



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

MOTION Electronically Filed:
November 2, 2015 16:28

By: ROBERT E. CAHILL 0072918

Confirmation Nbr. 585260

EDWARD GRAHAM, ET AL

CV 15 846212

VTS.

Judge:

CITY OF LAKEWOOD, ET AL

JOHN P. O'DONNELL

Pages Filed: 19

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.,	)	CASE NO: CV-15-846212
	)	
Plaintiffs,	)	JUDGE JOHN P. O'DONNELL
	)	
v.	)	
	)	
CITY OF LAKEWOOD, et al.,	)	DEFENDANTS CITY OF LAKEWOOD
	)	AND MAYOR MICHAEL SUMMERS'
Defendants.	)	MOTION FOR PROTECTIVE ORDER
	)	
	)	
	)	

NOW COMES Defendants City of Lakewood and Mayor Michael Summers, by and through counsel, and move, pursuant to Civ.R. 26(C)(2), for a protective order to continue Mayor Summers' deposition, which was noticed for November 5, 2015, until after the Court rules upon Defendants' pending motion to dismiss in order to avoid undue burden and expense. A brief in support of this motion is attached.

Respectfully submitted,

s/ Kevin M. Butler (per consent – REC)
Kevin M. Butler, Law Director (0074204)
kevin.butler@lakewoodoh.net
Jennifer L. Swallow, Chief Assistant Law
Director (0069982)
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/s/ Robert E. Cahill

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Attorneys for City of Lakewood and

Mayor Michael Summers

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.,	)	CASE NO: CV-15-846212
	)	
Plaintiffs,	)	JUDGE JOHN P. O'DONNELL
	)	
v.	)	
	)	
CITY OF LAKEWOOD, et al.,	)	DEFENDANTS CITY OF LAKEWOOD
	)	AND MAYOR MICHAEL SUMMERS'
Defendants.	)	BRIEF IN SUPPORT OF MOTION FOR
	)	PROTECTIVE ORDER
	)	
	)	

I. INTRODUCTION

In light of the very real possibility that this Court is going to grant either entirely or partially the Defendants' pending motion to dismiss, there is no reason to proceed with Mayor Summers' deposition on November 5, 2015 when the Court has previously indicated that it would rule on the motion to dismiss prior to the pretrial conference scheduled for November 19, 2015. Within two weeks of when the deposition is currently scheduled to occur, the parties will likely know whether the case is dismissed in its entirety, partially, or not at all. The record before the Court suggests that this case will be dismissed. As such, it would create an undue burden on the City of Lakewood and its residents to take Mayor Summers away from his mayoral duties for approximately a day (when deposition preparation, travel, and the deposition itself are considered) and an undue expense for the City and all parties with likely nine attorneys (representing all parties) present and billing for this deposition when the deposition will likely be for naught.

Mayor Summers' deposition should be continued until after the Court rules on the pending motion to dismiss because a several week delay will not prejudice Plaintiffs and will

likely result in time and cost savings for the City of Lakewood, Mayor Summers, and all the parties to this litigation.

II. FACTS

Plaintiffs' counsel initially requested Mayor Summers's deposition via an e-mail dated October 6, 2015 for some time during the week of October 12, 2015. The undersigned responded via e-mail on October 7, 2015 that the Mayor was not available due to his normal duties, the ongoing negotiations concerning Lakewood Hospital, and the upcoming election until November 5, 10, 12, or 13. Via an e-mail dated October 8, 2015, Plaintiffs' counsel selected November 5. This e-mail chain between counsel is attached as Exhibit A.

On October 9, 2015, Plaintiffs filed their brief in opposition to Defendant's motion to dismiss on which Plaintiffs relied on numerous documents that are outside the four corners of the amended complaint and in which they failed to establish that any of the claims set forth in the amended complaint are viable.

On October 19, 2015, Defendants filed a reply brief in support of their motion to dismiss making clear Plaintiffs' failure to state any claims upon which relief may be granted. That same day, Defendants also filed a motion to stay discovery until the Court rules upon the pending motion to dismiss.¹

On October 26, 2015, Plaintiffs filed the notice of deposition of Mayor Summers. That notice is attached as Exhibit B.

On October 30, 2015, the undersigned called and e-mailed Plaintiffs' counsel requesting that Mayor Summers' deposition be continued until the pending motion to dismiss had been ruled upon in order to save the City, Mayor, and all parties undue burden and expense.

¹ Defendants' motion to stay discovery filed on October 19, 2015 is incorporated by reference herein because the rationale set forth therein for staying discovery is clearly applicable to Mayor Summers' deposition.

Plaintiffs' counsel refused via an e-mail dated October 31, 2015. On November 2, 2015, the undersigned again e-mailed Plaintiffs' counsel requesting a continuance of Mayor Summers' deposition and Plaintiffs' counsel again refused. This e-mail chain between counsel is attached as Exhibit C.

III. LAW AND ARGUMENT

Mayor Summers' deposition should be continued until after the Court rules on the pending motion to dismiss because a several week delay will not prejudice Plaintiffs and will likely result in time and cost savings for the City of Lakewood, Mayor Summers, and all the parties to this litigation. Moreover, there is a strong basis upon which the pending motion to dismiss will be granted and the time and expense of going forward this week with Mayor Summers' deposition will be for naught.

Civ.R. 26(C) provides in relevant part that:

Upon motion by any 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 that justice requires to protect a party or person from...undue burden or expense, including one or more of the following: (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place.²

The City and Mayor Summers do not seek to prevent the Mayor's deposition from taking place, but only that it be continued until after the Court has ruled upon the pending motion to dismiss. In that the Court has suggested it will likely rule in advance of the November 19, 2015 pretrial conference, the parties should know within two weeks of the date on which the deposition is currently scheduled whether the case has been dismissed in its entirety, some of the claims have been dismissed, or none of the claims will be dismissed. Obviously, if the case is

² Civ.R. 26(C) requires a reasonable effort be made to resolve the matter with counsel for the party seeking the discovery. The undersigned has made a reasonable effort to resolve this matter with Plaintiffs' counsel, but to no avail. Exhibit C.

dismissed entirely, the residents of Lakewood will be saved from having their Mayor spend an entire day preparing for and being deposed, instead of carrying out the duties of his office. The cost savings for the City and all parties will be significant as well because, based on the attendance at past depositions, it is anticipated that nine lawyers will attend the Mayor's deposition: two for Plaintiffs, two for the City and Mayor, two for CCF, and one each for LHA, LHF, and Subsidium. Granting this motion will potentially save thousands of dollars on a deposition that may soon be unnecessary or significantly pared down in scope.

In Grover v. Bartsch, 170 Ohio App.3d 188, 2006 Ohio 6115, 866 N.E.2d 547 (2nd Dist.), the trial court granted defendant's motion for a protective order preventing plaintiffs from deposing defendant while defendant's motion to dismiss was pending, which was ultimately granted. The Court of Appeals affirmed holding that "Considering that the motion to dismiss was based on the allegations in the complaint and might dispose of the litigation, the trial court acted within its discretion when it granted the stay of discovery." Grover at P10. See also Wallace v. The City of Rocky River, Nos. 40597, 40737, and 40863, 1980 Ohio App. Lexis 14309 (8th Dist. March 6, 1980) (holding that the trial court did not abuse its discretion where it granted a protective order to prevent the depositions of a judge and six police officers while their motion to dismiss was pending).

For the same reasons the trial courts in the Grover and Wallace cases granted protective orders precluding the depositions of defendants while their motions to dismiss were pending, this Court should likewise grant the City and Mayor Summers' motion for a protective order to continue the Mayor's deposition until after the Court rules on the pending motion to dismiss in order to avoid undue burden and expense.

IV. CONCLUSION

For all the foregoing reasons, Defendants City of Lakewood and Mayor Summers respectfully request that the Court enter a protective order precluding the Mayor from being deposed until after the Court has ruled on the pending motion to dismiss so that the parties may know what issues, if any, remain germane to this action upon which the Mayor could testify and so that the City, Mayor, and all parties are not subjected to undue burden and expense in proceeding with the Mayor's deposition this week.

Respectfully submitted,

s/ Kevin M. Butler (per consent – REC)

Kevin M. Butler, Law Director (0074204)

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Jennifer L. Swallow, Chief Assistant Law
Director (0069982)

jennifer.swallow@lakewoodoh.net

CITY OF LAKEWOOD LAW

DEPARTMENT

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/s/ Robert E. Cahill

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(216) 928-2200 phone

(216) 928-4400 facsimile

rcahill@sutter-law.com

Attorneys for City of Lakewood and
Mayor Michael Summers

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2015, the foregoing Defendants City of Lakewood and Mayor Michael Summers's Motion for Protective Order was electronically filed with the Clerk of the Court using the Court's Electronic Filing system which will send notification of to each party to this action. In addition, the following have been served with this motion via e-mail:

Christopher M. DeVito
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, OH 44113-1204
chrismdevito@gmail.com

A. Steven Dever
A. Steven Dever Co., L.P.A.
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Cleveland, Ohio 44114

/s/ Robert E. Cahill
ROBERT E. CAHILL

From: [A. Steven Dever](#)
To: [Robert E. Cahill](#)
Cc: [kevin.butler@lakewoodoh.net](#); [jennifer.swallow@lakewoodoh.net](#); [cdevito@mmd-law.com](#); [Meghan Medlock](#)
Subject: Re: Michael Summers Deposition
Date: Thursday, October 08, 2015 5:06:13 PM

Hi Rob,

I am ok with your request to delay the Mayors deposition until after the election. I will send you a notice for November 5th at 10am at Chris DeVito's Law office downtown. Thanks

A. Steven Dever

A. Steven Dever Co., L.P.A.
phone: (216)228-1166 | fax: (216)228.3484 | [web](#)
13363 Madison Avenue | Lakewood, OH 44107

-----Original Message-----

From: Robert E. Cahill <rcahill@sutter-law.com>
To: 'A. Steven Dever' <astevendevery@aol.com>
Cc: 'kevin.butler@lakewoodoh.net' <kevin.butler@lakewoodoh.net>; 'jennifer.swallow@lakewoodoh.net' <jennifer.swallow@lakewoodoh.net>; 'cdevito@mmd-law.com' <cdevito@mmd-law.com>; Meghan Medlock <mmedlock@sutter-law.com>
Sent: Wed, Oct 7, 2015 5:06 pm
Subject: RE: Michael Summers Deposition

Steve,

In response to your request to depose Mayor Summers sometime next week, I have checked with the Mayor and he is not available to be deposed next week (the week of October 12) given so little advance notice. Mayor Summers is similarly unavailable during the following two weeks (the weeks of October 19 and 26). As you can well imagine, between the Mayor's normal duties, the ongoing negotiations concerning Lakewood Hospital, and the upcoming election, the Mayor is tremendously busy right now.

Mayor Summers is available to be deposed on November 5 (which he currently has scheduled as a vacation day but which he is willing to forego to make himself available) and is also available generally during the day on November 10, 12, and 13 (although he has some morning and late afternoon meetings that we would have to schedule around). Please let me know which date works best for you so that it can be blocked off because the Mayor's calendar fills up quickly. Thanks.

Rob

From: A. Steven Dever [<mailto:astevendevery@aol.com>]
Sent: Tuesday, October 06, 2015 2:48 PM
To: Robert E. Cahill <rcahill@sutter-law.com>
Cc: [kevin.butler@lakewoodoh.net](#); [jennifer.swallow@lakewoodoh.net](#); [cdevito@mmd-law.com](#)
Subject: Michael Summers Deposition

Hi Robert,

Electronically Filed 11/02/2015 16:28 / MOTION / CV 15 846212 / Confirmation Nbr. 585260 / BATCH

I would like to take the Deposition of Mr Summers next week. It should take about 1/2 of a day. Let me know if you can agree to a time that is convenient to you and your client before I get busy with a notice. Thanks

A. Steven Dever

A. Steven Dever Co., L.P.A.

phone: (216)228-1166 | fax: (216)228.3484 | [web](#)

13363 Madison Avenue | Lakewood, OH

Robert E. Cahill

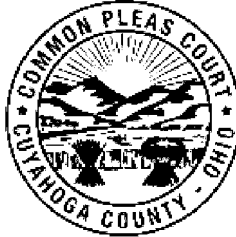
Associate

Sutter O'Connell Co.

