

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BGC REAL ESTATE OF MICHIGAN, LLC,
d/b/a NEWMARK GRUBB KNIGHT FRANK,

Plaintiff/Counter-Defendant,

vs.

Case No. 2015-974-CB

PHOENIX SHELBY INDUSTRIAL 6, LLC,
PHOENIX SHELBY INDUSTRIAL 3, LLC,
PHOENIX SHELBY INDUSTRIAL 1, LLC,
and PHOENIX CONTRACTING
CORPORATION,

Defendants/Counter-Plaintiff,

and

GEOFFREY HILL,

Counter-Defendant.

OPINION AND ORDER

Defendants have filed a motion to compel the deposition of Plaintiff's president of brokerage services. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendants are the owners of an industrial park in Shelby Twp., MI ("Subject Property"). Defendant entered into a commission agreement with Plaintiff in 2013 ("Agreement"). On March 19, 2015, Plaintiff filed its complaint in this matter based on Defendants alleged failure to pay Plaintiff commissions allegedly it and its broker Counter-Defendant Geoffrey Hill earned. Defendants have since filed a counter-complaint in which they assert that Plaintiff and Mr. Hill violated the Agreement by failing

to represent Defendants best interests in negotiating lease amendments with Defendants' tenants.

On December 28, 2015, Defendants filed their instant motion to compel the deposition of Plaintiff's president of brokerage services, Michael Sheinkop. On December 30, 2015, Plaintiff filed its response and requests that the motion be denied. On January 4, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been an abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343-346; 497 NW2d 585 (1993). Generally, parties may obtain discovery regarding any matter not privileged that is relevant to the subject matter involved in the pending action. *Id.*; MCR 2.302(B)(1). Although broad discovery is encouraged, a party opposing discovery must not be subject to "excessive, abusive, irrelevant or unduly burdensome discovery requests." *Hamed v Wayne County*, 271 Mich App 106, 110; 719 NW2d 612 (2006) (internal citation omitted). As such, a court may issue "any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C). Furthermore, discovery should not be extended merely to allow a "fishing expedition." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004).

III. Arguments and Analysis

In their motion, Defendants contend that Mr. Sheinkop is a key witness.

Specifically, Defendants assert that Plaintiff's defense to the counter-complaint is that the express terms of the Agreement were a mistake as Plaintiff only intended to act as the agent of Defendants' tenant(s), not as Defendants' agent. The provision of the Agreement at issue is:

[Plaintiff] is a duly licensed real estate broker in the State of Michigan and is the sole and exclusive agent for [Defendants].
(See Defendants' Exhibit A, Agreement, at ¶1.)

In their motion, Defendants state that Mr. Sheinkop's deposition is necessary because he has knowledge as to: (1) whether Plaintiff followed its policies concerning the use of a contract not approved by its corporate management; (2) whether Plaintiff's corporate policies were followed when it entered into the Agreement; (3) whether Mr. Hill's delay in advising Plaintiff of the commission dispute violated Plaintiff's policies and (4) whether Plaintiff's policies regarding their agent's duties to client and third parties were violated by Mr. Hill. Defendants contend that they need to depose Mr. Sheinkop regarding these issues because whether Mr. Hill entering into the Agreement was negligent and/or reckless and whether Plaintiff's actions violated its own policies are at issue in this case.

In its response, Plaintiff avers that Mr. Sheinkop is based out of Chicago, Illinois, has had no involvement in Plaintiff's performance under the Agreement, and has no knowledge of any of the facts and circumstances involved in this case. Further, Plaintiff asserts that Mr. Sheinkop has not been mentioned during the depositions previously held in this case or in connection with any other discovery requests or responses. Further, Plaintiff asserts that Michigan has adopted the "apex-deposition rule", which protects high ranking corporate executives, such as Mr. Sheinkop, from harassment during

litigation. Specifically, Plaintiff relies on *Alberto v Toyota Motor Corp*, 289 Mich App 328; 796 NW2d 490 (2010), which provides:

In adopting the apex-deposition rule, we recognize, as have other courts, that an apex corporate officer, like a high-ranking governmental official, often has no particularized or specialized knowledge of the day-to-day operations or the particular factual situations that lead to litigation, and has far-reaching and comprehensive employment duties that require a significant time commitment. And, therefore, to allow depositions of high-ranking governmental officials or corporate officers without any restriction or conditions could result in the abuse of the discovery process and harassment of the parties. Accordingly, our adoption of the apex-deposition rule should serve as a useful rule for trial courts to use in balancing the discovery rights of the parties.

In order to overcome the apex-deposition rule, the party seeking the deposition must demonstrate that the official in question has superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees. *Id.* at 333. In this case, Defendants have not demonstrated that either of the above-referenced elements are met. Consequently, the Court is convinced that Defendants' motion to compel the deposition of Mr. Sheinkop must be denied.

IV. Conclusion

For the reasons set forth above, Defendants' motion to compel the deposition of Plaintiff's president of brokerage services DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: JAN 20 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge