

## SECOND CIRCUIT REVIEW

# Second Circuit Clarifies Procedure for Supplementing Rule 30(b)(6) Testimony



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This month, we discuss *Keepers, Inc. v. City of Milford*,<sup>1</sup> in which the U.S. Court of Appeals for the Second Circuit clarified the circumstances and manner in which a corporate party can supplement its prior deposition testimony through additional testimony or affidavits under Rule 30(b)(6) of the Federal Rules of Civil Procedure. The rule provides for the deposition of a corporation or other similar entity by an individual or individuals designated by the corporation to provide testimony on its behalf.

At issue in *Keepers* was whether the rule precludes a party from filing an affidavit to supplement deposition testimony taken under the rule from a different witness, where the opposing party claims the testimony is contradictory.

The court also addressed whether a corporation has standing to challenge the constitutionality of a municipal ordinance that applies only to the corporation's officers and owners.

In an opinion by Judge José A. Cabranes, joined by Judges Reena Raggi and Denny Chin, the Second Circuit held that the District Court did not abuse its discretion in considering a supplementary affidavit on summary judgment, following a decision from a sister circuit that held Rule 30(b)(6) testimony may be supplemented by later affidavits for the purposes of expanding, but not contradicting, deposition testimony.

With respect to the merits of the constitutional challenge, the Second Circuit held that the corporation was seeking to assert claims on behalf of the third-party officers and owners, rather than itself, and that it failed to satisfy either jurisprudential or constitutional standing requirements.

### Background

In 1996, Milford adopted an Ordinance Regulating Adult-Oriented Establishments as Chapter 2.3 of its municipal code, regulating sexually oriented

businesses (SOBs).<sup>2</sup> Chapter 2.3 was amended in 2003 to include, among other things, new restrictions on SOBs in the form of new regulations for live nude performances and licensing requirements for SOB operators. The new licensing provision required an SOB to obtain an "adult-oriented establishment" license that included the names of operators and individuals directly managing or controlling the SOB, and to post it publicly in a conspicuous place at or near the entrance.

The Second Circuit followed a decision from a sister circuit that held Rule 30(b)(6) testimony may be supplemented by later affidavits for the purposes of expanding, but not contradicting, deposition testimony.

In 2007, Milford repealed and replaced Chapter 2.3 with a new version of the ordinance containing many similar provisions. Under the new Chapter 2.3, an SOB is still required to obtain and publicly post an "adult-oriented establishment" license; however, the list of names required on the license was expanded to include anyone with indirect ownership or control of the SOB.

Plaintiff in this case, *Keepers*, is a sexually oriented business that falls within the scope of both the 2003 and 2007 versions of Chapter 2.3.<sup>3</sup>

### Prior Proceedings

On Dec. 11, 2003, *Keepers* filed a complaint against Milford challenging the constitutionality of the 2003 revisions to Chapter 2.3 on various grounds, including for alleged violations of its First Amendment right to anonymous expression. On Aug. 13, 2007, while the 2003 litigation was pending, *Keepers* filed a second lawsuit against Milford challenging the enactment of the 2007 ordinance on similar bases as the 2003 complaint. The U.S. District Court for the District of Connecticut (Judge Alvin W. Thompson) consolidated these actions, and the parties each separately moved for summary judgment in the consolidated action.

In support of its motion for summary judgment, Milford supplemented the prior deposition testimony of its Rule 30(b)(6) witness, former Milford municipal attorney Marilyn Lipton, with an affidavit from a different witness, Milford Chief of Police Keith Mello. The Mello affidavit offered guidelines on the interpretation and enforcement of Chapter 2.3, for consideration by the District Court in addition to the testimony provided by Lipton on the same subject. *Keepers* moved to strike the affidavit on the grounds that it improperly contradicted the deposition testimony in violation of Rule 30(b)(6); the District Court denied *Keepers*' motion.<sup>4</sup>

On March 13, 2013, the District Court granted in part and denied in part both Milford's and *Keepers*' motions for summary judgment. The District Court upheld the constitutionality of the public posting requirement in the 2003 ordinance, but found the public posting requirement of the 2007 ordinance to be unconstitutionally broad, and invalidated the portion of the 2007 ordinance requiring the posting of names of individuals other than those who directly manage, operate or control SOBs.<sup>5</sup>

Following the District Court's denial of a motion for reconsideration filed by Milford, both parties filed a timely notice of appeal on April 25, 2014, with *Keepers* appealing the District Court's decision upholding portions of the 2003 and 2007 ordinances, including the District Court's decision to consider the Mello affidavit, and Milford appealing the decision with respect to the public posting requirement in the 2007 ordinance.

### The Second Circuit's Decision

The Second Circuit reviewed the District Court's decision allowing Milford to supplement the deposition testimony of its Rule 30(b)(6) witness with an affidavit from a different witness as part of Milford's summary judgment motion under an abuse of discretion standard. The court sua sponte reviewed whether *Keepers* had standing to challenge the public posting requirements of the 2003 and 2007 ordinances.

**Rule 30(b)(6) Testimony.** The Second Circuit addressed whether the District Court properly denied *Keepers*' motion to strike the Mello affidavit

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by reviewing the language of Rule 30(b)(6). Following a decision from the U.S. Court of Appeals for the Seventh Circuit,<sup>6</sup> the Second Circuit determined that nothing in the plain language of Rule 30(b)(6) or in the Advisory Committee notes precludes a corporate party from correcting, explaining or supplementing its deposition testimony—particularly with respect to matters the corporate designee could not remember at the time of the deposition.

The court rejected Keepers' argument that the District Court erred because Lipton's Rule 30(b)(6) testimony was binding on Milford. Although the court agreed with Keepers that Rule 30(b)(6) testimony can be used against a party, it held that a corporate party is not limited only to this testimony. The court further noted that the ability of a party to supplement its Rule 30(b)(6) testimony applied with special force in this case, as Keepers' attorney agreed to

Finally, the court determined that, even if the District Court erred by considering the affidavit, the error was harmless because the District Court's decision did not rely on the affidavit in its holding that certain provisions of Chapter 2.3 were not unconstitutionally vague.

### First Amendment Challenge

The Second Circuit began its analysis of Keepers' challenge to the constitutionality of the public posting requirement of Chapter 2.3 by determining whose First Amendment rights were at stake in the proceeding. The court found that the asserted First Amendment right was the right of anonymity of Keepers' officers, shareholders and other third parties, but not of Keepers itself. Emphasizing that a corporation is a legal entity distinct from its officers and shareholders, the court determined that Keepers' ability to challenge

and owners' First Amendment rights caused Keepers harm, and rejected as unsupported by the record Keepers' speculative assertion that the public posting requirement might "chill" Keepers' own expression. Similarly, the court dismissed the notion that Keepers was injured by participating in violating its owners' and officers' rights though the public posting requirement, noting that mere discomfort arising from an alleged constitutional violation is not sufficient to confer standing. Thus, the Second Circuit determined that the record lacked affirmative evidence that Keepers suffered any injury based on the alleged violation of third parties' constitutional rights.

Finally, the Second Circuit determined that Keepers' First Amendment challenge was moot because the only issue on appeal involved whether Keepers was required under the 2007 ordinance to post the names of its passive owners and officers. With no evidence in the record that any such owners or officers existed, the court dismissed as moot Keepers' third-party anonymity and compelled speech claims.

### Conclusion

The Second Circuit's decision provides helpful guidance as to the role Rule 30(b)(6) deposition testimony can play in proceedings. By following the plain language of the rule and the reasoning of its sister circuit, the Second Circuit clarified the circumstances and manner in which a corporate party can supplement its prior deposition testimony through additional testimony or affidavits, while reminding parties and judges that discovery abuses are not to be tolerated.

The Second Circuit's decision also serves as an important reminder to litigants that they must carefully consider the specific party on whose behalf a claim is being asserted to avoid dismissal for lack of standing. In particular, the court's decision underscores the need to determine from the outset of litigation whether a claim is being brought on behalf of a corporate party, its owners or officers, or both, and to ensure that these distinctions are respected as the litigation progresses.

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1. \_\_\_ F.3d \_\_\_, No. 14-1581-cv, 2015 U.S. App. LEXIS 20223 (2d Cir. Nov. 20, 2015).

