

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 19339

HILB ROGAL & HOBBS COMPANY and
MANAGING AGENCY GROUP, INC.,

Plaintiffs,

v.

DONALD SELLARS,

Defendant.

ORDER

THIS MATTER is before the Court upon Defendant's Emergency Motion for a protective order (the "Motion") in the above-captioned case. The Motion requests that the Court quash a notice of deposition served by Plaintiffs, who seek to have the parties travel to Rhode Island two weeks before trial to take the trial deposition of a Peter Plumb. After considering the Motion, the Court file, and the briefs of the parties, the Court **GRANTS** the Motion for the following reasons:

1. The Court previously continued the trial of this case by Order dated 14 September 2009 so that Plaintiffs could take trial depositions of four witnesses (not including Peter Plumb);
2. Plaintiffs did not give sufficient notice to Defendant or the Court that they anticipated having to take yet another trial deposition. Indeed, it appears Plaintiffs were aware of Plumb's potential unavailability for trial as early as 11 December 2009, yet did not notify Defendant of the problem until 21 January 2010.¹ (Pls.' Resp. 2-3.);
3. Plaintiffs also have made no showing that they cannot present at trial through other means the same substantive evidence they seek to elicit from Plumb. In that regard, the

¹ Plaintiffs assert that "[b]etween December 11, 2009 and January 20, 2009 [sic], undersigned counsel worked diligently with the Plaintiffs in an attempt to enable Mr. Plumb to participate as a live witness at trial." (Pls.' Brief 2.) Plaintiffs, however, have submitted no evidence to support that contention.

North Carolina Rules of Civil Procedure allow any party to use at trial the depositions of unavailable witnesses. N.C.R. Civ. P. 32(a)(4). Defendant has twice deposed Plumb in this case, and the scope of those discovery depositions was likely sufficiently broad so as to encompass the substantive evidence Plaintiffs expected to elicit from Plumb at trial. Plaintiffs may therefore tender Plumb's deposition testimony at trial and/or elicit the same evidence from other witnesses; and

4. Finally, should it become clear at trial that Plaintiffs absolutely need additional evidence from Plumb to meet their burden, the Court may keep the record open to re-visit this issue.

CONCLUSION

The Court **GRANTS** the Motion. The Notice of Deposition served by Plaintiffs with respect to Peter Plumb is hereby **QUASHED**.

SO ORDERED, this the 28th day of January 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge