

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

METLIFE INVESTORS USA INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 11-911-LPS
	:	
STAR LITE BROKERAGE, INC. and BREINDEL KLEIN,	:	[PUBLIC VERSION]
	:	
Defendants.	:	

MEMORANDUM ORDER

Pending before the Court is Plaintiff's request to compel Defendant Breindel Klein ("Klein") to appear for a deposition and to impose sanctions for her refusal to date to appear for a deposition. Klein, in turn, seeks a protective order to prevent her deposition due to medical issues. The Court will grant Plaintiff's request and deny Klein's.

1. Plaintiff, MetLife Investors USA Insurance Company ("MetLife"), an insurance company, filed suit on October 6, 2011 against Defendants Star Lite Brokerage, Inc. ("Star Lite"), a brokerage agency, and Klein, a broker affiliated with MetLife and Star Lite. (D.I. 1 ¶¶ 1-3) Star Lite and Klein were authorized to sell insurance products on MetLife's behalf. (*Id.*)

2. MetLife alleges that Star Lite and Klein are liable for in excess of \$400,000 due to Defendants' alleged breach of contract and unjust enrichment. (*Id.* at 7-8)

3. On January 6, 2012, Defendants answered the complaint and both also asserted counterclaims against MetLife for allegedly withholding commissions. (D.I. 9 ¶ 65; D.I. 10 ¶ 65)

4. Plaintiff noticed a deposition of Klein for May 31, 2012, but Klein failed to appear. (D.I. 34 at 2 & Exs. 3-4)

5. Thereafter, Plaintiff made several attempts to reschedule Klein's deposition, even offering to travel to Klein's home city of Monroe, New York. (D.I. 34 Exs. 5-8) The Scheduling Order entered in this case would otherwise require that the deposition take place in New York City. (D.I. 16 ¶ 3.e.ii)

6. Klein's attorney informed MetLife that Klein would be unable to attend any deposition because of poor health. Klein offered as evidence a June 4, 2012 note from a Dr.

, stating, in full, "Until her situation is clarified she shouldn't be subjected to a deposition." (D.I. 34 Ex. 9)

7. Unconvinced, Plaintiff sought through the Court's Discovery Matters procedures (D.I. 16 ¶ 3.g) to compel Klein's attendance for a deposition (D.I. 34).

8. Klein responded to Plaintiff's request with a letter from the same Dr. who had provided the previous medical note. Dated July 18, 2012, Dr. 's letter states, in full:

"Breindel [Klein] has been my patient for many years

. Until her condition is clarified she should not be subjected to a deposition." (D.I. 35 Ex. A)

9. On July 24, 2012, the Court held a teleconference to consider the parties' dispute.

10. The Court did not resolve the parties' dispute during the teleconference. Instead, the Court granted Klein's request for an additional opportunity to make a record to support her request for a protective order to prevent or delay the deposition. (Tr. at 13-14, 17) The Court stated:

If Ms. Klein is at all able to do so, she is going to need to provide or submit to a deposition in this case. As I suggested, she is not only a defendant and a key witness, she is also a plaintiff on a counterclaim in this case and clearly would have information that is relevant and discoverable.

[I]f I'm not persuaded based on what I get next week [from Defendants] that this deposition should be prevented, then this deposition will go forward. I will require the plaintiff to accommodate reasonably whatever concerns there are of Ms. Klein; for instance, the possibility of traveling to her. But I will almost certainly . . . impose sanctions as well, to include compensating the plaintiff for the cost of bringing this dispute to the Court and potentially also to shift costs in connection with travel.

(*Id.* at 16-18) The Court also provided guidance as to what it would be looking for in Defendants' forthcoming submission:

I am curious about how whatever medical conditions Ms. Klein suffers from . . . are affecting her activities of daily living and also the doctor's view on, if she is not competent to answer questions now, when, and if, he thinks that she will be, because those both will be factors that I will consider as I decide whether or not this deposition should go forward.

(*Id.* at 18)

11. On July 31, 2012, Klein's attorney filed a letter from a different doctor – , M.D., P.C. – describing the medications prescribed to and general lifestyle of Klein, as well as stating the doctor's conclusion that Klein should not be deposed. (D.I. 37) In counsel's submission accompanying Dr 's letter, Klein now seeks to stay her deposition for sixty days. Dr. : letter, which runs to two pages, states that Klein has been a patient at Dr. office for approximately 10 years and lists medications she takes on a daily basis.

(*Id.* Ex. A) Dr. observes that Klein

” (*Id.*) He reiterates, as Dr. _____ had noted, that Klein “
_____,” and elaborates: “[S]he is _____

.” (*Id.*) After noting that “due to her _____
status she is no longer performing any type of insurance [or] financial
service activities” and has not done so “for at least three years,” Dr. _____ opines:

My firm belief is that at this point in time, Breindel, my
patient . . . is not competent to testify under oath during a
deposition proceeding. She doesn’t understand what a deposition
is all about. She could become _____ and could not provide
accurate answers to questions asked.

