

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Mary Ann Stimac, personal representative)	
of the estate of Rudolph Stimac, deceased,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 5045
)	
BNSF Railway Company and Gary Railway Company,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 213(f) requires all trial witnesses be disclosed. A Rule 206(a)(1) corporate representative may testify at trial, but only if disclosed as a Rule 213(f) witness. In this case, the defendant failed to identify in a timely fashion its Rule 206(a) corporate representative as a Rule 213(f)(1) witness. The plaintiff's motion to strike the defendant's late of a Rule 213(f)(1) witness is, therefore, granted and the witness is precluded from testifying at trial. In addition, the plaintiff's motion to strike the defendant's designation of an additional Rule 213(f)(1) witness is granted.

Facts

This court's July 24, 2020 case management order required Stimac and BNSF Railway Company ("BNSF") to complete Illinois Supreme Court Rule 214 and Rule 213(f)(1) and (f)(2) written discovery by October 31, 2020. The order further required the parties to complete Rule 213(f)(1) and (f)(2) depositions by January 31, 2021. Stimac was to complete her Rule 213(f)(3) disclosures by March 1, 2021, and her retained expert witnesses deposed by April 15, 2021. BNSF was to complete its Rule 213(f)(3) disclosures by May 15, 2021, and its retained expert witnesses deposed by June 30, 2021.

BNSF timely disclosed Paul Nash, its former supervisory employee, as a Rule 213(f)(1) witness. On October 19, 2020, Stimac took Nash's discovery deposition. Nash died several months later.

On January 12, 2021, Stimac served BNSF with a notice of deposition of a corporate designee pursuant to Rule 206(a)(1). On April 15, 2021, BNSF communicated it would produce a corporate designee for deposition on May 4,

2021. On April 21, 2021, BNSF disclosed Robert Reyff as its corporate representative.

On April 29, 2021, BNSF served its third supplemental Rule 213(f)(1) and (f)(2) disclosures designating four new lay witnesses, including Reyff. Stimac opposed the motion, and the parties fully briefed the issues. On May 26, 2021, the court entered an order granting and denying, in part, BNSF's motion. The order specifically provided that BNSF would be allowed to name one Rule 213(f)(1) witness to replace Nash, with the understanding that the scope of the new witness's disclosures would be limited to Nash's disclosures. The order also provided that BNSF could disclose Reyff as a Rule 206(a)(1) corporate representative.

BNSF later disclosed Michael Croy as its Rule 213(f)(1) witness to replace Nash. On June 25, 2021, BNSF served Stimac with its Rule 206(a)(1) corporate representative witness designations. Stimac elected not to take Reyff's Rule 206(a)(1) deposition.

On January 4, 2022, Stimac filed a motion to strike BNSF's designation of Reyff as a Rule 213(f)(1) witness. The parties fully briefed the motion.

The parties also communicated regarding BNSF's Rule 213 disclosures. BNSF expressed its intent to offer Nash's deposition testimony at trial. On January 4, 2022, Stimac filed a motion to strike BNSF's designation of Nash as a Rule 213(f)(1) witness. The parties fully briefed the motion.

Analysis

Pretrial discovery is intended to enhance truth seeking, enable attorneys to prepare for a trial, eliminate surprise, and quickly decide controversies in accordance with the parties' substantive rights. *D.C. v. S.A.*, 178 Ill. 2d 551, 561 (1997). Illinois Supreme Court Rule 213 specifically requires a party, upon written interrogatory, to identify the name and address of every witness who will testify at trial. Ill. S. Ct. R. 213(f). As with pretrial discovery in general, the purpose of the Rule 213 disclosure requirements is to avoid surprise and discourage strategic gamesmanship. *Thomas v. Johnson Controls, Inc.*, 344 Ill. App. 3d 1026, 1032 (1st Dist. 2003). Rule 213 permits litigants to rely on the disclosed opinions of opposing witnesses and construct their trial strategy accordingly. *Firststar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 532 (1st Dist. 1999).

Rule 213(f)(1) provides as follows:

(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses *who will testify at trial* and must provide the following information:

(1) Lay Witnesses. A “lay witness” is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.

Ill. S. Ct. R. 213(f)(1) (emphasis added). Rule 213 disclosure requirements are mandatory, and the parties must strictly comply. *Kovera v. Enviroite of Illinois, Inc.*, 2015 IL App (1st) 133049, ¶ 59.

Rule 206(a)(1) provides a specific procedure by which an organization may designate an officer, director, or managing agent to testify on its behalf if that organization has been issued a subpoena. Ill. S. Ct. R. 206(a)(1). As with the other discovery rules, the purpose of Rule 206 is to ensure fairness and protect the parties from surprise. *Bruske v. Arnold*, 100 Ill. App. 2d 428, 433 (3d Dist. 1968). Rule 206(a)(1) provides:

(a) Notice of Examination; Time and Place. A party desiring *to take the deposition* of any person upon oral examination shall serve notice in writing a reasonable time in advance on the other parties. The notice shall state the time and place for taking the deposition; the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify the deponent; and whether the deposition is for purposes of discovery or for use in evidence.

