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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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|---------------------|---|-----------------------------------|
| SHINICHI TAKAHASHI, |) | Civil Action No. 93-58 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | DECISION AND ORDER DENYING |
| |) | DEFENDANT'S MOTION FOR |
| SHINJI INOUE, |) | DISCOVERY EXPENSES AND |
| |) | ATTORNEY'S FEES |
| Defendant. |) | |

Defendant Shinji Inoue has filed a motion for discovery expenses and attorney's fees incurred during preparation for an aborted deposition meant to take place in Tokyo, Japan, on June 23rd, 1993. The Court has reviewed the memoranda and exhibits of both parties concerning this matter. On October 27, 1993, the Court also heard oral argument of both parties.

I. FACTS

Plaintiff Takahashi wished to depose a non-party, Japanese citizen named Mr. Yoshizawa. Counsel for Plaintiff realized that the taking of such a deposition was governed by Commonwealth Rule

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1 of Civil Procedure 28(b), and would ordinarily require a drawn out
2 process involving a subpoena issued from a Japanese court and a
3 deposition taken at the U.S. embassy in Japan. Upon Plaintiff's
4 request, Defendant Inoue waived the Rule 28(b) procedure by
5 agreeing to stipulate to Mr. Yoshizawa's voluntary appearance for
6 his deposition in Japan. Both parties agreed not to sign the
7 stipulation until Plaintiff could get Mr. Yoshizawa to commit to
8 a particular place and time for the taking of his deposition. In
9 addition to an outstanding bench warrant for his arrest, Mr.
10 Yoshizawa has failed to pay a \$999,879.27 judgment issued by this
11 court in a matter related to this case.

12 After one failed attempt to secure a deposition date on May
13 26, 1993, Mr. Yoshizawa told Mr. Takahashi that he would be able
14 to appear for a deposition on June 23, 1993. On May 28th, both
15 parties signed the written stipulation concerning the June 23rd
16 deposition date. On June 17th, counsel for the Defendant received
17 a phone call from Mrs. Nishigaya, Defendant's translator,
18 regarding the possibility that Mr. Yoshizawa would not appear at
19 the June 23rd deposition. When Defendant's counsel phoned
20 Plaintiff's counsel to confirm this report, Plaintiff's counsel
21 only stated that to his knowledge the report was false.

22 On Friday, June 18, attorneys for both parties traveled to
23 Tokyo, Japan for the purpose of taking the deposition of Mr.
24 Yoshizawa the following Wednesday. Later that day, Plaintiff met
25 with his attorney and informed him that Mr. Yoshizawa might not
26 appear. Counsel for Plaintiff made limited and fruitless efforts
27 to contact Defendant's counsel with this information. On June
28 22nd, a telephone conversation between Mr. Takahashi and Mr.

1 Yoshizawa revealed that the latter's appearance at the June 23rd
2 deposition was further in doubt. Plaintiff contacted Defense
3 counsel's Saipan office with this information. The deponent
4 failed to appear on June 23rd. Defendant Inoue has filed a motion
5 requesting this Court to order Plaintiff to pay \$7684.91 worth of
6 Defendant's discovery expenses and attorney's fees pursuant to
7 Commonwealth Rule of Civil Procedure 30(g)(1).

8
9 II. ISSUE

10
11 1) Whether Com.R.Civ.P. 30(g)(1) requires a plaintiff
12 responsible for arranging the time and location of a foreign
13 deposition involving a non-party deponent to guarantee the non-
14 party deponent's appearance at the stipulated date of deposition?

15 2) Whether Com.R.Civ.P. 30(g)(1) requires a party giving
16 notice of a deposition to inform the other party of an aborted
17 deposition if the noticing party attends the deposition, and the
18 non-party deponent causes the cancellation by failing to appear?