(*Id.*)

12. Plaintiff responded on August 6, 2012, opposing Klein’s request for a protective
order or a stay of 60 days. (D.I. 40)

13. “The court may, for good cause, issue an order to protect a party or person from
annoyance, embarrassment, oppression, or undue burden or expense” Fed. R. Civ. Proc. 26
(c)(1). “In seeking to prevent or delay a deposition by reason of medical grounds, the moving
party has the burden of making a specific and documented factual showing that the deposition
would be dangerous to the deponent’s health.” *Medlin v. Andrew*, 113 F.R.D. 650, 653
(M.D.N.C. 1987). “It is very unusual for a court to prohibit the taking of a deposition altogether
and absent extraordinary circumstances, such an order would likely be in error.” *Salter v.*
Upjohn Co., 593 F.2d 649, 651 (5th Circ. 1979).

14. Klein has not met her burden. While Dr. _____’s letter gives the Court concern

that Klein may become incompetent to testify, it does not state that she is currently delusional and cannot provide competent answers to questions (while represented by counsel, who can explain to her what a deposition is all about). Nor does Dr. _____ opine that appearing for a deposition at this time would be dangerous to Klein's health. Given the entire course of circumstances – including the conclusory and largely unhelpful note and letter from Dr. _____ the Court concludes that Klein has not met the high burden imposed on her to obtain the relief she seeks.

15. The Court advised the parties during the teleconference that it would be interested in whether Klein's conditions affect her activities of daily living. To the extent Dr. _____ addresses this issue, he states only that Klein is not working, and suggests that with assistance she is able to perform daily housekeeping tasks ("such as laundry, cleaning and cooking") and that during the week she leaves the house to attend a program "where lunch is served among other practical activities." (D.I. 37 Ex. A) This suggests that Klein is, in fact, able to engage in at least some activities outside of the home. The Court further advised the parties during the teleconference that it would be interested in a physician's opinion on when, if at all, Klein would be competent to proceed with a deposition. Dr. _____ does not directly address this issue, although he suggests that "_____ and offers to provide an updated report in about 60 days. (*Id.*) This does not help the Court to make an assessment as to when, if ever, Dr. _____ would believe that Klein could competently answer questions at a deposition. Nor does the Court have before it any medical opinion as to whether Klein's condition is improving or may, unfortunately, worsen (in which case further delay of the

deposition would be disfavored). (See D.I. 40 at 2 n.3) Thus, again, considering the record as a whole, including Klein's undisputedly central relevance to the issues in dispute in this case (some of which were injected into the case by Klein's own counterclaims), the Court finds that Klein has not met her burden to obtain the protective order or stay she seeks.

16. The court may, on motion, order sanctions if a party, after being served with proper notice, fails to appear for its deposition. See Fed. R. Civ. Proc. 37(d)(1). A party who fails to appear for her deposition "bears the burden of demonstrating a substantial justification for her absence." See *Neufeld v. Neufeld*, 169 F.R.D. 289, 290 (S.D.N.Y. 1996); see also Fed. R. Civ. Proc. 37(d)(3) (requiring sanctions for failure to appear for deposition "unless the failure was substantially justified" or sanctions would be unjust).

17. The Court concludes that Klein has failed to demonstrate substantial justification for her failure to appear for her deposition. Dr. [redacted]'s note and letter do not support a finding that Klein's failure to appear was substantially justified. Plaintiff was required to prepare a letter to the Court and participate in a teleconference before Klein even produced the more detailed explanation of her situation from Dr. [redacted]. Thereafter, Plaintiff was required to prepare an additional letter to the Court addressing Dr. [redacted]'s letter. Under the circumstances, the Court finds it appropriate for Klein to reimburse Plaintiff for its reasonable attorneys' fees associated with the preparation of these two letters to the Court and participation in the teleconference. The Court will not, however, require Klein to reimburse Plaintiff's counsel's travel expenses that will be incurred in conjunction with traveling to Monroe, New York for Klein's deposition. Plaintiff offered such an accommodation and the Court finds it is appropriate under the circumstances.

Accordingly, **IT IS HEREBY ORDERED THAT:**


1. Klein's request for a protective order is **DENIED**.

2. MetLife's request to compel the deposition of Klein is **GRANTED**. The deposition shall take place at a mutually convenient time and location within Monroe, New York no later than September 7, 2012.

3. MetLife's request for sanctions is **GRANTED**. Klein shall reimburse MetLife for the reasonable attorneys fees and costs associated with MetLife's preparation of its submissions to the Court in connection with this dispute. The parties shall advise the Court by joint letter no later than August 20, 2012 as to whether there is a dispute as to the amount of reimbursement to which Plaintiff is entitled and, if so, of their respective proposals for how the Court should resolve such dispute.

4. In the same letter to be submitted on August 20, 2012, the parties shall advise the Court as to the status of the dispute over the deposition of Abraham Weinstock, as described in MetLife's letter of August 2, 2012.

4. This Order has been filed under seal. The parties shall advise the Court, by joint submission no later than August 20, 2012, of any redactions they request be made to the public version of this Order. The Court will thereafter release a public version of this Order.


UNITED STATES DISTRICT JUDGE