

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

WEST VIRGINIA RADIO CORPORATION

Plaintiff,

vs.

// CIVIL ACTION NO. 13-C-468
(THOMAS C. EVANS III,
PRESIDING CIRCUIT JUDGE)

WEST VIRGINIA UNIVERSITY BOARD OF
GOVERNORS, WEST VIRGINIA UNIVERSITY
FOUNDATION, INC., WEST VIRGINIA MEDIA
HOLDINGS, LLC, ANDREW A. PAYNE, III,
DAVID B. ALVAREZ, ALBERT BRAY CARY,
JR., RALPH BALLARD, RICHARD BALLARD,
OLIVER LUCK, JAMES P. CLEMENTS, and
IMG COLLEGE, LLC

Defendants.

ORDER

*(Re: Motion of Defendants IMG College, LLC, West Virginia Media Holdings, LLC,
Bray Cary, James P. Clements, Ralph Ballard and Richard Ballard for Leave to Compel
Completion of Deposition of J. Robert Gwynne and Cross-Motion for a Protective Order of
Plaintiff West Virginia Radio Corporation)*

The motion and cross-motion, along with exhibits and memoranda of authorities,
has been carefully considered by the court. With these filings, the parties have
represented to the court that the motion and cross-motion are submitted for decision.

Findings of Fact and Conclusions of Law

1. On April 3, 2014, Defendant IMG College, LLC ("IMG") noticed the
continuation of the videotaped deposition of Mr. Robert Gwynne, for a mutually
agreeable time and place.

2. On April 15, 2014, Defendants IMG, West Virginia Media Holdings, LLC
("WV Media"), James P. Clements ("Clements"), Ralph Ballard, and Richard Ballard
(collectively, the "Moving Defendants"), filed a Motion to Compel the Completion of
Mr. Gwynne's deposition.

3. Mr. Gwynne, an officer of the Plaintiff and the person who verified the 50 page Verified and Supplemental Amended Complaint herein, has been deposed for four days in this case, resulting in over 1600 pages of deposition transcript. The deposition began October 23, 2013, and was continued on November 8, December 18 and December 19, 2013. During these sessions of the deposition of Mr. Gwynne, he was examined by the attorney for Defendant West Virginia University Board of Governors; the attorney for Defendant West Virginia University Foundation; the attorney for Defendant Andrew A. Payne, III; the attorney for Defendant Oliver Luck; and, the attorney for Defendant David B. Alvarez.

4. At least four (4) of the Defendants have not been given the opportunity to depose Mr. Gwynne, and these Defendants are the Moving Defendants who seek an order to compel the resumption of the Gwynne deposition.

5. In an effort to plan for the conclusion of the Gwynne deposition, Plaintiff's counsel obtained from Moving Defendants an estimate of the time each would need in order to complete the deposition. According to the Defendant IMG College's motion to compel, that amount of time totaled 7-1/2 hours.

6. In response to requests to schedule the continuation of the deposition of this witness, Plaintiff refused unless certain conditions were met. The Moving Defendants and the Plaintiff have not been able to arrive at an agreement relating to the continuation of the Gwynne deposition. For this reason, the Moving Defendants move to compel the continuation and completion of the Gwynne deposition, pursuant to Rule 37(a), WVRCivP and paragraph 9(b) of the Case Management Order.

7. The Plaintiff maintains that the deposition of Mr. Gwynne has been conducted in such a calculated manner so as to unreasonably annoy, embarrass, and oppress both Mr. Gwynne and WV Radio. Moreover, continuing Mr. Gwynne's deposition for yet another day and indefinitely would result in annoyance, embarrassment, oppression, undue burden and expense.

For this reason, Plaintiff West Virginia Radio Corp. opposes that Motion to Compel and, through its Cross-Motion, seeks a Protective Order pursuant to West Virginia Rule of Civil Procedure ("Rule") 26(c) and Rule 30(d)(3) with respect to the continued notice of deposition of Mr. Gwynne. Alternatively, WV Radio requests a limitation in time, scope, and manner of the continuation of Mr. Gwynne's deposition.

8. Applicable law relating to these motions is set forth in the WVRCivP.

Rule 30 Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. . . .

Rule 37 Failure to Cooperate in Discovery. Sanctions.

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

....

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

....

(4) Expenses and Sanctions.

(A) If the motion is granted, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to

be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Rule 30(d)(1) provides in part as follows:

A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

Rule 30(d)(3) provides:

(3) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court of the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

OPINION ORDER

Plaintiff maintains that the deposition of Mr. Gwynne has been conducted in such a calculated manner as to unreasonably annoy, embarrass, and oppress both Mr. Gwynne and WV Radio, and that continuing Mr. Gwynne's deposition for yet another day and, indefinitely, would result in annoyance, embarrassment, oppression, undue burden and expense. The court disagrees. There is no evidence that the Defendants have colluded or combined, one with another, or have acted together, in a "calculated manner," in order to unreasonably annoy, embarrass and oppress the deponent and WV Radio.

The pleading of the Plaintiff sets forth several claims for relief and alleges, factually, several complex transactions. The allegations of the Verified and

Supplemental Amended Complaint include a claim of civil conspiracy by some of the Defendants, including what Plaintiff refers as to "Insider Defendants" and IMG College and WV Media Holdings, LLC. Also included are claims for relief for fraud, and breach of fiduciary obligations.

Generally, each Defendant has a right to examine a deponent at a regularly noticed discovery deposition. *See Rule 30(b), WVRCivP*. While some of the Defendants are alleged to be "Insider Defendants" and some are alleged to have entered into a civil conspiracy, none appear to be in privity with any another Defendant and no two or more Defendants are conducting a "joint defense" so far as this record demonstrates.

The court has reviewed the deposition transcript excerpts submitted by the Plaintiff and the Moving Defendants. It does not appear that Plaintiff ever moved for a protective order or directed the deponent to not answer any question considered by Plaintiff's counsel to be made in bad faith or unreasonably annoying, embarrassing or oppressive, or suspended the deposition, pending application for protective order, under the procedure set forth in *Rule 30(d)(3), WVRCivP*.

Therefore, the Moving Defendants motion to compel the completion of the deposition is granted, in part, and denied in part. The Plaintiff's motion for a protective order is granted in part and denied in part, as follows:

1. The deponent shall sit for further examination and completion of the discovery deposition, to be conducted by counsel for the parties who have not had the opportunity to examine the deponent, at such times and places as the parties may reasonably agree.
2. Due to the uncertainty presented in the scope of such examination by Defendant who have not had the opportunity to depose Mr. Gwynne, the court declines

to limit the completion of the deposition in terms of days or time, (whether start, finish and break times), subject to the provisions of paragraph 3 of this order.

3. Examining counsel at the continued deposition of Mr. Gwynne shall not ask questions of the witness that have already been asked and answered.

While the attorneys in this case are highly skilled and experienced, the court reminds counsel that the scope of the examination shall also be limited as set forth *Rule 26(b)(1), WVR CivP*, as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Counsel are enjoined from seeking information that does not appear to be relevant evidence or which does not appear to be reasonably calculated to lead to the discovery of admissible evidence. If this basic rule is not followed, the witness or counsel for the adverse party may object and seek a protective order whether or that may require suspension of the deposition.

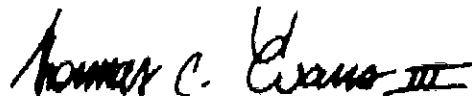
4. In the completion of Mr. Gwynne's deposition, counsel shall act reasonably in all respects, under all circumstances.

5. The court defers an award of attorney's fees and costs pending further hearing, upon a duly supported notice and motion.

The Clerk shall forward true copies of this order to counsel of record.

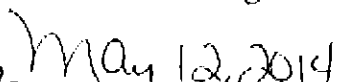
All of which is ORDERED, accordingly.

ENTER: May 12, 2014



Thomas C. Evans, III, Circuit Judge
Business Court Division, State of West Virginia

ENTERED



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BOOKET LINE 6: 529

CLERK, CIRCUIT CLERK