COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX , SS.

SUPERIOR COURT
CIVIL ACTION NO. 2008-04641-B

JOHNSON GOLF MANAGEMENT, INC.
Plaintiff

v.

TOWN OF DUXBURY, and NORTH HILL ADVISORY COMMITTEE, Consisting of MICHAEL DOOLIN, Chairman, SCOTT WHITCOMB, ROBERT M. MUSTARD, JR., MICHAEL MARLBOROUGH, ANTHONY FLOREANO, MICHAEL T. RUFO, THOMAS K. GARRITY, RICHARD MANNING, W. JAMES FORD, and GORDON CUSHING (EX OFFICO), CALM GOLF, INC., and CHARLES LANZETTA
Defendants

EMERGENCY MOTION TO QUASH THE DEPOSITION NOTICE OF ATTORNEY ROBERT TROY AND FOR THE ENTRY OF A PROTECTIVE ORDER

This is a 2008 action filed by Johnson Golf Management, Inc. ("Johnson") arising out of their disappointment that they were not awarded a public contract to manage the North Hill Country Club Golf Course ("Golf Course"). (Exh. A, *Amended Compl.*)[1] Johnson alleges that the Town of Duxbury ("Town") intended to deprive them of a fair opportunity to bid for the contract and conspired to reject initial bids as a pretext to denying Johnson from receiving the contract. *Id.*

After two discovery extensions, the discovery deadline expired on May 31, 2011. However, a year later on June 5, 2012, Johnson subpoenaed the Town's prior counsel, Attorney Robert Troy ("Attorney Troy"), to be deposed on June 13, 2012. (Exh. B, *Subpoena*). A

[1] Due to the number of attachments, only the complaint is attached. The attachments will be provided upon request.

Superior Court Rule 9C Conference was conducted, and although Johnson has not agreed to withdraw this subpoena, Johnson has agreed to reschedule the deposition if necessary.

Johnson's subpoena should be quashed because: (1) it lacks any legal validity; (2) it would unduly prejudice the Town; and (3) it appears to lack any good faith basis as to why it was not timely served within the two extended tracking orders. The subpoena was served in direct violation of this Court's Order, outside the parameters of Superior Court Standing Order 1-88, and within four months of trial. If the deposition occurs, it would need to be postponed for at least two months to allow Attorney Troy's Counsel sufficient time to review the 18,953 pages of documents that are related to this action. This delay would likely undermine settlement efforts and would likely prevent the Town from having time to investigate any new evidence discovered at Attorney Troy's deposition.

A protective order should also issue to enjoin the parties from noticing Attorney Troy's deposition in the future. It appears that Johnson is merely seeking to embarrass Attorney Troy's reputation by asking questions about alleged misrepresentations made during the pendency of this claim. It appears that Johnson's factual basis for contending that misrepresentations were made is incorrect and the alleged misrepresentations are not material to this action. To date, it is unclear what relevant information Johnson seeks from Attorney Troy that has otherwise been unavailable.

FACTUAL BACKGROUND

A. The Underlying Litigation

This matter involves claims by Johnson arising out of alleged irregularities in the public bidding of a contract to manage the Golf Course in violation of G.L. c. 30B. (Exh. A, *Amended Compl.*). Johnson has sought and/or seeks injunctive relief, a declaratory judgment, and monetary damages. *Id.*

In September 2008, the Town issued a *Request for Proposals* ("RFP") regarding the award of a new contract to manage the Golf Course. (Ex. A, *Amended Compl.* ¶¶ 9, 15). The Town rejected the initial round of bids and decided to re-bid the RFP because the Town Manager discovered: (1) two of the evaluators did not provide composite scores by which the non-price proposals could be compared; (2) one of the evaluators did not give a statement of the "reasons for the rating" as required; (3) one of the evaluators did not use the required statutory terms for the composite evaluations; and (4) one of the evaluators saw the price proposals before the Town Manager determined that the non-price evaluators were noncompliant. (Docket No. 78, *Town's Memorandum in Support of Emergency Motion for Reconsideration*). A second RFP was issued and the Town awarded to the contract to CALM Golf. (Ex. A, *Amended Compl.* ¶¶ 33, 37).

