

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 82-5-20 Cacv

Bihari vs. Shambhala USA et al

ENTRY REGARDING MOTION

Title: Motion Ex Parte Motion to Shorten Time Period Between Notice and Witness
Deposition (Motion: 22)
Filer: Brenda J. Luciano
Filed Date: June 20, 2024

The motion is GRANTED IN PART and DENIED IN PART.

Plaintiff Bihari seeks permission from the Court to notice the deposition of a non-party for a period of less than 14 days under V.R.C.P. 30(b)(1). This motion is made on an *ex parte* basis as allowed under the rules. For the reasons outlined below, the Court will allow the notice of the deposition to be served on July 10, 2024 for a July 18, 2024 deposition as allowed under Rule 45, but it will not allow such notice to be withheld from the opposing parties under Rule 30(b)(1).

Background Facts

The present matter concerns allegations of childhood sexual abuse occurring in 1983. As described by the Vermont Supreme Court in its decision *A.B. v. S.U.*, 2023 VT 32, ¶¶ 4–7, these allegations were revived as a cause of action in 2019 when the legislature enacted 12 V.S.A. § 522 and made the provision retroactive to any claims that arose prior to the enactment of the statute. *Id.* Defendant Shambhala USA initially sought to dismiss this matter on the grounds that Section 522 and its retroactivity provisions were unconstitutional. This motion was denied by the trial court in 2022, and the Vermont Supreme Court affirmed the trial court and the constitutionality of Section 522 in 2023. *.B. v. S.U.*, 2023 VT 32, ¶ 25.

Following the Vermont Supreme Court’s remand of this case, the parties have begun to engage in discovery. Plaintiff has filed the immediate motion seeking to depose Sakyong Mipham Rinpoche, the former head of Shambhala USA during a brief window when “Sakyong” will be in

Vermont to deliver a series of classes and lecture. Sakyong is not a party defendant in this case, and he was not the head of Shambala USA when the alleged abuse occurred. As Plaintiff's exhibits indicate, he did not become the leader of the community until 1990. Prior to his ascension, Sakyong was living outside the United States. Nevertheless, Sakyong is the son of the founder of Shambala USA, who was the leader at the time of the alleged acts, and while Plaintiffs have not alleged specific knowledge from the time in question, it is not unreasonable given his later leadership role, familial connection, and long history with Shambala USA to understand that he likely has relevant information on Shambala USA's oversight and management of individuals within the organization, such as the alleged perpetrator of Plaintiff's alleged abuse, who was an employee and part of the Shambala USA organization.

Through the documents supplied by Plaintiff in his motion, it appears that Sakyong stepped down from his leadership role and is no longer the leader or administrator of Shambala USA, which is now operated by a board of trustees. As such, Plaintiff concedes that Sakyong should be treated as a non-party. Sakyong lives in Nepal and does not reside in the United States. He travels internationally throughout the year. Plaintiff represents that Sakyong has not been to the United States "in years," but he does not provide any source for this representation other than information and belief.

Plaintiff further represents that Sakyong has announced on his public website that he will be coming to Vermont for in-person events from July 10, 2024 through July 21, 2024. The schedule indicates that these dates correspond to four different retreats to be conducted in Vermont. Plaintiff seeks to serve Sakyong with a notice of deposition on or before July 10, 2024 and schedule the deposition for July 18, 2024, which would be an 8-day window between notice and deposition, or six days less than what is normally required under V.R.C.P. 30(b)(1).

Plaintiff indicates that Sakyong is fluent in English and has been represented by counsel in the United States in the recent past based on his mediation with Shambala USA and settlement of separate legal actions in other states. It is not clear if Sakyong has Vermont counsel or would be able to obtain Vermont counsel in the eight days between proposed service and deposition.

Plaintiff notes that if Sakyong is not served and deposed during this time in Vermont, then he is unlikely to return because of his recent history that has not included travel to Vermont and because his schedule indicates no other public trips to the United States in 2024. There is no

evidence or indication that Plaintiff has reached out to Sakyong to obtain a deposition or that Sakyong has refused or avoided a deposition or similar notice in this or other cases. There is no evidence that Plaintiff has had any communications or consultations with Defendants to arrange Sakyong's deposition or if Shambala USA has any on-going contact with Sakyong. It is not clear if Shambala USA exercises any control over Sakyong. While Sakyong may not return to the United States in 2024, there has been no showing that he is unavailable or unwilling to participate in a zoom-based deposition or that he would be inaccessible to process in Nepal.

Plaintiff also suggests that if notice of the deposition is provided in advance to the defendants that they will inform Sakyong, and that Sakyong will alter his travel plans. This statement is not supported by any particular evidence, facts, or even prior practice, and it appears facially inconsistent with the fact that Sakyong has planned, scheduled, and publicly announced his trip to Vermont in advance of this trip while knowing that this case, which was filed when he was still head of Shambala USA was still pending in Vermont.

