

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Derrick Schaeffer,)
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)
 Plaintiff,) No. 19-cv-7711
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)
-vs-) (*Judge Dow*)
)
)
City of Chicago, et al.) (*Magistrate Judge Gilbert*)
)
)
 Defendants.)

REPLY IN SUPPORT OF MOTION TO COMPEL

In response to plaintiff's motion to compel defendants to produce copies of transcripts in their possession, defendants have withdrawn their objection to producing these documents and state for the first time that they are willing to make the documents available for inspection. (ECF No. 59 at 3.) Because defendants have withdrawn their objection to providing the documents to plaintiff, the Court should grant plaintiff's motion to compel and order defendants to produce the transcripts electronically.

A. Defendants Have Withdrawn Their Objections to Producing the Transcripts

In response to Mandatory Initial Discovery Request 3, defendants listed over 300 pages of documents, which they produced to plaintiff electronically. (ECF No. 54-1 at 6-7.) Defendants also referred to transcripts from 22 court appearances in plaintiff's state court criminal case and stated, "Defendants object to producing them." (ECF No. 54-1 at 8.)

Defendants produced by electronic means several hundred additional documents in response to plaintiff's requests for production. Plaintiff attaches defendants' response to the requests (without the documents) as Exhibit 1. In response to Request 5, defendants re-raised their objections to producing the transcripts. (Exhibit 1 at 4-5.)

In their response to plaintiff's motion to compel, defendants withdraw their objection to producing the transcripts. (ECF No. 59 at 3.) Defendants state for the first time that their objection is only to producing the transcripts in the same manner as the parties have produced all other documents in this litigation: "Should Plaintiff's counsel wish to inspect the 22 court transcripts, defense counsel will arrange for such an inspection." (ECF No. 59 at 3.) Plaintiff assumes that, as required by Rule 34, he would be permitted to copy the documents in any such inspection. In light of this change in position, the Court should grant plaintiff's motion to compel and order defendants to produce the transcripts electronically.

The Court should reject defendants' insistence on an in-person inspection. Defense counsel is working remotely and the transcripts are available to them as electronic documents that can be produced electronically at no cost. Federal Rule of Civil Procedure 34(b)(2)(E) does not permit production by inspection of electronically stored information. Defendants do not

suggest that there is something special about these documents that would make it impossible to produce them electronically. The Court should reject defendants' position that they may require plaintiff's counsel to inspect and copy these documents instead of producing them in the same manner as every other document in this case.

Defendants' insistence on an in-person inspection flies in the face of the uniform guidance from public health authorities (including defendant City of Chicago) to minimize in-person contacts to stop the spread of COVID-19. This is not the first time that the City of Chicago has insisted that counsel ignore public health guidelines. On June 11, 2020, Judge Andrea Wood overruled the City's insistence that counsel appear in person to retrieve a settlement check and ordered the City to send the check by mail.

Smith v. Chicago, 14-cv-7718, ECF No. 123.

B. The Court Should Overrule Defendants' "Equally Available" Objection

In light of defendants' new position about producing the transcripts, the Court need not consider defendants' argument that they may refuse to produce a document in their possession because plaintiff could jump through the hoops necessary to acquire the document from a third party. Defendants acknowledge the numerous cases that plaintiff cited rejecting their "equally available" objection, contending that the reasoning of those cases does not

apply because none of the cases involved transcripts. (ECF No. 59 at 4.) But defendants do not explain why transcripts are different than any other document acquired from a third-party.

As plaintiff explained in his motion, he has produced documents he acquired from third parties relevant to this litigation. (ECF No. 54 at 3-4.) Defendants state in their response to plaintiff's requests for production that they intend to follow suit by producing documents they have obtained from the Cook County Clerk of Court. (Exhibit 3 at 5.) Producing such documents is a regular practice in discovery; there is no basis for defendants' claim that continuing to follow this regular practice would have "troubling implications." (ECF No. 59 at 8-9.)

C. Plaintiff Does not Seek Transcripts of Depositions Taken in this Case

The only precedent on which defendants seek to rely holds that deposition transcripts taken in a case are not a proper subject of a request for production.¹ (ECF No. 59 at 7.) Plaintiff does not challenge this well-established rule. *See Gomez v. Massey*, No. 3:18-CV-00348, 2020 WL 2104700, at

¹ Defendants' include a quotation that they state appears in the opinion of the Fourth Circuit in *LaVay Corp. v. Dominion Federal Sav. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987). (ECF No. 59 at 7.) The quotation does not appear in that opinion, which says nothing about producing deposition transcripts. *LaVay Corp* holds only that "A district court should award costs when the taking of a deposition is reasonably necessary at the time of its taking." *Id.* Defendants' quotation appears in *Young v. United Parcel Serv., Inc.*, No. CIV.A. DKC 08-2586, 2014 WL 858330, at *3 (D. Md. Mar. 4, 2014).

*2 (S.D. Tex. Apr. 23, 2020), *report and recommendation adopted*, No. 3:18-CV-00348, 2020 WL 3415712 (S.D. Tex. June 22, 2020) (collecting cases). Oral depositions are governed by Federal Rule of Civil Procedure 30; they are not subject to a request for production under Rule 34. As explained by the Magistrate Judge in *Schroer v. United States*, 250 F.R.D. 531 (D. Colo. 2008):

The general rule, established expressly by the Federal Rules of Civil Procedure, is that a party must obtain copies of deposition transcripts directly from the court reporter upon the payment of a reasonable charge, and not from opposing counsel or the court.

Id. at 537.

D. Conclusion

For these reasons and those previously advanced, the Court should order defendants to produce the transcripts electronically.

Respectfully submitted,

/s/ Joel A. Flaxman
Joel A. Flaxman
ARDC No. 6292818
Kenneth N. Flaxman
200 South Michigan Ave. Ste 201
Chicago, Illinois 60604
(312) 427-3200
Attorneys for Plaintiff