STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	COURT OF COMMON PLEAS CASE NO. 16-CP-18-1001
TAMMY C. RICHARDSON, PLAINTIFF, V. HALCYON REAL ESTATE SERVICES, LLC AND MCCABE, TROTTER & BEVERLY, P.C., DEFENDANTS.	**ORDER** GRANTING PLAINTIFF'S MOTION FOR SANCTIONS FOR DEPOSITION MISCONDUCT AND DENYING DEFENDANT'S MOTIONS FOR PROTECTION (SELF AND GATLING)

On March 4, 2019, multiple motions came before the Court for a hearing, three of which concern conduct that occurred during two depositions.[1] Counsel for the parties were present at the hearing. Defendant McCabe Trotter & Beverly P.C. ("MTB") filed two motions seeking protection after defense counsel instructed the witnesses not to answer questions during their depositions: (1) Motion for Protective Order (Deposition of Haylen Gatling) filed January 21, 2019; and (2) Motion for Protective Order (Deposition of Sheri Self) filed January 31, 2019. Plaintiff filed a Motion and Memorandum in Support of Sanctions on February 7, 2019 concerning the conduct of MTB's counsel during those same depositions.

After carefully listening to the oral arguments of counsel, thoroughly reading all of the filings, including the relevant deposition transcripts and testimony cited, and after due consideration, the Court grants Plaintiff's Motion for Sanctions because of the conduct shown and the reasons stated in Plaintiff's Memorandum. This Court grants the relief sought and listed on page three of Plaintiff's Memorandum as explained herein and denies MTB's Motions for

[1] The other motions have been resolved by separate Order filed March 21, 2019.

Protection (Self and Gatling). In addition, attorney's fees and costs incurred by Plaintiff for the prior depositions (Self and Gatling) and the subsequent depositions to take place (Sheri Self, Haylen Gatling and Stephanie Trotter, Esq.) are awarded to Plaintiff. The Court's decision is based on its findings of fact and conclusions of law as follows:

I. PRESCRIBED CONDUCT DURING DEPOSITIONS.

The conduct of attorneys during the course of depositions is set forth in SCRCP, Rule 30, and particularly in *In the Matter of Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001).

The South Carolina deposition conduct rules boil down to "if you can't do it in front of a judge, you shouldn't do it in a deposition." The Supreme Court has warned lawyers their conduct in depositions can result in ethical violations and sanctions. *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001). South Carolina adopted deposition conduct rules derived from *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). Having adopted the *Hall* approach, our Court requires attorneys to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation. *In re Anonymous Member of S.C. Bar*, at 190, 16.

Prohibited conduct includes off-the record conferences, suggestive objections and interjections and unauthorized instructions not to answer. There are various additional contempt powers available to the trial court when counsel violates the Rules.

> In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. *Id.* Among the costs a

> judge may deem appropriate could be those incurred for future judicial monitoring of depositions or payment for the retaking of depositions. Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.

Id. at 194, 18. Attorneys who cross the line during a deposition, do not promote the "just, speedy, and inexpensive determination of every action." *Id.*

During a deposition, the only permissible discussion between counsel and a witness that may take place *if it does not involve deciding whether to assert privilege* is to discuss a previously undisclosed document. *In re Anonymous Member of S.C. Bar*, at 190-191, 16. (emphasis added).

The law is clear: Conferences called to assist a witness in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions. *In re Anonymous Member of S.C. Bar*, at 191, 17. If there is a permissible basis for meeting with the witness, "[b]efore beginning such a conference, the deponent's attorney should note for the record that a break is needed to discuss the possible assertion of a privilege or a newly produced document." *In re Anonymous Member of S.C. Bar*, at 191, 16. When there is an off-the-record conference, whether or not a privilege is asserted, deposing counsel may inquire on the record into the subject of the conference to determine if there has been any witness coaching. *In re Anonymous Member of S.C. Bar*, at 191, 16.

Further, an attorney cannot object to a question just because the attorney does not understand the question. *See Hall,* 150 F.R.D. at 530 n. 10 adopted and approved by *In re Anonymous Member of S.C. Bar*. It is improper for counsel to state for the record their interpretations of questions, since such interpretations are completely irrelevant and improperly suggestive to the deponent. *Id.* A

witness's attorney must also refrain from rephrasing questions for the witness. *In re Anonymous Member of S.C. Bar*, at 192, 17.