B. The Procedural History

Since December 12, 2008, this matter has been hotly contested and aggressively litigated. The parties conducted a limited amount of written discovery, but have conducted at least ten depositions. The case has generated over 120 dockets entries, has been the subject of four summary judgment motions, and has seen two interlocutory appeals. The matter was designated on Track A and discovery notices should have been served no later than December 2, 2010. (Exh. C, *Tracking Order*); *MA R. Super Ct Order 1-88(A)* (2012).

This Court has provided two discovery extensions. On December 14, 2010, this Court extended the discovery deadline until March 31, 2011. (Docket No. 60). On March 31, 2011, the Court extended the discovery deadline until May 31, 2011. (Docket Nos. 87, 90). The Parties have not requested any additional extensions.

On November 3, 2011, a Joint Pre-trial Memorandum was signed. Johnson expressly listed Attorney Troy as an expected witness and represented that it "has noticed depositions of

various witnesses and needs to schedule one more deposition, which was originally scheduled in November, 2010 and April, 2011." (emphasis added). Upon information and belief, this witness was Betsy Sullivan.

In approximately December 2010, Attorney Deborah Ecker of Brody, Hardoon, Perkins, and Kesten, LLP joined Attorney Troy as Counsel for the Town. Attorney Leonard Kesten of the same firm later replaced Attorney Ecker. In 2012, Attorney Troy withdrew from this action and the Town hired Arthur Kreiger.

C. Attorney Troy's Deposition

A subpoena for Attorney Troy's deposition was not served on Attorney Troy until June 5, 2012. On June 7, 2012, Attorney Covino emailed Johnson's Counsel requesting a Superior Court Rule 9C Conference and objecting to Attorney Troy's deposition. (Exh. D, *Email from Attorney Covino*, dated June 7, 2012). On the same day, the conference was conducted and it was learned that Johnson seeks information regarding the alleged misrepresentations and concealment of public records by Attorney Troy. It is understood that Johnson believes that Attorney Troy conspired with the Town to prevent Johnson from receiving the contract. The substance of the conversation was consistent with a prior letter from Johnson to Attorney Kesten and Attorney Kreiger. (Exh. E, *Letter from Steven Follansbee*, dated May 23, 2012).

ARGUMENT

For good cause shown, a Court may make any order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden. *Mass. R. Civ. P. 26(c)* (2012). A Court may order "the discovery not be had," "discovery may be had only on specific terms," and "that certain matters not be inquired into." *Id.*

I. THE DEPOSITION NOTICE SHOULD BE STRICKEN AS UNTIMELY, UNDULY PREJUDICIAL, AND LACKING ANY GOOD FAITH BASIS.

A. The Deposition Notice Is Untimely & Unduly Prejudicial

The Superior Court promulgated Superior Court Standing Order 1-88 to respond to, and comply with, the directive of the Supreme Judicial Court to prevent the excessive delay and cost of court proceedings in an effort to "secure the just, speedy and inexpensive determination of every action." *MA R. Super Ct Order 1-88(A)* (2012). It provides, "the concept of early and continuous judicial supervision and control is intended to enhance the quality of litigation and ensure that justice is fairly rendered." *Id.*

The standing order provides "**mandatory**" tracking deadlines, unless modified "by order of the Session Judge or Regional Administrative Judge." *MA R. Super Ct Order 1-88(F)* (2012). Deposition transcripts filed outside these deadlines "need not be acted upon by the Court, even if filed by agreement between the parties." *Id.* Amendments to the tracking order may only be granted upon motion to the Session Judge filed in accordance with Superior Court Rule 9A and for good cause shown. *MA R. Super Ct Order 1-88(D)(1-2)* (2012). Under Track A, as here, all discovery requests must be served within twenty-four months. *MA R. Super Ct Order 1-88(F)(ii)(7)* (2012). "Tracking Orders are Court Orders, which are to be minded." *Cook v. Parkway Plaza West Condominiums*, 06-CV-3891-F, 2007 WL 2705561 * 1 (Mass. Super. Ct. 2007) (Curran, J.)(providing a limited sixty-day extension in a slip and fall claim).

