STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 4138
759 VENTURES, LLC; and GUARDIAN GC, LLC, a North Carolina limited-liability company, individually and derivatively on behalf of 759 Ventures, LLC, Plaintiffs, v. GCP APARTMENT INVESTORS, LLC, a Florida limited-liability company, Defendant.	**ORDER ON MOTION FOR PROTECTIVE ORDER**
GCP APARTMENT INVESTORS, LLC, a Florida limited-liability company, Counterclaim Plaintiff, v. 759 VENTURES, LLC; and GUARDIAN GC, LLC, a North Carolina limited-liability company, Counterclaim Defendants.	

1. Trial in this matter is set for January 2020. This Order addresses whether the defendant, GCP Apartment Investors, LLC ("GCP"), may take trial depositions—also known as *de bene esse* depositions—of five witnesses.

2. As previous orders explain, this litigation arises out of a management dispute between the members of 759 Ventures, LLC. *See 759 Ventures, LLC v. GCP Apartment Inv'rs, LLC*, 2018 NCBC LEXIS 82 (N.C. Super. Ct. Aug. 13, 2018); *759 Ventures, LLC v. GCP Apartment Inv'rs, LLC*, 2018 NCBC LEXIS 44 (N.C. Super. Ct.

May 9, 2018). The plaintiff, Guardian GC, LLC ("Guardian"), owns two-thirds of the membership interest in 759 Ventures. GCP owns the rest. Guardian and GCP are also the managers of 759 Ventures.

3. Of the many sources of enmity between the two sides, most pertinent is an episode involving Vyne Residential, LLC ("Vyne"). 759 Ventures is one of Vyne's members and its sole manager (meaning that Guardian and GCP share control of Vyne through their control of 759 Ventures). At the start of 2016, Vyne sold its only asset, a condominium complex. Vyne distributed most of the cash from the sale immediately but reserved $1.75 million. Whether and how to distribute the reserved cash became a sore subject. When Vyne made its final distribution to 759 Ventures and its other members about a year later, it did so apparently at the direction of GCP's manager, Max Mazzone. 759 Ventures then made a corresponding distribution to GCP but withheld Guardian's share, also apparently at Mazzone's direction. Guardian objects to what it views as unilateral and unfair actions by GCP.

4. GCP's defense, at least in part, is that Guardian left it no choice. It appears to be undisputed that Guardian was gripped by an internal power struggle for the better part of 2016. Enzo Mizzi and his brother Filippo eventually acquired undisputed control of Guardian, but their claim had been challenged by Christopher Needham and apparently also by Justin Fong and Marlon Brand. GCP asserts that each of the three factions wanted Vyne's cash to be distributed in mid-2016 (an assertion that Guardian strenuously disputes) but not to the opposing factions. So, GCP contends, it went forward with the distribution on the ground that further delay

due to Guardian's internal contest would have been unreasonable, but it withheld Guardian's share while awaiting a victor.

5. This and other disputes led to litigation. Guardian contends that GCP materially breached the operating agreement for 759 Ventures and that it is therefore entitled by the agreement's terms to remove GCP as a manager. GCP denies any breach and, as a counterclaim, seeks judicial dissolution of 759 Ventures on the theory that the two managers are deadlocked, making it no longer practicable to conduct the company's business. Now some thirty months along, this case is in its late stages. The Court recently issued a pretrial scheduling order in anticipation of a bench trial set to begin early next year. (ECF No. 164.)

6. In preparation for trial, GCP served notice that it planned to take trial depositions of the Mizzi brothers and Needham. Guardian objected to the depositions and submitted the dispute as a discovery dispute under North Carolina Business Court Rule 10.9. The Court authorized Guardian to move for a protective order and requested expedited briefing, during which GCP stated that it also intends to depose Fong and Brand. The dispute is now fully briefed, and the Court elects to decide it without a hearing. *See* BCR 7.4.

