

**IN THE CIRCUIT COURT FOR THE SIXTH CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

GMAC MORTGAGE, LLC
Plaintiff,

v.

Case No.: 07013084CI

DEBBIE VISICARO,
et al.
Defendants.

**HOMEOWNER’S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PROTECTIVE ORDER**

Defendants DEBBIE VISICARO and FRANK VISICARO (collectively, “Homeowner”), by and through undersigned counsel, submit this memorandum of law in opposition to Plaintiff’s Motion for Protective Order. The Court should deny the motion because:

- 1) Plaintiff has failed to meet their burden to show “good cause” to prevent Homeowner from taking the deposition of Beth Cerni, a witness with knowledge of the facts related to the alleged default and indebtedness in this foreclosure action;
- 2) Homeowner is entitled to take the deposition of any person with knowledge of the facts relating to this case, and Plaintiff specifically put Beth Cerni’s knowledge at issue in this case by submitting an affidavit from her purporting to have personal knowledge of facts relating to this case; and,
- 3) The Court, in this specific case, has already directed that the deposition of

Ms. Cerni take place to determine the truthfulness of the claims she swears to in her affidavit.

This Court should deny the motion, enter an order directing Plaintiff to produce the witness for deposition, and award Homeowner's expenses of opposing the motion pursuant to Rule 1.380 (a)(4), Fla. R. Civ. P.

FACTUAL BACKGROUND

Plaintiff brought his foreclosure action against Homeowner, alleging a default on a Note purportedly held by the Plaintiff. Plaintiff moved for final summary judgment on the foreclosure claim, and this Court originally granted that motion over Homeowner's objections that the affidavit was not legally sufficient to support entry of judgment. On rehearing, on April 7, 2010, this Court vacated the prior judgment based on the insufficiency of the affidavit.

Cerni's affidavit, among other thing, asserted her personal knowledge of facts relating to the alleged default in payment and Plaintiff's supposed status as a party entitled to enforce the Note. At hearing on Homeowner's motion for rehearing, this Court expressed concerns over the truthfulness of Cerni's affidavit, stating:

You know what I'd really like to see? I'd like to see in one of these cases where a defense lawyer cross-examines, takes a deposition of these people, and we can see whether they ought to be charged with perjury for all of these affidavits.

After that hearing, Homeowner contacted Plaintiff's counsel to arrange for deposition dates. Plaintiff's counsel responded:

We will be mailing out today a Renewed Motion for Summary

Judgment with an Affidavit of Amounts Due and Owing having been signed by Dave Cunningham of GMAC. The previous Motion for Summary Judgment, with an affidavit signed by Beth Cerni, has now been denied and is no longer a pending Motion. As stated, the Renewed Motion for Summary Judgment will not rely on any affidavit signed by Beth Cerni. Therefore, a deposition of Beth Cerni is not necessary and as such, we will be opposing the taking of her deposition.

Plaintiff's Motion for Protective Order followed.

ARGUMENT

I. LEGAL STANDARD

A. Protective orders are within the sound discretion of the Court.

Issuance of protective orders are governed by Rule 1.280 (c), Fla. R. Civ. P., which states in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires.

The issuance of protective orders under the rule is within the broad discretion of the trial court. *Waite v. Wellington Boats, Inc.*, 459 So.2d 425 (Fla. 1st DCA 1984); *Gross v. Security Trust Co.*, 453 So.2d 944 (Fla. 4th DCA 1984). The trial court may limit discovery only when the moving party has made an affirmative showing of good cause. *Deltona Corp. v. Bailey*, 336 So.2d 1163 (Fla.1976); *Travelers Indem. Co. v. Hill*, 388 So.2d 648 (Fla. 5th DCA 1980).

If the trial court denies a protective order, "the court may, on such terms and

conditions as are just, order that any party or person provide or permit discovery.” Rule 1.280 (c), Fla. R. Civ. P. Also, the rule states: “The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.” *Id.* That rule, in turn, states in pertinent part:

If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys fees....

Rule 1.380 (a)(4), Fla. R. Civ. P. The costs of opposing the motion, therefore, are awardable as part of the relief the Court should order.

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE GOOD CAUSE TO ENTER A PROTECTIVE ORDER.

Rule 1.280 (c) expressly requires that the moving party show “good cause” for the entry of a protective order. In order to show “good cause,” Plaintiff must raise something other than the unsworn assertions of counsel. *Urbanek v. Hopkins*, 993 So.2d 1110, 1113 (Fla. 4th DCA, 2008) (assertions of counsel do not provide “good cause” to compel examination). They have failed to do so, and failing a showing of good cause, the Defendants’ motion should be denied.

A. Plaintiff, having submitted Beth Cerni as a witness for the Plaintiff, may not now shield her from deposition.

Plaintiff argues that the deposition of Ms. Cerni is “not necessary” because they no longer intend to offer her as a witness. (Plaintiff’s Motion for Protective Order, ¶¶ 2-5) Plaintiff’s assertions are not “good cause” to prevent Homeowner from taking Cerni’s deposition, however, because her affidavit reveals that she is a person with knowledge of facts surrounding the transaction, and Homeowner

will likely offer her testimony in favor of the defense.

In other words, Ms. Cerni is now a defense witness.

Plaintiff's motion for protective order is, in effect, an objection as to relevance of her anticipated testimony. Such objection is clearly improper under the Rule, and does not establish "good cause" for a protective order to issue. Rule 1.280(c), Fla. R. Civ.P., lists the grounds for such an order: "annoyance, embarrassment, oppression, or undue burden or expense." Plaintiff has not raised any of these as grounds to prevent Homeowner from taking Cerni's deposition. All that is left, then, is relevance. But under the simple application of the rules, an objection to relevance is improper and does not constitute "good cause" to hide the affiant from a deposition:

Parties may obtain discovery regarding *any matter*, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

Rule 1.280 (b)(1), Fla.R.Civ.P. (emphasis added) *See also Beekie v. Morgan*, 751 So. 2d 694, 697 Fla. 5th DCA 2000)(protective order must be based upon "good cause," such as "annoyance, embarrassment, oppression or undue burden or expense;" mere inconvenience does not suffice.)

