SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TRUMP OLD POST OFFICE LLC,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2015 CA 5890 B**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
CZ-NATIONAL, LLC, *et al.*,	:	
	:	
Defendants.	:	

ORDER

This matter comes before the Court upon consideration of Plaintiff's Motion for Protective Order, filed on January 15, 2016. On February 2, 2016, Defendant filed the Opposition.

I. PROCEDURAL HISTORY

On August 3, 2015, Plaintiff filed the Complaint. Plaintiff, the landlord, alleges that Defendant CZ-National, the tenant (hereafter referred to as "Tenant"), breached obligations under a sublease (the "Sublease") to use certain restaurant space at the Trump International Hotel, The Old Post Office, Washington, D.C. (Compl. at 1.) Defendant BVS Acquisition Co. allegedly entered into an agreement with Plaintiff to guarantee all obligations (the "Guarantee") assumed by Tenant under the Sublease. (Compl. at ¶ 9.) Tenant is a corporate entity affiliated with renowned chef Geoffrey Zakarian. (*Id.* at ¶ 8.) Plaintiff alleges that Tenant defaulted and abandoned its obligations under the Sublease "allegedly based on personal offense to statements by Mr. Trump with respect to illegal immigration during his June 16, 2015 presidential campaign announcement speech."[1] Plaintiff asserts a claim for breach of the Sublease against Defendant

[1] An excerpt of Mr. Trump's remarks reads: "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with [them]. They're bringing drugs. They're bringing crime. They're rapists." (Opp'n at 5.)

CZ-National, breach of the Guarantee against Defendant BVS Acquisition, and claims for attorneys' fees against all Defendants. (Compl. at 9-11.)

On September 16, 2015, Defendants filed the Answer and Counterclaims. Defendants assert that the Sublease "includes, as a matter of law, an implied obligation of good faith and fair dealing" and that Mr. Trump's remarks during his speech on June 16, 2015 were "inflammatory" and "made it impossible for Tenant to move forward with opening a restaurant [at the Old Post Office site]." (Ans. and Counterclaims at ¶ 60-64.) Defendants allege that the Tenant provided Plaintiff with a letter of credit in the amount of $461,000 (the "Letter of Credit") and cash security in the amount of $29,167.00 as collateral for Tenant's performance under the Sublease. (*Id.* at ¶ 66.) Defendants assert that as a result of Tenant's cessation of performance under the Sublease, Plaintiff withdrew both the Letter of Credit and cash security in violation of the terms of the Sublease that permitted Plaintiff "to draw down on all or part of the Letter of Credit *or* the cash security[.]" (*Id.* at ¶ 68.) Defendants assert counterclaims for the breach of covenant of good faith and fair dealing and breach of the letter of credit provisions of the Sublease. (*Id.* at ¶ 71-77.)

II. ANALYSIS

Plaintiff requests that the Court enter a protective order precluding Defendants from conducting the deposition of Donald J. Trump, the President of the corporate Plaintiff. (Mot. at 1.) The record indicates that Defendants served Plaintiff with the Notice of Deposition of Donald J. Trump on November 23, 2015. (Not. of Deposition Nov. 23, 2015 at 1-3.)

A. Standard of Review

The Superior Court Rules of Civil Procedure, Rule 26(c) governs entry of a protective order:

> (1) In General. -- A party or any person from whom discovery is sought may move for a protective order in this court or as an alternative on matters relating to a deposition, in the court for the jurisdiction where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> > (A) forbidding the disclosure or;
> >
> > (B) specifying terms, including time or place, for the disclosure or discovery;
> >
> > (C) prescribing a discovery other than the one selected by the party seeking discovery;
> >
> > (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
> >
> > (E) designating the persons who may be present while the discovery is conducted;
> >
> > (F) requiring that a deposition be sealed and opened only by court order;
> >
> > (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
> >
> > (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
>
> (2) Ordering Discovery. -- If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

The instant Motion contains the required certification that Plaintiff, the movant, has conferred with Defendants in an effort to resolve the current dispute. (Mot. at 8.)