Direct: 216.928.3554

Mobile: 216.496.2738

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NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

NOTICE Electronically Filed:
October 26, 2015 13:19

By: CHRISTOPHER M. DEVITO 0047118

Confirmation Nbr. 578276

EDWARD GRAHAM, ET AL

CV 15 846212

VTS.

Judge:

CITY OF LAKEWOOD, ET AL

JOHN P. O'DONNELL

Pages Filed: 4

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.

Plaintiffs

v.

CITY OF LAKEWOOD, et al.

Defendants

CASE NO. CV-15-846212

JUDGE JOHN P. O'DONNELL

NOTICE OF DEPOSITION
OF MICHAEL SUMMERS

Plaintiffs Edward Graham, et al., by and through undersigned counsel, give notice to take the deposition of Micheal Summers at a date agreed upon with his counsel.

Pursuant to Ohio Rules of Civil Procedure ("Civ.R.") 26 and 30, the oral deposition will commence on **Thursday November 5, 2015, at 9:30 a.m.** and continue before a Notary Public at the law office of **Morganstern, MacAdams & DeVito Co., L.P.A.**, 623 West Saint Clair Avenue, Cleveland, Ohio 44113-1204. The oral examination will continue from day to day until completed and will be used for all purposes allowable under Civ.R. 26 through 37. Furthermore, notice is given pursuant to Civ.R. 30(B)(3) that the deposition may be taken by video in lieu of stenographic means.

Respectfully submitted,

/s/ Christopher M. DeVito

Christopher M. DeVito (0047118)

Morganstern, MacAdams & DeVito Co., L.P.A.

623 West Saint Clair Avenue

Cleveland, Ohio 44113

216-687-1212 Office / 216-621-2951 Fax

ChrisMDeVito@gmail.com

-and-

/s/ A. Steven Dever

A. Steven Dever (0024982)

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Lakewood, Ohio 44107

216-228-1166 Office / 216-228-3484 Fax

astevendever@aol.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

A copy of the foregoing **Amended Notice of Deposition of Shannan Ritchie, Interim President of Lakewood Hospital** has been filed through the Court's electronic case management system ("ECM"), is available for review on-line by counsel and parties, will be provided notice of filing by the Court's ECM system, and a courtesy pdf copy is also being sent via email only on this 26th day of October, 2015, to the following:

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kevin.butler@lakewoodoh.net
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City of Lakewood Law Department
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Lakewood, Ohio 44107
-and-
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Lakewood Hospital Foundation, Inc.
and Kenneth Haber*

*Attorneys for Defendant
Subsidium Healthcare, LLC*

*Attorneys for Defendant
The Ohio Attorney General
Mike DeWine*

s/ Christopher M. DeVito
Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
Attorney for Plaintiffs

L:\CLIENTS-CMD\LakewoodHospital\2015.10.26. Notice of Depo-Mike Summers.docx

From: [A. Steven Dever](#)
To: [Robert E. Cahill](#)
Cc: [cdevito@mmd-law.com](#); [kevin.butler@lakewoodoh.net](#); [Meghan Medlock](#)
Subject: Re: Mayor Summers' deposition
Date: Monday, November 02, 2015 9:37:45 AM
Attachments: [image001.png](#)

Hi Rob,

Sorry we will not agree to continuing the deposition. See you Thursday.

A. Steven Dever

A. Steven Dever Co., L.P.A.
phone: (216)228-1166 | fax: (216)228.3484 | [web](#)
13363 Madison Avenue | Lakewood, OH 44107

-----Original Message-----

From: Robert E. Cahill <rcahill@sutter-law.com>
To: 'A. Steven Dever' <astevendevery@aol.com>
Cc: 'cdevito@mmd-law.com' <cdevito@mmd-law.com>; 'kevin.butler@lakewoodoh.net' <kevin.butler@lakewoodoh.net>; Meghan Medlock <mmedlock@sutter-law.com>
Sent: Mon, Nov 2, 2015 9:12 am
Subject: RE: Mayor Summers' deposition

Steve,

Thanks for your response. While I agree with your recitation of how we initially arrived at the November 5 date for the Mayor's deposition due to his unavailability (although I never raised the "campaign fodder" issue), you haven't addressed the substance of my most recent request. Given the likelihood of Defendants' motion to dismiss being granted, proceeding with the Mayor's deposition this week will unduly burden the City and cause undue expense. Even if I'm wrong and the Court denies the motion to dismiss in its entirety, a 2-3 week delay for the deposition is not significant given the cost and time savings that would be realized if the motion to dismiss is granted. I reiterate that if the Court denies the motion to dismiss or only partially denies the motion and the City and/or the Mayor remain as parties, I ensure you that I will obtain a new deposition date for the Mayor's deposition in short order after the ruling is delivered.

