

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

<p>TRUMP OLD POST OFFICE LLC,</p> <p style="text-align:center">Plaintiff/Counter-Defendant,</p> <p>v.</p> <p>TOPO ATRIO LLC, et al.,</p> <p style="text-align:center">Defendants/Counter-Plaintiffs.</p>	<p>Case No. 2015 CA 006624 B</p> <p>Judge Jennifer A. Di Toro</p>
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OMNIBUS ORDER

This matter is before the Court for consideration of (1) Defendants’ *Motion to Compel*, filed on December 7, 2016; (2) Defendants’ *Motion for Expedited Review*, filed on December 7, 2016; and (3) Plaintiff’s *Emergency Motion for Protective Order*, filed on December 13, 2016.

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 Trump Old Post Office LLC, or, in the alternative, to impose limitations on both the length and scope of Defendants’ examination. Defendants request that this Court order Plaintiff to produce Mr. Trump for a deposition not to exceed seven hours and to deny the request for limitations on the deposition’s length and scope. For the reasons discussed herein, Plaintiff’s Motion shall be denied and Defendants’ motions shall be granted.

I. Procedural History

On August 27, 2015, Plaintiff/Counter-Defendant Trump Old Post Office LLC (“Landlord”) filed a Complaint against Defendants Topo Atrio LLC (“Tenant”) and ThinkFoodGroup LLC asserting claims for breach of contract and action on a guarantee. *See* Compl. Landlord entered into a sublease with Tenant on November 19, 2014, to open a restaurant space at the Trump International Hotel, The Old Post Office, Washington, D.C. (“The

Old Post Office”), which Plaintiff leased from the United States of America—General Services Administration. *See* Compl. ¶¶ 7-9. ThinkFoodGroup provided Landlord with a letter of credit in the amount of \$258,171 (the “Letter of Credit”) to guarantee Tenant’s full and prompt performance of all obligations under the terms of the Sublease. *Id.* ¶¶ 11, 27. Mr. Trump is and was President of Trump Old Post Office LLC from the time the Sublease was executed through the present.

On July 17, 2015, Tenant sent a Notice of Default, alleging constructive eviction from the premises and violation of the covenants of quiet enjoyment and good faith and fair dealing, based on statements on immigration made by Mr. Trump in June and July of 2015. Ans. and Counterclaims at 16, ¶ 20. Defendants allege that the statements constituted arbitrary and capricious conduct demonstrating disregard for the Sublease and interference with Defendants’ ability to perform by alienating investors, employees, and customers. *Compl.* ¶¶ 29-30. Defendants allege that Trump LLC was offered an opportunity to cure by disavowing the statements within the Sublease’s cure period. *Id.* ¶¶ 20, 35. On July 29, 2015, following the ten-day period allotted to cure the default, Tenant sent a Notice of Termination and Cancellation to Landlord, terminating the Sublease. *Id.* ¶ 22. Defendants allege that as a result of Tenant’s cessation of performance under the Sublease, Landlord withdrew both the Letter of Credit and cash security. *Id.* at 16, ¶ 25.

Plaintiff now requests that the Court enter a protective order precluding Defendants from conducting the deposition of Mr. Trump or, in the alternative, limiting the deposition’s length and scope. Defendants request that the Court order Plaintiff to produce Mr. Trump for a deposition in accordance with Super. Ct. Civ. R. 30.

II. Standard of Review

Super. Ct. Civ. R. 26(c) authorizes courts, for good cause shown, to enter an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” In doing so, the court may order, *inter alia*, “that the discovery not be had . . . [or] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters” *Id.* The trial court has “substantial discretion in deciding to grant a protective order.” *Mampe v. Ayerst Laboratories*, 548 A.2d 798, 803 (D.C. 1988) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

Before a protective order may be entered, the party seeking the order must demonstrate good cause by “stating with some specificity how it may be harmed” if the protective order is not granted. *Id.* Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the requirements of Rule 26(c). Rather, the asserted harm must be “significant, not a mere trifle.” *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). Only after good cause is shown does the burden shift to the opposing party to establish that disclosure of the material is relevant and necessary. *Id.*; *see also Plough, Inc. v. Nat’l Academy of Sciences*, 530 A.2d 1152, 1155 (D.C. 1987). The party seeking discovery needs only to show that the discovery sought is “reasonably calculated to lead to admissible evidence,” and that the information is necessary to the preparation of that party’s case. *Mampe*, 548 A.2d at 803.

Plaintiff relies on the “apex doctrine” adopted by the federal courts in arguing that Mr. Trump’s testimony should be precluded. *Mot. for Protective Order* at 4. 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 apex doctrine recognizes that deposition notices directed at high-level corporate officials may create “tremendous potential for abuse or harassment,” and directs courts to consider whether requests for depositions are being made for such improper purposes.

Groupion, LLC v. Groupon, Inc., No. 11-0870 MEG, 2012 WL 359699, at *2. While this Court may consider the factors under the apex doctrine, this jurisdiction has neither adopted nor otherwise addressed it. The applicable test for entry of a protective order as articulated by the District of Columbia Court of Appeals and Superior Rule of Civil Procedure 26(c) is whether Plaintiff has shown good cause to grant the relief requested. *See Mampe*, 548 A.2d at 803-04; Super. Ct. Civ. R. 26(c). The factors under the apex doctrine are included among Plaintiff’s arguments in support of the request for the protective order, which the Court has therefore considered in concluding that Plaintiff has not met that burden.

