

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

v

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

THE CHARTER TOWNSHIP OF MILFORD,
a Michigan municipal corporation, **TOWNSHIP
OF MILFORD BOARD**, a public body, **DONALD
D. GREEN**, in his personal capacity and in his
official capacity as Supervisor of Milford Township,
and **TIMOTHY C. BRANDT**, in his personal capacity
and in his official capacity as Building and Zoning
Administrator of Milford Township,

Defendants.

**PLAINTIFFS' RESPONSE TO
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QUESTION PRESENTED

1. Do Defendants have standing to bring the instant motion in response to Plaintiffs' subpoenas directed to third parties represented by counsel who have agreed to produce the third parties pursuant to the terms set forth in the subpoenas?

Plaintiffs answer: No

Defendants answer: Yes

2. Is there good cause for a protective order?

Plaintiffs answer: No

Defendants answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 26

Nix v. Sword, 11 F. App'x 498 (6th Cir. 2001)

United States v. Wells, No. 06-10589, 2006 WL 3203905 (E.D. Mich. Nov. 3, 2006)

SUMMARY

Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack (the “Hacks”) subpoenaed three third-party witnesses for deposition: neighbors David and Valerie Mamo (the “Mamos”) and engineer Michael Darga. Defendants’ instant motion effectively seeks to quash the subpoenas but is styled as seeking a protective order.

Preliminarily, Defendants do not have standing to quash subpoenas issued to third-parties. *United States v. Wells*, No. 06-10589, 2006 WL 3203905, at *2 (E.D. Mich. Nov. 3, 2006). The Mamos and Mr. Darga each have separate counsel, and each have agreed to produce them pursuant to duly-served subpoenas. **Exhibit A;**
Exhibit B.

Separately, Defendants have not articulated good cause for a protective order; Defendants fail to identify “specific facts showing clearly defined and serious injury” resulting from the subpoenas. *Nix v. Sword*, 11 F. App’x 498, 500 (6th Cir. 2001).

Defendants have four attorneys with appearances in this case: Jennifer H. Elowsky, Richard V. Stokan, Jr., Michael J. Bonvolanta, and James E. Tamm. Three of these attorneys have been practicing more than 18 years each. However, only Defendants’ lead counsel, Mr. Tamm, objects; his sole objection is lack of availability. No other attorney claims lack of unavailability for the depositions, standing mute to requested availability.

Undersigned counsel requested dates from Defendants' counsel in an attempt to accommodate Mr. Tamm. Mr. Tamm states he is unavailable for depositions until February 11, 2019.

The Hacks obtained their initial building permit, with driveway included, in November of 2017. After thirteen months, the Hacks still do not have a driveway. Their home sits 300 feet off the County Roads, often submerged in water and mud—now a icy corridor. Mr. Hack has moved out of the home and is under mental health treatment to treat onset depression. The state court saw the urgency of the situation and expedited a show cause hearing, and this Court, too, saw fit to expedite this matter. Plainly spoken, Plaintiffs have waited long enough to build a driveway that gives them safe passage to their home. Undersigned counsel needs these depositions to ascertain the veracity of Defendants' claims for revoking the Hacks' permit and to bring this case to resolution.

Mr. Tamm's objections are not reasonable, can be remedied by having co-counsel attend, and do not constitute good cause—even assuming Defendants have standing to halt these depositions.

Plaintiffs respectfully request that the Court deny Defendants' Motion for a Protective Order.

PERTINENT FACTUAL AND PROCEDURAL HISTORY

A. The attorney for engineer Michael Darga has agreed to produce Mr. Darga pursuant to the subpoena served on him through counsel.

Michael Darga is an engineer with Hubbell, Roth and Clark, Inc.

On August 24, 2018, Mr. Darga, in his capacity as Milford's retained engineer, approved the Hacks' driveway plan.

Afterward, Defendant Donald D. Green, Milford's Supervisor, intervened for unexplained reasons, leading Milford's Board to "table" review of its own engineer's approval.

After Milford's intervention, Mr. Darga issued a new letter recommending multiple "conditions" be required before the Hacks could construction their driveway, including conducting a study of the areas water "tributary" system and conducting rainfall calculations—there were no such preconditions in Milford's approval of the building permit in November of 2017 or Mr. Darga's approval on August 24, 2018.

Mr. Darga is represented by attorney Kevin J. Gleeson of Sullivan, Ward, Asher & Patton, P.C. Mr. Gleeson has agreed to produce Mr. Darga for deposition on December 18, 2018, pursuant to the subpoena. **Exhibit A.**

B. The attorney for Valerie and David Mamo has agreed to produce the Mamos pursuant to the subpoena served on them.

The "Mamos" are the neighbors of the Hacks, specifically residing on the lot

bordering the Hacks' eastern border.

The Milford Parties state that the David Mamo's complaints allegedly caused Defendant Timothy C. Brandt to issue a cease and desist letter after Milford, through Mr. Brandt, issued the Hacks a building permit in November of 2017 authorizing the Hacks to build a home and driveway. *Defendants' Response*, ECF No. 10 at PageID 299.¹

The Milford Parties have also contended that David Mamo "presented evidence to the Township Board" on which Milford allegedly relied to reject Mr. Darga's August 24, 2018 recommendation that the Hacks be allowed to implement their driveway construction plan.

The Mamos are represented by attorney Kenneth Silver of Hertz Schram. Mr. Silver has agreed to produce the Mamos for deposition on December 17, 2018, pursuant to the subpoena. **Exhibit B.**

C. Plaintiffs' counsel has worked to schedule mutually-agreeable deposition dates, but there is an impasse.

On November 28, 2018, undersigned counsel requested deposition dates in response to Mr. Tamm's notification that he was unavailable for the Mamos' deposition on December 17.

¹ The Defendants do not initially identify the Mamos by name, but there is no dispute that Defendants are referring to David Mamo in this citation.

On November 29, 2018, Mr. Tamm wrote that his earliest availability was February 11. **Exhibit C.**

On November 30, 2018, undersigned counsel asked Mr. Tamm to provide dates for the Mamos' depositions and Mr. Darga's deposition within a reasonable timeframe. Undersigned counsel also asked for the availability of Mr. Tamm's co-counsel.

Mr. Tamm insisted he must attend, and refused to provide a date earlier than February 11, 2019.

This lack of availability comes within the following context:

- The Complaint was filed in State Court on October 17, 2018.
- Undersigned requested a 26(f) conference on October 24, 2018; availability was not provided until November 15, 2018.
- On November 26, 2018, undersigned counsel requested deposition dates for Defendants Timothy Brandt and Donald Green. Defendants counsel has not provided any dates.

ARGUMENT

A. The standard for motions for protective order pursuant to Fed. R. Civ. P. 26.

The party seeking to quash a subpoena bears a heavy burden of proof. *Irons v. Karceski*, 74 F.3d 1262, 1264, 316(D.C.Cir.1995). Specifically, to obtain a protective order, the movant must establish "good cause." *Nix v. Sword*, 11 F. App'x 498, 500 (6th Cir.2001) (per curiam). Good cause is established with

“specific facts showing ‘clearly defined and serious injury’ resulting from the discovery sought and cannot rely on mere conclusory statements.” *Nix*, 11 F.App’x at 500.

The typical purpose of a protective order pursuant to Fed. R. Civ. P. 26 is to protect “a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .” *William Beaumont Hosp. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 WL 2534207, at *4 (E.D. Mich. June 18, 2010).

B. Defendants have no standing to, in effect, quash Plaintiffs’ subpoenas issued to third-parties.

“As a general rule, a party has no standing to seek to quash a subpoena directed to a non-party.” *United States v. Wells*, No. 06-10589, 2006 WL 3203905, at *2 (E.D. Mich. Nov. 3, 2006); *see, Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir.1975) (“In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness.”); *see also Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir.1979) (holding that absent a personal right or privilege with respect to the materials subpoenaed, a party does not have standing to quash a subpoena directed at to a third party.).

Here, Defendants claim no privilege or personal right in the depositions or subpoenaed documents. That is because none exists.

Further, third-parties Michael Darga, Valerie Mamo, and David Mamo have not objected to the subpoenas, let alone filed motions seeking to quash the subpoenas.

C. There is no good cause for a protective order.

Plaintiffs filed their complaint on October 17, 2018, and nearly two months have passed since then; it is reasonable to conduct discovery, including depositions. Conversely, it is unreasonable to wait until February 11, 2019 to conduct depositions.

Defendants have failed to articulate any specific facts or specific “serious” injury that will occur if the depositions take place on December 17, 2018, and December 18, 2018.

Defendants are well-represented by four attorneys and two law firms. Only one of the four attorneys states he is unavailable. Defendants’ counsel can have another attorney attend these depositions without serious injury.

ACCORDINGLY, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack respectfully request that this Court enter an order denying Defendants’ Motion for Protective Order.

Respectfully submitted,

/s/ R.J. Cronkhite

R.J. Cronkhite (P78374)

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Dated: November 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on **December 10, 2018**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronkhite
Attorney for Plaintiffs