Legal Analysis

As a discovery ruling, the decision to shorten the time for a deposition is squarely within the discretion of the trial court. *Pcolar v. Casella Waste Systems, Inc.*, 2012 VT 58, ¶ 11. In this case, the relief Plaintiff seeks involves the shortening of two timelines.

The first is found in Rule 30(b)(1), which requires a party to “give notice in writing to every other party to the action at least 14 days before the time of taking the deposition” V.R.C.P. 30(b)(1) (emphasis added). The Rules allows this 14-day notice period to be shortened by the Court for good cause. *Id.*

The second falls under Rule 45, which governs subpoena. As a non-party, Sakyong must be served the notice of the deposition as a subpoena under the provisions of Rule 45. V.R.C.P. 30(a) (“The attendance of witnesses may be compelled by subpoena as provided in Rule 45.”); see also 8A Wright & Miller, Fed. Prac. & Proc. Civil § 2107 (3d. ed. 2024 update); 9A Wright & Miller, Fed. Prac. & Proc. Civil § 2460 (3d. ed. 2024 update) (noting that under analogous federal practice the notice of a deposition to a non-party must be served by a subpoena under Rule 45). This Rule does not have a minimum time requirement, but merely requires “reasonable time for compliance.” V.R.C.P. 45(3)(A)(i).

Plaintiff's motion conflates these two different timelines and standards. Rule 30(b)(1) applies to the notice required to be given to the parties to a case, whether the deponent is a party or a non-party witness. While there may be facts about when and how the deposition must be conducted that inform the shortening of the timelines, the timeline itself is primarily about the requirement to notice other parties. This rule and timeline does not apply to non-parties who are not subject to the provisions of Rule 30(b)(1) because they are not parties to the litigation. *Koplewitz v. Hamilton*, Dckt. No. 103-2-01 WmCv. (Vt. Super. Ct. July 22, 2004) (Wesley, J.) (noting that the subpoena compels a non-party's attendance at a deposition), available at 2004 WL 5657983; *Duggan v. Bisson*, Dckt. No. 114-5-98 Cacv (Vt. Super. Ct. May 14, 2003) (Pearson, J.), available at 2003 WL 25826926 (noting that non-party members fall outside of Rule 30(b) and must be subpoenaed for deposition under V.R.C.P. 45); see also 9A Wright & Miller, Fed. Prac. & Proc. Civil § 2460.

This is consistent with the federal caselaw cited by Plaintiff in his motion. Each case cited concerns circumstances where a party could not notice a deposition, except on a shortened timeline, and the courts looked to see what, if any reason led to the short notice, and if the opposing party had timely and validly objected. See *F.A.A. v. Landry*, 705 F.2d 624, 634 (2d Cir. 1983) (finding "reasonable written notice" to opposing counsel for a short-notice testimony preservation deposition where opposing counsel did not object or file for emergency relief); *Davidson v. Dean*, 204 F.R.D. 251, 256 (S.D.N.Y. 2001) (finding "reasonable written notice" where an incarcerated party failed to provide any substantive objections to a notice of deposition, other than it was delivered 8 days prior to the scheduled deposition); *Jones v. U.S.*, 720 F.Supp. 355, 366 (S.D.N.Y. 1989) (finding "reasonable written notice" where opposing party did not object to a short-notice testimony preservation deposition).

In none of the cases cited by Plaintiff is Rule 30(b)(1) or the analogous federal provision used to analyze whether a deposition notice is sufficient, reasonable, or shortened for good cause against a non-party witness who is being compelled to sit for a deposition. That analysis must be done under the standards of Rule 45. V.R.C.P. 30(a).

In this case using the standard for Rule 45, the 8-day window proposed by Plaintiff appears on its face to be reasonable. While Sakyong does not have Vermont counsel of record, he is familiar with the American legal system, has had legal counsel in other states, and it is not unreasonable to believe that he will find counsel on relatively short notice. The facts also demonstrate that this is likely to be the only opportunity to depose Sakyong in 2024, apart from either an in-person

deposition in Nepal; an international subpoena for a remote deposition; or requiring him to return to Vermont. All three options are likely to be costly and onerous given both the expense of such flights, the expense of international process, Sakyong's schedule of retreats and seminars, and the cost of obtaining out-of-state counsel. These expenses must be weighed against both the limited amount of time being sought to be waived and the limited nature of Sakyong's testimony. Despite Plaintiff's characterizations, the facts do not demonstrate that Sakyong is a critical witness to the specific underlying abuse or the management of Shambala USA in 1983. On these grounds, the Court finds the proposed timeline for issuing the subpoena eight days before a scheduled deposition to be facially reasonable under Rule 45. Nevertheless, as an ex parte ruling, nothing in the Court's determination would prevent either Sakyong or a party from filing an objection or challenging the reasonableness of this initial ruling.

