

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ORLEANS

AB 511 DOE,

Plaintiff,

v.

LYNDONVILLE CENTRAL SCHOOL
DISTRICT AND LYNDONVILLE
ELEMENTARY SCHOOL,

Defendants.

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO QUASH
SUBPOENA OF DONALD BOW AND
DIRECTING USE OF DEPOSITION
TESTIMONY AT TRIAL**

Index No. 20-46602

Hon. Deborah Chimes, J.S.C.

The undersigned, Leah Costanzo, Esq., an attorney at law, affirms that the following statements are true, under penalty of perjury:

1. I am an attorney licensed to practice law in the State of New York and am the attorney for plaintiff in the above referenced matter. As such, I am fully familiar with the facts and circumstances arising in this case.

2. This Affirmation is respectfully submitted in opposition to defendant's motion to quash the trial subpoena duces tecum served on nonparty Donald Bow and seeking use of his deposition at trial pursuant to CPLR § 3117(a)(3)(iii) in its place.

PROCEDURAL AND FACTUAL BACKGROUND

3. Plaintiff has brought a claim under the Child Victims Act for abuse by the late Terry Houseman at defendant's school in 1986-1987. Terry Houseman was employed at defendant's school from 1970 to 1991.

4. Donald Bow was supervising principal at defendant's school from 1973 to 1978 and superintendent from 1978 to 1982.

5. Plaintiff submitted initial discovery demands to defendant on May 18, 2021. See cover letter attached as **Exhibit A**.

6. Shortly thereafter, defendant issued “non-party” subpoenas for the depositions of two former school administrators, Donald Bow and Russell Martino, without providing any discovery, arguing that due to the witnesses ages and health conditions, they needed to be deposed immediately.

7. Defendant initially attempted to schedule these depositions for July 20, 2021 and conduct them without providing plaintiff with any discovery responses. When plaintiff refused to participate in the depositions without discovery, they were adjourned.

8. On July 22, 2021, defendant provided plaintiff with partial discovery responses which consisted of a partial, redacted transcript of Houseman’s criminal trial, board minutes referencing Houseman and his school file, select documents relating to the 1990-91 criminal investigation, copies of plaintiff’s pleadings, copies of AB 524 Doe’s pleadings, defendant’s record retention policy, and plaintiff’s medical records.

9. While these discovery responses consisted of approximately 700 pages, notably missing were plaintiff’s student file, the employment files of Donald Bow and Russell Martino, anything related to defendant’s policies and procedures during the relevant time frame, and defendant’s responses to plaintiff’s request for interrogatories. Despite having omitted these relevant documents and before plaintiff even had a chance to review the sufficiency of what was provided, defendant began demanding that plaintiff’s counsel agree to attend nonparty depositions of Mr. Bow and Mr. Martino in August of 2021. See emails at **Exhibit B**.

10. Thereafter, your affirmant informed defendant’s counsel that more time was needed to review the discovery and dates to conduct these depositions in September of 2021 were

provided. In response, defendant issued amended Notices of Deposition scheduling the depositions for August 30, 2021. I notified defense counsel that I was required to be in federal court for motion practice that day and indicated that plaintiff would move for a protective order if defendant sought to proceed in plaintiff's absence. See emails at **Exhibit C**.

11. Ultimately, court intervention was requested. See **Exhibit D**. The depositions were scheduled for September 24, 2021, and defendant was instructed to provide additional responsive discovery.

12. Only eight days before the depositions, defendant provided a response to plaintiff's request for interrogatories and almost 350 pages of additional discoverable documents including plaintiff's school file, the employment files of Mr. Bow and Mr. Martino, and agreements between defendant and the Lyndonville Teacher's Association. See letter at **Exhibit E**. The following day, defendant provided more than 200 pages of additional documents which included defendant's various policies and procedures.