(1) Representative Deponent. A party may in the notice and in a subpoena, if required, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. The subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

Ill. S. Ct. R. 206(a)(1) (emphasis added).

The parties' arguments arise from this court's May 26, 2021 order. That order was prompted by BNSF's motion for leave to file its third supplemental Rule 213(f)(1) disclosures that sought to name Reyff as a 213(f)(1) witness. The order states: "Reyff may be disclosed as a Rule 206(a)(1) corporate representative." Based on that language, Stimac argues the May 26 order limits Reyff's appearance in this case solely as a Rule 206(a)(1) corporate designee. For its part, BNSF argues the order granted BNSF's designation of Reyff as a corporate representative but did not strike him as a fact witness, thus not precluding Reyff from testifying at trial. Importantly, the order does not state that Reyff may appear as a 213(f)(1) witness.

BNSF is certainly correct that a Rule 206(a)(1) witness may appear at trial as a Rule 213(f)(1) witness and testify to facts within that person's personal knowledge. The designation of a Rule 206(a)(1) corporate designee does not, however, automatically elevate the witness to a Rule 213(f)(1) witness. Fundamentally, a witness must be disclosed pursuant to the requirements of Rule 213 before they may testify at trial. The plain language of Rule 213(f) dictates: "Upon written interrogatory, a party must furnish the identities and addresses of witnesses *who will testify at trial* and must provide the following information. . . ." Ill. S. Ct. R. 213(f) (emphasis added). Subjects not disclosed under Rule 213(f)(1) or testified to at a discovery deposition cannot be testified to at trial. *Van Gelderen v. Hokin*, 2011 IL App (1st) 093152, ¶ 34. Additionally, Rule 206(a)(1) provides the rules for "[a] party desiring to take the *deposition* of any person." Ill. S. Ct. R. 206(a)(1) (emphasis added). Plainly, Rule 206(a)(1) is devoid of any language suggesting the designation of a corporate representative automatically makes that person also a trial witness under Rule 213(f)(1). Rather, Rule 206(a)(1) is merely designed to be a discovery mechanism to obtain for corporate information.

BNSF also argues that correspondence with Stimac's counsel indicates that Stimac misled BNSF as to whether Reyff would be a Rule 213(f)(1) fact witness or a Rule 206(a)(1) corporate representative. That argument is not persuasive. The burden was on BNSF to name its Rule 213(f)(1) trial witnesses. BNSF certainly had sufficient time to do so, but did not file any motions for extensions of time to identify Reyff as a Rule 213(f)(1) witness.

Fundamentally, BNSF's position asks this court to reconsider its May 26, 2021 order. Despite the order's plain language, BNSF seeks to reopen decided issues. This court previously reviewed BNSF's arguments in support of its motion to file its third supplemental Rule 213(f)(1) disclosures. This court concluded that BNSF could not disclose Reyff as a Rule 213(f)(1)

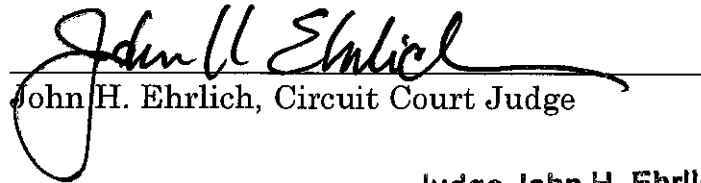
witness. And since a Rule 213(f) disclosure is a prerequisite to testifying at trial, Reyff's testimony remains limited to the parameters of Rule 206(a)(1).

This court also finds the May 26, 2021 order applicable to the issue of whether BNSF should be allowed to present Nash's deposition at trial. This court previously provided that: "The defendant is permitted to name one Rule 213(f)(1) witness to *replace* Paul Nash, with the understanding that the scope of the new witness's disclosures are limited to Nash's disclosures." (Emphasis added). BNSF subsequently designated Croy as its Rule 213(f)(1) witness replacement for Nash. The order's plain language explicitly permitted BNSF to name one Rule 213(f)(1) witness to replace Nash. The order does not permit BNSF to designate a Rule 213(f)(1) witness in addition to presenting Nash's deposition testimony. BNSF's attempt to parse the language of the order does not change the outcome.

Conclusion

For the reasons presented above, it is ordered that:

1. The plaintiff's motion to strike the defendant's designation of Robert Reyff as a Rule 213(f)(1) witness is granted; and
2. The plaintiff's motion to strike the defendant's designation of Paul Nash as a Rule 213(f)(1) witness is granted; the defendant is permitted to present Michael Croy in lieu of Nash to the extent of Nash's prior testimony.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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