and the Pleading was "interposed for an improper purpose," namely: "to cause unnecessary delay."

Accordingly, the Court hereby GRANTS Defendants' Motion for Rule 11 Sanctions Against Plaintiffs' Counsel. Furthermore, Defense Counsel is entitled to an award of Attorney's fees for the work devoted to its Motion to Dismiss the Complaint.

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FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK, Plaintiff, vs. LINDA CARL and the ESTATE OF YOSHIRO CARL, Defendants.	)	CIVIL ACTION NO. 1996-060

ORDER

Dennis K. Yamase
Chief Justice

Decided: March 15, 2015

APPEARANCES:

For the Plaintiff: Nora E. Sigrah, Esq.
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For the Defendants: Yoslyn G. Sigrah, Esq.
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HEADNOTES

Civil Procedure – Discovery – Protective Order

A party may not ask for an order to protect the rights of another party or witness because a party ordinarily does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena. FSM Dev. Bank v. Carl, 20 FSM R. 329, 331 (Pon. 2016).

Civil Procedure – Discovery – Protective Order

Non-parties are not without the court's protection since a non-party under subpoena may move to quash the subpoena directed to him. FSM Dev. Bank v. Carl, 20 FSM R. 329, 332 (Pon. 2016).

Civil Procedure – Discovery – Protective Order

For good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Accordingly, the court may require: 1) that the discovery not be had; 2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; 3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, 4) that certain matters not be inquired into, or 5) that the scope of the discovery be limited to certain matters. FSM Dev. Bank v. Carl, 20 FSM R. 329, 332-33 (Pon. 2016).

Civil Procedure – Discovery – Protective Order

A court may quash or modify a subpoena if it is unreasonable and oppressive, but in view of the broad test of relevancy at the discovery stage, such a motion will ordinarily be denied. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Depositions; Civil Procedure – Discovery – Protective Order

Generally, a protective order is granted only when it clearly appears that the information sought is wholly irrelevant and could have no possible bearing on the issue, and a witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Discovery

Under FSM Civil Rule 26, parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Discovery

The rules governing discovery are quite permissive, and the scope of examination is very broad. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Discovery; Debtors' and Creditors' Rights – Orders in Aid of Judgment

Post-judgment discovery from any person is expressly available. The judgment creditor or a successor in interest when that interest appears of record, may, in aid of the judgment or execution, obtain discovery from any person, including the judgment debtor. The judgment creditor is allowed discovery to find out about assets on which execution can issue or about assets that have been fraudulently transferred or are otherwise beyond the reach of execution. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Discovery – Protective Order

The general rule is that a protective order will not likely issue at the discovery stage unless the information sought is privileged or wholly irrelevant. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Civil Procedure – Discovery – Protective Order

When the information sought targets the judgment-debtor's sources of income and the subpoenas are reasonably calculated to uncover assets not previously disclosed, good cause to issue a protective order is not shown. FSM Dev. Bank v. Carl, 20 FSM R. 329, 333 (Pon. 2016).

Evidence – Witnesses

Every person is competent to testify. When challenged on the basis of impairment or diminished capacity, the general rule of competency is presumed, and the witness is almost invariably pronounced

competent unless shown otherwise. FSM Dev. Bank v. Carl, 20 FSM R. 329, 334 (Pon. 2016).

Evidence – Witnesses

The burden of proof as to witness competency rests with the objecting party. In determining competence a judge has great latitude in the procedure he may follow. Typically, the court will simply permit the witness to begin direct examination testimony, and then consider the witness's competency in light of the content of that testimony and the manner in which it was given. Alternatively, the court may conduct a preliminary examination, or even hold a separate competency hearing, wherein the prospective witness is subjected to questioning, and other witnesses may testify and external evidence may be submitted to help the court assess the claim because the assistance of experts is sometimes necessary to aid in the determination. FSM Dev. Bank v. Carl, 20 FSM R. 329, 334 (Pon. 2016).

Evidence – Witnesses

Witness competence is a preliminary question to be decided by the judge. FSM Dev. Bank v. Carl, 20 FSM R. 329, 334 (Pon. 2016).

Evidence – Witnesses

A diagnosis of diabetes is insufficient to overcome the general rule that every person is competent to testify. FSM Dev. Bank v. Carl, 20 FSM R. 329, 334 (Pon. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On February 16, 2016, a hearing on all pending motions, including an order in aid of judgment, was held in this matter. In preparation for this hearing, the FSM Development Bank (FSMDB) subpoenaed several nonparties to testify or provide documents. On February 15, 2016, the day before the hearing, defendant Linda Carl (Carl) filed a Motion to Quash Subpoena and Subpoena Duces Tecum Directed at Denis Cayabyab (Cayabyab); and Subpoena Directed at McLinda Carl (McLinda). Attached to this motion were two exhibits, including an employment contract for Cayabyab and a business license for Linda's Barber Shop indicating part ownership to McLinda. The FSMDB objected by raising the question of whether a party has standing to quash a subpoena on behalf of a non-party. By implication this Court has previously dealt with that issue, however, it has yet to address this question directly.[1]

I. STANDING

Generally, "[a] party may not ask for an order to protect the rights of another party or witness." 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035, at 261 (1970). "Ordinarily, a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena."[2] United States v. Idema, 118 Fed. App'x 740, 744, (4th Cir. 2005) (citing 9A CHARLES A.