Will you agree to continue the Mayor's deposition until the Court rules on the motion to dismiss? Thanks.

Rob

From: A. Steven Dever [<mailto:astevendevery@aol.com>]
Sent: Saturday, October 31, 2015 11:52 AM
To: Robert E. Cahill <rcahill@sutter-law.com>
Cc: [cdevito@mmd-law.com](#); [kevin.butler@lakewoodoh.net](#); Meghan Medlock <mmedlock@sutter-law.com>
Subject: Re: Mayor Summers' deposition

Hi Rob,

Sorry I missed your call yesterday. I am unable to agree to a continuance of the Mayors deposition. If you recall we agreed to allow the deposition to take place after the election so as to allow the Mayor to campaign and attend to his responsibilities as the Mayor of Lakewood. This concession allowed the Mayor to be free of any risk that his testimony would become "campaign fodder" as described by one of the attorneys in this case. However, you agreed to produce him this week and we want his deposition. I do not anticipate that this should take any longer than 3 hours.

Thanks

A. Steven Dever

A. Steven Dever Co., L.P.A.

phone: (216)228-1166 | fax: (216)228.3484 | [web](#)

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Robert E. Cahill

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-----Original Message-----

From: Robert E. Cahill <rcahill@sutter-law.com>

To: 'A. Steven Dever' <astevendevery@aol.com>

Cc: 'cdevito@mmd-law.com' <cdevito@mmd-law.com>; 'kevin.butler@lakewoodoh.net' <kevin.butler@lakewoodoh.net>; Meghan Medlock <mmedlock@sutter-law.com>

Sent: Fri, Oct 30, 2015 3:05 pm

Subject: Mayor Summers' deposition

Steve,

I called you earlier today, but you were out of the office. I called and am writing to request that Mayor Summers' deposition be continued until after the Court rules on the pending motion to dismiss. Having reviewed Plaintiffs' brief in opposition to the motion to dismiss and the reliance on documents that cannot be considered in ruling on a motion to dismiss since we first talked about the Mayor's deposition, I think that the motion to dismiss will be granted and that proceeding with the deposition next week will unduly burden the City and Mayor and cause undue expense.

Preparing the Mayor for his deposition and the deposition itself will likely keep the Mayor from performing his duties for at least one full day, which is a significant cost to the people of Lakewood. Moreover, there will be a significant expense to the deposition itself, not only for the City but also for all the parties. I anticipate that nine lawyers will likely be present and billing at the deposition: you and Chris for Plaintiffs, Kevin and me for the City and Mayor, two lawyers for the Clinic, LHA's counsel, LHF's counsel, and Subsidiary's counsel.

From what Judge O'Donnell said the last time we were before him, I anticipate that the Court is going to rule on the motion to dismiss and the other pending motions in advance of the pretrial scheduled for November 19. There are three possibilities for how the Court will rule: it grants the motion to dismiss in its entirety, it partially grants and denies the motion to dismiss, or it denies the motion to dismiss in its entirety. Under either of the first two possibilities, going forward with the Mayor's deposition before the ruling makes no sense at this time because even with only a partial dismissal the issues will be pared down and the City may not remain a party to the litigation. If the Court denies the motion to dismiss or only partially denies the motion and the City and/or the Mayor remain as parties, I ensure you that I will obtain a new deposition date for the Mayor's deposition in short order after the ruling is delivered.

Should the Court rule in Plaintiffs' favor, we are likely looking at only a 2-3 week delay in deposing the Mayor with the very real potential to avoid significant costs and undue burden by continuing the deposition in the event the court rules in Defendants' favor.

I know you are out of the office this afternoon, but please let me know at your earliest convenience if you are amenable to this request. I'm happy to discuss this request more fully over the phone, which is why I called you earlier today. Thanks.

Rob



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