In this case, it is unquestionable that the deposition notice of Attorney Troy is untimely, violates this Court's order, and is outside the time parameters of Superior Court Standing Order 1-88. Leave has not been sought by the appropriate authority to conduct this deposition or in accordance with Superior Court Rule 9A. Thus, and as a matter of course, the Court should

enforce its own order and those of its department. Moreover, the Court should not allow the parties to substitute their judgment for an issue that this Court has already determined.

In addition, the resulting prejudice of this deposition is clear. There are approximately 18,953 pages of documents in this matter. Aside from exercising herculean efforts, Counsel for Attorney Troy will need at least sixty days to assess this file entirely and to prepare Attorney Troy effectively for his deposition. Under these circumstances, Attorney Troy will be deposed within **two months** of trial. This delay may unnecessarily restrict the parties' ability to engage in discussions regarding a resolution and may create new questions of fact that cannot be investigated because discovery has expired and trial is looming. This result is directly antithetical to the purpose of Superior Court Standing Order 1-88.

Johnson appears to provide no good faith basis for their delay in serving this deposition notice and requesting extrajudicial assistance in taking this deposition. All of the anticipated grounds for deposing Attorney Troy were known, or should have been known, by Johnson before the extended discovery deadline expired. It appears from Johnson's recent correspondence that they seek to depose Attorney Troy regarding: (1) alleged misrepresentations regarding the role of the Inspector General, (2) alleged misrepresentations regarding a consultant, (3) why Attorney Troy secured RFP documents in his office, and (4) Attorney Troy's communications with the Town regarding his attorney-client communications. (Exh. E, *Letter from Attorney Follansbee*, dated May 23, 2012).

First, Johnson appears to have represented its belief that Attorney Troy has been untruthful about the Inspector General's Office on February 10, 2011 when responding to a Motion for Summary Judgment. (Exh. F, *Johnson's Memorandum In Opposition to Defendants' Motions For Summary Judgment*, p. 2 ¶ 3, February 10, 2011)("... Duxbury has engaged in a

course of conduct providing misinformation to the Office of the Inspector General...") Any failure to exercise due diligence by Johnson in following up with the Inspector General's Office before discovery closed is not good cause for further discovery or a basis to depose Attorney Troy. *Cf. McIsaac v. Cedergren*, 54 Mass. App. Ct. 607, 610 (2002)(affirming the denial of a motion for relief of judgment where attorney's egregious inattention was not to be rewarded).

Second, information regarding the role of a consultant was made known as of May 11, 2011 at the deposition of Gordon Cushing, the Town's Recreation Director. (Exh. G., *Cushing Depo. Tr. pp. 1, 54*, dated May 11, 2011).

Third, information regarding the fact that Attorney Troy maintained certain documents was provided to the Court on January 27, 2009. (Ex. H. *Preliminary Injunction Hearing Tr.* pp. 1, 26).

Fourth, discussions with the Town as to the status of this litigation, even if unknown by Johnson, are irrelevant. They are privileged and cannot be inquired into at Attorney Troy's deposition. (Exh. I, *Email from Attorney Kreiger*, dated June 7, 2012)(discussing the Town's position on waiving the privilege); *Wilson v. Petricca*, CA 97-2504-A, 2000 WL 424475 *1 (Mass. Super. Mar. 1, 2000)(Hillman, J.)(quashing a deposition that sought communications between an attorney and his client).

Simply put, the deposition notice should be quashed as untimely, unduly prejudicial, and advanced without a good cause as to why the deposition was delayed.

B. There Appears To Be No Good Faith Basis To Depose Attorney Troy

Similar to the argument above, Johnson equally appears to have no good faith basis as to why Johnson would need to depose Attorney Troy. It appears that the facts relied upon by Johnson to assert that Attorney Troy made certain misrepresentations are incorrect and/or have

been misconstrued. Even if Attorney Troy misrepresented certain facts, which he denies, the statements appear immaterial to the case at bar.

First, Attorney Troy never misrepresented his communications with the Inspector General's Office. Despite Johnson's assertions, it appears that the only evidence suggesting that Attorney Troy did not speak with the Inspector General is a letter dated May 14, 2012. (Exh. J, *Letter from Inspector General's Office*, dated May 14, 2012). This letter does not indicate that Attorney Troy did not contact the Inspector General, but that the Inspector General does not have a record of his calls. *Id.* This letter does not appear inconsistent with Attorney Troy's position because calls may be made anonymously to the Inspector General's Office. (Exh. K, *Printout from the Inspector General's Website, http://www.mass.gov/ig/about-us/contact-the-office.html*).

In addition, alleging that Attorney Troy misrepresented facts about a consultant appears to be misplaced. An attorney does not vouch for the evidence that he submits. *See e.g., Mass. R. Prof. C. 3.3 Cmt. 1* (2012). Johnson is: (1) contesting representations made in 2009 that "the client hired a consultant to do this [prepare an RFP] because they wanted to open it up to people other than people running municipal golf courses", "... the Committee hired a consultant to draft a new RFP for North Hill in 2008", and (2) contesting a representation in October 2010 at a Duxbury Town Meeting that "in this particular case, it was decided that the matter was so specialized that we actually went outside of Town Hall and hired a procurement company." Unquestionably, it appears that a consultant was intended to be involved in the process to review the RFP. (Exh. L, *Cushing Depo. Tr.* pp. 1, 7, 25, 35, May 22, 2012)(testifying as to the Town's intentions); (Exh. M, *North Hill Advisory Committee Meeting Minutes § 3.0 ¶ 3*) (The minutes discuss that the Town's recreation director shall meet a "town-appointed RFP specialist");(Exh. N, *Michael Marlborough Depo. Tr.* p. 1, 44)(testifying that he "...th[ought] there was a

consultant" and recalls, "it was mentioned that [the RFP] was going to be looked at by someone...");(Exh. O, *Michael Doolin Depo. Tr.* p. 1, 73)(testifying that "... I think that I heard that the town had somebody that was going to assist in preparing the RFP, yeah."). Johnson apparently takes Attorney Troy's statements in Court that the Consultant was "hired" to draft the RFP as a very specific representation that the consultant had 100% responsibility for every aspect of the process and drafted every word in the RFP. In context, it is clear that the representation is nothing of the sort. Clearly, the Town, in expecting the consultant to *review* the RFP, expected the consultant to make recommendations and to *draft* changes to the RFP as she saw fit. Although Attorney's Troy final statement regarding a consultant in 2010 might have understated the Town's role in the procurement process, he had no intent to deceive. Mr. Cushing, the individual whose testimony allegedly revealed the "misrepresentation," was present at the town meeting (two years after the initial RFP) where the purported misstatements were made. Mr. Cushing made no contemporaneous effort to correct statements made by Mr. Troy. His conduct is completely consistent with the conclusion that Attorney Troy was accurately stating information that he believed to be true.

