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Commercial division update: Judicial discretion to permit remote depositions for non-resident parties

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As technology advances, the litigation landscape evolves with it. Several years ago, when this evolving technology converged with the Covid pandemic, remote depositions boomed and since have become commonplace.

In-person depositions are often preferable as they allow attorneys to better assess witness demeanor and credibility, deal with physical documents and avoid disruptions from internet and equipment failures.

On the other hand, remote depositions can be far more convenient, can avoid travel expenses and are well suited to the technologies attorneys now have in place.

While frequently done on consent, courts otherwise are tasked with balancing the traditional preference for in-person depositions against the legitimate hardships that an in-person requirement may impose, particularly when the deponent resides outside the United States.

This column delves into the criteria the Commercial Division courts have considered when evaluating requests for remote depositions for party witnesses.

We also examine several cases outside the Commercial Division to demonstrate that a non-commercial party who is an individual may have an easier path to convince the court to allow a remote deposition than would a well-financed commercial party.

Legal framework

Under New York law, depositions of parties who are not residents of New York, including officers, directors, members and employees of a party, are generally required to be held in the county in New York where the action is pending. CPLR 3110(1); *Weinstein v. Gindi*, 92 A.D.3d 526, 527 (1st Dep't 2012).

Commercial Division Rule 37 authorizes the court to order a remote deposition upon a motion showing good cause, that Rule setting forth a list of non-exclusive factors for the court to consider.

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Outside the Commercial Division, CPLR 3103(a) authorize courts to issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts," which includes allowing a non-resident deponent to be deposed remotely.

Under either rule, the general test for whether the court will permit a remote deposition turns on whether the party demonstrates that conducting the deposition in-person in New York would cause undue hardship, the burden of demonstrating such resting on the party making the request.

Courts have been called upon to assess a variety of types of claims of undue hardship and generally require specific, substantiated reasons, rather than conclusory assertions.

Visa and travel restrictions

One argument often made as to undue hardship involves difficulties in obtaining visas to travel to New York.

In the recent case of *DOIT Hosp. Delaware LLC v. Reuben Bros. Ltd.*, 229 N.Y.S.3d 921 (N.Y. Co. April 14, 2025), Justice Robert Reed of the New York County Commercial Division considered whether an alleged visa restriction would be sufficient to warrant a remote deposition.

The record demonstrated that the witness in question, who resided in India, was an authorized representative of the plaintiff and an integral fact witness who had submitted an affidavit in opposition to defendant's motion to dismiss.

In support of its application, the plaintiff cited evidence "that the current wait time in India for an appointment to apply for a visa interview is 151 days" and the witness "is ineligible for an interview waiver," adding that the witness would "likely be unable to secure an appointment, let alone a visa, in time to travel to New York for his deposition."

In denying the request for remote deposition, the court focused on the record discussed above and two additional factors; first, that the New York forum was selected pursuant to a New York forum selection clause to which the plaintiff had agreed and second, that the case had been pending for three years and the deposition notice for the witness in question had been served over nine months earlier, yet plaintiff had taken no steps to apply for a visa.

The court observed that plaintiff had "failed to set forth what steps, if any, [the witness] has taken to secure the necessary visa and other travel documents in the time since defendants served the deposition notice."

The court ordered that plaintiff produce the witness for a deposition in New York within 180 days or have its complaint stricken.

In other cases, courts have found that visa difficulties can constitute undue hardship to warrant remote depositions.

For example, in *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 976 (2d Dep't 2015), a non-commercial personal injury action brought by an individual plaintiff residing in China, the Second Department reversed the denial of a protective order and permitted a plaintiff's deposition to be conducted by remote electronic means "in light of the evidence that the plaintiff's applications for a visa to return to the United States had been denied, and the evidence establishing that he presently was ineligible to be admitted to the United States."

Thus, by submitting evidence of the actual denial of the visa—something missing in the *DOIT* case–the plaintiff was able to convince the court to grant a protective order allowing for a remote deposition.

Financial constraints

Another argument for undue hardship advanced by parties is that travelling to New York for an in-person deposition would impose financial hardship.

In *Gabriel v. Johnston's L.P. Gas Serv., Inc.*, 98 A.D.3d 168, 181 (4th Dep't 2012), a non-commercial case in which individual migrant workers sued their employer for personal injuries arising from a gas explosion, the court allowed a group of plaintiffs to be deposed remotely in their home country of Guatemala.

The court found that these plaintiffs were impoverished and had no means to obtain visas to re-enter the United States, justifying their depositions being remote.

However, in the Commercial Division case of *Sumec Textile & Light Indus. Co. v. Zee Co. Apparel Corp.*, 83 Misc. 3d 1296(A), 217 N.Y.S.3d 476 (N.Y. Co. 2024), the plaintiff sought leave for a remote deposition for its corporate representative residing in China, asserting that "the time and expenses required for her to travel to New York for a deposition would be unduly burdensome."

Reed was unconvinced, stating that, because the plaintiff had chosen New York as the venue, it accepted the cost of litigating there. One factor that may have weighed heavily in the court's analysis was the assertion by defense counsel of their intent to use hundreds of documents and a coat during the deposition.

Health and caregiving responsibilities

Courts have also found that health concerns during the Covid pandemic, as well as caregiving responsibilities, can qualify as undue hardship warranting remote depositions.

In *Rubin v. Sabharwal*, 139 N.Y.S.3d 522 (N.Y. Co. 2021), the plaintiff in this breach of contract action argued that forcing her to travel to New York for a deposition at the height of the Covid pandemic would impose an undue hardship in the form of health risk.

Justice Gerald Lebovits of the New York County Commercial Division found that a 77-year-old plaintiff domiciled in Florida who alleged "travel restrictions, quarantine requirements, and her personal circumstances of being the primary caregiver to her ill husband" warranted a remote deposition.

The court held that "personal and public-health dangers posed by the coronavirus pandemic present an undue hardship" and thus allowed the plaintiff to be deposed remotely.

Not surprisingly, as Covid-19 has abated, more recent cases have been less lenient towards COVID-19-related hardships, as demonstrated by *Bush v. Alliant Content, LLC*, 76 Misc. 3d 477, 480 (West. Co. 2022), in which the court found that "as time progresses, we have learned ways to protect ourselves… and can take measures to put protections in place so as to conduct in person proceedings, including depositions."

Other cases have also considered whether caregiving responsibilities justify a remote deposition. In *Sumec Textile* discussed above, the plaintiff additionally argued for a remote deposition because the witness "is the principal caretaker for a young child and cares for her elderly parents, who all reside in China."

The court in this Commercial Division dispute found those reasons insufficient to warrant remote deposition. However, in a non-commercial case involving similar reasoning for remote deposition, *Rogovin v. Rogovin*, 3 A.D.3d 352, 353 (1st Dep't 2004), the court affirmed the grant of a protective order to permit an individual defendant who resided in Kansas to be deposed remotely.

There, the defendant demonstrated that she was the "sole caregiver for her ailing nonagenarian grandmother" and had "sole responsibility for a 10-year-old daughter with special needs."

Conclusion

As litigation increasingly intersects with global mobility challenges and financial realities, the question of whether a deposition should be remote or in-person will likely arise with increasing frequency.

Both New York Commercial Division and non-commercial courts have signaled a willingness to allow remote depositions in proper circumstances. However, the requesting party is required to demonstrate a specific undue hardship to warrant a remote deposition, which may be an easier burden to satisfy where the party making the request is an individual.

With tangible proof and active engagement, parties can show undue hardship through means like demonstrating visa issues, financial constraints, health issues and caregiving responsibilities.

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