

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-23154-CIV SEITZ/SIMONTON

SANDRA RINKER,

Plaintiff,

v.

CARNIVAL CORPORATION,
et al.,

Defendants.

ORDER GRANTING JAMES RINKER, JR.'S MOTION TO QUASH SUBPOENA

This matter came before the Court upon Plaintiffs' Motion for Protective Order and to Quash Defendant Ramanbhai Patel's Subpoena for the Deposition of James Rinker, Jr. for October 25, 2011 (DE # 187).¹ Supplemental exhibits (DE # 191), as well as the Affidavit of James Rinker, Jr. (DE # 193), have been filed in support of the Motion. Carnival Corporation ("Carnival") has filed a Response to the Motion (DE # 197). The Honorable Patricia A. Seitz has referred all discovery in this case to the undersigned Magistrate Judge (DE ## 34, 134). On October 12, 2011, the undersigned held a hearing on the Motion (DE # 192). Upon a review of the record as a whole, and for the reasons stated below, the Motion is granted.

I. **Background and Motion**

Plaintiff filed this action, alleging that she was severely injured due to the Defendants' failure to "promptly, adequately and properly diagnose her meningitis, bacteremia and osteomyelitis," during a Carnival cruise. The fifteen-count Amended

¹ The Motion is captioned as "Plaintiffs' Motion," but the introduction of the Motion identifies it as being that of Plaintiff Sandra Rinker. A review of the record also indicates that Mr. Rinker is no longer a party to this action, thereby leaving Sandra Rinker as the sole Plaintiff (DE # 85 at 1). Counsel for Plaintiff, however, clarified at the hearing that he continues to represent both Plaintiff and Mr. Rinker in this matter, and that the Motion was filed on behalf of Mr. Rinker.

Complaint primarily asserts negligence claims and claims of assault and/or battery against the Defendants (DE # 39).

According to the Motion, in scheduling Mr. Rinker's deposition, counsel for Plaintiff and Mr. Rinker had expressed to opposing counsel that Mr. Rinker would be available for deposition on Sundays only, because of his full-time employment and substantial responsibilities as the only caretaker for his Plaintiff-wife, due, at least in part, to her injuries that are the subject of this case. The Motion details Mr. Rinker's caretaking duties. Counsel for Defendant Dr. Patel, nonetheless, served Mr. Rinker with a subpoena by mail, requiring his appearance at deposition on Tuesday, October 25, 2011. The Motion argues that a protective order should be entered to protect Mr. Rinker from undue burden, and the subpoena should be quashed for failure to comply with the personal service requirements of Federal Rule of Civil Procedure 45 (DE # 187 at 2). Upon order of this Court at the hearing, as noted below, Mr. Rinker subsequently filed an affidavit attesting to his caretaking responsibilities (DE # 193).

Defendant Carnival has filed a Response to the Motion. First, Carnival points out that Mr. Rinker's deposition has been scheduled in conjunction with several others to be taken in Las Vegas, Nevada, during the same time period in order for them to be taken during a single trip to Las Vegas. The depositions have been difficult to schedule due to the unavailability of Plaintiff's counsel during September, and the difficulty of coordinating with the other out-of-state deponents' busy schedules (DE # 197 at 2). In addition, due to the impending discovery deadline and defense counsel's other obligations, the deposition cannot be rescheduled. Moreover, the deposition was properly noticed, and service of subpoena by certified mail under Rule 45 is proper. Finally, Mr. Rinker has not demonstrated any undue burden (DE # 197 at 3).

At the hearing held after the Motion was filed, the undersigned ordered that Defendants file any response to the Motion by Friday, October 14, 2011 (which, as noted above, Defendant Carnival has filed); and the undersigned required James Rinker, Jr. to file an affidavit by the same date, detailing his caretaking responsibilities, ability to take time off work for deposition, and his specific availability on Monday, October 24, 2011, and Monday, October 31, 2011 (which, as indicated above, Mr. Rinker has filed).² As further detailed at the hearing, the undersigned concluded that an affidavit was required because Mr. Rinker had not yet provided the Court with a basis for his unavailability; and, with regard to the Motion, generally, the undersigned wished to afford the defense an opportunity to file a written response to the Motion, including addressing whether service of the subpoena by certified mail satisfied the requirements of Federal Rule of Civil Procedure 45(b)(1).

II. Legal Standard and Analysis

Serving a subpoena pursuant to Federal Rule of Civil Procedure 45(b) requires, *inter alia*, “delivering a copy to the named person.” As counsel have noted, some courts have interpreted this provision to require personal service while others have found service by other means sufficient in certain circumstances. This court, in *In Re Matter Under Investigation by Grand Jury No. 1*, 2011 WL 761234, No. 10-81252-MC, at *1 (S.D. Fla. Feb. 24, 2011), reviewed case law on this issue from several jurisdictions, citing cases supporting both positions, and ultimately concluded that personal service was required pursuant to Rule 45(b). After a careful review of Rule 45 and the case law, the undersigned reaches the same conclusion as set forth in *In Re Matter Under Investigation*, and finds more persuasive the line of cases requiring personal service

² The undersigned notes, however, that Mr. Rinker’s Affidavit failed to address this last issue regarding his availability on the noted dates.

pursuant to Rule 45(b). As the court noted in *In Re Matter Under Investigation*, the “longstanding interpretation” of this provision has been a literal understanding of the term “delivering,” requiring personal service. *Id.* (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2454 (3d ed. 2010)). In addition, *Moore’s Federal Practice* recognizes personal service as the majority rule. 9 James Wm. Moore et al., *Moore’s Federal Practice* § 45.21 (3d ed. 1997) (noting the majority rule, but stating that there appears to be no sound policy reason for not permitting alternative methods for service). Moreover, as recognized in *In Re Matter Under Investigation*, authority in this Circuit suggests that personal service is required. 2011 WL 761234, at *1 (citing *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968)).³ Therefore, in accordance with other decisions in this Circuit, the undersigned applies to this case the majority rule requiring personal service pursuant to Rule 45(b). See *MAC Funding Corp. v. ASAP Graphics, Inc.*, 2009 WL 1564236, No. 08-61785-MC (S.D. Fla. June 3, 2009); *Lake Shore Radiator, Inc. v. Radiator Express Warehouse*, 2007 WL 842989, No. 3:05-CV-1232-J-12MCR (M.D. Fla. Mar. 19, 2007); *Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc.*, 211 F.R.D. 685 (N.D. Ga. 2002).

As Carnival notes, Mr. Rinker has acknowledged receipt of the subpoena by mail (DE # 193-1 at 1). Nonetheless, this fact is not determinative of the issue. See *In Re Matter Under Investigation*, 2011 WL 761234, at *2 (noting that the individual sought for deposition had already filed a motion on the merits of the case, but that there was no apparent impediment to personal service, and no evidence of attempts to evade service). Defense counsel acknowledged at the hearing that they have not attempted to personally serve Mr. Rinker. Therefore, under the rule applied in this case, service of the subpoena

³ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

by certified mail upon Mr. Rinker pursuant to Federal Rule of Civil Procedure 45 was deficient, and the subpoena is quashed. Because the subpoena is quashed, the undersigned does not reach the parties' remaining arguments in respect of a protective order.

The undersigned notes, as Carnival has in its Response, that the Court's deadlines for discovery and dispositive motions is approaching quickly, and that the testimony of Mr. Rinker could be relevant to the parties' dispositive motions. In this regard, the undersigned suggests, for the sake of expediency, that the parties work together to consider alternative means for conducting the deposition remotely as well as alternative dates, such as Monday, October 24, 2011, or Monday, October 31, 2011, as the record is unclear as to the parties' specific obligations on these dates.

Therefore, upon a review of the record as a whole, and for the reasons stated above, it is hereby

ORDERED AND ADJUDGED that James Rinker, Jr.'s Motion for Protective Order and to Quash Defendant Ramanbhai Patel's Subpoena for the Deposition of James Rinker, Jr. for October 25, 2011 (DE # 187) is **GRANTED**, as described in the body of this Order.

DONE AND ORDERED in Miami, Florida, on October 20, 2011.



ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished via CM/ECF to:

The Honorable Patricia A. Seitz,
U.S. District Judge
Counsel of Record