

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SPORT & WHEAT, CPA, PA,

Plaintiff,

v.

Case No. 3:20cv5425-TKW-HTC

SERVISFIRST BANK, INC., et al.,

Defendants.

ORDER

This matter is before the Court on several motions filed by the parties: (1) Defendant Synovus Bank's ("Synovus") motion to terminate deposition (ECF Doc. 52); (2) Plaintiff Sport & Wheat, CPA's ("S&W") motion to file text messages under seal (ECF Doc. 63); and Synovus's motion to file a reply to Plaintiff's response to the motion to terminate to address Plaintiff's request for fees (ECF Doc. 74).¹ The Court heard argument from the parties on July 9, 2020. Upon consideration of the parties' written submissions, the evidence presented, and the arguments of counsel, the Court finds the motion to terminate should be DENIED, the motion to file text messages under seal should be GRANTED, and the motion

¹ S&W's response to the motion to terminate can be found at ECF Doc. 73 and Synovus's response to the motion to seal can be found at ECF Doc. 72.

to file a reply should be DENIED. The undersigned further finds that neither party is entitled to fees under Federal Rule of Civil Procedure 37.

I. BACKGROUND

S&W files this action against Defendants for agent fees to which S&W alleges it is entitled under the Coronavirus Aid Relief and Economic Security Act (the “CARES Act”), Pub. L. No. 116-136, for assisting a borrower in obtaining a loan under the Paycheck Protection Program (“PPP”). Defendant Synovus disagrees with S&W’s interpretation of the CARES Act and further disputes that it worked with S&W to provide loans for borrowers. Synovus has filed a motion to dismiss this action, which is pending.

Shortly after the case was filed, and before written discovery was even issued to S&W, S&W sought to take a 30(b)(6) deposition of Synovus. Although Synovus’s counsel found this to be an odd request given the early stage of the litigation, Synovus, nonetheless, agreed to the deposition. Synovus’s counsel contends that this agreement was made only because S&W’s counsel agreed that he would provide the names of the borrower(s) at issue prior to the deposition. According to Synovus, this information was important in preparing its witness and a search of its email records showed no communications between S&W and Synovus regarding any borrower. Of course, S&W’s counsel disagrees that any such promises were made. Additionally, S&W argues that it had provided enough

information in the complaint from which Synovus could have easily identified the borrower(s) at issue.

Synovus's counsel made requests for the names of the borrower(s) on June 2, and possibly again on June 15. No names were provided. Nonetheless, Synovus proceeded with the deposition on June 18, 2020, as scheduled. Because of COVID-19 issues, the parties conducted the deposition via Zoom.² The deposition proceeded for approximately three (3) hours and was subsequently terminated by Synovus shortly after the parties returned from a lunch break and over the objection of S&W.

Synovus's counsel stated on the record that he was terminating the deposition under Rule 30(d) because it was being conducted in bad faith. Specifically, counsel stated that Synovus's counsel is entitled to see documents before they are put to the witness³, to have the witness consider the documents in context, and to have had the prior communications that S&W's counsel had promised. ECF Doc. 73-2 at 137. In response, S&W's counsel argued that under Rule 30(c)(2), if there is an objection to the evidence, the parties' conduct, the officers' qualifications, or the manner of taking the deposition, the objection should be noted on the record but the

² Although it appears that Synovus also takes issue with the use of Zoom to take the deposition, the undersigned does not find anything inherently improper about using video platforms such as Zoom to take depositions if all parties agree. The use of Zoom, particularly in light of COVID-19, helps move cases along and also reduces litigation costs.

³ At the July 9 hearing, Synovus's counsel acknowledged that S&W's failure to show documents to counsel *prior to* the documents being shown to the witness for questioning is not necessarily bad faith but is a matter of professional courtesy.

examination still proceeds. *Id.* S&W's counsel also objected to the termination because it was "cutting off" his ability to ask the witness questions not related to the exhibits and on other topics. ECF Doc. 73-2 at 138. Nonetheless, the witness and his counsel left the deposition.

