



COMPELLING RELUCTANT COUNSEL TO PROCEED WITH REMOTE DEPOSITIONS

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As law firms adapt to social distancing mandates, the use of remote depositions, or depositions done through an internet-based video service such as Zoom or Skype, are gaining currency. CPLR Section 3113(d) permits the parties to stipulate to take depositions by electronic means. (See also Uniform Rule Section 202.15(a)). However, as law firms tentatively emerge from the Covid lockdown, issues are arising as to whether a reluctant lawyer, party, or a witness, can be compelled to appear remotely.

In general terms, pursuant to CPLR 3103(a), the trial Court has the power to regulate any disclosure device to prevent prejudice. As the First Department noted almost a decade ago, “The decision to allow a party or witness to testify via videoconference link is left to the trial Court’s discretion.” *American Bank Note Corp. v. Daniele*, 81 A.D.3d 500, 501 (1st Dep’t 2011) *citing* People v Wrotten, 14 NY3d 33, 37-38, 923 NE2d 1099, 896 NYS2d 711 (2009) cert denied 130 S Ct 2520, (2010).

Historically, CPLR 3113(d) has been interpreted to mean that the officer administering the oath must be physically present at the place of the deposition, unless stipulated otherwise by the parties. However, this provision does not limit the discretion of the Court to order a remote deposition, and the swearing in of witnesses remotely. The Court’s discretion to compel a virtual deposition can be invoked upon a showing of “undue hardship.” See *Yu Hui Chen v Chen Li Zhi*, 81 A.D.3d 818 (2d Dep’t 2011) (deposition by electronic means may be ordered when undue hardship is established); *Rogovin v. Rogovin*, 3 A.D.3d 352 (1st Dep’t 2004) (video deposition ordered where witness’ appearance in New York would cause hardship); *Matter of Singh*, 22 Misc. 3d 288, 290, 865 N.Y.S.2d 902, 904 (Bronx County Surrogate Court, 2008) (remote depositions permissible if undue hardship established). In its discretion, the Court can also order that the parties travel to a witness located remotely, or permit interrogatories in lieu of a deposition. See *Hoffman v. Kraus* 260 A.D.2d 435 (2d Dep’t 1999) (due to “undue hardship,” the examination of the defendant may either be done in person in Hungary or by written question); *Fielding v. S. Klein Department Stores, Inc.*, 354 N.Y.S.2d 438 (1st Dep’t 1974)(to avoid undue hardship, deposition of the defendant shall either take place in California, or in lieu thereof, by written questions).

The question presented, then, is whether the COVID-19 pandemic creates the “undue hardship” necessary to satisfy the CPLR and invoke the Court’s discretion. A brief sampling of very recent post Covid decisions of New York’s trial level courts clearly suggest the answer is, “yes.”¹ See *Johnson v. Time Warner Cable New York City, LLC*, Index No. 155531/2017 (Supreme Court New York County May, 28, 2020) (Kalish, J.) (remote depositions ordered where the defendant refused to proceed remotely, with the Court noting, “to delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable.”); *Arner v. Derf Cab Corp.*, (Index No. 151731/19) (Supreme Court New York County May 14, 2020)(Silvera, J) (Defendants ordered to appear for virtual depositions); *Ai Bee Lim v. James Jian Cui*, (Index No. 714516/2018) (Supreme Court Queens County May 7, 2020) (O’Donoghue, J.) (Defendant required to appear at a videotape deposition within 45 days in a medical malpractice case); *Macdonald v. Pantony*, (Index No. 612715/17) (Supreme Court, Nassau County May 28, 2020) (McCormack, J.) (remote depositions ordered unless all parties agree to face to face depositions with the appropriate social distancing); *Stern as Executrix of Stern v. New York Presbyterian Hospital*, (Index No. 510384/2018) (Supreme Court Kings County June 1, 2020) (Edwards, J.)(virtual depositions ordered in a medical malpractice case).

Although the formal court rules in New York have not specifically regulated remote deposition issues due to the Covid-19 crisis, the rules of other states have. See New Jersey Supreme Court Omnibus Order (March 27, 2020); Rules of the Massachusetts Supreme Judicial Court, Order OE-144 (March 20, 2020); Wisconsin Supreme Court Order (March 25, 2020); Florida Supreme Court, Order No. AOSC20-16 (March 18, 2020). Federal procedure also contemplates remote depositions. Pursuant to Federal Rule of Civil Procedure 30(b)(4), the parties may stipulate, or the Court may order on motion, that a deposition be taken by telephone or other remote means. Federal judges have little patience with parties who seek to delay discovery because they will not voluntarily agree to use video deposition technology. See *Sinceno v. Riverside Church in City of New York*, 2020 WL 1302053 at page 1 (S.D.N.Y., March 18, 2020) (ordering that all depositions be taken via telephone, videoconference or other remote means, and ordering that such depositions will be deemed to be conducted before an officer so long as that “officer” attends the deposition via the same remote means).

In short, it is reasonably clear that a party will not be able to unilaterally bring litigation to a hard stop because the party refuses to embrace 21st century virtual deposition technology, especially in light of the special circumstances caused by the COVID-19 pandemic.

¹ Please contact the authors for copies of any unpublished decisions referenced herein.



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