

FSM SUPREME COURT TRIAL DIVISION

THE PEOPLE OF THE MUNICIPALITY OF TOMIL,)	CIVIL ACTION NO. 2009-3002
YAP, by and through CHIEF STEVEN MAR, CHIEF)	
ALEX GILTAMNGIN, and CHIEF ROBERT FITHING,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
M/C JUMBO ROCK CARRIER III and M/T PAGBILAO)	
l, <i>in rem</i> , their engines, masts, bowsprits, boats,)	
anchors, chains, cables, rigging, apparel, furniture,)	
and all necessities thereunto pertaining;)	
)	
and)	
)	
IDHI PORTS & SHIPPING, INC.,)	
)	
<i>In Personam</i> Defendant.)	
)	

ORDER COMPELLING DEPOSITION; GRANTING SANCTIONS

Dennis K. Yamase
Associate Justice

Decided: February 22, 2010

APPEARANCES:

For the Plaintiffs: Joseph C. Razzano, Esq. (pro hac vice)
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For the Defendants: Manuel N. Camacho, Esq. (pro hac vice)
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HEADNOTES

Civil Procedure – Depositions

Leave of court to take a deposition is required only if it is taken before 30 days after the complaint and summons were served on a defendant. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 67 (Yap 2010).

People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III
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Civil Procedure – Depositions

Any party seeking to depose any person upon oral examination must give reasonable notice in writing to every other party to the action. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 67 (Yap 2010).

Civil Procedure – Depositions

When defense counsel's office is in Greater Manila, Philippines, written notice given defense counsel on August 21, 2009, for a deposition in Yap on August 25, 2009, is not the "reasonable notice" required by Rule 30(a) and will be quashed since this was not enough advance notice for defense counsel to prepare for the deposition, make travel arrangements, and arrive in Yap, thousands of miles away on the opposite side of the Philippine Sea and where, given the flight schedules, he might not have been able to get to in time for the scheduled deposition. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Depositions

Since parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, the plaintiffs were entitled to depose the tug's captain as he was a witness with relevant information and since pretrial depositions are an expected and normal part of pretrial discovery. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Discovery

Pretrial discovery has three major purposes: 1) to preserve relevant information that might not be available at trial, 2) to ascertain the issues that are actually in dispute between the parties, and 3) to allow a party to obtain information that will lead to admissible evidence on the issues that are in fact disputed. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Depositions; Civil Procedure – Discovery

Ordinarily, the court will not grant motions for protective orders to substitute written interrogatories for oral depositions in view of the recognized value and effectiveness of oral over written examinations. While a deposition on written questions may be useful in certain circumstances, this procedure is inflexible, and as a result, infrequently used since depositions upon written questions are not as effective as oral depositions in eliciting spontaneous answers. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Depositions

Written depositions are used primarily to obtain routine information that is not in substantial dispute or in suits where the amount involved is small. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Depositions

When none of the factors listed in FSM Civil Rule 26(c) for granting a protective order – i.e. "annoyance, embarrassment, oppression, or undue burden or expense" – are present, the court will deny a request that a deposition be taken by means of written, instead of oral, questions. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Discovery

Opposing counsel are expected to cooperate in the discovery process. The discovery rules encourage the parties to conduct discovery with a minimum of court involvement or intervention, and sanctions are provided to discourage an abuse or breakdown of the discovery process that would

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require court involvement. People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010).

Civil Procedure – Depositions

The defendants' insistence that a witness not be deposed without a court order is completely unjustified when the defendants give no colorable ground for their position. The court will accordingly grant the plaintiffs' motion to compel the deposition and encourage the parties to agree on a date and time for it that is mutually convenient but, if the parties are unable to agree on an earlier date and time, the oral deposition will start at on a court-set date. People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68-69 (Yap 2010).

Civil Procedure – Depositions; Civil Procedure – Sanctions

When the court does not find that the defendants' opposition to the plaintiffs' motion to compel a deposition was substantially justified and it has not been shown that other circumstances make an expenses award unjust, the court must order the defendants to pay the plaintiffs' reasonable attorney fees in obtaining the order. People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 69 (Yap 2010).

Civil Procedure – Sanctions

Rule 37(a)(4) requires an opportunity for hearing before attorney's fees are awarded to a prevailing party on a motion to compel discovery and courts may comply with this requirement either by holding an oral hearing on adequate notice or by considering written submissions from the affected parties. People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 69 (Yap 2010).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This comes before the court on the plaintiffs' Motion to Compel Deposition and for Attorneys' Fees, and Cost, filed January 22, 2010, and the defendants' opposition, filed January 29, 2010. The motion is granted in part. The reasons follow.

I. BACKGROUND

On July 20, 2009, the plaintiffs filed a complaint *in rem* and *in personam* against the defendants and had summonses issued. The *in rem* defendants – the M/C *Jumbo Rock Carrier III* and M/T *Pagbilao I* – were served when those vessels were arrested on July 20, 2009. The *in personam* defendant was also served on the same day by personal delivery on its Yap agent. On August 12, 2009, all defendants appeared through counsel and filed their answer. Also on August 12, 2009, counsel for both the plaintiffs and the defendants appeared at the FSM Supreme Court in Colonia, Yap for a telephonic hearing. Afterward, the plaintiffs' counsel returned to Guam and the defendants' counsel returned to the Philippines.

On Friday, August 21, 2009, the plaintiffs filed a notice and obtained a subpoena to compel the attendance of Captain Avito Bautista of the M/T *Pagbilao I* and to take his deposition on Tuesday, August 25, 2009, at the FSM Supreme Court in Colonia, Yap. On August 23, 2009, the defendants e-mailed to the court clerk an opposition to the captain's deposition but never filed it. Captain Bautista appeared as ordered, but after taking the oath, declined to be deposed because the defendants' attorney had advised him not to allow himself to be deposed until a judge had ordered him to do so. Plaintiff's

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counsel subsequently made several unsuccessful attempts to make arrangements with the defendants' counsel for the captain's deposition.

On January 22, 2010, the plaintiffs moved to compel the captain's deposition. They ask that the court order Captain Bautista be deposed on a date certain; that the plaintiffs' attorneys be awarded \$1,500 in attorney's fees incurred in bringing the plaintiffs' motion to compel; and that they be awarded travel and lodging costs of \$1,000 incurred in trying to take Captain Bautista's deposition on August 25, 2009. The defendants assert that the motion should be denied because, in their view, the plaintiffs should have obtained leave of court to take the deposition but did not and because they were not given reasonable notice of the deposition. The defendants ask that Captain Bautista's deposition be taken by written interrogatories instead of orally.

II. AUGUST 25, 2009 DEPOSITION

The defendants cite Civil Rule 28(a) as their authority that the plaintiffs must secure leave of court before deposing Captain Bautista. This appears to be a typographical error as the language they cite comes from Rule 30(a). The pertinent part of that rule states:

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required . . . if special notice is given as provided in subdivision (b)(2) of this rule.

FSM Civ. R. 30(a). The defendants appear to read this as requiring 30 days notice before taking any deposition. This is incorrect. It requires leave of court to take a deposition only if it is taken before 30 days after the complaint and summons were served on a defendant. All defendants were served the complaint and summons on July 20, 2009. Thirty days had expired [on August 19, 2009] before the noticed August 25, 2009 deposition. The plaintiffs did not need leave of court to depose Captain Bautista on August 25.

The defendants also contend that they were not given the required reasonable notice before the deposition. Any party seeking to depose any person upon oral examination must "give reasonable notice in writing to every other party to the action." FSM Civ. R. 30(b)(1). Defense counsel was given written notice of the August 25, 2009 deposition on either August 20 or 21, 2009.

The court concludes that, under the circumstances, of this case, that does not constitute "reasonable notice." Defense counsel's law office is in Greater Manila, Philippines. The deposition was set for Colonia, Yap. The court concludes that this is not enough advance notice for defense counsel to prepare for the deposition, make travel arrangements, and arrive in Yap for the deposition, and, considering the flight schedules, it might not even have been possible to arrive in Yap in time.

In Lloyd v. Cessna Aircraft Co., 430 F. Supp. 25, 26 (E.D. Tenn. 1976), the court held that a deposition notice served on adversary counsel in Chattanooga, Tennessee and Washington, D.C. on Wednesday, May 26, 1976, for a Tuesday June 2 [*sic*], 1976 deposition in Los Angeles, California was (under a similar United States civil rule) not reasonable notice for a deposition taken "cross-country or half cross-country" for adversary counsel who had only two full working days before the noticed deposition. The Lloyd court therefore quashed the deposition notice and ordered adversary counsel to engage in telephone consultation and to "undertake to agree orally upon a reasonable time for the taking of the depositions heretofore noticed." *Id.*

This case is closely analogous. After service of the deposition notice, defense counsel in this case had one, maybe two, working days before the noticed deposition, to be held thousands of miles away in Yap on the opposite side of the Philippine Sea and where, given the flight schedules, he might not have been able to get to in time for the scheduled deposition. The August 21, 2009 deposition notice is accordingly quashed. Since reasonable notice was not given the defendants for the August 25, 2009 deposition, the plaintiffs are not entitled to an award for expenses incurred in trying to depose Captain Bautista on August 25, 2009. That portion of the plaintiffs' motion is accordingly denied.

III. RIGHT TO DEPOSE CAPTAIN BAUTISTA

Since "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," FSM Civ. R. 26(b)(1), the plaintiffs are entitled to depose Captain Bautista as he is a witness with relevant information, FSM Civ. R. 30(a) ("any party may take the testimony of any person . . . by deposition upon oral examination"). Pretrial depositions are an expected and normal part of pretrial discovery. Pretrial discovery has three major purposes: 1) to preserve relevant information that might not be available at trial, 2) to ascertain the issues that are actually in dispute between the parties, and 3) to allow a party to obtain information that will lead to admissible evidence on the issues that are in fact disputed. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 7.1, at 379-80 (2d ed. 1993).

