UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:11-bk-1002-JAF

BEN H. WILLINGHAM, Chapter 7

Debtor.

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ABDULLAH M. AL-RAYES,
ENTERPRISE PROPERTIES, INC., et al.,

Plaintiffs,

vs. Adv. Case No. 3:11-ap-00269-JAF

BEN H. WILLINGHAM,

Defendant.

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ORDER GRANTING DEFENDANT'S MOTION TO COMPEL, GRANTING DEFENDANT'S MOTION FOR JUDICIAL NOTICE AND DENYING PLAINTIFF'S CROSS MOTION FOR PROTECTIVE ORDER

This case is before the Court upon, Ben H. Willingham's, Defendant, Renewed Motion for Judicial Notice (the "Motion for Judicial Notice"), and Defendant's Motion to Compel Deposition, or Alternatively, Preclude Testimony (the "Motion to Compel"). (Docs. 70, 91). Enterprise Properties, Inc., one of the Plaintiffs, filed a Memorandum in Opposition to Defendant's Motion for Judicial Notice, to which Defendant filed a reply, and a Memorandum in Opposition to Defendant's Motion to Compel Deposition, or Alternatively, Preclude Testimony, to which Defendant filed a reply. (Docs. 72, 77, 95, 99). Enterprise Properties Inc. also filed a Cross-Motion for Protective Order, to which Defendant filed a response. (Docs. 71, 78). Upon consideration of the parties' papers, the Court concludes that Defendant's Motion for Judicial

Notice (Doc. 91) and Motion to Compel (Doc. 70) should be granted. Furthermore, the Court concludes that Plaintiff's CrossMotion for Protective Order (Doc. 71) should be denied.

Background

On March 15, 2007, the United States District Court for the Middle District of Florida entered a Consent Judgment against Defendant (the "Consent Judgment") in favor of Plaintiffs in the amount of $25,707,605.00 (the "District Court Litigation"). In the District Court Litigation, Plaintiffs alleged claims against Defendant for, *inter alia*, fraud under the federal and state RICO statutes (the "District Court Complaint"). More particularly, Plaintiffs asserted that their claims arose out of a massive fraud perpetrated by Defendant between 1994 through 2003 who, unbeknownst to Plaintiffs, acted as both a seller to, and as an agent for, Plaintiffs in connection with the purchase by Plaintiffs of several commercial office buildings. It was alleged in the District Court Complaint that Defendant represented Plaintiffs' interests in negotiations for the purchase of various commercial buildings as an agent for Plaintiffs. Subsequently, after taking Plaintiffs' purchase money, Defendant would purchase a commercial office building from the owner (which was either a third party or, at times, one of Defendant's corporations) and then re-sell it to Plaintiffs at a substantial undisclosed markup shortly thereafter. The damages suffered by Plaintiffs as a result of Defendant's conduct are purportedly represented, at least in part, by the Consent Judgment in the amount of $25,707,605.00[1]. The Consent Judgment explicitly states that it was entered "without concession on the part of [Defendant] as to the merits of the claim" asserted against him.

On February 17, 2011, Defendant filed a voluntary petition for Chapter 7 relief under the Bankruptcy Code (Doc. 1 in Case No. 3:11-bk-01002-JAF); on May 23, 2011, Plaintiffs initiated

[1] The District Court Complaint contains twenty-two counts, several of which are claims for general breach of contract damages. Consequently, it is not clear what portion of the amount awarded pursuant to the Consent Judgment is attributable to Plaintiffs' claims of fraud and breach of fiduciary duty.

this adversary proceeding and on October 14, 2011, they filed an Amended Complaint Objecting to Dischargeability of Debt and Discharge of Debtor pursuant to 11 U.S.C. §§ 523 and 727. (Doc. 14).

Motion for Judicial Notice

On June 13, 2014, Defendant filed the Motion for Judicial Notice. (Doc. 91). In the Motion for Judicial Notice, Defendant asks the Court to take judicial notice of the "current corporate structure and the named officers" of Enterprise Properties, Inc. (Doc. 91 at 1). Defendant further requests the Court take judicial notice that Mr. Renato Vanotti is currently listed as an officer in the corporate structure of the following Plaintiffs: "(1) Enterprise Properties, Inc.; (2) Essex Investments, Inc.; (3) Essex-Triangle, Inc.; and (4) Ranger-Kenmar, Inc." (Doc. 91 at 1-2). Defendant attached two exhibits to support his factual assertions and explained that the above information "was obtained from public records available at the State of Florida, Division of Corporations, website http://www.sunbiz.org, and at the State of Georgia, Corporations Division, website https://cgov.sos.state.ga.us/BizEntity.aspx (last visited Jun. 10, 2014)." Defendant also claims that Renato Vanotti has been an active officer in each of the four identified corporations throughout the period relevant to this proceeding and was the primary individual with whom Defendant spoke and transacted business relevant to this proceeding. (Doc. 91 at 2).

A court has "wide discretion to take judicial notice of facts," but such discretion must be exercised with caution. Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197, 1204-05 (11th Cir. 2004). A bankruptcy court may take judicial notice of adjudicative facts.[2] FED.R.CIV.P. 201(a). Specifically, Rule 201(b) states that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial

[2] Adjudicative facts are simply the facts of the particular case. Adv. Comm. Note (1972).

jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. "[J]udicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347 (5th Cir. 1982); see e.g., In re Martin, 97 B.R. 1013, 1020 (Bankr. N.D. Ga. 1989) (taking judicial notice that foreclosure sales in Georgia take place between 10 a.m. and 4 p.m. on the first Tuesday of each month as provided by statute); In re Holman, 26 B.R. 110, 112 n.4 (Bankr. M.D. Tenn. 1983) (taking judicial notice that there were 36 weeks between March and December of 1981 excluding July and August of that year); In re Int'l Bldg. Components, 159 B.R. 173, 180 (Bankr. W.D. Pa. 1993) (taking judicial notice that a particular city was located within a particular county); In re Huffman, 204 B.R. 562, 564 (Bankr. W.D. Mo. 1997) (taking judicial notice of the United States government's directory of zip codes and a United States atlas). A court may take judicial notice of the records of the State of Florida, Division of Corporations. See e.g., Milliken v. Kranz Tree Serv., Inc., No. 6:08-cv-822-Orl-28-DAB, 2008 WL 4469882 at *1 n.1 (M.D. Fla. Oct. 2, 2008).

Plaintiffs objected to this request and claim that the current corporate structure of Enterprise Properties, Inc. bears no relevance to transactions which occurred between 1994 through 2003. (Doc. 95 at 3,5). However, it should be noted that Enterprise Properties Inc. specifically admitted Renato Vanotti became an officer in 2007 and does not dispute that he is currently an officer. (Docs. 95, 71 at 5). Thus, it is unclear as to why Enterprise Properties Inc. opposes the Motion for Judicial Notice. Nevertheless, the Court finds that Enterprise Properties Inc.'s corporate structure is relevant to determine what individuals could be designated to testify on its behalf pursuant to Federal Rule of Civil Procedure 30(b)(6). Consequently, the Court takes judicial notice that pursuant to 2013 and 2014 Florida Profit Corporation Annual Reports

filed on April 22, 2013, and on March 6, 2014, with the Secretary of State, Renato Venotti is an "[o]fficer/[d]irector" of Enterprise Properties, Inc., which is a Plaintiff in this adversary proceeding. (Docs. 91-1 at 1; 91-2 at 4). Furthermore, the Court takes judicial notice that pursuant to documents that are available at the Georgia Secretary of State Corporation Division website, which were accessed by Defendant on March 27, 2014, and on June 10, 2014, Renato Vanotti is an officer of Essex Investments, Inc., Essex Triangle, Inc. and Ranger-Kenmar, Inc., which are also plaintiffs in this adversary proceeding. (Docs. 91-1 at 2-4, 91-2 at 5-7). The Court must note these documents are publically available and constitute evidence of the information provided by the state agencies to individuals and industry participants. Moreover, information contained therein was provided to these agencies by Plaintiffs. Thus, there is a presumption that the information contained in such documents as of the date they are filed with the state is accurate and can only be rebutted by clear and convincing evidence.