III. Analysis

A. Entry of a Protective Order

Plaintiff has the initial burden to demonstrate with some specificity any harm flowing from denial of the requested relief. Plaintiff asserts that as Mr. Trump is the President-Elect, “he is extremely busy handling matters of very significant public importance” and requests that the Court adjust case scheduling and testimonial obligations accordingly. *Mot. for Protective Order* at 5. Plaintiff also asserts that Mr. Trump “has not been involved in this dispute and, therefore, has only limited knowledge of the facts at issue.” *Id.* at 6.

In weighing Mr. Trump’s obligations as President-Elect and Defendants’ interests in defending their case, the Court finds that entry of a protective order would cause significant

prejudice to the Defendants by inhibiting their right to prepare the case for trial, and minimal, if any, prejudice to Mr. Trump, whose schedule the Defendants have agreed to accommodate. Regarding Plaintiff's argument that Mr. Trump has no personal knowledge of the facts at issue, Mr. Trump's own statements are at the heart of Defendants' counterclaim of breach of the implied covenant of good faith and fair dealing. Ans. and Counterclaims at p. 16, ¶ 18 ("The perception that Mr. Trump's statements were anti-Hispanic made it very difficult to recruit appropriate staff for a Hispanic restaurant, to attract the requisite number of Hispanic food patrons for a profitable enterprise, and to raise capital for what was now an extraordinarily risky Spanish restaurant.") The Sublease Agreement is personally signed by Mr. Trump, as are two notices drawing down on the letter of credit. *See* Defs.' Mot. Sum. J., Ex. 1, Sublease Agreement; Ex. 21, 22, Statements to Eagle Bank. Finally, Plaintiff Trump, LLC, owned by Mr. Trump, has initiated the instant litigation. It is apparent that Mr. Trump may have relevant personal knowledge of the facts and circumstances of this case. Rule 26(b)(1) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Super. Ct. Civ. R. 26(b)(1). For the reasons discussed above, the Court finds that Mr. Trump has unique personal knowledge relevant to the claims presented in the instant action and has not shown good cause for the entry of a protective order.

With respect to Plaintiff's claim that Mr. Trump's schedule renders it difficult for him to be present in the District of Columbia, Defendants have agreed to conduct the deposition in New York City, thereby obviating the need for travel to the District and for the Court to address the concerns raised by the Plaintiff regarding Mr. Trump's travel schedule. Plaintiff is unable to establish good cause warranting entry of a protective order precluding the deposition of Mr. Trump and therefore, Plaintiff must produce Mr. Trump for a deposition.

B. Limitations on Length and Scope

Pursuant to Rule 26(c)(1) of the Superior Court Civil Rules, the Court may impose limitations or conditions on requested discovery in order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Super. Ct. Civ. R. 26(c)(1). Under Rule 30(d)(2), the length of a deposition is limited to one day of seven hours. Super. Ct. Civ. R. 30(d)(2). Plaintiff seeks to limit the length of Mr. Trump’s deposition to two hours and to preclude Defendants from asking any questions that were asked of Mr. Trump in a case currently pending before the Superior Court, *Trump Old Post Office LLC v. CZ-National, LLC, et al.*, 2015 CA 005890. Mot. for Protective Order at 6-7. Plaintiff argues that Mr. Trump’s prior deposition was “taken by highly-capable opposing counsel, took only two hours to complete ... and covered all of the topics (and more) that are pertinent in this litigation” Mot. for Protective Order at 7. The instant matter, although similar, concerns different parties and different factual allegations. The Court is not persuaded that limiting the deposition to two hours would ensure that Defendants would have the full and fair opportunity to secure the information that is necessary to the preparation of their case for trial, including pursuing their own theories and rebutting those of Plaintiff. *Mampe*, 548 A.2d at 803-04. The Court concludes that Plaintiff shall be entitled to the seven hours allowed under Rule 30(d)(2).

Plaintiff further seeks to preclude Defendants from asking questions that are “duplicative of those asked in the *CZ-National* case,” as such questions would be “harassing, annoying, and oppressive.” Mot. for Protective Order at 7. However, Rule 26(b)(1) entitles Defendants to obtain discovery regarding any matter which is relevant to the subject matter involved in the pending action. Defendants are entitled to develop their own theories of the case, which may be distinct from the case strategy advanced by counsel in an entirely separate litigation. Therefore,

the Court will neither limit the length nor scope of Mr. Trump's deposition. Plaintiff's *Emergency Motion for a Protective Order* shall be denied and Plaintiff's *Motion to Compel* shall be granted.

Accordingly, it is this 14th day of December, 2016, hereby

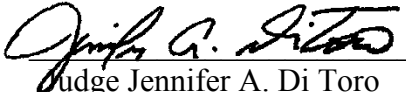
ORDERED, that Defendants' *Motion for Expedited Review* is **GRANTED**; it is further

ORDERED, that Defendants' *Motion to Compel* is **GRANTED**; it is further

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

ORDERED, that Plaintiff must produce Donald J. Trump for a deposition on the date agreed by the parties in the first week of January in New York City to last up to seven hours on the record.

SO ORDERED.


Judge Jennifer A. Di Toro
Associate Judge
Signed in Chambers

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