

Business Litigation Session of Superior Court

Docket: 1784CV02352-BLS2

Date: March 9, 2020

Parties: LUBIN & MEYER, P.C. V. JOHN J. MANNING

Judge: /s/Kenneth W. Salinger Justice of the Superior Court

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO DEPOSE DEFENDANT'S EXPERT

Defendant recently disclosed an expert witness. The witness provided a 47-page report that discusses his relevant background and expertise, identifies the case materials he has reviewed, describes his understanding of the case, and explains in detail the opinions and conclusions the witness has reached.

Plaintiff now seeks leave to depose this proposed expert witness. Defendant opposes the motion.

In Massachusetts civil actions, the parties have the right to compel the disclosure of opinions by putative expert witnesses through interrogatories, but must obtain leave of court to compel the deposition of an opposing party's testifying expert. See Mass. R. Civ. P. 26(b)(4)(A). Like all discovery, a motion to compel an expert deposition should be evaluated to determine whether it would impose undue burden on other parties. See Mass. R. Civ. P. 26(c).

A party seeking to conduct an expert deposition over objection by the opposing party therefore has "the burden to show that further expert discovery is reasonable and necessary." *O'Brien v. American Med. Response of Massachusetts, Inc.*, No. HDCV201100713B, 2013 WL 7760826, at *3 (Mass. Super. Sept. 12, 2013) (McDonough, J.).

"[The purpose behind the requirement of a court order for further discovery in Rule 26(b)(4)(A)(ii) is to insure that the movant's only interest is in obtaining information for cross-examination." In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 41 (N.D. Cal. 1977).

"In other words, a court should allow a motion for further discovery under Rule 26(b)(4) if it is satisfied that the moving party's interest is limited to obtaining the information needed for cross-examination and not designed to build her own case on the work of an opposing party's expert." Nelson G.

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Apjohn, Further Discovery of Expert Witnesses Under Massachusetts Rule of Civil Procedure 26, 88 Mass. L. Rev. 197, 199 (2004).

The Court has typically allowed requests to depose expert witnesses. Usually a party seeking to depose the other side's expert can show that such discovery is needed to obtain information effectively to cross-examine the expert, and that doing so will likely streamline the presentation of the case at trial. But in this case the Court is not satisfied that Plaintiff seeks to depose Defendant's expert to bolster its cross-examination of the expert.

The motion proffers two justifications for deposing this expert. Neither is convincing.

First, Plaintiff argues that it should be allowed to ask the witness whether he has opinions that are not disclosed in his report. But there is no need to depose any expert regarding opinions that they have not disclosed. At trial, the expert's testimony will be limited to what is contained in his expert report.

Second, Plaintiff says it will be challenging the admissibility of this witness's opinions on the ground that he is not qualified to testify on these topics, the proffered opinions are irrelevant, and the issues addressed in the expert's report are not the appropriate subject of expert testimony. But Plaintiff does not explain why it needs to depose the witness in order to raise such challenges. The expert's written report either does or does not establish that he is qualified to testify about the disclosed opinions and conclusions. And Defendant either can or cannot show that those opinions are relevant and the proper subject of expert testimony. There is no apparent need for an expert deposition on any of those gatekeeper issues of admissibility.

In sum, Plaintiff has not shown that deposing Defendant's expert is reasonable and necessary. The Court will therefore deny the motion.

ORDER

Plaintiff's motion for leave to take the deposition of Defendant's expert witness is DENIED.

/s/Kenneth W. Salinger Justice of the Superior Court

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