7. Guardian argues that these depositions are untimely under the Court's case management order. (*See* Br. in Supp. 5–6, ECF No. 167.) Fact discovery closed on March 29, 2019, (*see* ECF No. 120), and neither party took any depositions before that deadline. That should end the matter, Guardian contends, because the case

management order makes no provision for post-discovery trial depositions and reopening discovery at this late stage would be prejudicial. (*See* Br. in Supp. 6.)

8. GCP argues that trial depositions are not subject to discovery deadlines because their purpose is to preserve trial testimony, not to discover information. (*See* Opp'n 2, ECF No. 168.) According to GCP, the five witnesses at issue are likely to be unavailable for trial because most live in Canada and all live outside the Court's subpoena power. (*See* Opp'n 4.) On that basis, GCP contends, it should be permitted to conduct limited depositions to preserve each witness's testimony for trial even though it chose not to depose them during discovery. (*See* Opp'n 5.)

9. Deciding whether and when to allow trial depositions is a highly case-specific question. The North Carolina Rules of Civil Procedure do not mention them. This Court once filled the gap with a local rule on the subject, but no longer. And the most that can be said from our State's case law is that trial depositions of unavailable witnesses are permitted and perhaps even advisable in some circumstances. *See In re Will of Yelverton*, 178 N.C. App. 267, 274, 631 S.E.2d 180, 184 (2006) (upholding denial of continuance when party knew witness was unavailable for trial but "made no attempt to secure her testimony through a deposition *de bene esse*"); *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co.*, 192 N.C. App. 376, 387, 665 S.E.2d 505, 512 (2008) ("We have also suggested that in a situation such as this, counsel should attempt to secure testimony through a deposition *de bene esse*.").

10. Guardian argues that post-discovery trial depositions are not allowed because, as our Court of Appeals has held, "there is no distinction between a discovery

deposition and a trial deposition" under Rule 32 of the North Carolina Rules of Civil Procedure. *Robertson v. Nelson*, 116 N.C. App. 324, 327, 447 S.E.2d 488, 490 (1994). But Rule 32 isn't the issue here. Rule 32 governs the use of deposition testimony at trial, not whether a trial deposition may be taken in the first place. *See Patterson v. W. Carolina Univ.*, 2013 U.S. Dist. LEXIS 53825, at *2 (W.D.N.C. Apr. 16, 2013) (addressing analogous federal Rule 32); *Bouygues Telecom, S.A. v. Tekelec, Inc.*, 238 F.R.D. 413, 414 (E.D.N.C. 2006) (same). Neither *Robertson* nor Rule 32 holds that trial depositions must be taken during the discovery period.

11. Indeed, it would be arbitrary to refuse a trial deposition solely because a party requests it after the close of discovery. *See Charles v. Wade*, 665 F.2d 661, 664 (5th Cir. 1982). As one federal district court has explained, "[t]he purpose of a discovery deposition is to discover information; the purpose of a [trial] deposition is to preserve testimony for trial." *Bouygues Telecom, S.A.*, 238 F.R.D. at 414. In other words, the point of a trial deposition is to preserve the testimony of a witness who is or may become unavailable to testify at trial. A witness's availability may not be known until trial draws near, which is usually well after discovery has closed. A bright-line rule prohibiting post-discovery trial depositions would bar them when they are needed most.

12. Of course, courts retain the discretion to address trial depositions in the case management order, including the discretion to set deadlines and other parameters for such depositions. The Court did not do so here. No party suggested in the case management report or during the case management conference that the discovery

deadline should apply to both discovery depositions and trial depositions, and the case management order does not address trial depositions.

13. This is not to say that the discovery deadline is irrelevant. Many federal courts have cautioned that a trial deposition should not be allowed if it is no more than a disguised effort at belated discovery. It is appropriate to consider, for example, when the party seeking the deposition became aware that the witness would be unavailable. *See, e.g.*, *Estate of Terry Gee v. Bloomington Hosp. & Health Care Sys.*, 2012 U.S. Dist. LEXIS 29404, at *17 (S.D. Ind. Mar. 6, 2012); *Bamcor LLC v. Jupiter Aluminum Corp.*, 2010 U.S. Dist. LEXIS 126702, at *4–5 (N.D. Ind. Nov. 29, 2010); *George v. Ford Motor Co.*, 2007 U.S. Dist. LEXIS 61453, at *32 (S.D.N.Y. Aug. 17, 2007). If the party became aware during the discovery period, then there is a reasonable argument that it should have noticed a deposition at that time, rather than waiting until trial.

