

VERMONT SUPERIOR COURT
CALEDONIA UNIT

CIVIL DIVISION
DOCKET NO. 187-7-11 CACV

KATHERINE BAKER and
MING-LIEN LINSLEY
Plaintiffs

v.

WILDFLOWER INN a/k/a DOR ASSOCIATES LLP
Defendant

Defendant's Emergency Motion for Protective Order

NOW COMES the Defendant and objects to the scheduling of a deposition prior to the currently scheduled Status Conference and pursuant to Rule 26(c) of the Vermont Rules of Civil Procedure requests the assistance of the Court in scheduling same, if it is to be held at all, and in support thereof states as follows:

Preliminary:

1. Eleven days after this Court had scheduled a Status Conference, the Plaintiffs, through Counsel, have scheduled the deposition of a non-party witness for February 1, 2012 ("Deposition"), just six days before the Status Conference.

Background:

2. On November 3, 2011, Defendant offered to settle this matter with Plaintiffs, providing all relief requested in their Complaint, which Plaintiffs subsequently amended.
3. Plaintiffs refused to accept Defendant's offer to settle, instead amending their Complaint and embarking on a course of action that demands more relief than that to which they are entitled by law.
4. Defendant has done everything it can from the beginning to contain costs for all parties involved.
5. On December 13, 2011, Defendant filed a motion which included a request for a Status Conference in order that the parties could have the assistance of Court to settle this matter without protracted and unnecessary litigation.
6. The Court granted that motion on January 6, 2012 and scheduled a Status Conference for February 7, 2012 at 11:45 AM.
7. On January 17, 2012, in apparent retaliation to the Defendant for not submitting to new demands for relief for which the Plaintiffs are not entitled, the Plaintiff unilaterally scheduled the deposition of a non-party witness for February 1, 2012 at 1:00 PM.

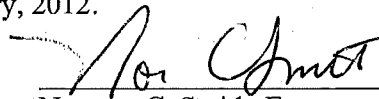
8. Counsel for the Plaintiffs never contacted Counsel for the Defendant at any time prior to scheduling same.
9. Counsel for the Plaintiffs never attempted to work out the scheduling of the Deposition at a mutually agreeable time.
10. Instead, Counsel for the Plaintiffs simply sent a copy of the Subpoena, issued under Rule 45 of the Vermont Rules of Civil Procedure, with a cover letter explaining to Counsel for the Defendant that he had already scheduled the Deposition.
11. The letter only vaguely references that "The witness was able to commit only to Wednesday, February 1st" but offers no purported reason why the Deposition cannot wait until after the Status Conference. In fact, the letter does not even purport to explain whether or not Counsel for the Plaintiffs explored with the witness deposition dates after the Status Conference. See the attached letter.
12. In response, and in accordance with the terms of Rules 26, Counsel for the Defendant promptly emailed Counsel for the Plaintiffs and asked that the Deposition be scheduled after the Status Conference.
13. The response was a refusal based in large part upon a self-proclaimed need for discovery in order to "aid the court in deciding the pending motions." Such a rationale is self-serving and circular. Another basis for the refusal was that Plaintiffs claim the witness is a key witness, a point which would only be true if there were a need to litigate. Thus, this rationale is also self-serving and circular.
14. No exigency is known to exist that would demand that the Deposition take place before the Status Conference.
15. There is no advantage to the taking of the Deposition before the Status Conference that is not strongly outweighed by the prejudice to the increased costs of all parties involved, particularly given that the purpose of the Status Conference is to discuss with the court settlement of the matter while avoiding such unnecessary costs.
16. There is no justifiable need to run up anyone's costs before the Status Conference, at which Defendant hopes to accomplish settlement. Viewed in its most favorable light, Plaintiffs' insistence on holding the deposition is unjustified; in its worse light, their insistence might be viewed as an effort to punitively increase costs and attorney's fees to Defendant in a case where Defendant has offered all the relief sought in the original Complaint.
17. Defendant has not withdrawn their offer to settle and reissued their offer under Rule 68.
18. Defendants wish the Court to know that all efforts were made to resolve this question without the Court's intervention. When we learned that counsel for plaintiffs dispensed with the customary practice of working with opposing counsel for setting a mutually

convenient deposition date, defendants promptly initiated contact with counsel in an effort to reschedule same. Plaintiff's unwillingness to do so leaves defendants in the untenable position of not participating in the deposition, as well as possible exposure to extra attorney's fees and costs in an action in which defendants have offered all relief sought by the plaintiffs in their original complaint. The zealous representation of our clients leaves us no alternative but to seek the court's assistance in this and further discovery reasonably anticipated based on the plaintiffs' methodology.

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

- A. Issue an immediate order pursuant to Rule 26(c)(1 and 2) that the Deposition shall not be held until after the Status Conference currently scheduled for February 7, 2012 and consistent with further order of the Court to be made at that time.
- B. Issue any other order related to this matter that it deems just and equitable.

Dated at Essex Junction, Vermont this 26th day of January, 2012.



Norman C. Smith, Esq.
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CERTIFICATION

I hereby certify that, consistent with Rule 26(h) and Rule 11, Co-Counsel for the Defendant, Attorney John Anthony Simmons, Sr., on January 23rd, 2012, has conferred with opposing counsel about the discovery issues in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution, and that he has attempted to confer with Plaintiffs' Counsel in an effort in good faith to resolve by agreement the issues raised by this motion without the intervention of the court, and has been unable to reach such an agreement.