Motion to Compel

In the Motion to Compel, Defendant seeks to depose Renato Vanotti because he apparently has unique personal knowledge of the business negotiations between Defendant and Plaintiffs. (Doc. 70 at 1). Defendant explained that Vanotti "was the individual with whom [Defendant] most frequently communicated and who was personally present at all significant transactions." (Doc. 70 at 2). Furthermore, Defendant claims that as "an agent of Plaintiffs, Vanotti signed the vast majority of documents related to the business transactions that formed the basis of the underlying civil suit that directly led to [Defendant's] bankruptcy." (Doc. 70 at 2). Furthermore, Defendant claims Plaintiffs, in responding to interrogatories, specifically identified Vanotti as an individual with "knowledge of the various transactions that transpired during the relevant period between the parties, including the parties in the litigation." (Doc. 70 at 3).

Defendant claims that Vanotti objected to the Notice of Deposition issued on March 24, 2014, setting a deposition in Jacksonville, Florida on April 24, 2014. (Doc. 70 at 1-2). According to Defendant, the reason for Vanotti's objection was the fact that "he is beyond the subpoena power of this Court and as a resident of Switzerland, he cannot be required to appear for a deposition in this action in Jacksonville, Florida." (Doc. 70 at 1-2). Enterprise Properties Inc. does not dispute these assertions. In fact Enterprise Properties Inc. admits that it opposes Defendant's request to depose Vanotti and claims Defendant attempts to harass Enterprise Properties Inc. and Vanotti and to circumvent the Federal Rule of Civil Procedure 45 subpoena requirement for taking Vanotti's deposition. (Doc. 72 at 5). Enterprise Properties Inc. explains that it designated Mario Kranjac as its corporate representative who will travel from New York to Jacksonville to appear for a deposition to testify on its behalf. (Doc. 72 at 5). Finally, Enterprise Properties Inc. claims that the Court should shield Vanotti from attending the deposition requested by Defendant in Jacksonville by entering a protective order. (Doc. 72 at 3-4).

"The Federal Rules of Civil Procedure strongly favor full discovery whenever possible." Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). "The concept of trial by ambush has long ago fallen into desuetude in both state and federal courts." In re Sulfuric Acid Antitrust Litig., 231 F.R.D. 331, 342 (N.D. Ill. 2005). The purpose of discovery under the federal rules is to require the timely disclosure of relevant information to aid in the ultimate resolution of disputes in a civil action. Hickman v. Taylor, 329 U.S. 495, 501 (1947). The federal rules were intended to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (citing Hickman, 329 U.S. at 501). "Thus, lawyers have a

duty to act in good faith in complying with their discovery obligations and to cooperate with and facilitate forthright discovery." In re Sulfuric Acid Antitrust Litig., 231 F.R.D. at 342. Depositions are useful discovery tools to expedite the trial process.

Federal Rule of Civil Procedure 30(a)(1) provides that a party may, by oral questions, depose any person. A party may also depose a public or private corporation, a partnership, an association, a governmental agency, or other entity. FED.R.CIV.P. 30(b)(6). When the deponent is a corporation the person designed to be deposed on behalf of the corporation must be an officer, director, or managing agent of the corporate deponent. 7 J. Moore et al., Moore's Federal Practice § 30.03[2] (2013). "[A] party who wishes the deposition of a specific officer or agent of a corporation may still obtain it and is not required to allow the corporation to decide for itself whose testimony the other party may have." United States v. One Parcel of Real Estate at 5860 North Bay Road, Miami Beach, Fla., 121 F.R.D. 439, 440 (S.D. Fla. 1988) (internal quotations omitted). However, the Rule 30(b)(6) procedure should be distinguished from the situation in which a party wants to take the deposition of a specific individual associated with the corporation or organization. 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2103 (3d. 2014).

