(2004)

ANN STAUBER and the NEW YORK CIVIL LIBERTIES UNION, Plaintiffs,
v.
THE CITY OF NEW YORK, et al., Defendants.
JEREMY CONRAD, Plaintiff,
v.
THE CITY OF NEW YORK, et al., Defendants.
JEREMIAH GUTMAN and the NEW YORK CIVIL LIBERTIES UNION, Plaintiffs,
v.
THE CITY OF NEW YORK, et al., Defendants.

03 Civ. 9162 (RWS), 03 Civ. 9163 (RWS), 03 Civ. 9164 (RWS).

United States District Court, S.D. New York.

May 7, 2004.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, Attorneys for Plaintiffs, New York, NY, By: CHRISTOPHER DUNN, ESQ., ARTHUR EISENBERG, ESQ., Of Counsel.

HONORABLE MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, Attorneys for Defendants, New York, NY, By: TERRI FEINSTEIN SASANOW, ESQ., Of Counsel.

OPINION

ROBERT SWEET, Senior District Judge.

Following the service of a Notice of Deposition in the above-captioned cases by the defendants seeking to take the deposition of plaintiffs' counsel, Christopher T. Dunn ("Dunn"), plaintiffs have moved for a protective order barring the defendants from taking Dunn's deposition. For the following reasons, the motion is granted.

Prior Proceedings

Plaintiffs sent a letter to the court, dated April 27, 2004, raising the Dunn deposition issue. The parties discussed the issue briefly before the Court on April 28, 2004, at which time it was held that Dunn could not be deposed as a representative of plaintiff New York Civil

Liberties Union ("NYCLU"). Following the submission of briefs, oral argument was heard on the motion on May 5, 2004, at which time the motion was deemed fully submitted.

Background

Plaintiffs have sought injunctive relief challenging the practices of the New York City Police Department ("NYPD") in managing crowds at organized demonstrations. In particular, plaintiffs challenge what they allege are: 1) unreasonable restrictions on public access to demonstrations; 2) unreasonable use of "pens" (constructed of interlocking metal barricades) to confine people seeking to participate in demonstrations; 3) unreasonable and dangerous use of police horses to disperse groups of peaceful demonstrators; and 4) suspicionless searches of people seeking to attend demonstrations. Plaintiffs also challenge certain arrest-processing practices and have individual damage claims, but those claims have been deferred pending resolution of the injunctive claims.

Dunn was present at the large anti-war demonstration in Manhattan on February 15, 2003 in his capacity as counsel for United for Peace and Justice ("UPJ"), the organizer of the event. UPJ is not a party to the instant litigation, although the defendants have sought to depose the leader of that organization.

Defendants have sought to depose Dunn because: 1) he is "the only witness to all six rallies, marches and demonstrations identified by plaintiffs as relevant to their claims for injunctive relief in these actions, and therefore his deposition is the most efficient and expeditious way for defendants to take discovery as to plaintiffs' position on those events"; and 2) "Dunn's presence on Third Avenue on the afternoon of February 15, 2003 and unawareness of any alleged police misconduct referred to in the complaint until after the demonstration was over is highly relevant to the City's defense. . ." Defendants' Mem. at 2. Defendants have also indicated that they would like to question Dunn about conversations he had with high-level NYPD officials on that day.

Discussion

The Federal Rules of Civil Procedure provide that parties may obtain discovery, including by oral depositions, "regarding any matter, not privileged, that is relevant to the claim or defense of any party" and that "[r]elevant information need not be admissible." Fed. R. Civ. P. 26(b)(1)). However, a district court may limit

> [t]he frequency or extent of the use of discovery methods otherwise permitted under [the federal] rules ... if it determines that: (i) the discovery sought is

> unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Rule 26(b)(2). "The burden of persuasion in a motion . . . for a protective order is borne by the movant." Jones v. Hirschfeld, 219 F.R.D. 71, 74 (S.D.N.Y. 2003) (citing Dove v. Atl. Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992)).

In this Circuit, "depositions of opposing counsel are disfavored." United States v. Yonkers Bd of Educ., 946 F.2d 180, 185 (2d Cir. 1991). The rationale behind the presumption against such discovery is that "even a deposition of counsel limited to relevant and nonprivileged information risks disrupting the attorney-client relationship and impeding the litigation." Alcon Labs. v. Pharmacia Corp., 225 F. Supp. 2d 340, 344 (S.D.N.Y. 2002) (quoting Madanes v. Madanes, 199 F.R.D. 135, 151 (S.D.N.Y. 2001)). The Second Circuit recently published a discussion of the standards to be used in determining whether a deposition of opposing counsel is appropriate. See In re Subpoena Issued to Dennis Friedman, 350 F.3d 65 (2d Cir. 2003). However, because the attorney who was the subject of the subpoena agreed to be deposed before the opinion was released, the appeal was dismissed as moot, and the discussion on the merits was dicta. Id. at 72 n.4. The Second Circuit nonetheless used the occasion to point out that it has never adopted the doctrine set out in Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), which requires that a party "seeking to depose `opposing trial counsel' must show that `no other means exist to obtain the information [sought] than to depose opposing counsel.'" In re Subpoena Issued to Dennis Friedman, 350 F.3d at 68 (quoting Shelton, 805 F.2d at 1327). Describing the Shelton rule as "rigid," id. at 67, the Second Circuit instead urged "a flexible approach to lawyer depositions" which would take into account considerations such as

> the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted.

Id. at 72. These factors may also be used to determine "whether interrogatories should be used at least initially and sometimes in lieu of a deposition." Id.

The plaintiffs argue that there is no need to depose Dunn because: 1) he has no recollection of the particulars of any statements made to NYPD officials on February 15, 2003; 2) defendants' goal of eliciting testimony as to plaintiffs' view of police practices is more appropriately effected by deposing the plaintiffs; and 3) Dunn was never on Third Avenue on February 15, 2003.

The defendants have not shown a need to depose Dunn in order to determine the plaintiffs' position on the demonstrations that are the subject of this litigation. The depositions of plaintiffs Ann Stauber and Jeremy Conrad that have already taken place are sufficient to determine the plaintiffs' view of the matters at issue in this litigation.[1] It has already been held that Dunn is not to be deposed as a representative of the plaintiff NYCLU. Further, the affirmation submitted by Dunn stating that he was not present on Third Avenue on February 15, 2003 is sufficient to explain Dunn's "unawareness of any alleged police misconduct .. . until after the demonstration was over." Def.'s Mem. at 2.

The defendants argue that Dunn's assertion that he has no recollection of his conversations with high-level NYPD officials on February 15, 2003 is not sufficient to shield him from being deposed because defendants are entitled to attempt to refresh his recollection at a deposition. In Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp., 125 F.R.D. 578, 594 (N.D.N.Y. 1989), the court recognized the holdings of several district courts that "at a minimum, the attorney must submit to a deposition so that his lack of knowledge may be tested. . ."; see also Alcon Labs, 225 F. Supp. 2d at 344. It is true that a deposition that would otherwise be appropriate cannot be avoided by preemptively protesting a lack of knowledge. However, under the circumstances presented here, in which the NYPD officials themselves may be questioned as to the nature of their conversations with Dunn, combined with the tenuous relationship of any statements Dunn may have made to NYPD officials to either the plaintiffs' claims or the City's defenses, the deposition of Dunn for the purposes stated by the defendants is inappropriate. As plaintiffs have not requested a protective order preventing Dunn from responding to written interrogatories, that issue will not be addressed.

Conclusion

For the foregoing reasons, plaintiffs' motion for a protective order barring the defendants from taking Dunn's depositions is granted.

It is so ordered.

[1] Plaintiff Jeremiah Gutman died on February 25, 2004, apparently before being deposed.