IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ANNE GEIER, et al.,

Plaintiffs,

v.

MARYLAND BOARD OF PHYSICIANS, et al.,

Defendants.

Case No. 371761-V

MEMORANDUM AND ORDER

On November 13, 2014, the court held a hearing on the plaintiffs' fifth motion for sanctions. After hearing argument from counsel, the court made certain factual findings and told counsel that the motion would be granted, with the sanction to be determined by the court at a later time. For the reasons that follow, which supplement the court's prior findings and statement of reasons set forth at the hearing, the court will enter a default against the defendants but on the issue of liability only. Once the current interlocutory appeal has been resolved, the court will schedule a trial on damages.

Background

This case began on December 21, 2012. The crux of the plaintiffs' claims is that the defendants published private and confidential medical information on the government website of the Maryland Board of Physicians (the "Board") on January 25, 2012. According to the plaintiffs' complaint, the Board issued a cease and desist order (the "Order") against Dr. Mark R. Geier stating that Dr. Geier had "prescribed drugs to himself, his son and his wife after his license was suspended." The Order also identified the names of the drugs and the persons for whom the drugs had been prescribed. Also,

noted were the symptoms and conditions that the drugs were designed to treat. According to the plaintiffs, the Order disclosed to the public at large their private medical information, which by state statue is required to be kept confidential. The Board's website contained a link to the Order, which made it readily available to anyone over the Internet.

On February 6, 2012, an attorney for the plaintiffs sent a letter to the Board detailing the ways in which the Board had violated Maryland law in making the Order, which included private medical information, public. After receipt of this letter, on February 10, 2012, the Board removed the link to the Order from the Board's website.

On February 22, 2012, the Board issued an amended Order, which excluded the personal medical information. However, despite the removal of the link, the original Order was still widely available over the Internet, and was "republished" by, among other outlets, ABC News and various blogs. According to the complaint, the original Order was still available over the Internet as of the date the suit was filed in December 2012. Based on the foregoing, the complaint asserts claims for damages under 28 U.S.C. § 1983, the Maryland Medical Records Act, and common law defamation.

The deadlines in this case have been moved repeatedly because of discovery problems, due to the conduct of the Board and its inability, or in some cases outright refusal, to produce documents or accurate privilege logs in a timely fashion. The plaintiffs have filed six motions for sanctions. The court previously granted, at least in part, the first, second and third motions for sanctions. The fourth and sixth motions for sanctions are the subject of the Board's current interlocutory appeal to the Court of Special Appeals and, therefore, are not before this court. The fifth motion for sanctions is

properly before this court for a decision and not barred by any order of an appellate court.[1]

Discussion

To say that discovery in this case has not proceeded smoothly would be an understatement. The plaintiffs' first motion for sanctions, which the court granted, was the result of the Board's production of fourteen boxes of documents many months after the court ordered their production on November 25, 2013. Although the original request for production was issued on August 1, 2013, the Board did not make its final production of responsive documents until June 2, 2014.

The plaintiffs' second motion for sanctions resulted from the Board's intentional failure to appear for a properly noticed organizational deposition. The plaintiffs' third motion for sanctions arose from the Board's failure to comply with the court's order of June 17, 2014, requiring the further production of documents. To date, the Board has not fully complied with this order.[2]

The plaintiffs' fifth motion for sanctions arises out of the following circumstances. On April 23, 2014, the plaintiffs notified counsel for the Board that they wanted to take an organizational deposition, and do so on July 1, July 2, and July 3, 2014. On May 8, 2014, the Board agreed that certain depositions could be re-scheduled so that

[1] The operative order from the Court of Special Appeals, dated September 24, 2014, only stays discovery as to three delineated subjects: (1) the Dr. John Young file; (2) the Board's audio recordings, and (3) putative attorney-client communications. The intermediate appellate court did not, as this court reads its order, expressly or impliedly stay any other proceedings in the trial court.

[2] The fourth motion for sanctions was granted due to Board's refusal to answer deposition questions on subjects the court had ruled to be discoverable. However, since that ruling is before the Court of Special Appeals for oral argument in January 2015, it is referred to only for historical purposes.

the July 1-3 window would be held open for the Board to produce its witness or witnesses for an organizational deposition. On June 17, 2014, the plaintiffs served a deposition notice (both electronically and by regular mail) for the July dates, and outlined 167 topics on which it requested testimony.

On June 19, 2014, the Board took the position, first, that an organizational deposition should be limited to a single seven hour day, and second, that the July dates no longer were acceptable due to the schedule of the selected representative.

On June 27, 2014, two business days before the organizational deposition was to start, the Board filed a motion for protective order. The court denied the Board's motion for protective order on July 9, 2014. Despite not having obtained a protective order, the Board failed to appear for the deposition on July 1, 2014.[3]

On July 11, 2014, the court granted the plaintiffs' motion for leave to take an organizational deposition of the Board longer than seven hours. After this ruling the Board agreed to re-schedule the organizational deposition for July 29, July 31 and August 1, 2014.