13. Defendant had more than a year to investigate this claim and collect and review all relevant documents and information in their possession, including those related to former administrators Donald Bow and Russell Martino, while plaintiff – having to rely on defendant's production for information – did not have that opportunity. At the time the depositions of Mr. Bow and Mr. Martino were conducted, plaintiff had inadequate paper discovery, no opportunity for supplemental requests, and an insufficient amount of time to adequately prepare.

14. After the Bow and Martino depositions, discovery proceeded and the parties performed twelve additional depositions including plaintiff, four former teachers, a former Business Administrator, a former Superintendent, two current staff members, plaintiff's ex-wife, nonparty witness Patrick Whipple, and plaintiff in a related case, AB 524 Doe. Additional records

from board meetings were provided, three onsite inspections of the school building took place, and complete, unredacted documents and transcripts from Houseman's criminal investigation and trial were obtained.

15. At the trial scheduling conference on January 16, 2024, defendant requested that this Court permit them to use Donald Bow's deposition transcript in lieu of live testimony due to Mr. Bow's health condition. At that time, plaintiff indicated that he would be calling Donald Bow as a live witness at trial and could not consent to use of the deposition transcript. The Court advised that medical documentation was necessary.

16. On January 25, 2024, defendant emailed plaintiff the Affirmation of Kimberly Bow dated January 25, 2024, Donald Bow's daughter-in-law. ([NYSCEF Doc. No. 239](#)). While the affirmation contained numerous hearsay statements with no attached proof or medical documentation, it did confirm that Mr. Bow was not suffering from any mental incapacity. It also failed to disclose to counsel or the Court that Ms. Bow is a current employee of defendant, and therefore an interested witness, now seeking to prevent a "nonparty" from testifying.

ARGUMENT

17. Defendant is seeking to quash plaintiff's subpoena for the trial testimony of Donald Bow and require the use of his deposition testimony at trial pursuant to CPLR § 3117(a)(3)(iii). A copy of the subpoena issued to Mr. Bow is attached as **Exhibit F**.

18. Defendant does not argue that Mr. Bow is not competent to testify and none of his listed health conditions (Smith Aff., ¶11) indicate any mental infirmity. Instead, defendant's argument relates solely to his physical condition at age 92.

19. Mr. Bow initially testified in this matter at the age of 90. At that time, defendant did not raise the issue of his age relative to his ability to testify.

20. While defendant continues to address Mr. Bow as a nonparty witness, it is readily apparent that Mr. Bow is under the direct control of defendant, with unfettered access to information in support of their position on this issue. Plaintiff does not have, and has not had, the opportunity to explore Mr. Bow's competency, ability to testify, and obtain a complete medical picture of Mr. Bow's present condition (to assess whether any of the alleged medical conditions claimed in defendant's motion were present when he initially testified in 2021) as defendant has controlled the flow of information. The only medical evidence presented to this Court regarding Mr. Bow's ability to testify is heavily redacted medical records from an illness he suffered months ago, an affidavit of defendant's own employee saying Mr. Bow has certain medical conditions, none of which affect his mental capacity, and a letter from his doctor asking for accommodations. Plaintiff respectfully submits that this is insufficient to support preclusion of Mr. Bow's trial testimony under the circumstances, absent a voir dire.

21. In support of their argument, defendant attaches select medical information which has been largely redacted by some undisclosed person or party. From these records, plaintiff understands that Mr. Bow was exposed to a respiratory illness and became ill at or around January 4, 2024. Contrary to defendant's argument, Mr. Bow did not appear to have been hospitalized following this illness (Smith Aff., ¶13) and was instead discharged home at the request of his family (Smith Aff., Ex. C).

22. Defendant argues that the only time Mr. Bow left his home was three weeks ago due to a syncopal episode (Smith Aff., ¶13, 16). However, the affirmation of Kimberly Bow establishes that this syncopal episode happened almost 2 months ago due to pneumonia. (Smith Aff., Ex. A). All other relevant information regarding Mr. Bow's condition at a January 12, 2024

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