

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Frank J. Steinhauser, III, et al.,

Civil No. 04-2632 (JNE / SRN)

Plaintiffs,

v.

ORDER

City of St. Paul, et al.,

Defendants.

Sandra Harrilal, et al.,

Civil No. 05-461 (JNE / SRN)

Plaintiffs,

v.

ORDER

Steve Magner, et al.,

Defendants.

Thomas J. Gallagher, et al.,

Civil No. 05-1348 (JNE / SRN)

Plaintiffs,

v.

ORDER

Steve Magner, et al.,

Defendants.

Matthew A. Engel, 11282 86th Avenue North, Maple Grove, MN 55369, for Plaintiffs Gallagher et al.; John R. Shoemaker, Shoemaker & Shoemaker, P.L.L.C., 7701 France Ave. South, Suite 200, Edina, MN 55435, for Plaintiffs Steinhauser et al., and Harrilal et al.

Louise Toscai Seeba, Assistant City Attorney, 750 City Hall and Courthouse, 15 West Kellogg Blvd., St. Paul, MN 55102, for Defendants.

SUSAN RICHARD NELSON, United States Magistrate Judge

This matter comes before the undersigned United States Magistrate Judge on Defendants' Motions For a Protective Order (Doc. No. 71 (No. 04-CV-2632), Doc. No. 30 (No. 05-CV-1348), & Doc. No. 36 (No. 05-CV-461)). The matter has been referred to the undersigned pursuant to 28 U.S.C. § 636 and District of Minnesota Local Rule 72.1(a). For the reasons stated below, the Court grants the motions in part and denies the motions in part.

I. FACTUAL AND PROCEDURAL HISTORY

In these three related actions, several owners of rental properties within the City of St. Paul (Plaintiffs) generally allege that the City of St. Paul and various municipal officials (Defendants) have engaged in discriminatory practices with respect to enforcing building codes regarding Plaintiffs' properties, which are allegedly occupied primarily by "protected-class" renters.

Plaintiffs seek to depose various individuals, mostly non-parties, that are present or former St. Paul municipal officials, including former Mayor Randy Kelly, City Council President Kathy Landry, City Council Member David Thune, Legislative Hearing Officer Marcia Moermond, and Assistant City Attorney Maureen Dolan. Defendants now move for protective orders prohibiting the depositions.

II. DISCUSSION

Parties generally are entitled to conduct liberal discovery into any relevant non-privileged material. Fed. R. Civ. P. 26(b)(1). Upon a showing of good cause, however, this Court may enter a protective order tailoring the nature and form of discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c); see also id. 26(b)(2) (permitting limitation of discovery based on various grounds). This

Court possesses broad discretion in deciding “when a protective order is appropriate and what degree of protection is required.” Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

Additional factors and concerns are relevant where discovery is sought from a public official. A protective order prohibiting the deposition of certain public officials is particularly appropriate where the party seeking such discovery cannot “show specific need for the information.” Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982). To depose government officials, the party seeking such discovery must show that the prospective deponent “possessed information which was essential to plaintiffs’ case and which could not be obtained from” others. Id. Where plaintiffs who allege a civil rights violation that requires a showing of discriminatory intent seek to depose public officials, they must “support their allegations with evidence sufficient to permit the inference that race was a motivating factor in the council members’ decision.” Stone’s Auto Mart, Inc. v. City of St. Paul, Minn., 721 F. Supp. 206, 211 (D. Minn. 1989).

Generally, such depositions—at least where the deponent lacks personal knowledge of the facts relevant to the lawsuit—are permitted only where the party seeking them demonstrates (1) that the deponent’s testimony will likely lead to the discovery of admissible evidence, (2) that it is essential to that party’s case, and (3) that it is not available through any other source or less burdensome means. Warzon v. Drew, 155 F.R.D. 183, 185 (W.D. Wis. 1994).¹

Where the deponent possesses such personal knowledge, however, discovery might be more appropriate. E.g. NEC Corp. v. U.S. Dept. of Commerce, 958 F. Supp. 624, 634-35 (Ct.

¹ Although numerous courts have addressed this general issue, there is little controlling law in this district apart from the Eighth Circuit’s decision in Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982). This court will cite as persuasive authority decisions from other jurisdictions that are not inconsistent with Sweeney, particularly where they in turn rely on Sweeney. E.g. Warzon v. Drew, 155 F.R.D. 183, 185 (W.D. Wis. 1994) (citing Sweeney).

Int'l Trade 1997) (distinguishing deposition of official who lacks personal knowledge from deposition of official alleged to have used authority for improper purpose). Moreover, where the claims require the plaintiff to prove that a particular official acted with illegal or otherwise improper intent as an essential element of those claims, such information is generally discoverable. Stone's Auto Mart, 721 F. Supp. at 211 ("The motivation of the council members is precisely what is at issue and, therefore, is discoverable.").

Here, Defendants claim the municipal officials are entitled to a "limited" or "qualified" immunity generally accorded to "high-ranking government officials." (Mem. at 7.)² They claim that such officials generally "are not subject to depositions" unless "the requesting party establishes a specific need." (Id. at 7-8 (citing Warzon v. Drew, 155 F.R.D. 183, 185 (W.D. Wis. 1994).)

Plaintiffs generally do not dispute the requirements of the governing standard but rather argue that they have met that standard because they have alleged that various public officials deprived them of their civil rights and the requisite showing of intent to prove such claims requires that they be permitted to depose certain officials to discover evidence of such intent. (See Mem. at 6-8). They submit that the depositions (1) will likely lead to the discovery of

² Defendants consistently assert that the officials are entitled to a "qualified immunity." (E.g. Mem. at 7, 9, 10.) In actions against government officials, certain officials are entitled to "absolute immunity" (also known as "official immunity") and the rest are protected by "qualified immunity." See Anderson v. Creighton, 483 U.S. 635, 642-43 & n.4 (1987); Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986). Both of these forms of immunity, however, are immunity from suit, entitling the official to seek dismissal even before discovery. Here, doctrines of immunity from suit are presently not directly at issue for the most part because all but one of the prospective deponents are not defendants, but rather only non-party witnesses. In addition, with respect to the prospective deponent who is a defendant, the present issue is not whether he is immune from suit. Although the issue is thus simply whether such officials can be deposed in light of their official functions, government officials are nonetheless generally entitled to some protection from such intrusions on the performance of their official duties.

admissible evidence, (2) will reveal facts essential to their claims, and (3) will be the only means of discovering such facts. (Id. at 4-5.) They further contend that “[o]ral depositions of the disputed deponents is essential to further develop” and gather evidence “of direct or circumstantial evidence of the discriminatory intent of the defendants.” (Id. at 25.) They also argue that depositions upon written questions would not be adequate “given the complexity of the evidence” and the “need for follow-up questions and the spontaneity that oral depositions provides to counsel.” (Id.) Finally, they assert that with respect to Mr. Kelly, who apparently no longer resides in the Twin Cities, they could take his deposition by telephone if attorney travel is not warranted. (Id. at 26.)

Here, the prospective deponents fall into several categories of municipal official and, therefore, will be addressed accordingly.

A. The Mayor And Members Of The City Council

Plaintiffs assert that they are not seeking any privileged information from the former mayor and certain city council members related to their performance of their executive and legislative duties, but rather seek only the officials “personal knowledge of relevant information that is essential to Plaintiffs’ claims,” that is, knowledge that the City “intentionally targeted . . . low-income rental properties with adverse code enforcement operations while at the same time allow[ing] a preferential code enforcement standard to apply to the City’s Public Housing Agency rental properties and to City officials’ properties.” (Mem. at 5-7.)

1. Former Mayor Randy Kelly

Plaintiffs seek to depose Randy Kelly, who served as the Mayor of St. Paul during the relevant time frame. Of the prospective deponents at issue here, Mr. Kelly is the only one who is named as a Defendant in these actions. As Defendants point out, while in office Mayor Kelly

created the NHPI division of Code Enforcement and appointed Andy Dawkins as its director. (Mem. at 3-4.) Defendants claim Plaintiffs “cannot articulate a specific need for” Kelly’s deposition and claim that Plaintiffs only seek “to put the former Mayor’s policy decisions and discretionary acts under the spotlight” so as to “improperly prob[e] his policy decisions and discretionary acts.” (Mem. at 9-10.)

Generally, courts often limit or even preclude depositions of government officials because of the intrusion on such officials’ time and in order to foster official decision-making free of concern of having to explain such decisions in legal proceedings. Where the prospective deponent is no longer a governmental official, however, the first reason for limiting such discovery might not apply. Here, Mr. Kelly is no longer the Mayor of St. Paul, nor does he apparently hold any official office currently.

Nevertheless, this Court believes that an official’s concern that he would have to explain in legal proceedings his decisions as a public official extends beyond the official’s term in office. See Energy Capital Corp. v. United States, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (explaining that principle of shielding current officials has been extended to also protect former officials); United States v. Wal-Mart Stores, 2002 WL 562301 (D. Md. 2002) (same); Arnold Agency v. West Virginia Lottery Commission, 526 S.E.2d 814, 830 (W. Va. 1999) (“Former high-ranking government administrators . . . have a legitimate interest in avoiding unnecessary entanglements in civil litigation [which] obviously survives leaving office.”). Contra Sanstrom v. Rosa, 1996 WL 469589, *5 (S.D.N.Y. Aug. 16, 1996) (“[B]ecause Mr. Cuomo is no longer governor, he cannot claim this privilege.”); see Gibson v. Carmody, 1991 WL 161087 (S.D.N.Y. Aug. 14, 1991) (permitting deposition of former official).

As a general matter, the courts are reluctant to permit depositions of high-ranking

government officials even in Section 1983 actions such as this. Murray v. County of Suffolk, 212 F.R.D. 108, 108 (E.D.N.Y. 2002) (prohibiting deposition of police commissioner, in action for sexual assault by other police personnel, where plaintiff sought “the deposition of [the] Commissioner . . . as the ultimate policymaker on *Monell* issues relating to the” police department and “the plaintiff does not appear to claim [the Commissioner possessed] any [personal] knowledge”). Accord Church of Scientology of Boston v. IRS, 138 F.R.D. 9, 12 (D. Mass. 1990) (noting exception to general rule prohibiting deposition of officials where officials “have direct personal factual information pertaining to material issues”); Community Federal Savings and Loan Assoc. v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621-22 (D.D.C. 1983) (granting protective order where plaintiff failed to satisfy any of three exceptions to general rule that government officials should not be subject to deposition).

Accordingly, although “under normal circumstances [this Court] would not allow” depositions of high-ranking government officials, an exception is warranted where “Plaintiffs allege actions personal to the Defendant and in violation of the United States Code.” Union Savings Bank of Patchogue, New York v. Saxon, 209 F. Supp. 319, 319-20 (D.D.C. 1962). Accord The Atlanta Journal and Constitution v. The City of Atlanta Dept. of Aviation, 175 F.R.D. 347, 348 (N.D. Ga. 1997) (permitting deposition of mayor where he was “a named defendant in his capacity as mayor and it is alleged that he has been involved directly with this case”); Tye v. City of Jacksonville, 707 F. Supp. 1298, 1300 (M.D. Fla. 1989) (noting, in Section 1983 action, “that the deposition of an executive official is proper when the official possesses particular information essential to plaintiff’s case which cannot reasonably be obtained by another discovery mechanism”).

Here, Plaintiffs allege that Mr. Kelly has personal knowledge relevant to the

discrimination claims. (Mem. at 9-12.) Accordingly, at this juncture of the action, “fairness to the parties requires” that Plaintiffs be able to depose Kelly regarding his personal knowledge relevant to the claims at issue. Gibson v. Carmody, 1991 WL 161087, *1 (S.D.N.Y. Aug. 14, 1991). Where, as here, the mayor “is not joined in this action because of his exercise of official discretion,” but rather because “plaintiffs allege [he] was an active participant in illegal activity,” then an “oral deposition is the best means of determining the extent of [the mayor’s] participation, if any.” Alliance To End Repression v. Rochford, 75 F.R.D. 428, 429 (N.D. Ill. 1976).

Although much of the evidence on which Plaintiffs rely could easily be construed to support the conclusion that the Mayor’s enforcement policy was at most exactingly harsh rather than improperly discriminatory (see Mem. at 10 (citing evidence that the mayor was “a micro manager” who insisted that inspectors “call everything”)), Plaintiffs have produced some evidence that might be relevant.³ Plaintiffs claim to have discovered evidence the Mayor’s office exerted “tremendous influence over the practices and plans of” the City’s property code enforcement operations, an “involvement [that] was overly meddlesome and was often motivated by something other than the public good.” (Mem. at 8-9.) They further rely on evidence they claim shows that the mayor “gave direct orders to Andy Dawkins to have inspectors ‘write up everything’ on a home owned by a disabled Hispanic woman” even though other properties in that neighborhood were purportedly in worse shape. (Mem. at 9.)

While such evidence might never be sufficient to support Plaintiffs’ claims of

³ Defendants argue that Plaintiffs’ Complaints do not support their current arguments for needing to depose the officials at issue. (Mem. at 4-6, 9.) But as Plaintiffs point out, “[m]uch of the information to form the basis for oral depositions of the proposed deponents was not available at the time the Complaints were filed and has only been discovered through depositions of City inspectors or through review of City documents in the discovery process.” (Mem. at 4.)

discriminatory intent, this Court cannot say that Plaintiffs are not even entitled to pursue the discovery that would appear to be the best option for obtaining any such evidence should it exist. Accordingly, this Court will permit Plaintiffs to depose Mr. Kelly on the limited topic of discriminatory intent. Plaintiffs are not permitted, however, to inquire into Mr. Kelly's discretionary policy-making functions.

2. City Council Members Kathy Lantry and David Thune

Defendants claim that depositions of the two current city council members, neither of whom is a defendant in these actions, would constitute an “unnecessary inquiry into the thought processes and discretionary acts of” them, wasting their time “with improper inquiries into policy decisions and thought processes.” (Mem. at 10.) Defendants assert Plaintiffs have failed to establish the necessary need for such depositions. (Id.) Defendants suggest that Plaintiffs have supplied no reason for needing such depositions other than to probe “decisions made by the St. Paul City Council as a legislative or quasi-judicial body” in adopting “housing code enforcement rules and procedures” or the council members “reasons for approving appointees to the Public Housing Agency.” (Id. at 11.) Defendants claim that “inquiry into the City Council's decision making process in reviewing condemnation orders should also be prevented” as the city council is acting in a quasi-judicial capacity when engaging in such review. (Id.)

Plaintiffs respond by asserting that they “are not seeking” to depose Ms. Lantry “to obtain information about thought processes or discretionary acts related to [her] legislative role with the City Council,” but rather to search for evidence of “the motivation and intent of the officials of the City to discriminatorily target Plaintiffs.” (Mem. at 15.) Plaintiffs likewise contend that they “are not seeking information about . . . Thune's thought processes or discretionary acts as it relates to his legislative role in the City Council.” (Id. at 17.)

Rather, Plaintiffs rely on evidence that they claim shows that the prospective deponents discriminatorily target properties owned or occupied by racial minorities. (Mem. at 14.) Again, while such evidence might at most reveal the aggressive enforcement of property codes, the present issue is not whether the defendants are liable on Plaintiffs' civil rights claims, but rather only whether Plaintiffs should be allowed to pursue any evidence of such violations through the normal discovery channels.

Although these members of the city council are not named as defendants, they still might possess information relevant to the claims. McGoldrick v. Koch, 110 F.R.D. 153, 156-57 (S.D.N.Y. 1986) (permitting limited discovery with respect to non-defendant officials). This Court reiterates, however, that although the evidence of racial animosity at this juncture might be quite thin and speculative, the present issue is not liability on the merits or even whether Plaintiffs can survive a motion for summary judgment. Accordingly, this Court cannot conclude that Plaintiffs are absolutely prohibited from deposing the two city council members. See id. at 156 (noting that plaintiffs "have met [their] burden [of establishing a *prima facie* case of improper decision-making], but just barely"). In short, Plaintiffs may depose the city council members concerning the allegations of discriminatory intent. Plaintiffs are not permitted, however, to inquire into their discretionary policy-making functions.

B. Legislative Hearing Officer and Assistant City Attorney

Plaintiffs also seek to depose Marcia Moermond, a legislative hearing officer, and Maureen Dolan, an assistant city attorney. Plaintiffs contend that they are not "seeking the decision making process of [these two city officials] in denying Steinhauser's appeal or the decision making processes, impressions, conclusions, opinions or legal theories of [the city attorney] in bringing [Tenant Remedy Actions]." (Mem. at 19.) Rather, they claim they seek

“communications among departmental employees and decisions tainted by impropriety.” (Id. at 19-20.)

1. Legislative Hearing Officer Marcia Moermond

Defendants assert that Legislative Hearing Officer Moermond is entitled to a protective order because she should be entitled to the same protections accorded judges as she was acting in the capacity of an administrative judicial officer here when she denied Steinhauser’s request for an extension to comply with a correction notice. (Mem. at 5, 12.) Moreover, Defendants point out that Plaintiffs have not first sought a deposition by written questions. (Id. at 12-13.)

Plaintiffs claim that Moermond, who as a city council research staff member was an investigator for the Chronic Problem Property Report, “noted elements of racism against certain occupants of properties.” (Mem. at 21.) Although much of this evidence might support only the conclusion that other property owners—rather than city officials—held racist views towards minority renters, Plaintiffs generally contend that Defendants improperly responded to the racist complaints of the property owners. They note that “as a City Council legislative hearing officer [Moermond] hears legislative appeals from owners in the City” and that property owners “have complained that the hearing process administered by Ms. Moermond is a ‘sham’” and that the only purpose of such hearings is “to support the ‘already-made decision.’” (Id. at 22.)

Plaintiffs also argue that Moermond “has attempted to entice property owners to get code compliance inspections on their property falsely claiming that such an inspection is cheaper than an inspection under the City’s Truth in Sale of Housing” program, in an apparent attempt “to serve the City’s interest in fee generation through the vacant building registrations and permit fees.” (Id. (contending that resulting increased “costs for property owners” thus “reduces affordable housing for low income tenants”).) Finally, Plaintiffs assert that Moermond “has

demonstrated her ill will” toward certain of the plaintiffs “by making public, defamatory statements about [them] and their rental properties shortly after having them escorted from her hearing room in June 2004.” (Id. at 23.)

Again, on the present record, this Court cannot conclude that Plaintiffs should be denied the opportunity to pursue these issues. Cf. McGoldrick, 110 F.R.D. at 156-57. In sum, while Plaintiffs may depose Ms. Moermond regarding her alleged discriminatory intent, Plaintiffs are not permitted to inquire into her legal decisions or other discretionary policy-making functions.

2. Assistant City Attorney Maureen Dolan

With respect to Assistant City Attorney Dolan, in contrast, Plaintiffs simply claim, without any supporting citations to the record, that she “was a member of the Problem Property Unit and has information related to the workings of that unit” relevant here because she attended field inspections and “misrepresented the nature of code compliance during City initiated tenant remedy cases against Plaintiffs.” (Mem. at 23-24.)

Defendants assert that the “decision making process” of Ms. Dolan should be immune from discovery, noting that she worked with NHPI to bring Tenant Remedy Actions (TRAs), civil actions brought by the City on behalf of tenants residing at the property in dispute, against the property owners. (Mem. at 5, 13.) Defendants also note that Ms. Dolan has already disclosed all relevant information, except for her opinion work product prepared in prosecuting the TRA cases, which they assert is not discoverable. (Id. at 13-14.)

Accordingly, the Court concludes that Plaintiffs have failed to make the requisite *prima facie* showing to depose Ms. Dolan regarding issues of discriminatory intent.

C. Deposition Limitations

This Court recognizes that the municipal officials at issue should not be unduly hampered

in the performance of their official duties. Accordingly, the Court will impose, pursuant to its authority to supervise such matters, the following restrictions on the depositions. See NEC Corp. v. U.S. Dept. of Commerce, 958 F. Supp. 624, 634-35 (Ct. Int'l Trade 1997) (limiting depositions to written questions); McGoldrick, 110 F.R.D. at 156 (same). First, each deposition shall be limited to no more than four hours. Second, insofar as Mr. Kelly no longer resides in the local area, he shall be permitted, at his election, the option of being deposed over the telephone. Third, the subject matter of inquiry in each deposition shall be strictly limited to the allegations of intent relevant to the various civil rights claims at issue. Cf. Union Savings Bank of Patchogue, New York v. Saxon, 209 F. Supp. 319, 320 (D.D.C. 1962) (permitting deposition of the Comptroller of Currency "limited to the . . . action by the Defendant as to the subject matter of this case, and not the workings of [his] mind"). Fourth, and somewhat conversely, Plaintiffs may not inquire as to an official's proper exercise of their discretion in making policy decisions.

D. Attorneys' Fees

In light of this Court's ruling, Defendants' request for the fees and costs they incurred in seeking the requested protective orders is denied.

III. CONCLUSION

Although the evidence Plaintiffs have produced to date is perhaps far from sufficient to establish liability, they have satisfied their burden of making a *prima facie* showing that most of the prospective deponents could have personal knowledge relevant to the allegations regarding municipal officials' alleged intent to discriminate against certain landlords and tenants. This Court cannot conclude that an otherwise normal channel of discovery should be foreclosed, particularly in the present context of civil rights claims where the evidence of discriminatory intent is essential but often difficult to discover. The Court reiterates, however, that it is

expressing no views on the merits and the ultimate disposition of Plaintiff's claims.

IV. ORDER

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendants' motions for a protective order (Doc. No. 71 (No. 04-CV-2632), Doc. No. 30 (No. 05-CV-1348), & Doc. No. 36 (No. 05-CV-461) are GRANTED IN PART AND DENIED IN PART.

2. Defendants are entitled to a protective order prohibiting the deposition of Assistant City Attorney Maureen Dolan.

3. Plaintiffs shall be permitted to take the depositions of the other four of the five present and former municipal officials at issue, subject to the following conditions:

(A) each deposition shall be limited to four (4) hours;

(B) the deposition of Randy Kelly will be conducted over the telephone if Mr. Kelly so requests;

(C) the subject matter of the depositions shall be strictly limited to issues of discriminatory intent relevant to the underlying claims;

(D) Plaintiff shall not inquire as to the officials' proper exercise of their discretionary policy-making functions.

Dated: April 2, 2007

s/ Susan Richard Nelson

SUSAN RICHARD NELSON
United States Magistrate Judge