On July 29, 1014, the designated Board representative, Christine Farrelly, appeared for the deposition. At no time before the commencement of the deposition on July 29, 2014, did the Board move for a protective order specifically on the grounds that the plaintiffs had listed too many topics in the June 17 deposition notice or that the areas listed in the notice were overbroad. The court has reviewed Ms. Farrelly's deposition and concludes that she repeatedly failed to demonstrate knowledge about the topics listed in the deposition notice and that, she admitted in her deposition, that much of the

[3] This failure to appear subjected the Board to the possibility of immediate sanctions under Md. Rule 2-432(a). P. Niemeyer & L. Schuett, MARYLAND RULES COMMENTARY 282 (3d ed. 2003).

information needed to address those topics was available to her. Her preparation for the deposition was limited to spending a total of twelve hours reviewing the Board's orders and portions of the investigative file. She did not review the entire investigative file regarding Mark Geier or David Geier,[4] and she did not seek to interview a single witnesses (including Board members and Board staff) or other persons with knowledge of the events in question. She conducted no investigation or review to attempt to find information regarding the topics listed in the deposition notice other than review a limited number of readily available files in her office. She failed even to interview the individuals (whose identity is known) who were responsible for posting the plaintiffs' private medical information on the Board's website.

Despite her lack of effort to acquire information, the witness admitted repeatedly that information was readily available to elucidate the topics listed in the deposition notice. Incredibly, however, she testified that she simply did not seek out information from the relevant files or even bother to ask any key individuals, all of who are either public employees or governmental appointees, who have personal knowledge of the relevant facts. Although the witness does attend certain Board hearings, she testified during her deposition that she does not really pay attention to the proceedings, focusing instead on unrelated work on her laptop. She had not even read the pertinent administrative order until four days before the July 29, 2014 start of her deposition, did not speak with any Board voting members, and did not speak with any Board staff members. She only spoke with one individual, Joshua Schafer, but only to ask about the

[4] There were four separate Board actions. The witness testified that she did not review all of the investigative files in these cases. Her testimony was clear that she read very little of these investigative files as she was unable to recall written communications, for example between the plaintiffs and the pharmacies.

location of certain documents. In short, other than providing generic information about Board practice and procedure, she could not provide any information relevant to this case beyond that specifically set out in the administrative orders. The plaintiffs already had the administrative orders, and could read them. So, relevant to resolving the merits of this case, the deposition of Ms. Farrelly was, in short, a waste of time.

Md. Rule 2-412(d) affirmatively obligates an entity deponent, such as a public agency like the Board, to decide who will speak for it on the topics listed in a notice of deposition. Once a notice of deposition is served on the public agency, it becomes the agency's responsibility to locate and then designate one or more individuals to speak for it on the topics designated in the notice. If the individuals designated by the agency are not themselves knowledgeable on the deposition subjects, these individuals are required to investigate and prepare for the deposition "so that they may give knowledgeable and binding answers for [the public agency]." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). If necessary, the agency must "create a witness or witnesses with responsive knowledge." *Wilson v. Lakner*, 228 F.R.D. 524, 528 (D. Md. 2005). The agency's deposition designee must "collect information, review documents, and interview employees with personal knowledge" of the relevant facts before the deposition and then, at the deposition, testify cogently about the fruits of that effort. *Wilson*, 228 F.R.D. at 528. Producing an unprepared witness, as the Board did in this case, is tantamount to a failure to appear at a deposition and is sanctionable conduct under the rules. *Taylor*, 166 F.R.D. at 363.

The Board's obligation in this case under Md. Rule 2-412(d) includes the affirmative duty to tender witnesses who can in fact answer relevant questions that are

within the scope of the notice of deposition topics, and to be prepared at the deposition with information that is either currently known by or reasonably available, after a diligent inquiry, to the agency. *See Great Am. Ins. Co. of New York v. Vegas Construction Co. Inc.*, 251 F.R.D. 534 (D. Nev. 2008); *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638-39 (D. Kan. 1999). "A party cannot take a laissez faire approach to the inquiry. That is, producing a designee and seeing what he has to say or what can cover. . . . . If the originally designated spokesman for [the agency] lacks knowledge in the identified areas of inquiry, that does not become the inquiring party's problem, but demonstrates the responding party's failure of duty." *Poole ex rel Elliott v. Textron, Inc.*, 192 F.R.D. 494, 504-05 (D. Md. 2000).

In this case, although the witness testified that she prepared for 12 hours, she also testified that she was unable to testify on 90 of the topics listed in the deposition notice, undertook no meaningful investigation, and was unfamiliar with the facts bearing on the gravamen of this lawsuit. The court finds that the Board failed to make a good faith effort to find out the relevant facts or to interview witnesses with knowledge in preparation for its organizational deposition. There was little to no review of important documents and no collection of the information that is central to the claims asserted in the complaint. The court finds that the Board wholly failed in this regard, and the court finds that the Board's failure was willful, intentional and in bad faith.