Second, even if Johnson was correct that Attorney Troy misrepresented certain facts, which Attorney Troy disputes, none of the proposed misrepresentations appear material to this claim. Johnson alleges that the Town deprived it a fair opportunity to bid for the contract and conspired to reject the first RFP as a pretext to denying it the award. In other words, the claim turns on whether the RFP was legal and whether it was interpreted fairly. As a result, whether a consultant drafted the RFP or reviewed it would not change its legality. The existence of consultant would not make an illegal RFP legal, and not retaining a consultant would not make a legal RFP illegal. It is unclear how the retention or lack thereof of a consultant deprived Johnson

of any ability to fairly bid on the RFP. Likewise, the existence of a consultant appears to lack any casual connection as to whether the Town decided to reject the first RFP as a pretext to deny Johnson the contract. At best, the existence of a consultant merely seems to have a tangential value to boost the credibility of the RFP process by indicating that it was not entirely a political work product. Most importantly, the references were made in passing and not indicative of a conspiracy. The reference to a consultant in the January 2009 hearing appears to occur only in an isolated paragraph out of 50 pages of hearing testimony. The reference before the Board of Selectmen appears to be contained only in approximately 1 out of 70 pages of public hearing transcript. Nothing before either the Court or the Town Meeting in 2010 appeared to turn on who drafted the RFP language. Similarly, and as explained above, the RFP was rejected for four independent reasons. Thus, communications with the Inspector General appear immaterial because they suggest that the decision to reject the first RFP would have been made regardless of these communications.

Thus, for these reasons, coupled by Johnson's lack of a good faith basis to justify this delay, Johnson should not be granted a right to conduct last minute discovery.

II. WHERE THE DEPOSITION IS NOT ADVANCED IN GOOD FAITH, A PROTECTIVE ORDER SHOULD BE ISSUED.

Based on the reasons above, it appears that the deposition of Attorney Troy is aimed at embarrassing a long-standing member of the bar in a last ditch effort to build a more complicated and confusing factual record before trial. Therefore, it should be denied.

III. ALTERNATIVELY, IF THIS COURT DENIES THIS MOTION, ATTORNEY TROY REQUESTS A PROTECTIVE ORDER OF AT LEAST SIXTY DAYS.

A party to whom the deposition is requested must be provided at least seven days' notice. *Mass. R. Civ. P. 30(b)(1)(3)* (2012). A court may, for cause shown, enlarge this time. *Id.* This

case has approximately 18,953 pages of documentary materials. To ask Counsel to review those materials in less than ten days and to prepare his client effectively would be unreasonable. Johnson has no objection to rescheduling the deposition and allowing Attorney Troy's Counsel time to review the documents and prepare Attorney Troy if the Court orders the deposition to move forward. Accordingly, and in light of the documentary evidence, Attorney Troy requests that the deposition, if rescheduled, not be rescheduled for at least sixty (60) days.

CONCLUSION

For the foregoing reasons, the non-moving party, Attorney Robert Troy, respectfully requests that this Court **GRANT** its *Emergency Motion To Quash The Deposition Notice Of Attorney Robert Troy And For The Entry Of A Protective Order* and order any other relief it deems necessary and just. In the alternative, Attorney Robert Troy requests that a protective order enter for at least sixty (60) days to allow his Counsel to prepare Attorney Troy fully for his deposition.

The Non-Party Noticed Deponent,

Robert Troy,
By his attorneys,

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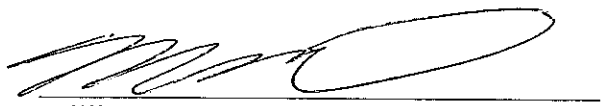
CERTIFICATE OF SERVICE

I, William R. Covino, hereby certify that on Friday, June 8, 2012 I emailed all Counsel of record that this motion will be marked up for a hearing on Monday, June 11, 2012 at 2:00 PM at the Middlesex Superior Court. I further certify that on Monday, June 11, 2012, I served a copy of this document in hand to all Counsel who appeared at the hearing of this motion. All other counsel will be served via first-class mail, postage pre-paid on Tuesday, June 12, 2012.



William R. Covino

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