14. It is also appropriate to consider whether the party knows what the substance of the witness's testimony will be. A party has little reason to spend time and money during discovery to learn what it already knows. Thus, a request to take the trial deposition of a friendly witness is very likely for the purpose of memorializing known testimony, rather than discovering new information. By contrast, requests to depose hostile or unfriendly witnesses—whose testimony is usually not known—"are more likely to be discovery depositions attempting to pose as trial depositions." *Estenfelder v. Gates Corp.*, 199 F.R.D. 351, 355 (D. Colo. 2001). In all cases, the touchstone is fairness.

15. In the circumstances of this case, the Court will not permit trial depositions of the Mizzi brothers. Guardian has represented that Enzo Mizzi will attend trial as its corporate representative and intends to testify. (Br. in Supp. 9.) Given that he will be available for trial, there is no reason to memorialize his testimony in advance.

16. Guardian has not made the same representation as to Filippo Mizzi, and he may well be unavailable given that he resides in Canada. But GCP has known this all along. "This is not a case in which the need to depose the witness results from the need to preserve testimony that the witness would otherwise have given at trial, based on unforeseen events arising after the close of discovery." *George*, 2007 U.S. Dist. LEXIS 61453, at *32. Furthermore, as one of Guardian's principals, Filippo is an unfriendly witness. GCP cannot fairly claim to know what the substance of his testimony will be. This appears to be an effort to discover the testimony of an opponent's witness long after the close of discovery. It would be unfair to Guardian to allow this deposition on the eve of trial.

17. The opposite is true for Needham. It appears that Needham used to live within the subpoena power of the Court, but he has since moved elsewhere, rendering him unavailable. (*See* Opp'n 4.) This is the type of unforeseen event or changed circumstance that commonly supports allowing a trial deposition. The Court does not perceive any prejudice to Guardian. If the deposition does not go forward, however, GCP may be deprived of the opportunity to present an important witness simply because he has relocated. The Court therefore denies the motion for protective order as to Needham.

18. It is a closer call as to Fong and Brand. GCP was clearly aware long ago that both individuals reside in Canada, outside the Court's subpoena power. But it would not be accurate to characterize either of these third-party witnesses as unfriendly. Both have submitted affidavits when requested by either party, and they seem to be willing to sit for a deposition. Had Guardian deposed Fong and Brand during discovery and GCP chosen not to ask questions of them at that time, the picture might look different. As it happens, neither party took any depositions at all. All things considered, the Court does not believe that targeted trial depositions of Fong and Brand would be prejudicial to Guardian, and a more complete record will ensure that this case is resolved on its merits.

19. One final word: it would have been far preferable to raise this issue during the pretrial scheduling conference and before the Court issued its pretrial scheduling order. Had that happened, each party and the Court would have had the opportunity to address not only the merits more fully but also the effect these depositions will have on the pretrial calendar. It also would have been possible to address alternatives, including options for securing live testimony of witnesses at trial through remote means, such as videoconference or teleconference. These opportunities have passed. The Court now expects cooperation and collegiality as counsel take the next steps in complying with this Order.

20. For these reasons, the Court **GRANTS** the motion for protective order as to Enzo Mizzo and Filippo Mizzi. The Court **DENIES** the motion as to Christopher Needham, Justin Fong, and Marlon Brand. Counsel shall work together to schedule

the depositions of Needham, Fong, and Brand at mutually agreeable times within fourteen days of this Order. Guardian may, of course, cross-examine the witnesses.

SO ORDERED, this the 4th day of November, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases