IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

CASE NO: 09-04133-CI-19

ARIEL MILIAN AND LUMEY CAMACHO,

Plaintiff,

vs.

DEVELOPERS DIVERSIFIED REALTY CORPORATION, A FOREIGN CORPORATION, DDRM BARDMOOR SHOPPING CENTER, LLC, A FOREIGN LIMITED LIABILITY COMPANY, and PROPERTY SOLUTIONS, INC.,

Defendants.

_____ /

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ELEVENTH MOTION TO COMPEL

COME NOW the Plaintiffs, **ARIEL MILIAN AND LUMEY CAMACHO,** by and through the undersigned attorney, and submit this Memorandum of Law In Support of Plaintiff's Eleventh Motion to Compel discovery against Defendants, **DEVELOPERS DIVERSIFIED REALTY CORPORATION and DDRM BARDMOOR SHOPPING CENTER, LLC.,** as follows:

I. PROCEDURAL RECITATION AND STATEMENT OF FACTS

This is an action for serious personal injuries and total disability resulting from the collapse of an awning attached to the rear of the Bardmoor Shopping Center owned and operated by Defendants, DEVELOPERS DIVERSIFIED REALTY CORPORATION, and DDRM

BARDMOOR SHOPPING CENTER, LLC. Plaintiff has been met with objections to virtually every discovery request in this case and has the limited information he has only after dogged determination and the pursuit of discovery orders. Plaintiff has requested the depositions of the following company officers/employees and has been once again met with objections that are, in this case, without merit:

- Dan Hurwitz, COO and Executive Committee Member (e.g. member of xecutive committee that made decisions on whether to visit an asset before purchase and to what extent to inspect it).
- David Weiss, Executive Vice President and General Counsel (e.g. has knowledge of existing corporate entities).
- Dan Branigan, Vice President, Acquisitions and Dispositions (e.g. deferred to as the person with most knowledge of decisions made regarding inspection policies when buying old shopping centers or acquiring old assets).
- David Favorite, Senior Vice President of Property Management (e.g. made decision to demolish and remove all other similar awnings).

Both Richard Forrest, the Director of Property Management for the State of Florida, and Paul Crafa, the Regional Property Manager, have deferred answering many topics to higher level corporate employees and officers including the witnesses subject to this motion. They have deferred particularly regarding big picture policy decisions pertaining to the acquisition of the shopping center which occurred several months prior to Mr. Milian's accident.

In this case, Bardmoor Shopping Center and the management company that operated it were acquired by Defendants, DEVELOPERS DIVERSIFIED REALTY CORPORATION, as a part of a large scale purchase of about 25 shopping centers. Defendant is a sophisticated corporation that

buys, sells and manages shopping centers all over the U.S.A. and Puerto Rico. All of these officers and employees have knowledge of the Defendant's company policies and procedures on acquiring "assets", i.e. shopping centers, determining company policies and procedures on whether they are visited before or during the purchase and to what extent they are inspected, analyzed and evaluated for structural integrity and safe occupancy, and other general operational decisions relevant to this particular case. The other corporate representatives and employees deposed have directed counsel to these company representatives to answer these and other material questions. (See depositions of Paul Crafa and Richard Forrest).

One of Plaintiff's theories of liability is that the shopping center was negligently inspected and assessed for safety and occupancy before and during the acquisition of its prior management company and owner. These corporate employees are material witnesses to the issues and facts relevant to the purchase, acquisition, inspection and assessment of the shopping center during the months prior to Plaintiff's tragic accident. Moreover, the taking of these depositions could yield additional unknown theories of liability. To prohibit the taking of the depositions of such material witnesses would be a clear departure from the essential requirements of the law, giving rise to certiorari review and appeal.

II. ARGUMENT

These officers and employees should be subject to deposition in this case. Prior case law and judicial policy supports such discovery in this circumstance.

The contention that these individuals have no knowledge of relevant facts and that therefore Plaintiff must exhaust other methods of discovery before conducting a deposition is without judicial support and contradicts discovery rationale. The opportunity for harassment of apex officials does exist and these officials are accordingly afforded due protections. However, where, as here Plaintiff

has made reasonable efforts to obtain relevant information from other employees of Defendants and these individuals are believed to have unique and superior knowledge of discoverable information, Defendant should be compelled to submit these individuals to a deposition.

Depositions should be ordered in this case for three reasons. First, Florida law permits broad discovery and the rationales for restricting it are not applicable in this situation; second, Defendant has not followed mandated procedure for a motion for protective order; and third, in the alternative, the rationales derived from courts of other jurisdiction make it clear that a deposition of these officers and employees are warranted.

A. Florida courts have not adopted the "apex doctrine" and permit broad discovery. The rare circumstances in which depositions are limited altogether are not applicable.

As stated in *Citigroup, Inc. v. Holtsberg,* 915 So.2d 1265 (Fla. 1st DCA 2005), no reported Florida appellate court opinion has expressly adopted the "apex" doctrine; a district court of appeal cannot adopt a doctrine which arguably conflicts with the discovery rules. Because discovery rules are rules of practice and procedure, only the Florida Supreme Court has this authority. *Art. V, § 2(a), Fla. Const*. Florida's discovery rules do not contain a requirement that a party must show that a high level officer has unique or superior knowledge before the officer can be deposed. *Fla. R. Civ. P.* 1.280(b)(1) (allowing a party to discover any matter that is not privileged and is relevant to the subject matter of the pending action or appears reasonably calculated to lead to the discovery of admissible evidence). Yet, trial courts have broad discretion in overseeing discovery and in protecting persons from whom discovery is sought. *Fla. R. Civ. P.* 1.280(c); *Rojas v. Ryder Truck Rental, Inc.,* 641 So.2d 855, 857 (Fla.1994). If good cause is shown, the court can prohibit or limit discovery in order to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. *Fla. R. Civ. P.* 1.280(c).

See *Citigroup v. Holtsberg, supra.* Moreover, where persons' conduct and knowledge are relevant to the case, "[C]ourts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue." *Id.* citing Adam M. Moskowitz, "*Deposing 'Apex' Officials in Florida: Shooting Straight for the Top,*" 72 Florida Bar Journal 10 (Dec.1998).

While no clear line has been established as to when a party may notice an apex deposition, courts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue. In the same light, courts should grant protective orders when the apex official has limited knowledge of the relevant claims and it appears, based upon the timing of the notice, that the deposition is simply an attempt to harass the apex official. While the apex position may be "an unimpressive paper barrier shielding [them] from the judicial process," courts should take into account the official's "prestige of position" by requiring reasonable time and place restrictions for all apex depositions. Adam M. Moskowitz, "*Deposing 'Apex' Officials in Florida: Shooting Straight for the Top,*" 72 Florida Bar Journal 10 (Dec.1998).

Florida Rule of Civil Procedure 1.310, similar to other state rules[1], expressly permits a party to take the deposition of "any person"[2] and it is very unusual for a court to prohibit the taking of any deposition altogether. See *Travelers Rental Company, Inc. v. Ford Motor Company, et al.*, 116 F.R.D. 140 (D.Mass. 1987). As Defendant correctly asserts, this right is not without limits and Florida Rule of Civil Procedure 1.280(c) grants the court discretion to limit discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

1 See Tex. R. Civ. P. 200 (party is permitted to take deposition of "any person"). See Ala. R. Civ. P. 30 ("any party may take the testimony of any person, including a party, by deposition upon oral examination")
2 Fla. R. Civ. P. 1.310(a) provides: "After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination."

. ." In exercising its discretion, the trial court should be guided by the spirit of the rules, which is to permit full discovery so as to save time, effort, and money and to expedite the trial with a view to achieving substantial justice. *Ex Parte Old Mountain Properties, Ltd.*, 415 So.2d 1048, 1050 (Ala. 1982).

