UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

WILLIAM R. LUCAS,	)	
	)	Civil No.: 5:08cv00079
Plaintiff	)	
v.	)	
	)	By: Hon. James G. Welsh
PACTIV CORPORATION,	)	U. S. Magistrate Judge
	)	
Defendant	)	
	)	

MEMORANDUM OPINION AND ORDER

This case comes before the court on motion of the plaintiff for leave of court to take the *de bene esse* depositions of three non-parties; two of whom are treating physicians (Dr. Gregory Stanford, a trauma surgeon with offices in the Winchester area, and Dr. Peter Johnson, an otolaryngologist also from the Winchester area), and the third is one of the plaintiff's expert witnesses (Dr. Bruce Smoller, a psychiatrist with offices in the Maryland suburbs of Washington). In support of this motion, the plaintiff represents that neither the treatment or findings of Drs. Stanford and Johnson are controverted, that Dr. Smoller's brain-injury and related testimony is also not substantially controverted, that a requirement for three physicians, or any of them, to appear at trial pursuant to subpoena would each constitute a professional hardship, and that the use of their testimony by *de bene esse* deposition would assist in the orderly and efficient trial of this case. Although not explicitly argued, the plaintiff's motion is impliedly based on the fact that any prior discovery depositions of these physicians were intended for discovery purposes and were not

necessarily structured in the format which the plaintiff would like to present the witnesses' testimony at trial. *See Green, Admx. V. Ford,* v. 2001 U.S. Dist. LEXIS 19883, *23-24 (W.D.Va. 2001).

In opposition to the motion, the defendant advances three arguments. First, it is noted that pretrial discovery closed more than two months ago, and it is argued that "Rule 30 prohibits the taking of these ... eleventh hour depositions." Second, the defendant points-out that the plaintiff selected Dr. Smoller as an expert witness and argues that it is, therefore, the plaintiff's responsibility to ensure that Dr. Smoller can appear at trial to give live oral testimony. Third, the defendant argues that the plaintiff should be required to make a good faith effort to obtain the live testimony of Drs. Stanford and Johnson before being allowed to take their trial depositions.

Although the defendant objects to the taking these three trial depositions, no contention is being made that they were not adequately identified by the plaintiff in a timely manner pursuant to the applicable requirements of Rule 26 and the court's Scheduling Order. Likewise, no contention is made that these witnesses were unavailable to the parties, or either of them, to be deposed on oral examination prior to the end of pretrial discovery.

Citing a number of decisions supporting his reading of the applicable federal rules, the defendant's challenges to the taking of the requested trial depositions in this case is based on the fact that there is no recognized distinction between trial and discovery depositions under Rule 32 of the Federal Rules of Civil Procedure and the fact that the period to take any depositions is long-closed pursuant to the court's pre-trial scheduling order, as amended. The plaintiff's contrary contention

that there is a very real and practical distinction between discovery and trial depositions appeals to basic principles of judicial fairness and it too finds support in various federal court decisions.

For example, in *Manley v. Ambase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003), the depositions of the defendant's former chairman was permitted once as part of the discovery process and for a second time pursuant to a *de bene esse* proceeding. Similarly, in *Estenfelder v. Gates Corp*., 199 F.R.D. 351, 355 (D. Colo. 2001), the court allowed the taking of trial depositions after expiration of the period for discovery and, in doing so, noted that it could not ignore the distinction between the need to *preserve* testimony for trial, as opposed to the need to *discover* evidence. (emphasis in original). In *RLS Assocs, LLC v. United Bank of Kuwait PLC*, 2005 U.S. Dist. LEXIS 3815, *22 (S.D.N.Y.), the court permitted the use of trial depositions by video conferencing and noted that such a procedure would avoid potential interference with the flow of the trial or other problems which could be better be handled in a deposition rather than during trial. Other examples where a practical distinction between trial and discovery depositions was recognized include: *Odell v. Burlington Northern RR Co*., 151 F.R.D. 661, 663, (D.Colo. 1993) (holding that trial depositions are not discovery depositions); *Charles v. F. W. Wade*, 665 F.2d 661, 664 (5th Cir. 1982) (holding that it was an abuse of discretion for a trial court to refuse to permit a deposition for trial testimony for the reason that discovery had closed; and *Spangler v. Sears, Roebuck and Co*., 138 F.R.D. 122, 123 (S.D.Ind. 1991) (holding that even though discovery has closed "a party may still prepare for trial by taking the depositions of witnesses whose unavailability for trial is anticipated").

On the other hand, as the defendant has ably pointed-out, there are also a significant number of compelling contrary decisions. For example, in *George v. Ford Motor Co.*, 2007 U.S. Dist.

LEXIS 61453 at *31-32 (S.D.N.Y.), it was held that *de bene esse* depositions are subject to discovery scheduling orders. In a case not unlike the case at bar, the court in *Henkel v. XIM Products, Inc*., 133 F.R.D. 556 (D.Minn.) concluded that there was no difference under the Federal Rules between discovery and trial depositions and that trial depositions were in fact governed by the pretrial schedule. Similarly, in *Aubrey Rogers Agency, Inc. v. AIG Life Ins.* Co., 2000 U.S.Dist. LEXIS 997 at *12 (D.Del.), the plaintiff sought to take the trial deposition of its expert witness in lieu of the expert's appearance, and in denying this effort, the court noted that it is the responsibility of a party offering an expert "to ascertain the willingness and availability of the expert to appear at trial."