II. Improper Obstructive Behavior Occurred During the Depositions.

During the depositions of Haylen Gatling (Gatling) and Sheri Self (Self), MTB counsel repeatedly interrupted the flow of the deposition and stopped to engage in prohibited off-the-record discussions with the witnesses regarding previously produced documents. When the witness was presented with a previously produced document, MTB counsel would stop the deposition and take the witness outside the room to discuss the document off the record. Neither before leaving nor after returning did MTB counsel state a valid privilege was being asserted as to the document. There was no valid reason as to why the off-the-record conferences occurred. When the witness returned, Plaintiff's counsel, as is allowed, would inquire of the witness what transpired off the record. MTB's counsel would instruct the witness not to answer. During the Self deposition, MTB counsel stopped the deposition for off the record conferences approximately 15 times and instructed the witness not to answer questions approximately 24 times. An example of the improper conduct appears in the deposition of Self on page 194. (emphasis added)

BY MR. KAHN:
Q Do you see on the second page where your initials appear?
MR. COUNTRYMAN: Going to talk to her about this before she answers any questions on it. If you have anything else you want me to go over with her, I'm happy to do that since --
MR. KAHN: I don't think the rules require that. I think what you're doing is improper. So we can --
MR. COUNTRYMAN: That's fine. But I'm doing

16 it. So I'm telling that ahead of time. If you want me
17 to go over them with -- with her now, I'll do that. If
18 not, **then you can waste more time doing it over the**
19 **next 30 minutes. That's fine.**

An example of the effects of the improper off-the-record discussions and witness coaching involve the change in testimony of Gatling after meeting with defense counsel and Stephanie Trotter, Esq. (Trotter) of MTB who attended Gatling's deposition. Prior to an off the record meeting, as to the MTB collection process, Gatling testified she printed documents, including various parts of a form letter package and "would pull two of the pages, the notice of lien and the witness page" and put those in a box with others for Trotter to review. Dep. Gatling p. 175, 17-23; p. 176, 2-6. After improperly meeting with MTB counsel and Trotter to discuss documents, the witness returned and testified she had suddenly "misremembered" the way documents were put in the box for the MTB attorney Trotter to sign. Gatling Dep. pp. 199-200. The impropriety of the meetings was noted on the record. *See. e.g.* Gatling Dep. pp. 182-187. When Plaintiff's counsel asked what was discussed, the witness was improperly instructed not to answer by MTB counsel.

Other portions of the depositions in Plaintiff's Motion further illustrate improper conduct.

It is clear to the Court that MTB counsel repeatedly violated the standards for deposition conduct and engaged in prohibited conduct to further the goal of disrupting and impeding the discovery process in at least the following ways:

1. Repeatedly stopping the depositions to engage in off-the-record discussions that involved witness coaching;

2. Repeatedly stopping the depositions to discuss documents with the witnesses even though the documents had been previously identified or produced in discovery;

3. Failing to state a permissible reason for interrupting the depositions such as whether a privilege would be asserted for a particular document and the results of such discussion; and

4. Instructing the witnesses not to testify as to what was discussed during the prohibited off the record meetings.

These actions are prohibited and cannot be tolerated. Defense counsel's conduct frustrated the truth seeking function of the depositions and tainted the witnesses.

III. IMPROPER INSTRUCTION FOR DEPONENT TO LEAVE UNCONCLUDED DEPOSITION.

Another example of improper conduct involves MTB's counsel improperly ending the out of state deposition of Self, a former employee of MTB, for no legitimate reason. Plaintiff's counsel travelled to Macon, Georgia and was in the middle of questioning the witness about documents she created and MTB's collection process. MTB's counsel announced, "This deposition is over." Self Dep. p. 224. Plaintiff's counsel objected. MTB's counsel instructed the witness to leave. Self Dep. pp. 224-225. This conduct clearly interfered with the deposition and frustrated the truth seeking function of the discovery process. This behavior should not and will not be tolerated. Thus, MTB and its counsel will make Sheri Self available for the continuation of her deposition.

IV. IMPROPER CONDUCT CANNOT BE ALLOWED AND SANCTIONS ARE WARRANTED.

Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions. *In re Anonymous Member of S.C. Bar*, at 194, 18. Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery. *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions,* 57 Md. L. Rev. 273, 277 (1998). "Depositions are the factual battleground where the vast majority of litigation actually takes place." *Hall*, 150 F.R.D. at 531. Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. When attorneys

cross the line during a deposition, their actions do not promote the "just, speedy, and inexpensive determination of every action." *See* Rule 1, SCRCP and *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001).

