2020 WL 1870320

District Court of Appeal of Florida, Second District.

HEPCO DATA, LLC, Focus Health, Inc., MSKLM Holdings, LLC, and Michael Bojkovic, M.D., Petitioners,
v.
HEPCO MEDICAL, LLC d/b/a Green Earth Medical Solutions, Hepco Holdings, LLC, Hepco Ventures, LLC, Kitty Hawk, LLC, Mueller Holdings Group, LLC, HJA Medical, LLC, and MGM Strategic Consulting, LLC, Respondents.

Case No. 2D19-2134
|
Opinion filed April 15, 2020.

Synopsis

Background: Owners of medical device patents brought action against business partners for declaratory judgment, seeking determination of rights to data collected from the device. The County Court, Pinellas County, Thomas H. Minkoff, J., denied business partners' motion to compel depositions of allegedly material witnesses and granted owner's motion for protective order. Business partners petitioned for writ of certiorari.

Holdings: The District Court of Appeal, Smith, J., held that:

[1] business partners made sufficient showing that the County Court's order caused material harm for remainder of trial which could not have been corrected on postjudgment appeal, and

[2] the County Court's order departed from the essential requirements of law.

Petition granted.

Procedural Posture(s): Petition for Writ of Certiorari; Motion for Protective Order; Motion to Compel Discovery.

West Headnotes (9)

[1] **Certiorari** Nature and scope of remedy in general

Certiorari relief is an extraordinary remedy that is granted in only limited circumstances.

[2] **Certiorari** Existence of Remedy by Appeal or Writ of Error

Certiorari Grounds in general

In order to be entitled to certiorari relief a party must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial, (3) that cannot be corrected on postjudgment appeal.

[3] **Certiorari** Inadequacy of remedy by appeal or writ of error

Certiorari Particular proceedings in civil actions

Certiorari review is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.

[4] **Certiorari** Particular proceedings in civil actions

A discovery order denying a party the right to depose a witness is appropriate for certiorari review.

[5] **Certiorari** Existence of Remedy by Appeal or Writ of Error

Certiorari Particular proceedings in civil actions

Pretrial Procedure Objections and protective orders

Defendants made sufficient showing that trial court's denial of motion to compel depositions of allegedly material witnesses and grant of plaintiffs' protective order regarding such witnesses caused material harm for remainder of the trial which could not have been corrected by postjudgment appeal, as required for certiorari relief; defendants alleged materiality of witnesses by identifying in detail the discoverable information that witnesses possessed, plaintiffs did not rebut witnesses' materiality and offered only conclusory objections of financial harm, record did not show that depositions were sought to harass or ruin plaintiffs, and denying the discovery eviscerated defendants' right to defend against plaintiffs' lawsuit. Fla. R. Civ. P. 1.280(a, c), 1.310.

[6] **Certiorari** Particular proceedings in civil actions

Pretrial Procedure Objections and protective orders

Trial court order denying defendants' motion to compel depositions of allegedly material witnesses and granting plaintiffs' motion for protective order departed from essential requirements of law, and therefore defendants were entitled to certiorari relief; trial court made no finding as to immateriality of proposed witnesses or a finding that plaintiffs met their burden in proving good cause for issuance of protective order. Fla. R. Civ. P. 1.280(c).

[7] **Certiorari** Particular proceedings in civil actions

Pretrial Procedure Objections and protective orders

When a party is denied the right to depose an alleged material witness without a finding of good cause to preclude the deposition, the trial court departs from the essential requirements of the law, as element of certiorari relief.

[8] **Witnesses** Persons Who May Be Required to Appear and Testify

A material witness is one who possesses information going to some fact affecting the merits of the cause and about which no other witness might testify.

[9] **Certiorari** Particular proceedings in civil actions

Pretrial Procedure Objections and protective orders

A trial court departs from the essential requirements of the law, as element of certiorari relief, when a discovery order blanketly denies, without explanation, a party's motion to compel discovery.

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Thomas H. Minkoff, Judge.

Attorneys and Law Firms

Marie A. Borland, Mark M. Wall, and Matthew F. Hall of Hill, Ward & Henderson, P.A., Tampa, for Petitioners.

Marie Tomassi, Shirin Vesely, and Bradley A. Muhs of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., St. Petersburg, for Respondents, Hepco Medical, LLC, d/b/a Green Earth Medical Solutions; and Hepco Holdings, LLC.