II. DISCUSSION

Two (2) business days after terminating the deposition, Defendant filed a motion to terminate under Rule 30(d)(3). The bases set forth in the motion are the same as those stated on the record, namely, that (1) S&W failed to identify the borrower(s) for whom S&W claimed to have acted as an "agent"; (2) S&W's counsel failed to provide any communications it had with Synovus prior to the deposition; and (3) S&W's counsel sought to interrogate the witness with redacted documents and refused to provide the witness and Synovus's counsel the complete, unredacted documents.

As an initial matter, the undersigned finds that bases one and two are insufficient reasons to terminate a deposition. As stated above, S&W denies that it made any agreement with Synovus to identify the borrower(s) at issue or to produce documents prior to the deposition. Regardless, Synovus was well aware as the deposition approached that this information was not forthcoming. Thus, Synovus could have filed a motion for protective order rather than proceed with the deposition. Synovus, having decided to proceed with the deposition despite not

being provided the information it thought should have been forthcoming, and which it thought was necessary to adequately prepare its witness, cannot complain about that decision after the fact.

Thus, the undersigned will focus on basis number three – the redaction of text messages used to question the witness during the deposition and the refusal of S&W’s counsel to provide unredacted documents to either Synovus’s counsel or the witness during questioning.

A. Motion To Terminate

Under FRCP 30(d)(3)(A), “[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party . . . If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.” Fed. R. Civ. P. 30(d)(3)(A); *Rutherford v. PaloVerde Health Care Dist.*, 2014 WL 12637191, at *2 (C.D. Cal. Oct. 28, 2014) (noting that “parties may halt the depositions and call the magistrate judge for further guidance”). The Advisory Committee Notes to Rule 30 state that both pertinent sections to this case, (b) and (d), were introduced “as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.” Fed. R. Civ. P. 30.

During the deposition, S&W's counsel questioned Synovus's witness about screen prints of text messages that included redactions. The text messages were obtained from the cellphone of S&W's principle, Jill Sport, and were text messages between Ms. Sport and Synovus employee, Anna Weaver. The text messages had not been produced to Synovus in either redacted form or unredacted form prior to the deposition. Additionally, during the deposition, despite requests from Synovus's counsel for S&W's counsel to provide an unredacted copy of the messages to the witness and to Synovus's counsel, S&W's counsel refused to do so. Although Synovus's counsel allowed questioning on some of these text messages, Synovus's counsel terminated the deposition when it appeared that S&W's counsel was about to go into a second set of text messages involving Sport and another Synovus employee, Larry Strain.

S&W explains in its opposition to the motion to terminate that the redactions were merely to "focus" the witness on specific texts that S&W's counsel was interested in asking about; to remove, in some cases, irrelevant chit chat between Ms. Sport and Ms. Weaver; to remove client information under Fla. Stat. 95.5055 protecting communications between an accountant and client; and to remove private medical information relating to third parties. During the hearing, S&W's counsel added a new twist to their argument, explaining that each text, and not the screen print of the text conversations, was a document on its own and, thus, the

redactions were not really redactions, but instead were just documents that were removed by S&W's counsel from a series or set of documents. In other words, according to S&W's counsel, the redacted texts were the equivalent of having 10 photographs of an incident but only showing the witness 5 of those photographs during a deposition.

At the Court's instruction, after S&W filed a motion to seal the entire set of text messages in S&W's counsel's possession, S&W submitted a complete unredacted set of the Weaver and Strain text messages to the undersigned for *in camera* review.⁴ Upon reviewing the portions of the text messages that were redacted, the redactions are not as innocuous as S&W represents. The redactions include information that could be relevant to Synovus and to the witness's understanding of the context of the communications, including showing that the communications between Weaver and Sport could be interpreted as communications between two friends about a mutual matter of interest; that Weaver was, in several instances, the one helping Sport; and that Sport specifically asked Weaver not to follow up on a question about fees.

⁴ S&W's motion to seal the unredacted text messages was initially opposed by Synovus, primarily because it still had not been provided or seen a copy of the unredacted messages. At the Court's request, after the July 9 hearing, the parties discussed the motion to seal and were able to reach an agreement, which will be reflected in this order. In agreeing to have the text messages filed under seal, Synovus expressly reserves its right to argue that any accountant-client privilege has previously been waived.

