

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

**PLAINTIFF'S MOTION TO COMPEL THE DEPOSITION OF DEFENDANT LILLIAN MILLS
AND FOR PAYMENT OF EXPENSES FOR HER NON-APPEARANCE**

RULE CV-7(G) STATEMENT

Plaintiff conferred with counsel for Defendants on January 26, 2024, and stated that Plaintiff would file this motion if Lilian Mills did not attend her deposition scheduled for January 29. Defendants indicated that Mills would not appear and that this motion would be opposed. Plaintiff also exchanged emails on this topic earlier that week.

INTRODUCTION

The University of Texas (UT) keeps trying to run out the clock, in order to block or delay Plaintiff from obtaining evidence proving that Jay Hartzell was involved in silencing Richard Lowery and related misconduct. UT latest stalling tactic was to have Defendant Lillian Mills no-show for her long-scheduled, properly noticed deposition on January 29. And UT will not agree to schedule Carlos Carvahlo's deposition until the second half of February. UT insists it will not provide any documents responsive to Plaintiff's fourth and fifth sets of requests for production unless this Court compels it to. Likewise, UT will not search for—let alone supply—the documents Kelly Kamm's subpoena demands. Apparently, UT thinks that until this Court rules on pending motions in mid-February, Defendants can operate as if discovery is stayed.

But this Court has not stayed discovery nor granted either of UT's pending motions for protective orders. And Fifth Circuit precedent makes clear that—unless a court has already *granted* a protective order—parties must comply with all discovery requests. Merely moving for an order does not excuse non-appearance.

This Court, therefore, should compel Defendant Mills to submit to a deposition between February 14 and 17 or within seven days of the Court granting this motion. Additionally, this Court should require UT to pay Plaintiff's reasonable expenses and attorneys' fees wasted on the January 29 deposition and on filing this motion.

FACTS AND BACKGROUND

The facts of this case are well known to the Court and will not be reproduced in full. *See, e.g.*, Dkt. 68 at 5-7; Dkt. 60 at 4-7. In the summer of 2022, Defendant Lillian Mills and other UT officers pressured and threatened Richard Lowery, to prevent him from publicly criticizing the university, its president Jay Hartzell, and UT leadership. Dkt. 1. Defendants sought to keep Lowery from exercising his First

Amendment rights by expressing opinions that they rejected or found inconvenient. Dkt. 83-4, 156:22-157:14; *see also* Dkt. 83-3. They may also have interpreted one of Lowery's articles as criticizing Jay Hartzell's alleged misuse of state resources to ensure his son received special treatment in admission to a UT graduate program. Dkt. 77-1, ¶¶ 12-19. Lowery published this article with Hartzell in mind. *Id.*, ¶ 14.

On December 4, 2023, the parties agreed to depose Defendant Lillian Mills on January 29, 2024—a date UT insisted upon and which was later than Plaintiff preferred. Dkt. 83-1, ¶ 4; Exs. A, B. Plaintiff scheduled this deposition primarily to seek evidence about Mills' efforts to silence Lowery in August 2022, such as her role at the August 12 meeting with Carlos Carvalho and her involvement in UT police's investigation of Lowery's tweets on August 24. *See* Dkt. 83-2, at 1. Because information about nepotism so far has focused on the actions of Jay Hartzell and Nancy Brazzil, not the actions of Lillian Mills, *see* Dkt. 77-1, Plaintiff did not expect to spend more than fifteen minutes of the deposition inquiring into the nepotism issue, *see* Dkt. 83-2 at 1. For comparison, only around eight minutes of the six-hour deposition of Ethan Burris—about 2% of the deposition—concerned the nepotism issue. *See* Dkt. 83-4, 245:1-250:12; *see also* Ex. C (Titman Dep. 88:2-92:8).

