

STATE OF NORTH CAROLINA
HARNETT COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 2015

JOEL KELLY, DPM; ELIZABETH
BASS DAUGHTRY, DPM; DUNN
FOOT AND ANKLE CENTER, P.A.;
and PIEDMONT FOOT CLINIC,
P.A.,

Plaintiffs,

v.

JASON NOLAN, DPM; and
RICHARD HAUSER, DPM,

Defendants.

**ORDER ON DEFENDANTS' BCR 10.9
SUBMISSION**

1. **THIS MATTER** is before the Court upon Defendants' 31 May 2023 submission under Business Court Rule ("BCR") 10.9 in the above-captioned matter.

2. Defendants emailed the Court on 31 May 2023 identifying an unresolved discovery dispute regarding three subpoenas *duces tecum* served by Plaintiffs on third-party financial institutions—Wells Fargo, Suntrust/Truist Bank, and Southern Bank. The Wells Fargo and Suntrust/Truist subpoenas were served on 22 May 2023, and the Southern Bank subpoena was served on 25 May 2023. All three subpoenas purported to require the production of certain documents at the office of Plaintiffs' counsel on 9 June 2023. Defendants have requested that these subpoenas be quashed because they were served on or after the last day of the discovery period in this case and were therefore untimely.

3. On 5 June 2023, the Court held a conference via Webex with counsel for all parties with regard to the BCR 10.9 submission. This Order memorializes the Court's rulings at that conference.

4. The Court most recently extended the deadline for the completion of discovery in this case by means of an Order entered on 17 March 2023. (ECF No. 38.) The discovery deadline set out in that Order was 22 May 2023 – the same day the Wells Fargo and Suntrust/Truist subpoenas were served. Because that Order was the third extension of discovery deadlines in this case (*see* ECF Nos. 28, 35), the Court stated therein that “[n]o further extensions or modifications . . . shall be granted absent a showing of compelling circumstances.” (ECF No. 38) (emphasis in original). Since the issuance of that Order, neither side has moved for additional extensions of the deadline for discovery.

5. BCR 10.4 states, in pertinent part, that “[e]ach party is responsible for ensuring that it can complete discovery within the time period in the Case Management Order.” Defendants contend that the subpoenas should be deemed untimely because all three sought the production of documents on a date that was after the discovery deadline. Defendants further assert that the Southern Bank subpoena is untimely for the additional reason that it was not even served until after the expiration of the discovery period. For these reasons, Defendants ask the Court to quash all three subpoenas.

6. This Court has previously addressed this precise issue, stating the following:

LoRusso objects to several subpoenas that Plaintiffs served on third parties. LuRusso contends that they were served after discovery closed; Plaintiffs contend that they were served on the last day of discovery. Either way, the subpoenas are untimely. By rule, parties must serve discovery “early enough that answers and responses will be due before the discovery deadline ends.” BCR 10.4(a). Plaintiffs did not do so.

Even if Plaintiffs had served the subpoenas on the last day of discovery, the third parties would not have had time to comply before the end of the discovery period. “[T]he Court has inherent authority to police its own case management order and to quash an untimely subpoena.” *Al-Hassan v. Salloum*, 2021 NCBC LEXIS 62, at *4 (N.C. Super. Ct. July 2, 2021) (citation and quotation marks omitted). Accordingly, the Court quashes Plaintiffs’ untimely subpoenas.

Wright v. LoRusso, No. 20 CVS 10612 ¶ 14 (N.C. Super. Ct. Feb. 13, 2023).

7. Here, as in *Wright*, the subpoenas are untimely. None of the three subpoenas were served in compliance with BCR 10.4(a).

8. Therefore, the Court, in its discretion, **ORDERS** that the three subpoenas at issue are **QUASHED**. Counsel for Plaintiffs are **DIRECTED** to serve a copy of this Order upon Wells Fargo, Suntrust/Truist Bank, and Southern Bank immediately and to inform them that they are not required to comply with the subpoenas.

9. Finally, in accordance with an agreement reached at the 5 June Webex conference on an unrelated discovery matter, Defendants’ counsel are **DIRECTED** to exercise their best efforts to expeditiously obtain and provide Plaintiffs’ counsel with legible copies of all documents previously produced by Defendants in an illegible format.

SO ORDERED, this the 6th day of June, 2023.

/s/ Mark A. Davis

Mark A. Davis

Special Superior Court Judge for
Complex Business Cases