Here, after throughout review of the Notice of Deposition, it appears that Defendant did not request to depose Venotti as a representative of Enterprise Properties Inc., but rather as an individual associated with this corporation *i.e.*, a nonparty deponent. This conclusion is supported by Defendant's specific explanation for deposing Vanotti *i.e.* he "is an individual with unique information relevant and material to the defense of the above-referenced contested matter." (Doc. 70-1 at 1). Moreover, Defendant specifically referred Rule 30(a)(1) as the purported authority for this deposition instead of relying on Rule 30(b)(6), which governs

deposition of corporate representatives. However, in the Motion to Compel, Defendant claims that he is seeking to depose Vanotti as a corporate representative of Enterprise Properties Inc. pursuant to Rule 30(b)(6). (Doc. 70 at 4). The Court is unable to reconcile this inconsistency. Nevertheless, in an abundance of caution, the Court will construe Defendant's Notice of Deposition as requesting deposition of Vanotti as a corporate representative of Enterprise Properties Inc. pursuant to Rule 30(b)(6).

A witness who is a party or party representative need not be subpoenaed for a deposition. 7 J. Moore et al., Moore's Federal Practice § 30.03[2] (2013). A proper deposition notice is sufficient to compel the party witness's attendance. Id. A party is responsible for ensuring that its representative attends the deposition. Id. Thus, the corporation is responsible for producing its officers, managing agents, and directors if notice is given and sanctions may be imposed against the corporation if they fail to appear. 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2103 (3d. 2014). Foreign nationals who qualify as managing agents or officers of a party may be subject to deposition pursuant to a notice. Calderon v. Experian Info. Solutions, Inc., 290 F.R.D. 508, 517 (D. Idaho 2013) ("[D]oubts about an individual's status as 'managing agent,' at the pretrial discovery stage, are resolved in favor of the examining party."). If not deposed as a representative of the corporate party, the witness must be subpoenaed. 7 J. Moore et al., Moore's Federal Practice § 30.03[2] (2013).

It appears Vanotti was a managing agent of Enterprise Properties Inc., at the relevant time and it is undisputed that Vanotti is currently an officer of Enterprise Properties Inc. As the Court construed Defendant's Notice of Deposition as requesting deposition of Vanotti as a corporate representative of Enterprise Properties Inc., the deposition notice is sufficient to compel Vanotti to attend the deposition.

Location

Defendant seeks to depose Vanotti in Jacksonville, Florida or via video teleconferencing. (Doc. 70 at 1-7). Defendant also expressed willingness to forego deposing Vanotti provided Plaintiffs will be barred from presenting his testimony at trial. (Doc. 70 at 1-7). Enterprise Properties Inc., on the other hand, requests that the Court order Defendant to travel to Switzerland where Vanotti resides. (Doc. 72 at 7). Enterprise Properties Inc. asserts that requiring Vanotti to travel from Switzerland to appear for a deposition in Jacksonville would impose an undue burden and expense on Enterprise Properties Inc., and would not promote litigation efficiency. (Doc. 72 at 7). Enterprise Properties Inc. ignores Defendant's request to conduct the deposition via video teleconferencing and fails to indicate if Plaintiffs plan to present Vanotti's testimony in this proceeding.

"The deposition of a corporation through its officers or agents normally must be taken at its principal place of business, at least when the corporation is not the plaintiff and did not choose the forum for the lawsuit or was . . . forced to commence litigation at a location away from its headquarters." 7 J. Moore et al., Moore's Federal Practice § 30.20[1][b] (2013). Nevertheless, courts retain substantial discretion to designate the site of a deposition, and presumptions as to where the deposition should take place are merely decisional rules that facilitate the determination when other relevant factors do not favor one side over the other. Id. ("Likewise, a foreign corporation's agents are frequently compelled to appear for deposition in United States, particularly when the foreign corporation is doing business in the United States and is subject to the court's jurisdiction."). Moreover, ample case law recognizes that a videoconference deposition can be an adequate substitute for an in-person deposition, particularly when significant expenses are at issue. United States v. One Gulfstream G-V Jet

Aircraft Displaying Tail Number VPCES, No. 11–01874, 2014 WL 1871342, at *7 (D.D.C. May, 9 2014); see, e.g., Gee v. Suntrust Mortg., Inc., No. 10–CV–01509, 2011 WL 5597124, at *3 (N.D. Cal. Nov. 15, 2011) ("[Defendant's] argument that conducting the depositions via videoconference would be detrimental to its ability to question and observe the deponents is unconvincing. Parties routinely conduct depositions via videoconference, and courts encourage the same, because doing so minimizes travel costs and permits the jury to make credibility evaluations not available when a transcript is read by another.") (citations and quotations omitted); Ins. Distribs. Int'l (Bermuda) Ltd. v. Edgewater Consulting Grp. Ltd., No. A–08–CA–767, 2010 WL 567233, at *2 (W.D. Tex. Feb. 10, 2010) ("The Court notes that, given the narrow focus of the testimony, and the location of the witnesses, it may be most efficient to arrange the deposition via a video conference."); Brasfield v. Source Broadband Servs., LLC, 255 F.R.D. 447, 450 (W.D. Tenn. 2008) ("Defendants have given no reason why the subject matter to be covered in the out-of-state opt-in plaintiffs' depositions is so significant that it requires an in-person oral deposition. The court sees no reason why the relatively simple, straightforward issues in this case would require a deposition that could not be conducted by alternative means, such as phone or video conferencing."); Connell v. City of New York, 230 F.Supp. 2d 432, 437 (S.D.N.Y. 2002) (stating that a video conference deposition should resolve any concerns defense counsel had over observing plaintiff's demeanor and ordering video conferencing when a plaintiff who had no real choice in selecting the forum, and who could not afford to travel to the forum for deposition could be deposed near his residence); Guillen v. Bank of America Corp., No. 10–05825, 2011 WL 3939690, at *1 (N.D. Cal. Aug. 31, 2011) ("A desire to save money constitutes good cause to depose out-of-state witnesses [via] telephone or remote means. The burden is on the opposing party to show how they would be prejudiced.").

The Court finds it may be most efficient to arrange a deposition via a video conference. Nevertheless, as mentioned before, Defendant is willing to forego deposing Vanotti if Plaintiffs confirm they will not present his testimony in the summary judgment stage of this proceeding or at trial. The Court believes this request constitutes a reasonable compromise and will order Enterprise Properties Inc., to inform Defendant within 7 days from the date of this Order if Plaintiff will produce Vanotti for a deposition or if they choose not to present his testimony in this adversary proceeding. Defendant's request that Plaintiffs bear any additional costs associated with having a remote deposition and the costs and fees associated with filing the Motion to Compel is denied.

CrossMotion for Protective Order

After a thorough review of Enterprise Properties, Inc.'s CrossMotion for Protective Order (Doc. 71), the Court concludes it should be denied without any further discussion.

Accordingly, it is **ORDERED**:

1. Debtor's Motion for Judicial Notice (Doc. 91) and Motion to Compel (Doc. 70) are granted.
2. Enterprise Properties Inc. has 7 days from the date of this Order to inform Defendant if Plaintiffs will produce Renato Vanotti for a deposition or, in the alternative, if they will forego using Vanotti's testimony in this adversary proceeding.
3. Enterprise Properties, Inc.'s CrossMotion for Protective Order (Doc. 71) is denied.

DATED this 18 day of July, 2014 in Jacksonville, Florida.

/s/_____
JERRY A. FUNK
United States Bankruptcy Judge

Attorney, Mike Jorgensen, is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.