Robert Persante, Zackary Zuroweste, and Darren M. Stotts of PersanteZuroweste, Clearwater, for Respondents, Hepco Ventures, LLC; Kitty Hawk, LLC; Mueller Holdings Group, LLC; HJA Medical, LLC; and MGM Strategic Consulting, LLC.

Opinion

SMITH, Judge.

***1** In this petition for writ of certiorari, we review the lower court's order denying a motion to compel depositions, without prejudice, and granting a protective order barring the depositions of eighteen prospective deponents sought to be taken by Petitioners, Hepco Data, LLC, Focus Health, Inc., MSKLM Holdings, LLC, and Michael Bojkovic, M.D. (Petitioners), in this declaratory action brought by Respondents, Hepco Medical, LLC, Hepco Holdings, LLC,

Hepco Ventures, LLC, Kitty Hawk, LLC, Mueller Holdings Group, LLC, HJA Medical, LLC, and MGM Strategic Consulting, LLC (Respondents). Petitioners seek certiorari relief arguing the trial court departed from the essential requirements of the law by entering an order with no findings addressing: (1) the materiality of the proposed deponents; and (2) the good cause component of Florida Rule of Civil Procedure 1.280(c). We find merit in both issues. The trial court's blanket order denying the motion to compel the eighteen depositions and granting a protective order, without explanation, constitutes a departure from the essential requirements of the law causing Petitioners material injury for which there is no adequate remedy at law. Accordingly, we grant the petition and quash the order below.

I

Respondents initiated the underlying litigation after a dispute arose over the ownership rights to certain data (Data) generated from a foot sanitation device (Device). Respondents own the patents on the Device. The Data from the Device is collected by Hepco Medical. In 2015, Dr. Bojkovic expressed an interest in acquiring the rights to the Data. As set forth in the August 4, 2015, letter of intent (LOI) between Dr. Bojkovic, Robert Mueller, E. James Mueller, Timothy L. Landt, and Hepco Medical, the parties detailed the organization of Hepco Holdings and Hepco Data. Hepco Holdings was organized as the holding company of the patents and was to be owned 100% by Timothy L. Landt, E. James Mueller and Robert Mueller (collectively the "Hepco Group"). [1] In 2015, Dr. Bojkovic contributed $250,000 with the understanding that $240,000 would be allocated towards his acquisition of a 70% controlling interest in Hepco Data and $10,000 would be allocated for his acquisition of a 6% interest in Hepco Holdings. Dr. Bojkovic's 70% interest in Hepco Data and 6% interest in Hepco Holdings was held in his family entity, MSKLM Holdings, LLC. The remaining 30% interest in Hepco Data was owned by Hepco Medical. Over the next three years, the parties continued working together as contemplated by the LOI. However, in June 2018, Hepco Holdings sought to unwind the LOI relationship by sending Dr. Bojkovic a letter offering to surrender its 30% interest in Hepco Data in exchange for MSKLM surrendering its interest in Hepco Holdings. Dr. Bojkovic rejected this offer and a dispute arose.

***2** Respondents initiated the underlying action seeking declaratory relief determining the parties' rights to the Data, arguing the nonexistence of an agreement where the parties never formalized their agreement as contemplated by the LOI. In response, Petitioners counterclaimed filing their own declaratory action seeking a determination of their rights to the Data, alleging the existence of an agreement as evidenced by the parties' course of dealings and course of performance over the preceding three-year period regarding the use of the $250,000 contribution and the ownership rights to the Data.

After engaging in some initial discovery, which included several depositions of various parties and their respective corporate representatives, Petitioners sought to take eighteen additional depositions and to complete three other depositions, which had been continued. Respondents objected to the taking of all twenty-one depositions and countered with a motion for protective order. [2]

In advance of the hearing on the motion to compel and motion for protective order, Petitioners filed a "notice of filing proffer of relevant and necessary deponents," identifying each prospective deponent and summarizing the relevant testimony sought. The proffer referred to prior deposition testimony and Respondents' discovery responses as support. At the hearing, Petitioners argued the common thread amongst the prospective deponents concerned their knowledge of the course of dealings between the parties for the purpose of establishing an agreement—as alleged in their declaratory judgment action. Further, of these proposed deponents, Petitioners argued that three of them were previously disclosed by Respondents in their answers to interrogatories as having information or knowledge about the case.

The thrust of Respondents' opposition to the depositions is the cost of the depositions and the financial harm and burden to their business. Respondents demur in their motion for protective order that in addition to the financial burden, the eighteen new deponents include Respondents' receptionist, customers, and other individuals "who did not negotiate anything" with Petitioners and thus have no knowledge of the parties' relationship. At the hearing, Respondents reiterated their financial harm argument and minced words with regard to their interrogatory answers. However, while Respondents made general objections to the depositions sought as a whole, there were no specific objections raised rebutting Petitioners' proffer of the individual prospective deponents, nor did Respondents offer any evidence in the form of affidavits or otherwise as to their financial harm.

After hearing argument, the trial court recognized the liberal rules of discovery but noted that the depositions must be "reasonably calculated" to lead to the discovery of admissible evidence. With that premise, the trial court found: "I do not think that we need to bring in people into this lawsuit that are going to have no bearing whatsoever on whether or not there was an agreement." The order rendered contains no findings and merely denies, without prejudice, the motion to compel and grants Respondents' motion for protective order.

II

***3** **[1]** Certiorari relief is an extraordinary remedy that is granted in only limited circumstances. Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 351-52 (Fla. 2012); Power Plant Entm't, LLC v. Trump Hotels & Casino Resorts Dev. Co., 958 So. 2d 565, 567 (Fla. 4th DCA 2007) ("[F]ew orders denying discovery will involve information so relevant and crucial to the position of the party seeking discovery, that it will amount to a departure from the essential requirements of law so as to warrant certiorari review.").

[2] **[3]** **[4]** In order to be entitled to certiorari relief a party must establish "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial, (3) that cannot be corrected on postjudgment appeal." Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 648 (Fla. 2d DCA 1995) (citing Gulf Cities Gas Corp. v. Cihak, 201 So. 2d 250 (Fla. 2d DCA 1967)). Prongs two and three are jurisdictional. Parkway Bank, 658 So. 2d at 649. "Certiorari review 'is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.' " Nucci v. Simmons, 20 So. 3d 388, 390 (Fla. 2d DCA 2009) (quoting Harley Shipbuilding Corp. v. Fast Cats Ferry Serv., LLC, 820 So. 2d 445, 448 (Fla. 2d DCA 2002)); see also Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009) (stating an order denying discovery which is relevant and reasonably calculated to lead to the discovery of admissible evidence "effectively eviscerates a party's claim, defense, or counterclaim" warranting certiorari relief). A discovery order denying a party the right to depose a witness is appropriate for certiorari review. Medero v. Fla. Power & Light Co., 658 So. 2d 566, 567 (Fla. 3d DCA 1995).

III

In reviewing the two jurisdictional prongs, we find Petitioners have made a sufficient showing of material harm throughout the remainder of the proceedings, which cannot be corrected by postjudgment appeal where Petitioners were entitled to the discovery sought and Respondents failed to show good cause for the preclusion of the eighteen depositions.

The rules governing discovery freely allow a party to obtain discovery by depositions. See Fla. R. Civ. P. 1.280, 1.310. Rule 1.280(a) imposes no limit on the number of depositions a party may take: "Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rules 1.200, 1.340, and 1.370."[3] Of course the scope of discovery must be relevant and the information sought must be reasonably calculated to lead to the discovery of admissible evidence. Fla. R. Civ. P. 1.280(b)(1). A motion for protective order is the proper method for restricting or denying a deposition. Fla. R. Civ. P. 1.280(c). Upon proper application—"for good cause shown"—the trial court may grant a protective order when "justice requires." Id. The rule is designed to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Id. The burden to show good cause lies upon the party seeking the protective order. Bush v. Schiavo, 866 So. 2d 136, 138 (Fla. 2d DCA 2004); see also Deltona Corp. v. Bailey, 336 So. 2d 1163, 1170 (Fla. 1976) ("[A] strong showing is required before a party will be denied entirely the right to take a deposition.").

***4** **[5]** Here, Petitioners contend that without the testimony of these material witnesses—the eighteen deponents—they will suffer irreparable harm throughout the remainder of the proceedings in that they will be prejudiced by their inability to prove their ownership rights to the Data as evidenced by the parties' course of dealings. Petitioners purport that the materiality[4] of the witnesses is supported in the proffer attached to their motion to compel, wherein Petitioners identify in detail the discoverable information that each of the twenty-one proposed deponents possesses, and that the materiality of these proposed deponents is unrebutted, and we agree.

The essence of Respondents' objection to the eighteen deponents is, foremost, the burden and expense to

Respondents as well as general objections to the lack of knowledge, involvement, and lack of authority on behalf of these proposed deponents. The trial court accepted Respondents' general objections and ruled at the hearing: "But I do not think that we need to bring in people into this lawsuit that are going to have no bearing whatsoever on whether or not there was an agreement." The trial court's ruling was not based upon specific findings of immateriality or good cause because there was simply no substantive support for the objections argued at the hearing or in Respondents' filings.

"Litigants would never be able to take a non-party deposition if all the non-party had to do to get out of it is to say that he or she has nothing relevant to say," as Respondents did here. Towers v. City of Longwood, 960 So. 2d 845, 849 (Fla. 5th DCA 2007) (holding "it would be utterly impossible to tell whether [a witness] has any information that is relevant to the suit if [a party] is prohibited from asking *any* questions of [the witness.]"). Neither the rules of discovery nor the courts of this State have held that a party must rely upon the representations of opposing counsel as to whether the requested discovery is relevant. It may very well be that the information sought elicits nothing germane to Petitioners' case, but Petitioners are entitled to make such discovery, nonetheless. See id.

The proffer made by Petitioners, at the very least, established that the depositions sought were reasonably calculated to lead to the discovery of admissible evidence. See Fla. R. Civ. P. 1.280(a). Moreover, Respondents' general objections failed to rebut Petitioners' proffer regarding the materiality of the eighteen proposed deponents. Absent a showing of good cause under rule 1.280(c), Petitioners were entitled to the discovery. And while Respondents filed a motion for protective order to preclude the depositions, Respondents' conclusory objections based upon financial harm failed to satisfy the "good cause" requirement under rule 1.280(c), nor does the record support Respondents' contentions that the depositions were being sought to harass or ruin them, as argued at the hearing. See In re Commitment of Sutton, 884 So. 2d 198, 203 (Fla. 2d DCA 2004) ("An objection claiming an undue burden in responding to discovery requests must be supported by record evidence, such as an affidavit detailing the basis for claiming that the onus of supplying the information or documents is inordinate."); Topp Telecom, Inc. v. Atkins, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000) (holding that parties seeking a protective order on the ground that the discovery requested would be unduly burdensome bear the burden of presenting evidence in the trial court to support that position). Paradoxically, it is Respondents who initiated the underlying litigation.

***5** The order entered by the trial court did not address the materiality of any of the eighteen deponents, or the justification for the entry of the protective order. It simply denied the motion to compel, without prejudice, and granted the motion for protective order. The fact that the order was without prejudice to Petitioners refiling another motion to compel later down the road does not affect our analysis here.

The trial court's blanket denial in effect "eviscerates" Petitioners' right to defend against Respondents' declaratory judgment action and to prosecute their counterclaim establishing their ownership rights to the Data by the parties' course of conduct. See Giacalone, 8 So. 3d at 1234 (granting petition for writ of certiorari where trial court's order denying discovery effectively eviscerated a party's claim, defense, or counterclaim). In the absence of any showing of good cause and having found Petitioners were entitled to the discovery sought, the preclusion of this discovery is a material harm for which there is no adequate remedy. See Dees v. Kidney Grp., LLC, 16 So. 3d 277, 280 (Fla. 2d DCA 2009) (holding protective order that prevented any discovery concerning two prior clients and a new venture formed by the other members of the company, in case where petitioner was seeking judicial dissolution, caused material harm); Kyker v. Lopez, 718 So. 2d 957, 957 (Fla. 5th DCA 1998) (approving order denying motion for protective order when requested information was discoverable). Accordingly, we find Petitioners have met the jurisdictional requirements for certiorari relief where the trial court denied Petitioners' motion to compel the proposed eighteen depositions and contemporaneously granted Respondents' motion for protective order precluding the same depositions. See Giacalone, 8 So. 3d at 1236.