To the extent the First District Court of Appeal may have adopted the doctrine in *Department of Agriculture and Consumer Services v. Broward County,* 810 So.2d 1056, 1057 (Fla. 1st DCA 2002) and *Horne v. School Board of Miami-Dade County,* 901 So.2d 238 (Fla. 1st DCA 2005), those cases are distinguishable both from this case and from *Citigroup v. Holtsberg* as arising in a governmental context, where there are policy arguments, such as not discouraging people from accepting positions as public servants, that are not applicable in the corporate context. *Citigroup v. Holtsberg, supra.*

Regarding the "apex doctrine", the Third District Court of Appeal most recently addressed the doctrine and declined to adopt it. While finding a protective order regarding the deposition of an insurance company president whose only involvement is having his preprinted signature on the policy of insurance at hand deserving of a protective order, the Third District Court of Appeal expressly rejected the "apex doctrine". *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC,* 57 So.3d 238 (Fla. 3rd DCA 2011). Unlike *General Star,* Plaintiffs seek to depose material witnesses, not to merely invoke a "device to get greater attention at an adversary's headquarters." These witnesses are far different from the insurance company president whose electronic signature appears on every policy issued by the company. These witnesses have relevant and material knowledge of the purchase, acquisition, and inspection and due diligence policies and procedures implemented by this sophisticated purveryor of large shopping centers.

Likewise, the Fifth District Court of Appeal declined to address adoption of the "apex doctrine" in the private, versus governmental context, when it found that an operational level vice president of an insurance company was not an "apex" level executive. *JMIC Life Insurance Company v. Henry,* 922 So.2d 998 (Fla. 5th DCA 2005).

In *Medero v. Florida Power & Light Company,*658 So.2d 566 (Fla. 3rd DCA 1995), the Third District Court of Appeal held that an order denying Plaintiff the opportunity to depose a corporate representative who was a material witness was reviewable by certiorari because the damage done was irreparable. Similar to the testimony in this case, the C.E.O. in *Medero* generally denied knowledge of the allegations of the complaint, but at numerous points identified Mr. Marshall, head of FPL's Distribution Department which oversees the placement of power lines, as potentially having knowledge regarding allegations of FPL's negligence in safety, design, construction, operations and compliance with the National Electric Safety Code. A protective order preventing the deposition of Mr. Marshall departed from the essential requirements of law and was quashed on certiorari review.

B. Defendants have not submitted any affidavits or record evidence in support of their contention that the "apex doctrine" precludes taking depositions of these material witnesses.

Florida law permits a party to file a motion for a protective order under *Fla. R. Civ. P.* 1.280(c), however, along with this motion the moving party "must" attach "the apex official's own affidavit attesting that the official has no knowledge of the claims at issue." Moskowitz at 13. See also *In re: Columbia Rio Grande Healthcare, L.P.* 977 S.W. 2d 433 (Tex. App. -- Corpus Cristi 1998). Without an affidavit supporting the contentions of the defense (a threshold requirement), defense's allegations that all of these witnesses have no personal knowledge of the events giving rise to this claim, that they were not involved with the acquisition of this shopping center, its

inspection and its remaining open to the public, and were not involved in the purchase, decisions to inspect, decisions on thoroughness of inspection, and the opening of the shopping center to the public, Defendants' contentions opposing discovery depositions of these witnesses amount to bare statements without any support. See *O'Rear v. American Family Life Assurance Company of Columbus, Inc.*, 817 F.Supp. 113, 115 (M.D. Fla. 1993). Only after the motion and affidavit are filed, does the burden rest upon the non-moving party to "demonstrate to the court that the apex official has unique or superior personal knowledge of discoverable information." *Moskowitz* at 13.

III. Conclusion.

Florida courts have not adopted the "apex" doctrine. Defendant has no established the predicate required, even if a motion for protective order were filed, to preclude Plaintiffs from taking depositions of these material witnesses. Notwithstanding their job titles and positions within the companies, they are material witnesses in the case, and Plaintiffs are entitled to take their depositions. Any order prohibiting this discovery would be a departure from the essential requirements of law subject to certiorari review.

Plaintiff hereby certifies that counsel has in good faith conferred or attempted to confer with the Defendant failing to make the discovery in an effort to secure the information or material sought without court action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail – postage paid, this _____ day of _____, 2011, to: Michael E. Reed,

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