2. Milford, Conn., Ordinances §2.3.

3. Another sexually oriented business, After Dark LLC, was a party in one of the proceedings before the District Court and was named as a cross-appellee before the Second Circuit by Milford; however, After Dark did not join in the appeal.

4. *Keepers, Inc. v. City of Milford*, 944 F.Supp.2d 129, 159 (D. Conn. 2013).

5. *Id.* at 173-74.

6. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).

7. *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 482 (2d Cir. 2014).

8. 181 F.3d 253 (2d Cir. 1999).

9. *Rajamin v. Deutsche Bank Nat'l Tr. Co.*, 757 F.3d 79, 86 (2d Cir. 2014).

10. Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer and David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 164 (7th ed. 2015).

11. *Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015).

12. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

The Second Circuit determined that nothing in the plain language of Rule 30(b)(6) or in the Advisory Committee notes precludes a corporate party from correcting, explaining or supplementing its deposition testimony—particularly with respect to matters the corporate designee could not remember at the time of the deposition.

such supplementation during the deposition and the supplementary affidavit focused primarily on interpretations of law rather than disputed facts.

The Second Circuit addressed the potential for abuse of Rule 30(b)(6), including situations in which a deponent intentionally offered misleading or incomplete responses the deponent later wished to supplement or correct. One such remedy to this problem is found in the "sham affidavit rule," which precludes a party from creating a factual issue "by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony."<sup>7</sup>

The court explained, however, that the rule was inapplicable in this case because nothing in the Mello affidavit contradicted the deposition testimony—instead, it permissibly filled in the gaps of Lipton's missing knowledge. The Second Circuit also noted that sanctions are available under Rule 37, including in the form of preclusion of evidence, to address abuses to the deposition process, but that no such sanctions were appropriate in this case.

The Second Circuit also distinguished the principal case relied on by Keepers, *Reilly v. Natwest Markets Group*.<sup>8</sup> In *Reilly*, the corporate defendant was served with a Rule 30(b)(6) notice requesting the production of numerous company representatives; however, the defendant produced only a single witness who was not sufficiently knowledgeable, in an attempt to stymie discovery. The District Court in *Reilly* denied defendant's later attempt to have two other witnesses testify at trial on the same subject as the Rule 30(b)(6) deponent.

In contrast to *Reilly*, the Second Circuit determined that, in the present case, Lipton's deposition testimony was inadequate because of Keepers' actions in surprising the deponent with hypotheticals outside the scope of the notice of deposition, and Milford had no reason to frustrate discovery by being unforthcoming.

the public posting requirement of the 2003 and 2007 ordinances turned on its constitutional and prudential standing to assert the rights of these individuals.

Beginning with prudential standing, which "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves,"<sup>9</sup> the Second Circuit rejected Keepers' argument that a party is permitted to assert the First Amendment free speech rights of third parties. Although courts generally allow such claims in First Amendment overbreadth challenges, Keepers had not brought an overbreadth challenge, but instead was seeking to invoke traditional third-party standing on the basis "that a single application of a law both injures [it] and impinges upon the constitutional rights of third persons."<sup>10</sup>

Citing a 2015 Second Circuit case, *Smith v. Hogan*,<sup>11</sup> the court noted: "Typically, a plaintiff who asserts the claims of a third party can obtain standing by establishing (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests."<sup>11</sup> The Second Circuit reasoned that, even if it were to assume that Keepers satisfied the first prong, nothing in Keepers' briefs or the record provided a basis for finding the second prong satisfied.

The Second Circuit also ruled that Keepers lacked constitutional standing by failing to satisfy the injury-in-fact requirement of Article III, which entails not only the existence of a legally cognizable injury, but also that the plaintiff itself be "among the injured."<sup>12</sup> The court clarified that, although it was undisputed that Keepers had standing to bring a challenge to Chapter 2.3 based on vagueness, a separate analysis was required to evaluate Keepers' claim that the public posting requirements violated its officers' and owners' First Amendment rights of anonymous expression.

The court determined that Keepers had failed to explain how the alleged violation of its officers'