure, it may be a more efficient method of scheduling depositions and is likely to foster cooperation and collegiality among counsel.

a. Absent prior consultation in scheduling future depositions, the Agency defendants must give all parties and the subpoenaed witness at least 30 days' notice of any deposition. In order to reduce the burden on non-party witnesses, defense counsel should also make every effort to schedule depositions at a location convenient for the witnesses. Prior to any deposition, the Agency defendants must provide the witness and each party a set of that witness's records that will likely be used at the deposition.

b. Any party may participate in a deposition by telephone but that party must bear the cost of teleconferencing. Cf. Fed. R. Civ. P. 30(b)(4).

c. Plaintiffs' request that the Agency defendants make arrangements to pay expert witness fees to plaintiffs' treating physicians is denied without prejudice. Whether a treating physician is entitled to a "reasonable fee" under Fed. R. Civ. P. 26(b)(4)(E) depends on the substance of that witness's testimony at the deposition. See Turner v. Delta Air Lines, 2008 WL 222559, at \*1 (E.D.N.Y. 2008). Accordingly, after the deposition, the witness can make an appropriate application seeking fees if warranted.

2. The Agency defendants' cross-motion for a protective order is denied. Defendants have not offered any evidence to support their bald allegation that plaintiffs' counsel improperly attempted to contact non-party witnesses. It is not improper for an attorney to contact a non-party witness, discuss the case with her or prepare her for deposition. Samad Brothers v. Bokara Rug Co., 2012 WL 43613, at \*3 (S.D.N.Y. 2012); N.Y. City Bar Assoc. Formal Opinion 2009-5; Restatement (Third) of Law Governing Lawyers § 116. Any suggestion by defendants to the contrary is without support as a matter of law. Insofar as defendants are intimating that plaintiffs' counsel improperly attempted to influence a witness not to comply with a subpoena or to alter his or her testimony, defendants have provided no basis in fact to make any such reckless insinuation.

However, should counsel for either side have prior contact with a non-party, the parties are advised that work product protection does not shield an attorney's preparation of a non-party witness. See SEC v. Gupta, 281 F.R.D. 169 (S.D.N.Y. 2012). A party can inquire as to a non-party witness's preparation with another party's counsel to test that witness's credibility so long as the questions are not designed to elicit counsel's strategy. See id.

3. The Agency defendants' motion for an extension of time to serve expert reports is granted. Although the Agency defendants should have raised this issue at the December 13, 2012 conference at which the schedule for expert discovery was set, the Court agrees that defendants' experts should have the opportunity to review the ongoing damages discovery being taken and the plaintiffs' depositions before preparing their reports. However, the Agency defendants are warned that any subsequent request for an updated deposition of plaintiffs will be viewed with circumspection.

a. Accordingly, the discovery schedule is amended and extended as follows: (i) medical examinations of each plaintiff must be completed by 7/31/13; (ii) defendants' medical expert reports must be served within 3 weeks of each plaintiffs' medical examination; (iii) should plaintiffs wish to supplement their medical expert reports in response, plaintiffs' supplemental medical expert reports must be served within 4 weeks of the service of defendants' medical expert reports;<sup>1</sup> (iv) defendants' life care planning expert report must be served within 3 weeks of defendants' medical expert reports; (v) defendants' economist's expert report must be served within 2 weeks of defendants' life care planning expert report; (vi) plaintiffs' rebuttal life care planning expert report and economist's expert report must be served within 4 weeks of defendants' corresponding expert report. Parties must send the Court a joint report regarding the status of discovery on November 1, 2013.

b. Questioning of plaintiffs is limited to the issue of damages to the extent it was not previously covered in the prior depositions.

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<sup>1</sup> The Court did not discuss the schedule of plaintiffs' rebuttal and supplemental expert reports at the conference.

c. Plaintiffs' depositions and medical examinations shall be conducted in Florida but without prejudice to application by defendants that a deposition or medical examination of a particular plaintiff be conducted in New York. If defendants seek to conduct both the deposition and medical examination of a plaintiff in New York, defendants must be prepared to conduct both in one trip by the plaintiff.

**SO ORDERED.**

Dated: Brooklyn, New York  
February 12, 2013

/s/ \_\_\_\_\_  
MARILYN D. GO  
UNITED STATES MAGISTRATE JUDGE