As to shortening the timeline Rule 30(b)(1), Plaintiff provides little support to his contention of good cause to support the shortening of time to notice the other parties to this litigation. Apart from the logistical need to serve Sakyong after he arrives in Vermont, the only reason that Plaintiff gives for not informing the other parties until after Sakyong is served is the insinuation that if defendants know, then they will inform Sakyong, who will cancel his trip to Vermont and will act to avoid service and jurisdiction. There has been no evidence or representation that Sakyong has previously ducked service or that defendants have sought to hide or divert witnesses in this case. Plaintiff provides no evidence, support, or facts for this contention. Instead, he characterizes this as a "grave concern" as a "belief" that there is a "high risk" if Sakyong is provided "prior advanced written notice, including through Defendant, Shambala USA," Sakyong "may decide to alter his travel plans and not come to Vermont after all." Pltf. Motion at ¶ 2

Without anything more, the Court cannot conclude that there is good cause to shorten the amount of time and notice to the other parties under V.R.C.P. 30(b)(1). There is no foundation or even circumstantial support for Plaintiff's contention. Given that Sakyong publicly communicated this trip to Vermont on his website, the Court finds Plaintiff's concerns to be at least somewhat inconsistent with the open manner in which Sakyong has planned the present trip.

Against this lack of support for Plaintiff's concerns, there are good reasons to give the opposing parties as much notice as possible. Plaintiff's notice indicates that at least one attorney for the defense may not be available on the proposed deposition date or may not know his availability until a jury draw occurs. In such cases, the additional notice can only help counsel try to reconcile

his schedule to the date in question given the witness's limited availability and compelling need in this case to conduct the deposition within the timeframe established by the witness's presence in the state. Given the complexity of this case, the Court also finds a compelling need to give the parties advance notice to prepare. Given that Sakyong is not a party and may have information that all sides would want, it is likely that Defendants will need time to prepare for the deposition and prepare questions. An addition six or more days would be reasonable if notice were possible.

For these reasons, the Court does not find good cause to delay notice of the proposed deposition from Defendants and finds that there are compelling reasons to provide such notice in as timely a manner as possible.

Finally, the Court will also note that none of the cases cited by Plaintiff or that the Court was able to find in its research would support the knowing withholding of a deposition notice from other parties after the *ex parte* application and court review. Plaintiff's motion, filed on June 20, 2024, effectively sought court approval and up to 20 days of both Plaintiff and the Court withholding the notice and determination from the other parties. Nothing in Rule 30(b)(1) creates a right to obtain pre-approval for a shortened deposition notice and then to withhold the notice and approval from other parties. The mere concern or belief that the other parties may try to thwart the deposition is not sufficient to overcome this process. Such an outcome would encourage ambush depositions and would reduce the cooperation that the rules encourage between parties in the discovery process.

For these additional reasons, the Court does not find good cause to limit the notice of deposition to July 10, 2024. Plaintiff intends to depose Sakyong when he comes to Vermont, and he is obligated, given the time available, to give the opposing parties the standard 14-days or more of notice as required under Rule 30(b)(1).

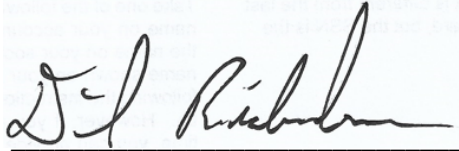
ORDER

Based on the foregoing, Plaintiff's intent to subpoena Sakyong on July 10, 2024 to compel his attendance at a July 18, 2024 deposition appears to be a reasonable amount of time to secure compliance, and the Court takes no issue with the proposal. The motion to the extent that Plaintiff seeks review and initial approval under V.R.C.P. 45 is **Granted**.

To the extent that Plaintiff seeks to withhold information about this planned subpoena and notice of deposition from the other parties, and to disclose it on a shortened timeline of 8 days, the Court find no good cause to support such withholding. There is no evidence or specific allegation that would support a finding that defendants would interfere with the service of such a deposition notice on Sakyong. There is no support for the contention that Sakyong would skip or try to thwart such an order or has in the past. On the contrary, there are grounds to support early notice to allow the other parties to reasonably prepare and to seek continuances, dismissal, or coverage for pending matters on the date in question. Finally, the language and intent of Rule 30(b)(1) does not give a party, absent some compelling showing, supported by evidence, the right to use the *ex parte* provision of Rule 30(b)(1) to hide a plan, notice, and preliminary court approval to take a deposition from opposing parties.

Without such support, Plaintiff's contentions lack sufficient basis to give rise to good cause, and Plaintiff's motion to shorten notice to the other parties in this matter under V.R.C.P. 30(b)(1) is **Denied.**

Electronically signed on 6/27/2024 2:42 AM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background. The signature is fluid and cursive.

Daniel Richardson
Superior Court Judge