Also, several of the redactions, which were supposedly to protect a client, identified no client by name at all or included redactions of more than just the client name. Moreover, the entirety of the Weaver text messages consisted of 18 pages of screen prints and, thus, there was no need to redact any information to “focus” the witness. This was not a situation where the witness was being asked about one paragraph in a 30-page contact.

While S&W argues that Synovus was aware that bank employees used their personal cell phones to communicate with borrowers and should have done more to obtain these messages from its own employees, that argument rings hollow. “Discovery is not a game of ‘blind man's bluff,’ *Dollar v. Long Mfg. N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977) (citation omitted), or ‘hide the ball,’ *Hosea v. Langley*, 2006 WL 314454, *5 (S.D. Ala.) (unpublished).” *Parrish v. Freightliner, LLC*, 471 F. Supp. 2d 1262, 1270 (M.D. Fla. 2006). At the end of the day, Synovus’s request to see unredacted messages, at least during the questioning, was not unreasonable. Indeed, counsel had no good answer at the hearing as to why unredacted versions were not provided to Synovus’s counsel or the witness at the deposition once Synovus objected to the use of redacted documents.

The undersigned also disagrees with S&W’s attempt to characterize each message within the conversation contained on a screen print as a separate document. Rather than analogizing text messages to a series of back and forth

letters, an exchange of text messages is more akin to a transcript of a telephone conversation. Just as redacting portions of a telephone conversation would make the transcript incomplete and would be improper, there was no good reason to redact portions of the text messages shown to the witness. See Fed. R. Evid. 106 (“[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any part – or any other writing or recorded statement – that in fairness ought to be considered at the same time”); *U.S. v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977) (the purpose of 106 is to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading); Fed. R. Civ. P. 30(c) (“[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615”).

Having determined that S&W’s counsel should not have used redacted screen prints of text messages to question Synovus’s witness, the Court must now determine whether such conduct rises to the level of “bad faith” and “extraordinary circumstances” that warrant the granting of a motion to terminate and the entry of a protective order under Rule 26. As stated above, “Rule 30(d)[(3)] is a narrow procedure designed for extraordinary situations where an examination is being conducted in bad faith or in an unreasonable, annoying or oppressive manner.”

Buckley Towers Condo. Inc., 2008 WL 2645680, at *9 (quoting *SEC v. Oakland Corp.*, 141 F.Supp.2d 435 (S.D.N.Y. 2001)). “Rule 30(d)[(3)] is not a backdoor mechanism for counsel to instruct witnesses not to answer certain questions. Nor is it designed in any way to preclude a witness from answering questions based on relevance.” *Id.* at *8. Similarly, a protective order under Rule 26 is used to prevent a party from “annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c).

Case law involving Rule 30(d)(3) is limited. Indeed, as Synovus’s counsel recognized, in his over 40 years of practice, he has not ever terminated a deposition under Rule 30(d)(3). Typically, situations where Rule 30(d)(3) has been utilized involve improper questioning of a witness on matters aimed solely for purposes of harassing or on privileged matters. *See, e.g., CSX Transp. Inc. v. Gilkison*, 2009 WL 2985594, at *2 (N.D. W. Va. Sept. 15, 2009) (finding proper use of Rule 30(d)(3) where counsel instructed witness not to answer questions believed to be asked in bad faith and to unreasonably annoy, embarrass, and oppress, stated on the record that he intended to seek an order to terminate, and did seek that order); *Rottlund Co., Inc. v. Pinnacle Corp.*, 222 F.R.D. 362, 381 (D. Minn. 2004) (stating that where an opposing attorney wanted to be the first to tell the deponent he was going to lose his job was “the epitome of bad faith” harassment. “The line of

questioning had nothing to do with the lawsuit and was intended for no reason other than to inflict emotional angst”).⁵