With well-reasoned case law authorities on both sides of the issue, neither party's argument can be dismissed as ill-considered or easily rejected. And with neither party providing any clear Fourth Circuit guidance, of necessity the court's determination of the issue turns on relevant policy considerations and principles of fairness.

Application of a fairness principle in this case makes it facially inappropriate to penalize the plaintiff for being unable to guess correctly how a particular judicial officer will decide this issue. *Kingsway Fin. Servs. v. Pricewaterhouse-Coopers LLP*, 2008 U.S. Dist. LEXIS 105222 at *6 (S.D.N.Y.). Moreover, at no time before the discovery period closed in this case was any indication given to the parties that the court intended to treat all depositions – whether for discovery or for use at trial – in the same fashion for timing purposes. *See Charles v. Wade*, 665 F.2^{d} 661, 664 (5th Cir. 1982) (holding that it would be an abuse of discretion to deny a request to take, after the discovery deadline, a deposition of testimony for use at trial).

It also must be recognized that evidence presented at trial is often not what a party wants to disclose voluntarily during discovery. For example, for reasons of trial strategy a party's attorney may decide to ask no questions of witnesses during the case's discovery, but he or she may want to ask broad open-ended questions of the witness at trial. As the court in *Estenfelder v Gates Corp*., 199 F.R.D. 351, 355 (D.Colo. 2001), observed, attorneys do not normally depose their own witnesses for discovery purposes because they already know what these witnesses will say when they testify. Simply put, the purpose of discovery is to ascertain facts, whereas the purpose of trial is to prove or disprove the various allegations and defenses presented in the pleadings.

From a policy perspective there are, however countervailing reasons why live, in court testimony is preferable to pre-recorded testimony. *See United States v. IBM Corp*., 90 F.R.D. 377, 381 (S.D.N.Y. 1981) (Live testimony provides "the trier of fact with the opportunity to observe the demeanor of the witness."). Nevertheless, "Rules 43(a) and 32(a) are meant to compliment one another, and depending on the nature of the case and the circumstances involved, one procedure may be preferred over another." *RLS Assocs, LLC v. United Bank of Kuwait PLC*, 2005 U.S. Dist. LEXIS 3815 *21 (S.D.N.Y.).

Moreover, the use of trial depositions (both video-taped and stenographic transcriptions), taken after the close of pretrial discovery, have been routinely used efficiently and effectively for many years, both in this court and in the state courts of Virginia. Subject to an explicitly reserved exception allowing the trial court to order the attendance of an available witness to testify *ore tenus*, Virginia Sup. Ct. Rule 4:7(a)(4)(E) permits a party to offer into evidence the deposition testimony of a treating or examining health care professional or public official whose duties prevent him or

her from attending court. Treating and examining physicians in Virginia are familiar with this procedure, and they have reasonably come to rely on it. In the undersigned's view, this approach is also a distinct aid to the orderly, efficient and cost effective presentation of trial evidence, particularly in cases pending in this court pursuant to 28 U.S.C. § 1332(a)(1) and to which the substantive law of Virginia applies.

Considering all of these factors, it is not unexpected that a majority of the courts that have previously considered the argument presented by the defendant's motion in the current case have made what can be fairly described as "a federal common law distinction between 'discovery depositions' and 'trial depositions' . . . and have held the latter category permissible even after the discovery deadline has passed." *Kingsway Fin. Servs. v. Pricewaterhouse-Coopers LLP*, 2008 U.S. Dist. LEXIS 105222 at *6 (S.D.N.Y.); *see also Bouygues Telecom, S.A. v. Tekelec, Inc*., 238 F.R.D. 413, 414 (E.D.N.C. 2006) ("There is a basic difference between . . . [these] depositions." One "is to discover information," and the other "is to preserve testimony" for use at trial.).

Based, therefore, on mature consideration of these factors and recognizing that the ultimate decision of admissibility of testimony at trial (both 'live' and by deposition) rests with the presiding district judge, it would be inappropriate to make a decision at this point precluding the taking of the three requested trial depositions.

For the foregoing reasons, it is ORDERED that the defendant's motion seeking to block the plaintiff's taking of the three requested trial depositions is DENIED; and the plaintiff's request for leave to take the trial depositions of Drs. Stanford, Johnson and Smoller is GRANTED; provided,

however, in advance of any trial deposition taken pursuant hereto, leave is also GRANTED to the defendant to take the discovery deposition of the witness not more than twenty-four hours in advance thereof, unless the parties may otherwise agree.

To this action of the court, the defendant's objection and exception for the reasons outlined in his argument is noted for the record.

ENTER: this 22nd day of December 2009.

s/ James G. Welsh
United States Magistrate Judge.