19
20 III. ANALYSIS

21 In the case at bar, the Defendant can only expect
22 reimbursement for his discovery expenses and attorney's fees if:
23 (1) the Plaintiff breached an existing duty to insure the
24 appearance of Mr. Yoshizawa at the June 23rd deposition; or (2)
25 the Plaintiff breached an existing duty to inform the Defendant of
26 Mr. Yoshizawa's failure to appear. In the memorandum in support
27 of the motion for discovery expenses and attorney's fees, the
28 Defendant relies on the language of Com.R.Civ.P. 30(g)(1) to

1 saddle the Plaintiff with the duty to ensure Mr. Yoshizawa's
2 appearance at the deposition. The Defendant also argues that the
3 Plaintiff violated Rule 30(g)(1) by canceling the deposition
4 without affording the Defendant proper notice. After a careful
5 analysis of Rule 30(g)(1), this Court finds that the Plaintiff had
6 no duty to ensure Mr. Yoshizawa's appearance at the June 23rd
7 deposition. In addition, the Court finds that the plain language
8 of Rule 30(g)(1) only burdens a noticing party (Plaintiff) with a
9 duty to inform the party receiving notice (Defendant) of a
10 canceled deposition when the noticing party fails to appear at the
11 deposition. The Court finds that Plaintiff attended the place of
12 deposition at 9:00 A.M. on June 23rd, 1993, and was prepared to
13 proceed with the deposition. Therefore, this Court denies
14 Defendant any recovery of discovery expenses and attorney's fees
15 in connection with this matter.

16 First, Rule 30(g)(1) does not impose upon Plaintiff any duty
17 to ensure Mr. Yoshizawa's appearance at the June 23rd deposition.
18 C.R.C.P. 30(g)(1) states:

19 If the party giving the notice of the taking of the
20 deposition fails to attend and proceed therewith and another
21 party attends in person or by attorney pursuant to notice,
22 the Court may order the party giving the notice to pay such
23 other party the reasonable expenses incurred by him and his
24 attorney in attending, including reasonable attorney's fees.

25 Com.R.Civ.Proc. 30(g)(1).

26 When interpreting a Federal Rule of Civil Procedure such as
27 Rule 30(g), the Court shall construe the rule liberally but should
28 not expand it by disregarding plainly expressed limitations.
Schlagenhauf v. Holder, 85 S. Ct. 234 (1964). With this in mind,
the Court construes Rule 30(g) as conferring a duty on the party

1 giving notice of the deposition either to be present at the
2 deposition, or in the event that he cannot attend, to make sure
3 the party that received notice of the deposition has also received
4 timely notice that the deposition will not occur. Id. If the
5 party arranging the deposition fails to attend and fails to notify
6 the other party of the aborted deposition, the decision whether to
7 impose discovery sanctions under Rule 30(g) is within the
8 discretion of the Court. Miller v. Transamerican Press, Inc., 709
9 F.2d 524, 532 (9th Cir.1983)

10 The facts of this case show that the Plaintiff arranged and
11 gave notice of the deposition of Mr. Yoshizawa to be held during
12 the morning of June 23, 1993 in Tokyo, Japan. Although Mr.
13 Yoshizawa, a non-party deponent, failed to appear at the
14 deposition, Plaintiff was at the place of deposition awaiting Mr.
15 Yoshizawa's arrival. Thus, Plaintiff satisfied his duty to appear
16 at the deposition he had arranged.

17 A careful reading of Rule 30(g)(1) reveals that the noticing
18 party's duty to timely notify another party of the aborted
19 deposition only arises "if" the noticing party has failed to
20 attend and proceed with the deposition. In the case at bar,
21 evidently the only participant not willing to attend the
22 deposition was the deponent himself. Whether or not general rules
23 of common decency required Mr. Takahashi to convey to Defendant a
24 definite answer from Mr. Yoshizawa concerning his appearance on
25 June 23rd, such a duty cannot be found in the plain language of
26 Rule 30(g)(1).

27 Even if Rule 30(g)(1) were read to include a duty to inform
28 the party receiving notice of a non-party deponent's failure to

1 attend a deposition, the Court finds that Plaintiff gave proper
2 notice under the circumstances. The facts show that Plaintiff
3 made a good faith effort to keep Defendant's counsel apprised of
4 the non-party deponent's intentions to attend the deposition. The
5 fact that Plaintiff went to great expense to fly his counsel to
6 Tokyo for the deposition and actually appeared at the aborted
7 deposition illustrates Plaintiff's sincere belief that Mr.
8 Yoshizawa would make an appearance on June 23rd.