[6] [7] [8] [9] We next address whether the trial court departed from the essential requirements of the law. When a party is denied the right to depose an alleged material witness without a finding of good cause to preclude the deposition, the trial court departs from the essential requirements of the law. See Nucci, 20 So. 3d at 391; Medero, 658 So. 2d at 567. Certiorari relief is warranted because "[a] material witness is one who possesses information 'going to some fact affecting the merits of the cause and about which *no other witness* might testify.' " Nucci, 20 So. 3d at 391 (quoting Sardinas v. Lagares, 805 So. 2d 1024, 1026 (Fla. 3d DCA 2001)). A trial court also departs from the

essential requirements of the law where the discovery order blanketly denies, without explanation, a party's motion to compel discovery. See Giacalone, 8 So. 3d at 1236 (noting the "circuit court's order was a form order containing no explanation of its decision to deny the motion or an analysis of the individual requests"); see also Towers, 960 So. 2d at 849 (granting certiorari relief where trial court made a wholesale characterization that the discovery sought was a "fishing expedition" when it was clear from the record that the discovery request sought "many relevant items").

Here, "[t]he order under review departs from the essential requirements of law because the trial court made no finding, and there is nothing in the record before us, to rebut the suggestion... that [the witness] is a material witness; and there was no finding of good cause to preclude this particular deposition." Medero, 658 So. 2d at 567. In Medero, the Third District quashed the trial court's order denying petitioner's motion to compel the deposition of the head of respondent's distribution department where the respondent's C.E.O. identified the proposed deponent as potentially having knowledge regarding the allegations in that case. Id. The court held the trial court's order denying the motion to compel departed from the essential requirements of the law "because the trial court made no finding, and there is nothing in the record ... to rebut the suggestion by [respondent's] own C.E.O. that [the proposed witness] is a material witness; and there was no finding of good cause to preclude this particular disposition." Id. Respondents dispute that Medero is applicable because in this case the trial court found the requested discovery had no bearing on the issues and was not reasonably calculated to lead to the discovery of admissible evidence. Cf. id. at 568 ("[T]he trial judge's cursory review of the issue and ruling that 'I think we have had enough discovery in this [case],' after his predecessor's virtual invitation to plaintiff to return to the court following the deposition of the C.E.O., evinces no consideration of good cause."). We, however, do not draw the same conclusion from reading the hearing transcript. The trial court made no finding as to the immateriality of the proposed witnesses or that Respondents met their burden in proving good cause under rule 1.280(c), inasmuch as the record is devoid of such showing by Respondents. For these reasons, we find Medero persuasive.

***6** Even so, relevancy is not a proper ground for protective relief under rule 1.280(c). See Dees, 16 So. 3d at 279-80 (upholding the circuit court's finding that the information sought to be protected is not related to any pending claim and is not reasonably calculated to lead to the discovery of admissible evidence is not sufficient to issue protective order under rule 1.280(c)); see also Kyker, 718 So. 2d at 959 (holding the argument that the information is not relevant to the issues in the lawsuit does not satisfy the moving party's burden to show that producing the requested information would subject him to "annoyance, embarrassment, oppression, or undue burden or expense").

Because we find Petitioners were entitled to depose the proffered, and unrebutted, eighteen deponents as material witnesses, we hold the trial court's blanket denial of this discovery and contemporaneous entry of a protective order, was a departure from the essential requirements of the law. See Dees, 16 So. 3d at 279. Accordingly, Petitioners are entitled to certiorari relief.

Petition granted; order quashed.

CASANUEVA and VILLANTI, JJ., Concur.

All Citations

--- So.3d ----, 2020 WL 1870320, 45 Fla. L. Weekly D843

Footnotes

1 The LOI contemplated that after the organization of Hepco Holdings, E. James Mueller and Robert Mueller would own 60% of Hepco Holdings in equal amounts and Timothy L. Landt would own the remaining 40% interest.

2 At the hearing on the motion to compel and motion for protective order Respondents conceded to allow Petitioners to depose the transactional attorney regarding his communications between the parties bearing

on the issues and to complete the depositions of two members of the Hepco Group with a two-hour time limit on each deposition. These three depositions are not the subject of this petition.

3 Respondents argued below that the trial court should follow Federal Rule of Civil Procedure 30, which limits the depositions to ten unless stipulated by the parties or upon leave of court.

4 In reaching our decision here, we need not reach whether the witnesses are material, as our decision is based upon the lack of any showing rebutting the materiality of the witnesses. See Racetrac Petroleum, Inc. v. Sewell, 150 So. 3d 1247, 1252 (Fla. 3d DCA 2014) ("[T]he trial court is almost always in a better position than the appellate court to determine whether the deposing party is entitled to depose the identified person.").