

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: THE ESTATE OF
LELAND W. BENSON, JR.,
deceased.

: NO. 41-18-0354
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:
: ORPHANS' COURT
: DIVISION
:
:
: *Motions to Compel Depositions*

DECREE

AND NOW, following argument held July 7, 2021, on *Respondents, Joel and Maggie Lipperini's Motion to Compel Depositions of Petitioner's Potential Witnesses* ("Motion to Compel Depositions" or "Motion"), the Court hereby issues the following ORDER.

On June 10, 2021, Respondents, Joel and Maggie Lipperini ("Moving Respondents"), filed the foregoing Motion to Compel Depositions. Moving Respondents aver within their Motion that on April 30, 2020, they propounded a First Set of Interrogatories upon Petitioner, Denise M. Cordes ("Petitioner"). This First Set of Interrogatories asked Petitioner, *inter alia*, to identify any and all persons with potential knowledge of facts relevant to the case, whether Petitioner was likely to call these parties as witnesses, and if so, a description of their anticipated testimony.¹ Petitioner initially did not answer this particular Interrogatory, but on June 3, 2020, filed a Supplemental Interrogatory Response identifying various parties with potential knowledge.² However, Moving Respondents aver that instead of providing a detailed summary of these parties' knowledge, Petitioner provided only vague information, and further aver that Petitioner failed to specify whether she planned to call these parties as witnesses at trial.³ Moving Respondents' counsel, Marc Sottile, Esquire, thereafter questioned Petitioner at deposition about the parties identified in her Supplemental Interrogatory Response, namely, James Segreaves, Reno Rivalta, Barry Smith, John Cropper, Chris Weaver, and Scott Knisely (although Mr. Knisely had not been identified

¹ Respondents, Joel and Maggie Lipperini's Motion to Compel Depositions of Petitioner's Potential Witnesses ("Motion to Compel Depositions") ¶ 1 (June 10, 2021).

² Motion to Compel Depositions ¶ 2. This Supplemental Interrogatory Response is attached as Exhibit A to the Motion to Compel Depositions.

³ Motion to Compel Depositions ¶¶ 3-4.

in Petitioner’s discovery responses).⁴ Petitioner testified that she was unsure whether she planned to call any of these parties as witnesses, and appeared to indicate that these parties had limited probative knowledge, or their testimony would be inadmissible hearsay.⁵ Moving Respondents, in order to preserve resources, therefore chose not to depose the majority of these individuals.⁶

On April 20, 2021, Petitioner filed a Civil Pretrial Memorandum with the Court. This Pretrial Memorandum listed Petitioner, Cheryl Romanell, and Trooper John Maggs as definite trial witnesses. The Pretrial Memorandum listed James Segreaves, Reno Rivalta, Barry Smith, John Cropper, Chris Weaver, and Scott Knisely as potential trial witnesses.⁷ On May 14, 2021, Attorney Sottile emailed counsel for Petitioner, Christopher Kenyon, Esquire, requesting that Attorney Kenyon actually identify those parties listed among the potential witnesses that he intended to call at trial so that Attorney Sottile could depose said witnesses.⁸ Moving Respondents contend that as an act of “gamesmanship” Attorney Kenyon rejected this request.⁹ Moving Respondents therefore seek a Decree of Court compelling Attorney Kenyon to identify all witnesses he intends to call at trial, as well as leave to subpoena the identified witnesses for deposition past the discovery deadline, which expired on December 29, 2020.

In *Petitioner’s Response to Respondents Joel and Maggie Lipperini’s Motion to Compel Depositions of Petitioner’s Potential Witnesses* (“Petitioner’s Response”), Petitioner maintains that, in accordance with Lyc. Co. R.C.P. L212(B), her Pretrial Memorandum properly named the witnesses she definitely intends to call at trial and the scope of their testimony, and the witnesses she might possibly call at trial and the scope of their testimony.¹⁰ Petitioner further notes that on December 8, 2020, Moving Respondents did in fact issue subpoenas to attend and testify on Scott Knisely and

⁴ Motion to Compel Depositions ¶ 5. Excerpts from Petitioner’s deposition is attached as Exhibit B to the Motion to Compel Depositions.

⁵ Motion to Compel Depositions ¶¶ 6-7.

⁶ Motion to Compel Depositions ¶¶ 8-9.

⁷ Motion to Compel Depositions ¶ 10. Petitioner’s Pretrial Memorandum is attached as Exhibit C to the Motion to Compel Depositions.

⁸ Motion to Compel Depositions ¶ 11. The email chain of this conversation is attached as Exhibit D to the Motion to Compel Depositions.

⁹ Motion to Compel Depositions ¶¶ 12-13.

¹⁰ *Petitioner’s Response to Respondents Joel and Maggie Lipperini’s Motion to Compel Depositions of Petitioner’s Potential Witnesses* (“Petitioner’s Response”) ¶ 12 (June 29, 2021).

Chris Weaver. However, when these subpoenaed witnesses failed to appear at the scheduled deposition, Moving Respondents did not take any follow-up action to compel their attendance.¹¹ Petitioner notes that Moving Respondents had some seven months upon receipt of the Supplemental Interrogatory Responses to depose the identified witnesses or to compel further responses from Petitioner. However, Moving Respondents waited some five months after the close of discovery, more than a month after receiving Petitioner's Pretrial Memorandum, and only two months prior to the scheduled trial to file the foregoing Motion.¹² Petitioner therefore contends that Moving Respondents cannot claim to be prejudiced, as their own choices have led them to their current position. Petitioner instead argues that allowing Moving Respondents to conduct further depositions would likely result in a delay of trial, which would be prejudicial to Petitioner.¹³

The Court is of accord with the arguments put forth by Petitioner. Petitioner complied with her duty under the local rules by identifying in her Pretrial Memorandum James Segreaves, Reno Rivalta, Barry Smith, John Cropper, Chris Weaver, and Scott Knisely as potential witnesses. Attorney Kenyon explained to Attorney Sottile in an email exchanged on May 17, 2021, that the witnesses Petitioner will in fact call at trial is contingent upon this Courts' ruling on the various parties' summary judgment motions, which has not yet issued.¹⁴ The Court does not find this position unreasonable or vexatious, nor does it find Petitioner was intentionally vague or misleading in the excerpted deposition testimony. Further, while reserving an opinion as to the sufficiency of Petitioner's Supplemental Interrogatory Response, the Court finds that it was Moving Respondents' obligation to seek augmentation of that Response before the close of discovery if augmentation was required. Similarly, Moving Respondents' made a tactical decision to subpoena only Chris Weaver and Scott Knisely upon the information available. Further, they also elected not to move to compel the attendance of these witnesses once they failed to appear at deposition. If these decisions were in error, it was an error solely on the part of Moving Respondents.

¹¹ Petitioner's Response ¶ 8. This is also discussed in the attached email chain.

¹² Petitioner's Response ¶ 13.

¹³ *Id.*

¹⁴ See the email exchange attached as the Motion to Compel Depositions.

The Court will not entertain an eleventh-hour discovery motion, particularly when as a practical matter, coordinating depositions at this late juncture would likely require a delay of trial. “A party seeking discovery is under an obligation to seek discovery in a timely fashion.”¹⁵ A court may dismiss a motion to compel discovery as untimely,¹⁶ or deny a motion to extend the discovery period when the moving party fails to meet their “obligation to show that the information sought was material to their case and that they proceeded with due diligence.”¹⁷ Finding that Moving Respondents have not engaged in discovery with due diligence, their Motion to Compel Depositions is hereby DENIED.

IT IS SO DECREED this 23rd day of July 2021.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

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¹⁵ *Reeves v. Middletown Athletic Ass’n*, 866 A.2d 1115, 1124 (Pa. Super. 2004) (citation omitted).

¹⁶ *See id.* (affirming lower court’s decision that appellant’s motion to compel complete answers to interrogatories, filed seven months after Appellee had served answers to the interrogatories and only after Appellee had moved for summary judgment, was untimely and had been rendered moot by the summary judgment motion).

¹⁷ *Id.*; *see also Kerns v. Methodist Hosp.*, 574 A.2d 1068, 1074 (Pa. Super. 1990) (“[A]ppellate courts of this Commonwealth have found no abuse of discretion in denying a continuance to pursue further discovery pursuant to Pa.R.C.P. 1035(e) when a reasonable period for discovery had expired, and the opposing party failed to demonstrate the materiality of the outstanding discovery or the opposing party failed to demonstrate that it had proceeded in a timely manner with respect to the discovery sought.”).