9 The Defendant seems to argue that the Mr. Takahashi had an
10 additional responsibility to make sure that the non-party deponent
11 appeared at the time of the deposition. However, neither the
12 Defendant nor the Court have been able to find any case law to
13 suggest that a party and their attorney are responsible for the
14 actions of anyone but themselves during a legal proceeding.

15 Defendant's first source of authority, Delozier v. First Nat.
16 Bank of Gatlinburg, fits the Rule 30(g) scenario perfectly because
17 the defendant gave notice of his own deposition and failed to show
18 up for it. Delozier, 109 F.R.D. 161, 165 (E.D.Tenn. 1986).
19 However, the Delozier case contains nothing to convince the Court
20 that the noticing party is responsible for a non-party deponents
21 appearance at deposition.

22 Defendant's second source of authority, Pine Lakes Int.
23 Country Club v. Polo Ralph Lauren, grants an award for expenses
24 and attorney's fees when the party noticing the deposition fails
25 to attend and neglects to deliver sufficient notice of
26 cancellation to the other party. Pine Lakes, 127 F.R.D. 473
27 (S.D.Miss. 1989). However, the noticing party in the case at bar
28 attended the place intended for the June 23rd deposition and

1 appeared to make an effort to keep the other party informed of Mr.
2 Yoshizawa's intentions as the information became available to
3 them.

4 As the facts illustrate, the Plaintiff was faced with the
5 troublesome task of deposing a witness in a foreign country.
6 Although C.R.C.P. 28(b) provides the proper methods for deposing
7 such a witness, Plaintiff attempted to circumvent the admittedly
8 cumbersome path set forth in Rule 28(b) by asking the Defendant if
9 he would be willing to waive the requirements under C.R.C.P. 28(b)
10 in favor of an expedited, voluntary appearance by Mr. Yoshizawa
11 for his deposition in Japan. The Defendant agreed to stipulate to
12 the waiver of Rule 28(b) on the condition that the Plaintiff get
13 Mr. Yoshizawa to commit to a time and place for the taking of his
14 deposition. By circumventing Rule 28(b) and attempting to take
15 Mr. Yoshizawa's deposition without enlisting the power of the
16 Japanese court system, both parties assumed the risk that Mr.
17 Yoshizawa would not appear.

18 According to the facts, Mr. Yoshizawa had agreed to appear
19 for the deposition on Thursday morning, June 23rd. However,
20 attorney's for both parties flew to Tokyo as early as Saturday,
21 June 18. The affidavit of Mr. Takahashi indicates that he first
22 became worried about the deponents intentions not to appear on
23 June 18 and relayed this information to his attorney upon his
24 arrival in Tokyo. It is unfortunate that both parties felt it
25 necessary to incur the expense of arriving in Tokyo five days
26 prior to the deposition of a deponent known for his unreliability.
27 Clearly, if both parties had made plans to leave for Tokyo at a
28 time more proximate to the deposition date, Mr. Takahashi's would

1 have communicated his reservations about the deponent's appearance
2 to his counsel while counsel for both parties were still in
3 Saipan.

4 In any case, Plaintiff upheld his end of the stipulation
5 agreement when Mr. Takahashi had gotten Mr. Yoshizawa to agree to
6 appear at the June 23rd deposition. The stipulation agreement did
7 not require Mr. Takahashi to guarantee Mr. Yoshizawa's appearance
8 at the deposition. The stipulation agreement mentioned nothing
9 about reimbursing Defendant for any expenses in the event Mr.
10 Yoshizawa failed to appear. Absent any such language in the
11 stipulation agreement, Plaintiff cannot be held responsible under
12 Rule 30(g)(1) for the failure of a non-party deponent to attend
13 the June 23rd deposition. Mr. Yoshizawa alone is responsible for
14 his failure to attend the June 23rd deposition.

15
16 **IV. CONCLUSION**

17
18 Based on the foregoing, the court DENIES Defendant Shinji
19 Inoue's motion for discovery expenses and attorney's fee's
20 pursuant to Commonwealth Rule of Civil Procedure 30(g).

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22 So ORDERED this 3 day of January, 1994.

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25 ALEXANDRO C. CASTRO, Presiding Judge
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