The defendants ask that Captain Bautista be deposed by written questions instead. Ordinarily the court will not grant motions for protective orders to substitute written interrogatories for oral depositions in view of the recognized value and effectiveness of oral over written examinations. Nahnken of Nett v. United States (III), 6 FSM Intrm. 417, 422 (Pon. 1994); McGillivray v. Bank of FSM (I), 6 FSM Intrm. 404, 408 (Pon. 1994). While a deposition on written questions may be useful in certain circumstances, this procedure is inflexible, and as a result, infrequently used. AHPW, Inc. v. FSM, 10 FSM Intrm. 420, 426 (Pon. 2001) (Rule 31 procedure for depositions upon written questions is that a copy of the questions is delivered to the court reporter who then takes the deposition in accordance with Rule 30(c), (e), and (f); written cross, redirect, and recross questions are thereafter propounded within the time provided by the rule). Depositions upon written questions are not as effective as oral depositions in eliciting spontaneous answers. AHPW, Inc., 10 FSM Intrm. at 426. Written depositions are thus used primarily to obtain routine information that is not in substantial dispute or in suits where the amount involved is small. FRIEDENTHAL, KANE & MILLER, *supra*, § 7.8, at 400. None of the factors listed in FSM Civil Rule 26(c) for granting a protective order – i.e. "annoyance, embarrassment, oppression, or undue burden or expense" – are present. Accordingly, the court will deny the defendants' request that Captain Bautista's deposition be taken by means of written questions.

After the abortive August 25, 2009 deposition, the plaintiffs tried to arrange with the defendants' counsel the taking of Captain Bautista's deposition. Defense counsel was not cooperative. Opposing counsel are expected to cooperate in the discovery process. The discovery rules encourage the parties to conduct discovery with a minimum of court involvement or intervention, and sanctions are provided to discourage an abuse or breakdown of the discovery process that would require court involvement. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 248 (App. 2006). The defendants' insistence that Captain Bautista not be deposed without a court order was completely unjustified. The defendants gave no colorable ground for their position.

Accordingly, the court grants the motion to compel Captain Avito Bautista's deposition and hereby orders that his oral deposition be taken no later than March 26, 2010. The parties are encouraged to agree on a date and time for Captain Bautista's deposition that is mutually convenient. If the parties are unable to agree on an earlier date and time, the Captain Avito Bautista's oral

deposition will start at 9:30 a.m., Friday, March 26, 2010. The plaintiffs may notice Captain Bautista's deposition accordingly and have a subpoena issued. The parties may, but are not required to, consider stipulating to taking the deposition telephonically. FSM Civ. R. 30(b)(7).

IV. SANCTIONS

The plaintiffs seek as sanctions an award of \$1,500 in attorney's fees incurred in bringing the plaintiffs' motion to compel and an award of \$1,000 for travel and lodging costs incurred in trying to take Captain Bautista's deposition on August 25, 2009. The request for travel and lodging costs for the August 25, 2009 deposition is denied since the court has, by this order, quashed the notice for that deposition.

Civil Procedure Rule 37(a)(4) provides that if a motion to compel discovery is granted, the court must,

after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party, attorney, or trial counselor advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney or trial counselor fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

The court does not find that the defendants' opposition to the motion to compel Captain Bautista's deposition was substantially justified. Nor has it been shown that other circumstances make an expenses award unjust. Rule 37(a)(4) requires an opportunity for hearing before attorney's fees are awarded to a prevailing party on a motion to compel discovery. Courts may comply with this requirement either by holding an oral hearing on adequate notice or by considering written submissions from the affected parties. Ehsa v. Pohnpei Port Auth., 14 FSM Intrm. 567, 571-72 (Pon. 2007); Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

The plaintiffs seek an award of \$1,500 in attorney's fees for bring their motion to compel. The defendants did not respond to that request. The court could simply deny the request for lack of supporting documentation or it could estimate the attorney time necessary to draft the motion and award a fee on that basis. The court, however, believes the better course, at least this time so that the parties better understand what is expected of them in the future, is to allow the parties to be heard on written submissions. Therefore, the plaintiffs shall file and serve, no later than March 5, 2010, their written submission on their attorney's fees request. The defendants shall have until March 16, 2010, to file and serve their response, if any.

V. CONCLUSION

The plaintiffs' motion to compel Captain Avito Bautista's deposition is granted. His deposition will be held on March 26, 2010, at 9:30 a.m., unless the parties stipulate otherwise. The August 21, 2009 deposition notice is quashed. The plaintiffs are entitled to an attorney's fees award for bringing the motion to compel and shall file and serve their written submission by March 5, 2010. The defendants may file and serve a response by March 16, 2010.

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