The District of Columbia Court of Appeals states that the trial court "has substantial discretion in deciding to grant a protective order [under Rule 26(c)], and its decision to do so will not ordinarily be disturbed on appeal unless that discretion has been abused." *Mampe v. Ayerst Laboratories*, 548 A.2d 798, 803-04 (D.C. 1988) (citations omitted). The burden of proof is on the moving party to "make a showing of good cause, stating with some specificity how it may be harmed by the [requested discovery]." *Id.* (Citation omitted.) If the moving party satisfies its burden of proof, the burden "then shifts to the party seeking discovery to establish that the disclosure is both relevant and necessary to the action." *Id.* To show necessity, the party seeking discovery and the party opposing the entry of a protective order "must demonstrate that the information is necessary to the preparation of its case for trial, including proving its own theories and rebutting those of its opponent." *Id.* (Citation omitted.)

Plaintiff relies on the so-called "apex" doctrine adopted by the federal courts. (Mot. at 3.) Under the apex doctrine:

> [T]he court "may protect a high level corporate executive from the burdens of a deposition when any of the following circumstances exist: (1) the executive has no unique personal knowledge of the matter in dispute; (2) the information sought from the executive can be obtained from another witness; (3) the information sought from the executive can be obtained through an alternative discovery method; or (4) sitting for the deposition is a severe hardship for the executive in light of his obligations to his company.

Naylor Farms, Inc. v. Anadarko OGC Co., 2011 U.S. Dist. LEXIS 68940 1, 3 (D. Colo. 2011) (citation omitted). The rationale behind the apex doctrine is that "'high ranking and important executives can easily be subjected to unwarranted harassment and abuse' and should therefore be protected." *Id.* at 3-4 (citation omitted); *see also Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("it is clear that the order merely required plaintiff to depose the other employees that

[defendant] indicated had more knowledge of the facts before deposing [the president of the corporate defendant].").

Defendant correctly asserts that this jurisdiction has neither adopted the apex doctrine nor otherwise addressed it. (Opp'n at 8.) While this Court may consider the facts relating to the factors contemplated under the apex doctrine, this Court must apply available controlling authority. The Court of Appeals has clearly articulated a general test for entry of a protective order precluding requested discovery and the applicable burden of proof. *Mampe*, 548 A.2d at 803-04; Super. Ct. R. Civ. P. R. 26(c).

B. Movant's Burden to Show Good Cause

Plaintiff has the initial burden to demonstrate that there is "good cause" to grant the requested relief, which requires a showing of "some specificity [of] how it may be harmed" by Defendants' requested deposition of Mr. Trump. *Mampe*, 548 A.2d at 803-04. Plaintiff asserts that Defendants "noticed the deposition of Mr. Trump without pursuing other courses of discovery, let alone exhausting the other avenues available to them which are less burdensome and disruptive[.]" (Mot. at 7.) Plaintiff asserts that Defendants "cannot demonstrate that testimony they would elicit from Mr. Trump is unique, non-repetitive, or constitutes first-hand knowledge of disputed facts properly at issue in this case" and Defendants merely seek to "harass" Mr. Trump. (*Id.* at 5, 7.)

Defendants assert that, contrary to Plaintiff's assertions, Mr. Trump has unique personal knowledge of the events and issues in dispute in the instant action. Defendants assert that Mr. Trump "has been personally involved with this project from the start, just as he is personally involved with all Trump Organization projects" by leading "the groundbreaking for the hotel[,] personally sign[ing] the Sublease[,] personally sign[ing] the certification to the bank drawing

down on the letter of credit[,] [a]nd personally stat[ing] that the withdrawal of CZ-National would have no adverse impact on the project." (Opp'n at 9.) Further, Defendants assert that Mr. Trump personally made statements "regarding Mexican immigrants" that "led directly to this case" and that only Mr. Trump knows "whether he considered the impact those statements would have on CZ-National and its rights under the Sublease." (*Id.* at 9-10.) Defendants note that Plaintiff, owned by Mr. Trump, initiated the instant action. (*Id.* at 10.)

It is apparent that Mr. Trump has personal knowledge of events and information relevant and material to the claims presented in the instant action. Defendants directly place Mr. Trump's own remarks at issue in asserting a claim for the breach of the implied covenant of good faith and fair dealing. *See Allworth v. Howard Univ.*, 890 A.2d 194, 201 (D.C. 2006) ("[i]f the party to a contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing."); (Ans. and Counterclaims at ¶ 65 ("Tenant relies heavily on substantial, committed support from the immigrant community and from Hispanic immigrants in particular . . . Mr. Trump's comments materially and fundamentally changed the public reaction [] and made it effectively impossible for Tenant to hire the caliber of personnel it must employ in order to open a first-class restaurant, as contemplated when Tenant entered into the Sublease.").) Further, the record contains a copy of the Sublease and certification requesting withdrawal of the Letter of Credit, each signed by Mr. Trump. (Ds' Ex. A at 98; Ds' Ex. B at 1-2.)

The foregoing establishes that Plaintiff is unable to demonstrate good cause to preclude the taking of any deposition of Mr. Trump; "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be

in error." *Salter*, 593 F.2d at 651; *see Mampe*, 548 A.2d at 803-04. Even assuming, *arguendo*, that Plaintiff has satisfied its burden of proof, Defendants have clearly demonstrated that it is both relevant and necessary to take the deposition of Mr. Trump to at least prove their asserted counterclaims. *Mampe*, 548 A.2d at 803-04; (Ans. and Counterclaims at ¶ 60-77.)

In the alternative, Plaintiff suggests that deposing Mr. Trump at this time is premature because he "delegated day-to-day responsibility for the development of the Hotel to others, including his son, Donald Trump, Jr., and his daughter, Ivanka Trump, both of whom are executives [] of [Plaintiff]." (Mot. at 5.)

C. Timing of the Requested Discovery

Under Rule 26(c)(1), the Court is empowered to place limitations on, or modify the terms of, requested discovery in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This is a fact-intensive inquiry left to the discretion of the trial court. *Mampe*, 548 A.2d at 803-04.

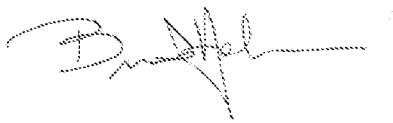
Contrary to Plaintiff's assertions, the fact that Mr. Trump (1) personally made certain "inflammatory" remarks on June 16, 2015, which allegedly caused this litigation, and (2) personally signed the Sublease and certification requesting withdrawal of the Letter of Credit, both integral to Plaintiff's claims and Defendants' counterclaims, establishes that Mr. Trump is "a critical witness in this case[.]" (*See* Mot. at 6; Ds' Ex. A at 98; Ds' Ex. B at 1-2.) Mr. Trump personally made statements and decisions that other witnesses are simply not privy to. Further, any claim of mere inconvenience facially lacks merit in light of the fact that *Plaintiff*, a corporation owned by Mr. Trump, *initiated the instant action*. *See Eaton Corp. v. Weeks*, 2014 WL 700466 1, 7 (E.D. Mich. 2014) (permitting deposition of a top executive where the corporate entity employing that executive initiates the subject litigation).

Neither the Rules nor controlling authority create a special exception for individuals that "may have a busy schedule" as a result of seeking public office. (Opp'n at 10.) The information that Defendants may glean from questioning Mr. Trump is "necessary to the preparation of its case for trial, including proving its own theories and rebutting those of [Plaintiff]." *Mampe*, 548 A.2d at 803-04. Further, as offered by Plaintiff, Defendants may also take the deposition of Mr. Trump, Jr. and Ms. Trump. (*See* Mot. at 5.)

WHEREFORE, it is this 11th of February 2016, hereby

ORDERED, that Plaintiff's Motion for Protective Order is **DENIED**; and it is further

ORDERED, that Plaintiff **SHALL PRODUCE** Donald J. Trump, Donald Trump, Jr., and Ivanka Trump for deposition, subject to mutual agreement between the parties as to the order of witnesses and scheduling. ***If the Court is asked to intervene on this issue, the non-prevailing party shall be subject to sanctions***.



BRIAN F. HOLEMAN
JUDGE

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