It has been shown that MTB's counsel acted willfully and in bad faith. Their conduct is prejudicial to the Plaintiff as it would be to any other party in that it promotes witness coaching, the alteration of free and voluntary testimony and blocks the search for the truth via proper inquiry. Further prejudice has been shown in the form of expenditure of costs and wasted time of deposing counsel and the witnesses. There is a clear need to deter this conduct in the future and to protect against discovery abuse.

V. ORDERED RELIEF - SANCTIONS

Based on the determinations and findings herein, the Court orders the following relief:

1. The depositions of MTB employees Gatling and former employee Self are to be reconvened and continue so the depositions can be conducted and completed unimpeded. Further, the witnesses are to answer questions concerning the matters discussed during off the record conferences with MTB's counsel and Stephanie Trotter. MTB's counsel is not to instruct the witnesses not to respond to questions regarding the off the record conferences. MTB shall make the witnesses available at a time, place and date convenient to Plaintiff's counsel within 20 days of the date of this Order or at such other date, time and place as may be agreed upon by Plaintiff's counsel. MTB is required to pay the costs of these depositions to be taken.

2. Stephanie Trotter's deposition will be conducted and completed unimpeded. Further, she is to answer questions concerning discussions during the improper off the record conferences with MTB's counsel. The deposition will take place at a time, place and date convenient to Plaintiff's counsel within 20 days of the date of this Order or at such other date, time and place

as may be agreed upon by Plaintiff's counsel. MTB is required to pay the costs of this deposition.

3. MTB's counsel shall cease and desist from the prohibited behavior discussed herein.

4. MTB is to pay attorney's fees and costs of the depositions taken and to be taken as follows:

   a) As to the prior depositions of Gatling and Self, based on the times set forth in the filed depositions, the Court notes that Gatling's deposition took approximately 8 hours 25 minutes. Self's deposition took approximately 4 hours and 45 minutes. The record further reflects that both Mr. Kahn and Ms. Arnold attended and participated in those depositions. The total time of the depositions was approximately 13.20 hours.

   b) The Court has reviewed the affidavits of Plaintiff's counsel submitted concerning their qualifications, experience in litigation and in handling various legal matters. The Court finds that the nature, extent and difficulty of the legal services rendered in coordinating, preparing and taking the depositions in this class action matter warrant the amount of attorney's fees stated herein. The professional standing of counsel is known to the Court and reflected in the affidavits submitted. Both Mary Leigh Arnold and Justin S. Kahn have handled various kinds of complex civil litigation and appeals in state and federal courts for more than 25 years each. As to the contingency of compensation, in this dispute, the Court finds that the rate stated herein to take the depositions of these witnesses in the context of this class action lawsuit is proper. As to the fee charged in the locality for similar services, the Court is aware of and of the opinion that this hourly rate is in line for attorneys of similar background and experience. Last, the attorneys have obtained beneficial results by successfully arguing and prevailing on the motions before the Court. As to these depositions, the Court finds Plaintiff's counsel are entitled to be compensated at the reasonable hourly rate stated below.

   c) MTB is to pay Plaintiff's counsel at the rate of $ 250 per hour for a total of $ 6,600. This is calculated as follows: 13.20 hours x 2 attorneys x $ 250 per hour. These fees are to be paid to Plaintiff's counsel within fifteen (15) days of the filing of this Order (time spent in travel and preparation of those depositions is neither being requested nor awarded).

d) As to the depositions of Gatling, Self and Trotter to be reconvened pursuant to this Order, Plaintiff's counsel shall file with the Court within fourteen (14) days of the completion of those depositions an affidavit stating the total time expended for taking those depositions. Defendant shall then have fifteen (15) days after the filing of the affidavit to pay the total time of the depositions for each of Plaintiff's counsel at the rate per hour stated herein (again preparation and travel time for those depositions is neither being requested or awarded).

e) The Court has reviewed the affidavits of Plaintiff's counsel. It shows the costs of the depositions of Self and Gatling are $4,265.50. These costs are to be paid by MTB to Plaintiff's counsel within fifteen (15) days of the filing of this Order.

AND IT IS SO ORDERED!

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Maite Murphy
Judge, First Judicial Circuit

April ___, 2019

Dorchester Common Pleas

Case Caption: Tammy C Richardson , plaintiff, et al VS Halcyon Real Estate Services LLC , defendant, et al

Case Number: 2016CP1801001

Type: Order/Sanctions

So Ordered

s/ Maite Murphy 2166