On January 22, 2024, UT's counsel emailed Plaintiff, unilaterally cancelling Mills's deposition and refusing to reschedule it until February 15 at the earliest. Dkt. 83-2 at 2. UT's stated reason for cancelling the deposition was to prevent Mills from answering questions about nepotism at UT. *Id.* Lowery's counsel responded that Plaintiff would not consent to cancelling the deposition but offered a compromise. *Id.* at 1. If Mills showed up for her long-scheduled deposition on January 29, Plaintiff would not ask questions about the nepotism issue until the very end of the deposition. *Id.* UT could then object and break off the deposition before any nepotism questions were answered. *Id.*; *cf.* FED. R. CIV. P. 30(d)(3)(A).

Subject to this Court's later rulings about pending motions, Plaintiff would then reschedule the last few minutes of the deposition to a later date. *See* Dkt. 83-2 at 1.

During a conference on Friday, January 26, counsel for UT reiterated their intention not to attend the deposition. Kolde Dec. ¶ 5. Later that day, after the close of business, UT moved for a protective order against "deposition questions, including the Mills deposition, to the Defendants on this topic," that "President Hartzell has ever sought favors for a family member or friend seeking admission to or employment with UT Austin." Dkt. 88 at 4. Lowery's main counsel flew to Austin and appeared at the deposition location, along with another of Lowery's counsel and a court reporter, on Monday, January 29. Kolde Dec. ¶ 6. When Mills did not appear, Plaintiff certified her non-attendance. *Id.* ¶ 7; Ex. D (6:5-17).

ARGUMENT

I. MILLS HAD A DUTY TO APPEAR AT HER DEPOSITION ABSENT AN ORDER EXCUSING HER ATTENDANCE

Defendant Mills was required to attend her deposition, even though UT had a motion for protective order pending. "A party cannot unilaterally cancel a properly noticed deposition." *Panzer v. Swiftships, LLC*, 318 F.R.D. 326, 328 (E.D. La. 2016). Once a deposition is properly noticed, "the party is obliged to appear until some order of the court excuses attendance," because "the mere act of filing a motion for a protective order does not relieve a party of the duty to appear." *Barnes v. Madison*, 79 F. App'x 691, 707 (5th Cir. 2003). A motion to quash or motion for a protective order "must be not only made but *granted* before the scheduled deposition to excuse compliance." *King v. Fid. Nat'l Bank*, 712 F.2d 188, 191 (5th Cir. 1983) (emphasis original); *see also Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) (stressing that the federal rules "place[] the burden on the proposed deponent to get an order,

not just to make a motion. . . . unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains.”) (quotation omitted).

Here, UT filed its motion for a protective order one business day before this deposition was to occur, after the close of business (and this, *53 days* after obtaining this deposition date at its request). Without waiting for this Court to rule or in any way act upon that motion, Defendant Mills refused to attend her deposition. But, as the Fifth Circuit held, a party “could hardly have expected in good faith to receive a court order excusing her attendance” when that party “did not file her motion for a protective order until . . . the Friday preceding her Monday morning deposition” when the party was aware of the deposition for over a month. *Barnes*, 79 F. App’x at 707.

Indeed, “such a last-minute filing” is a “tactic, dredged up from the cesspool of Rambo litigation, that cannot be countenanced,” because “the only reason to wait until the last minute before filing a motion for protective order such as this is to present an opponent with a *fait accompli*.” *Turner v. Nationstar Mortg. LLC*, No. 3:14-cv-1704-L-BN, 2015 U.S. Dist. LEXIS 183067, at *8 (N.D. Tex. May 14, 2015) (cleaned up) (emphasis original). UT knew since at least Sheridan Titman’s deposition on January 12 that Plaintiff intends to ask questions about Jay Hartzell’s alleged nepotism. *See* Dkt. 88 at 3. Defendants, thus, could have submitted their “eleventh-hour filing” weeks ago, and courts in the Fifth Circuit “will not grant relief on an expedited basis . . . for emergencies of the [party]’s own making.” *Talon Transaction Techs., Inc. v. StoneEagle Servs., Inc.*, No. 3:13-cv-902-P, 2014 U.S. Dist. LEXIS 167898, at *6 (N.D. Tex. Dec. 4, 2014) (citations omitted). Despite UT’s motion, Defendant Mills had a legal obligation to attend her deposition and violated her duty.

II. LOWERY IS ENTITLED TO HIS EXPENSES AND ATTORNEYS' FEES RELATED TO THE NON-APPEARANCE

The Federal Rules make it effectively a mandatory remedy that Defendants pay Lowery's reasonable fees and expenses for Mills's non-appearance. More severe sanctions, in comparison, are discretionary. Given the pattern of delaying tactics by UT, Lowery would be within his rights to seek further sanctions, but at this time, Lowery is seeking only expenses and fees. He may seek further sanctions if these abusive tactics continue.

According to Rule 37, courts “may, on motion, order sanctions if: a party or a party's officer, . . . fails, after being served with proper notice, to appear for that person's deposition.” FED. R. CIV. P. 37(d)(1)(a)(i). A “pending motion for a protective order” may excuse a non-appearing party from suffering the six types of discretionary sanctions under Rule 37(b)(2)(A)(i)-(vi). *See* FED. R. CIV. P. 37(d)(2). This rule, however, “does not automatically exempt a party from sanctions; rather, it expresses that at a minimum, a motion for a protective order must be pending if a party seeks to excuse its failure to appear.” *Knowlton v. City of Wauwatosa*, No. 20-CV-1660, 2021 U.S. Dist. LEXIS 157608, at *14 (E.D. Wis. Aug. 20, 2021); *see also MetroPCS v. Thomas*, 327 F.R.D. 600, 615 (N.D. Tex. 2018) (pending motion for a protective order “may only protect her from Rule 37(d)(1)(A) sanctions”).

But reasonable fees are a presumptive minimum consequence for a party's non-appearance: “Instead of or in addition to” the ordinary sanctions under Rule 37(b)(2)(A)(i)-(vi), “the court *must* require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” FED. R. CIV. P. 37(d)(3) (emphasis added).

The Fifth Circuit has repeatedly found that pending motions do not substantially justify non-appearance and has awarded expenses and fees as a result. *See, e.g., Barnes*, 79 F. App'x at 707 (affirming sanctions as motion for protective order filed three days before deposition did not substantially justify non-appearance); *King*, 712 F.2d at 192 (affirming sanctions as pending motion to quash did not substantially justify non-appearance). District courts, even outside the Fifth Circuit, agree. *See Batson v. Neal Spelce Assocs., Inc.*, 112 F.R.D. 632, 647 (W.D. Tex. 1986) (awarding fees as filing of a motion for protection does not dispense with duty to appear); *see also Knowlton*, 2021 U.S. Dist. LEXIS 157608, at *15, *18 (awarding expenses and fees for non-attendance despite pending motion); *Ross v. City of Memphis*, No. 02-2454 MI/An, 2005 U.S. Dist. LEXIS 63532, at *7 (W.D. Tenn. Jan. 13, 2005) (awarding expenses and fees as motion for protective order filed five days before deposition left too little time to be “good faith” excuse).

Here, UT moved for a protective order in the evening of Friday, January 26, although Mills' long-scheduled deposition was to occur on the morning of Monday, January 29. UT did not seek emergency relief from this Court. Nevertheless, Mills did not appear for her deposition—although this Court has not yet ruled and Lowery warned that he would file this motion. *See* Dkt. 83-2 at 1. UT could hardly have expected that its last-minute motion would receive a court order excusing Mills' attendance, *see Barnes*, 79 F. App'x at 707, so its motion does not justify Mills' non-appearance.

CONCLUSION

This Court should grant Lowery's motion to compel the Mills deposition to occur between Feb. 14 and 17 or within seven days of its ruling and should require that UT pay Plaintiff's reasonable expenses and attorneys' fees, caused by Mills' failure to attend her deposition.

Respectfully submitted,

Dated: January 30, 2024

s/Endel Kolde

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