The undersigned finds that the conduct at issue here, namely, the refusal to provide Synovus’s counsel or the witness with unredacted documents, while highly objectionable, is not the type of extraordinary circumstance warranting the entry of an order to terminate or protective order. Instead, the undersigned agrees with S&W that the correct procedure to be employed is under 30(c)(2). Namely, Synovus’s objection should have been made on the record and, at the very least, the parties should have proceeded with the deposition on matters unrelated to the exhibits and on the other topics on which the witness had been designated to testify. “While the Court is mindful of Defendant’s predicament at [the 30(b)(6)] deposition, none of the circumstances that permit an attorney to instruct his or her client not to answer were present here. Defendant’s counsel should have therefore noted his objection on the record, and allowed [the witness] to answer these questions.” *Siegmund v. Xuelian Bian*, 2018 WL 4293148, at *1 (S.D. Fla. Sept. 6, 2018). Furthermore, allowing a party to unilaterally terminate a deposition mid-

⁵ See also, *O’Boyle v. Sweetapple*, 2016 WL 9559956, at *3 (S.D. Fla. Jul. 6, 2016) (decision to terminate deposition was proper where plaintiff refused to state how much longer deposition would last); but compare, *Graves v. Standard Ins. Co.*, 2016 WL 3512032, at *6 (W.D. Ky. Jun. 16, 2016) (failure to notice deposition as one being conducted by remote means was not automatic basis for entry of protective order).

stream based on an objection regarding documents could lead to an abuse of Rule 30(d)(3).

The undersigned, therefore, declines to enter a protective order or enter an order terminating Synovus's 30(b)(6) deposition. The deposition should be continued, once the stay is lifted, should S&W want to continue the deposition. However, because the issue is now before the Court, the undersigned cautions S&W against deposing the 30(b)(6) witness (or any witness in this matter) about text messages or documents that have been improperly redacted or that are incomplete. *See id.* (requiring party to provide documents to counsel translated from Mandarin to English prior to deposition because "Defendant's counsel, who does not speak Mandarin, cannot be expected to meaningfully participate in the deposition without a certified translation of the documents on which Plaintiff will rely"). To the extent that any expected text messages or other documents contain privileged or confidential information, which require redaction, the parties should seek the entry of a protective order in advance of the deposition. Similarly, Synovus should consider whether it is ready and fully prepared to proceed with a deposition before agreeing to proceed. It is not always better to ask for forgiveness later.

B. Request For Fees

S&W has moved for fees under Rule 37, arguing that the motion to terminate was unnecessary as S&W advised Synovus that it had not yet reached a decision as

to whether it would seek to continue the deposition. S&W also contends that Synovus failed to comply with the meet and confer requirements in Local Rule 7.1(b) prior to filing the motion. Synovus filed a motion seeking leave to file a reply to the request for fees. However, because the undersigned is denying fees, no such reply is necessary.

The undersigned agrees with the argument made at the hearing by Synovus's counsel that Synovus met the meet and confer requirements by attempting, unsuccessfully, to work the matter out at the deposition. Indeed, at least one court has held that a motion to terminate must be filed immediately after the deposition is terminated. *See In re Omeprazole Patent Litig.*, 227 F.R.D. 227, 230 (S.D.N.Y. 2005) ("if the plaintiff's attorney believed that the examination was being conducted in bad faith ... or that the deponents were being needlessly annoyed, embarrassed, or oppressed, he should have halted the examination and applied immediately to the ex parte judge for a ruling on the questions, or for a protecting order, pursuant to Rule 30(d)"). Thus, had the motion not been filed after the deposition, Synovus could have risked an argument that any later motion was untimely. *See Thomas v. Rockin D Marine Serv., LLC*, 2013 WL 2459217, at *3 (E.D. La. Jun. 6, 2013) (finding passage of over a month "clearly in excess of any time 'necessary'" for a written motion to be presented under Rule 30(d)(3)). Moreover, S&W's subsequent email attempting to resolve the matter after the

deposition, while punting the issue down the road, did not necessarily moot the issue as it included a reference to a potential motion to compel. ECF Doc. 52-6 at 3; *see Buckley*, 2008 WL 2645680, at *9 (noting improper reliance on predecessor rule, Rule 30(d)(4), where “[n]o motion was filed that day, the day after, or even after several days passed. The issue was raised by Plaintiff’s motion to compel. Indeed no motion for protective order was ever filed”).

Additionally, the undersigned notes that a Rule 30(d)(3) motion to terminate is subject to fees to the prevailing party under Rule 37(a)(5). When the discovery motion is denied, such as in this case, the rule provides that the Court, “must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney’s fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(B). Similarly, Rule 30(d)(2) also allows the court to “impose an appropriate sanction--including the reasonable expenses and attorney’s fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.” Fed. R. Civ. P. 30(d)(2).

But, under Rule 37(a)(5)(B) and 30(d)(2), whether fees should be granted is dependent on whether the position of the non-prevailing party was substantially

justified. “Substantially justified means that reasonable people could differ as to the appropriateness of the contested action.” *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 853 (11th Cir. 1997) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The undersigned will save the parties the burden of filing any additional motions for fees on this issue as the undersigned finds that there was fault here by both parties and, thus, while the undersigned is denying the motion to terminate, the undersigned also finds that it was substantially justified.

As explained by Synovus’s counsel, he felt at the time of the deposition that he had no other choice but to terminate it given his frustration over the redacted text messages, which was only further enhanced by what counsel deemed as a lack of cooperation prior to the deposition taking place. Counsel acknowledges that in hindsight, maybe he should never have agreed to proceed with the deposition at all. Similarly, it appears to the undersigned that S&W’s counsel fully believed that he had every right to only show the witness the text messages he felt were relevant and pertinent to his questioning and did not see anything improper in the redactions that were made. Indeed, while the undersigned, upon review, disagrees that the redactions were proper or, for that matter, necessary, counsel clearly believed in his position or he would not have insisted on providing all the text messages to the Court for review. Like Synovus’s counsel, S&W’s counsel also acknowledged that,

in hindsight, the unredacted documents should have been provided. But, in the words of the late Pat Dye, hindsight is only 50/50.

III. CONCLUSION

A cursory review of the correspondence between counsel in this case shows that the parties have clearly started off on the wrong foot in this case and, for whatever reason, there is a lack of trust and collegiality. As Judge Wetherell noted in his order staying discovery, the parties “disagree on nearly everything” other than that the case is unlikely to settle promptly. ECF Doc. 64 at 1. As it applies specifically to discovery, “[w]hile the court is fully cognizant that some lawyers believe that they can win a case in discovery by ‘discovery gamesmanship,’ ... the parties are warned that the time for ‘discovery gamesmanship’ ends now.” *Wright v. Kimberly-Clark Glob. Sales, LLC*, 2010 WL 11493791, at *1 (N.D. Ga. May 24, 2010). The parties and their counsel should consider, as suggested by S&W’s counsel *after* the deposition had ended, pushing the “reset” button, not only as to the deposition, but as to their interactions in this case.

Accordingly, it is ORDERED that:

1. Synovus’s motion to terminate deposition at ECF Doc. 52 is DENIED.
2. S&W’s motion to seal at ECF Doc. 63 is GRANTED, to the extent that S&W is directed to file under seal the copies of screenshots from Jill Sport’s phone that Plaintiff’s counsel submitted to the Court for in camera review on Wednesday,

July 8, 2020 (“the Screenshots”). In the event that the Court lifts the stay of discovery in the above-captioned case, any party may move to lift this Seal for good cause shown. The Seal shall not limit the ability of Plaintiff or Synovus from disclosing the Screenshots to their respective officers, employees, or counsel. The Seal applies only to the Screenshots; to the extent copies of the text messages shown in the Screenshots are available from sources other than the Screenshots, the Seal does not apply.

3. Synovus’s motion for leave to file a reply brief in support of its motion to terminate at ECF Doc. 74 is DENIED as moot.

4. Each party is to bear its own fees and costs associated with the filings of the subject motions and responses.

DONE AND ORDERED this 14th day of July, 2020.

s/ Hope Thai Cannon

HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE