6-1-2015

John W. Robinson III, Protective Order

John Goger
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN W. ROBINSON III,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action File No.**
	)	**2015CV259408**
WELLSHIRE FINANCIAL SERVICES, LLC d/b/a LOANSTAR TITLE LOANS, d/b/a MOONEYMAX TITLE LOANS, and d/b/a LOANMAX; et al.,	)	**BUS 4**
	)	
Respondents.	)	

ORDER

Before this Court is Non-Party John W. Robinson III's Application for Protective Order under O.C.G.A. § 24-13-116. Having considered the briefs and the record, the Court finds as follows:

John W. Robinson, III has been issued a subpoena to appear for a deposition in a matter pending in Texas, *Wellshire Fin. Servs., LLC et al.("LoanStar") v. TMX Finance Holdings, Inc., et al, ("TitleMax")* No. 2013-33584 (152nd Judicial District, Harris Cnty, Tex.). The underlying Texas litigation involves allegations that TitleMax illegally procured customer information from its automobile title loan competitor, LoanStar, by sending employees to canvas LoanStar's parking lots. Mr. Robinson served as the President of TitleMax from 2007 to December 31, 2011, and as a board member in 2012. He has been employed as CEO of Aaron's, Inc. since November of 2014.

On March 6, 2015, Commissions to take the Oral Deposition of Mr. Robinson were issued by the Harris County, Texas Deputy District Clerk and the Texas Court issued its Letter Rogatory on March 3, 2015 stating that "the evidence to be solicited form the proposed witness

is necessary for purposes of proper progression and trial of this action." A Civil Subpoena for Deposition was issued from the Fulton County Superior Court Clerk of Court on April 3, 2015 noticing Mr. Robinson's deposition for April 15, 2015. Mr. Robinson filed the instant Motion seeking protection from this subpoena under O.C.G.A. § 24-13-116, which allows a protective order to be filed in the superior court of the county in which a foreign subpoena was issued in compliance with the statutes and court rules of Georgia.

Mr. Robinson asserts that he has no firsthand personal knowledge of the matters at issue in the Texas litigation. Mr. Robinson avers that he was only involved "at the very top of layers of managing TMX Finance, LLC's Business" and "did not have firsthand personal knowledge of the day-to-day operations or marketing activities of any particular TitleMax store in Texas." He does admit in his Affidavit: "It is possible that John McCloskey, the General Counsel of Select Management Resources, LLC, may have complained to me about what he thought some TitleMax employees were doing in Texas. But I do not presently remember receiving any specific information about these allegations." LoanStar, on the other hand, points to evidence that in addition to speaking with Mr. McCloskey, Mr. Robinson (1) messaged Linda McDonald, TitleMax's Vice-President of Operations to tell her that LoanStar claimed that TitleMax employees were going onto its competitor's parking lot and that this should not be occurring, and (2) coached Ms. McDonald regarding the propriety of canvassing parking lots to acquire customers.

Mr. Robinson also contends that he is very busy as Aaron's CEO and sitting for a deposition in this matter would be unduly burdensome.

Finally, Mr. Robinson notes that the Court of Appeals for the First District of Texas has stayed the depositions of TitleMax's current CEO, Mr. Tracy Young, and Senior Vice-President

of Operations, Mr. Otto Bielss while it reviews TitleMax's Petition for Writ of Mandamus pending before it. The Petition seeks review of the trial court's order denying protection under the apex doctrine and compelling the C-level executives' depositions. The Texas Court of Appeals issued its orders staying these depositions on December 4, 2014 and February 19, 2015. Mr. Robinson argues that the orders staying the depositions suggest that LoanStar has not sought relevant discovery from lower level employees with personal knowledge before pursing apex-level executives.

Mr. Robinson argues that he should not be compelled to testify under the "apex doctrine." In other jurisdictions, including Texas, the apex doctrine protects corporate officers at the apex of the corporate hierarchy from depositions without a showing that the official has superior knowledge that cannot be discovered in a less burdensome fashion.[1] There is no evidence that

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[1] *See Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (adopting the apex doctrine):

> When a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods. Depending upon the circumstances of the particular case, these methods could include the depositions of lower level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation. After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the trial court should modify or vacate the protective order as appropriate. As with any deponent, the trial court retains

the apex doctrine has ever been adopted in Georgia state courts and under O.C.G.A. § 24-13-116, Georgia law is controlling. Mr. Robinson cites various cases from the 11th Circuit and Georgia U.S. District courts applying the apex doctrine and argues that since the Federal Rule of Civil Procedure 26 mirrors O.C.G.A. § 9-11-26(c), which allows the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," the federal case law applying the apex doctrine is persuasive authority. The Court declines Petitioner's invitation to adopt the apex doctrine whole cloth, and instead will consider the motion pursuant to O.C.G.A. § 9-11-26(c) and controlling authority.

The Court is wary, however, of rendering a decision on the propriety of a deposition of a former CEO when the Texas Court of Appeals is currently considering the propriety of deposing current high level executives. The Court is not convinced that the stays issued by the Texas Court of Appeals suggest anything about the merits of the appeal and instead, were likely issued preserve the status quo pending its ruling. Allowing the depositions of the current CEO and Senior Vice President of Operations to go forward while the Petition was pending would render the Petition moot. Likewise, this Court will maintain the status quo consistent with the Texas cases and hereby issues a temporary protective order effective until a ruling from the Texas Court of Appeals on TitleMax's Petition for Writ of Mandamus. The parties are to notify the Court as soon as a decision is rendered. At that time, the Court will reconsider this Application for Protective Order.

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discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place.

As such, the Application for Protective Order under O.C.G.A. § 24-13-116 is **GRANTED** until the issuance of a ruling on TitleMax's Petition for Writ of Mandamus in the Court of Appeals for the First District of Texas.

SO ORDERED this 1 day of ~~May, 2015~~ June.

The Honorable John J. Goger
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Petitioner John W. Robinson III:	Attorneys for Wellshire Financial Services, LLC, et al.:
Ronan P. Doherty Jeremy D. Farris BONDURANT, MIXSON & ELMORE, LLP Atlanta, Georgia 30303 Telephone: (404) 881-4100 Doherty@bmelaw.com farris@bmelaw.com	Joseph D. Wargo Ryan Watstein Abigail Stecker Romero WARGO & FRENCH, LLP Atlanta, Georgia Telephone: (404) 853-1500 jwargo@wargofrench.com rwatstein@wargofrench.com aromero@wargofrench.com
Attorneys for TitleMax:	Kent Sullivan Daniel Johnson Robert A. Lemus SUTHERLAND ASBILL & BRENNAN LLP Houston, Texas 77002 Telephone: (713) 470-6100 Kent.sullivan@sutherland.com Daniel.johnson@sutherland.com Robert.lemus@sutherland.com
David Beck Geoff Gannaway Bryon Rice BECK REDDEN LLP Houston, TX 77010 Telephone: (713) 951-3700 dbeck@beckredden.com ggannaway@beckredden.com Stephen LaBriola Christina Baugh FELLOWS LABRIOLA LLP Atlanta, Georgia 30303-1731 Telephone: (404) 586-9200 slabriola@fellab.com	Sarah F. Powers Christina L. Goebelsmann WARGO & FRENCH LLP Los Angeles, California 90067 Telephone: (310) 853-6300 spowers@wargofrench.com cgoebelsmann@wargofrench.com