The failure to permit a deposition, or allow a party to answer questions during a deposition, has been held to be subject to certiorari relief. *Id*; citing *Medero v. Florida Power and Light Co.*, 658 So.2d 566, 567 (Fla. 3d DCA 1995). Plaintiff does not seek here to merely impose limits on a deposition, it seeks to prevent the deposition entirely. In order to obtain such an order, the Plaintiff is required to make a “strong showing” of good cause. *Bush v. Schiavo*, 866 So. 2d 136, 138 (Fla. 2d DCA, 2004) (quashing protective order preventing the taking of any depositions where party had failed to make a “strong showing” of good cause). Orders preventing the taking of depositions are disfavored in Florida courts. *Bush*, 866 So. 2d at 138; citing *Office of Att’y Gen. v. Millennium Communications & Fulfillment, Inc.*, 800 So.2d 255 (Fla. 3d DCA 2001); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So.2d 1022, 1024-25 (Fla. 1st DCA 1998); and *Brennan v. Bd. of Pub. Instruction*, 244 So.2d 463, 464 (Fla. 4th DCA 1971).

Plaintiff has failed to make a “strong showing” of good cause in this matter, and this Court should deny its motion for protective order.

B. Homeowner is entitled to take the deposition of Cerni where she has knowledge of facts that may assist the defense of this matter.

The substance of Cerni’s affidavit is already before the Court. In it, she testifies generally as to the relationship between the Plaintiff and Homeowner, the alleged indebtedness at issue in the case, and the evidentiary foundation for the admission of supposed business records relating to the alleged indebtedness.

Each of these issues present facts which, upon further examination, will almost certainly aid the Homeowner in their defense of this spurious claim, and in particular, support a complete equitable defense based on Plaintiff's fraud on the court. Such fraud defense was in effect, predicted by this Court when it used the word "perjury" to refer to the substance of the Cerni affidavit.

Because Cerni has knowledge of facts that are potentially helpful to the defense of this foreclosure action, Homeowner is entitled to take her deposition.

C. This Court has already directed the taking of affiant's deposition in this matter.

At hearing on Homeowner's Motion for Rehearing on the entry of Judgment, this Court directly stated that the deposition of the affiant, Beth Cerni, should go forward to determine whether her affidavit was truthful or would be grounds for a charge of perjury. Plaintiff has failed to show good cause to prevent the Court from having its way; indeed, the very fact that Plaintiff has attempted to block the deposition strongly suggests that an examination of Cerni under oath would reveal facts devastating to Plaintiff's interests. This Court should not only deny the motion for protective order; it should enter an order compelling the Plaintiff to produce Cerni for deposition in this matter.

D. Plaintiff has never previously objected to the venue of deposition prior to filing its Motion, and has therefore failed to comply with the "meet and confer" requirements governing discovery.

Plaintiff's last, desperate grasp at obtaining a protective order is the claim that taking Cerni's deposition in Pinellas County, where Plaintiff filed this action,

would be “unduly burdensome” because it would “require the expense of airfare.” Plaintiff has never raised this objection prior to filing its motion, and its claim for relief on that point is therefore frivolous. Had Plaintiff bothered to confer on the question of the location of the deposition, this matter likely would have resolved. No specific location for the deposition has yet been set; nor has Plaintiff proposed any other alternatives. Plaintiff’s motion should therefore be denied.

E. Plaintiff has provided no “good cause” to prevent the deposition from taking place in Pinellas County of anywhere else.

Furthermore, Plaintiff has failed to meet its burden to show “good cause” for a protective order as to the location of the deposition, where the only objection is some unsworn, unspecified amount of “airfare” that Plaintiff might have to incur. Plaintiff fails to state what the cost of such airfare might be, fails to provide any sworn evidence as to burden, yet expects this Court to exercise its discretion to limit the location of the deposition. Where Plaintiff fails to show good cause, such an exercise of discretion would be an abuse of discretion. *Bush, supra*.

Without having any sworn evidence as to what that “expense” might be, this Court does not have good cause, and cannot properly enter such an order.¹ Accordingly, the Court should deny Plaintiff’s motion as to this point.

F. Plaintiff must pay the reasonable expenses incurred by Homeowner in opposing this Motion.

Where a party seeks a protective order, and the court denies the motion, the

¹ Plaintiff has also failed to disclose to this Court that other factors – such as the comparative expense of court reporters in Pinellas County versus those in Plantation,

court “shall require the moving party to pay” the reasonable expenses incurred in opposing the motion, and such award may include attorney’s fees. Rule 1.280(c), *citing* Rule 1.380 (a)(4), Fla. R. Civ. P. Accordingly, this Court *must* enter an order awarding reasonable expenses, and may include attorney’s fees in that award.

CONCLUSION

Plaintiff has completely failed to show “good cause” for the entry of a protective order barring the deposition of Plaintiff’s affiant Beth Cerni in this matter. This Court should therefore deny the motion, order that the deposition take place, award Homeowner the costs incurred by Plaintiff’s unjustified opposition to the Cerni deposition, (including the costs incurred in opposing the motion), and order such other relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2010, I served a true and correct copy of the foregoing upon the following by U.S. Mail unless otherwise indicated:

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Florida – might partially offset the undisclosed expense of airfare.

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