The Board suggests that because it generally sought a protective order it is somehow relieved of its obligations. As a factual matter, the Board never specifically objected to or sought a protective order with respect to any particular topic listed in the deposition notice. As a legal matter, the Board at no time has made the requisite showing.

which, in the exercise of discretion, would have entitled it to the relief that it now, apparently, seeks.

The party seeking a protective order under Md. Rule 2-403 bears the evidentiary burden of showing that the relief requested is necessary. *Maryland-National Capital Park & Planning Comm'n v. Mardirossian*, 184 Md. App. 207, 227 (2009); *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 170 Md. App. 520, 530 (2006). The Board at no time even minimally attempted to meet this burden. At most, the Board uttered a brief reference in its motion to a generic undue burden claim, again without any particularity. Noticeably the Board never submitted an affidavit in support of is claim of undue burden. It is not correct, as the Board at least implicitly suggested, that the plaintiffs should demonstrate why they need to know what they listed in the deposition notice or why the notice is not overbroad. It is, in fact, the other way around. Although the number of topics designated by the plaintiffs is large, the Board did nothing to show the court how or why any of the topics were irrelevant or overbroad, given the nature of the claims in the complaint. The mere fact that a large number of topics are listed in an organizational deposition notice, without more, simply does not entitle a party to the issuance of a protective order. *Letcher v. Alcatel-Lucent USA, Inc.*, No. MJG-12-3051, 2012 WL 5845577 (D. Md., Nov. 16, 2012) (seventy three topics identified in the deposition notice; protective order denied absent particularized showing of undue burden.) In this case, it was the Board's factual burden, as the party seeking to be relieved of a discovery obligation, to show irrelevance, harassment or undue burden and the Board utterly failed to do so.

The defendants argued in their opposition that the topics in the deposition notice lacked reasonable particularity, required the production of information that was not readily available to the Board, unreasonably required the designated Board representative to conduct individual interviews of numerous Board members and staff, sought irrelevant information, and sought testimony protected by various privileges. As to these arguments, the court finds that the defendants' objections to the topics in the deposition notice should have been raised in timely a motion for a protective order (or other relief) filed before the scheduled depositions. Although the defendants had an opportunity, between the time they received the deposition notice and the date the depositions were scheduled, to file a specific motion for a protective order directed at the breath of the notice, the defendants failed to do so. Instead, the defendants raised these objections for the first time in their opposition to plaintiffs' fifth motion for sanctions. Since the defendants' objections could have been raised before Ms. Farrelly appeared for the depositions, the court finds that the defendants had no basis to refuse to make available a knowledgeable organizational representative on the scheduled deposition dates.

Under Md. Rule 2-433(a), under certain circumstances, the "entry of a default judgment is an appropriate remedy for a discovery violation." *Billman v. MDIF*, 86 Md. App. 1, 13 (1991). Of course, any sanction that has the effect of entering a default, even if only as to liability is by definition draconian, must be supported by the circumstances and should be entered only after less harsh remedies have been attempted. *See Scully v. Tauber*, 138 Md. App. 423, 430-36 (2001). However, based on the current record the court is justified in imposing the severest sanction contemplated by Md. Rule 2-433 because the court finds that the Board's conduct was intentional, willful and contumacious.

negligent. *See Billman*, 86 Md. App. at 11-13. The defendants' most recent discovery defaults are not technical in nature, have prejudiced the plaintiffs' ability to prepare their case for trial and, significantly, occurred after numerous hearings and orders compelling the Board, with limited success, to answer discovery. The defendants' defaults, considered in context and in their entirety, were not substantially justified and served, yet again, to needlessly delay a resolution of this case on the merits. *See Taliaferro v. State*, 295 Md. 376, 390-91 (1983); *Shelton v. Kirson*, 119 Md.App. 325, 331-32 (1998). Counsel for the Board knew that it needed to produce qualified witnesses for deposition and that it's belated and factually unsupported request for a protective order had been denied. Yet, the Board did not do so and, to date, has failed to explain why. The court finds that there is no justifying excuse for the Board's latest discovery violation. *See Taliaferro*, 295 Md. at 391. Under the circumstances, this case is not a candidate for a curative postponement. *Id.* As of today, almost 6 months have passed since the Board received the deposition notice. Yet, the Board still has not tendered any additional organizational deponent with knowledge of the topics listed in the deposition notice. The court reluctantly has concluded that the ultimate sanction sought by the plaintiffs, a default as to liability, is warranted and a default judgment as to liability only, will be entered.

The defendants may participate in the damages hearing, and introduce relevant evidence showing that evidence was timely produced to the plaintiffs during discovery. *See Fisher v. McCray*, 186 Md. App. 86, 134-36 (2009); *Greer v. Inman*, 79 Md. App. 350, 356-57 (1989).

It is SO ORDERED this 15th day of December, 2014.

Ronald B. Rubin, Judge

ENTERED

DEC 16 2014

Clerk of the Circuit Court
Montgomery County, Md.