[1] FSM v. Wainit, 13 FSM R. 301, 306 (Chk. 2005); AHPW, Inc., v. FSM, 10 FSM R. 420, 423 (Pon. 2001).

[2] A survey of U.S. District courts indicates that this rule is well established: United States v. Gordon, 247 F.R.D. 509, 509 (E.D.N.C. 2007) (citing Idema); Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 557

WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2459, at (2d ed. 1995); *see* Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1126 (2d Cir. 2006) ("In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness. 5A J. MOORE, FEDERAL PRACTICE ¶45.05(2) (2d ed. 1974)"); *see* Brown v. Braddick, 595 F. 2d 961, 967 (5th Cir. 1999) ("do not have standing"); *see* Ponsford v. United States, 771 F.2d 1305, 1308 (9th Cir. 1985) ("lacks standing to quash"). Thus only when a party claims a privilege do they have "standing to claim relief." Norris Mfg., Co. v. R.E. Darling, Co., 29 F.R.D. 1, 2 (D. Md. 1961). Under the exception, this Court previously considered, but ultimately denied a motion to quash a subpoena based on legislative immunity. *See* AHPW, Inc. v. FSM, 10 FSM R. 420, 423 (Pon. 2001). Non-parties are not without the court's protection, however, and "[a] non-party under subpoena may move to quash the subpoena directed to him." FSM v. Wainit, 13 FSM R. 301, 306 (Chk. 2005).

In this case, the named party defendant has attempted to intervene and assert a right on behalf of two third parties: McLinda and Cayabyab. Under the general rule she does not have standing to do so, unless a personal right or privilege is implicated. Carl has failed to make any showing that she has a personal right to, or privilege in the information sought in the subpoenas and therefore cannot quash. The court further finds that even if she did, the court would deny those motions on the merits for the reasons that follow.

II. MOTION TO QUASH

Pursuant to FSM Civil Rule 26(c), for good cause shown, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Accordingly, the court may require:

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n.3 (N.D. Ga. 2001) ("it appears to be the general rule of the federal courts that a party has standing to challenge a subpoena when she alleges a "personal right or privilege with respect to the materials subpoenaed."); Windsor v. Martindale, 175 F.R.D. 665, 668 (W.D. Col. 1997) ("The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought."); Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. of N.Y., 519 F. Supp. 668, 679 (D. Del. 1981) ("As a general matter, a party has no standing to seek to quash a subpoena directed to one who is not a party."); Robertson v. Cartinhour, 2010 WL 716221, 1 (D. Md. 2010) ("Generally, to have standing to challenge a subpoena, a person must assert his own legal interests. A party does not have standing to challenge a subpoena issued to a non-party 'unless the party claims some personal right or privilege in the information sought by the subpoena.'"); Joiner v. Choicepoint Servs., Inc., 2006 WL 2669370, 4 (W.D.N.C. 2006) (" a party generally has no standing to file a motion to quash a subpoena issued to a third-party"); Green v. Sauder Mouldings, Inc., 223 F. Supp. 304, 306 (E.D. Va. 2004) ("A motion to quash should be made by the person or entity from whom or from which the documents or things are requested. Generally, a party to litigation has no standing to move to quash a third-party subpoena duces tecum unless the movant claims some personal right or privilege to the documents sought."); Vogue Instrument Corp. v. LEM Instruments Corp., 41 F.R.D. 346, 348 (S.D.N.Y. 1967) ("being neither persons in possession or control of the documents, nor the persons to whom the subpoenas are directed, lack standing to attack the subpoenas.") Mancuso v. Florida Metropolitan Univ., Inc., 2011 WL 310726, 1 (S.D. Fla. 2011) ("As a threshold matter, the Court must consider whether Plaintiff has standing to challenge the subpoenas at issue. Generally, a party does not have standing to challenge a subpoena served on a non-party, unless that party has a personal right or privilege with respect to the subject matter of the materials subpoenaed"); United States v. Nachamie, 91 F. Supp. 2d 552, 554 (S.D.N.Y. 2000) ("A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a proprietary interest in the subpoenaed matter."); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 635 (D. Kan. 1999) ("[a] motion to quash or modify a subpoena duces tecum may only be made by the party to whom the subpoena is directed except where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter requested in the subpoena").

> (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery, (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . .

FSM Civ. R. 26(c) (protective orders). Furthermore, pursuant to FSM Civil Rule 45(b), the court may "quash or modify a subpoena if it is unreasonable and oppressive."[3] "In view of the broad test of relevancy at the discovery stage such a motion will ordinarily be denied." 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2037, at 275 (1970). Generally, a protective order is granted only when it clearly appears that the information sought is "wholly irrelevant and could have no possible bearing on the issue." *Id.* Furthermore, "[a] witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge." *Id.*

Pursuant to FSM Civil Rule 26(b)(1),

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Under FSM Civil Rule 26, parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence." Pohnpei v. M/V Miyo Maru No. 11, 8 FSM R. 281, 287 (Pon. 1998); *See* Adams v. Island Homes Constr., Inc., 10 FSM R. 430, 432 (Pon 2001). "The rules governing discovery are quite permissive." 12 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3014, at 189-90 (3d ed. 2014). "The scope of examination is very broad." *Id.* at 190.

Pursuant to FSM Civil Rule 69, post judgment discovery from any person is expressly available, "[i]n aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor." Thus the "judgment creditor is allowed discovery to find out about assets on which execution can issue or about assets that have been fraudulently transferred or are otherwise beyond the reach of execution." FSM Dev. Bank v. Carl, 20 FSM R. 70, 74 (Pon. 2015).

In this case, discovery in aid of judgment is expressly authorized by statute. Discovery is quite permissive and questioning any source for relevant information reasonably calculated to lead to admissible evidence is permitted. The general rule is that a protective order will not likely issue at the discovery stage unless the information sought is privileged or wholly irrelevant. The information sought by the FSMDB subpoenas target the sources of income for the defendant and are reasonably calculated to uncover assets not previously disclosed. Thus, good cause to issue a protective order is not shown in these filings, and the motion with regard to both nonparty defendants is therefore denied.

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[3] A subpoena duces tecum may "command the person to whom it is directed to produce books, papers, documents, or tangible things." FSM Civ. R. 45(b).

III. Competence

Finally, Carl's competence to testify was raised by her attorney at the hearing. Although not explicitly stated, the court treats this as an oral motion for a protective order or to quash made by implication in the proceedings, but denies this motion for the reasons that follow.

Pursuant to FSM Evidence Rule 601, "[e]very person is competent" to testify. When challenged on the basis of impairment or diminished capacity, the general rule of competency is presumed, and the witness is "almost invariably pronounced competent"[4] unless shown otherwise. 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6005, at 55 (2007). "The burden of proof as to witness competency . . . rests with the objecting party." *Id.* at 111. In determining competence "a judge has great latitude in the procedure he may follow." *Id.* at 54 n.36. Typically, the court will "simply permit . . . the witness to begin direct examination testimony, and then consider the witness' competency in light of the content of that testimony and the manner in which it was given." *Id.* at 113. Alternatively, the court may conduct a preliminary examination, or even hold a separate competency hearing, wherein the prospective witness is "subjected to questioning." *Id.* 115. "Other witnesses" may testify and external "evidence" may be submitted to help the court assess the claim. *Id.* at 116. The "assistance of experts" is sometimes necessary to aid in the determination. *Id.* at 122-23. Ultimately, however, "witness competence is a preliminary question to be decided by the judge." *Id.* at 109.

In this case, the defendant submitted two exhibits purporting to show her incompetence to take the stand.[5] Linda Carl has Diabetes Metlitus type II which has impaired the vision in both of her eyes, but she is "otherwise a cheerful and healthy woman." A diagnosis of diabetes is insufficient to overcome the general rule that every person is competent to testify. Carl will be required to take the stand and her condition will be accommodated in the courtroom, if necessary. The motion is denied.

IV. Conclusion

A party does not generally have standing to quash a subpoena on behalf of a nonparty. The motions to quash going to the nonparties are denied. The court does not find sufficient cause to issue a protective order under these circumstances. Thus all subpoenaed parties and nonparties are required to be present and prepared, as necessary, to testify at the future hearing for an order in aid of judgment that will be set following the disposition of the other pending motions in this matter. Any schedule previously discussed for March 22, 2016 is hereby vacated and will be rescheduled.

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[4] *See* United States v. Skorniak, 59 F.3d 750, 755 (8th Cir. 1995) ("witnesses are presumed competent to testify"); United States v. Devin, 918 F.2d 280, 291 (1st Cir. 1990); *See* United States v. Blankenship, 923 F.2d 1110, 1116-117 (5th Cir. 1991) ("the presumption is that every person is competent").

[5] Exhibit 1 is a Medical Summary for Linda Carl from Dr. Padwick Gallen and Exhibit 2 is a Medical Certification from Dr. Bryan Isaac.