

**IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

PAMELA MOSES,)	
)	
Plaintiff,)	
)	
v.)	No. CT-1579-19
)	Division I
)	
)	Judge Felicia Corbin-Johnson
MARK GOINS, TRE HARGETT, and)	Judge Suzanne Cooke
JONATHAN SKRMETTI, in their official)	Judge Barry Tidwell
capacities,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’
MOTION TO QUASH PLAINTIFF’S SUBPOENA DIRECTED TO NON-PARTY
OFFICE OF LEGAL SERVICES AND FOR A PROTECTIVE ORDER**

Pursuant to Tenn. R. Civ. P. 26.03 and 45.07, Defendants move to quash Plaintiff Pamela Moses’ subpoena *duces tecum* directed to the Office of Legal Services (“OLS”) and to issue a protective order releasing OLS from compliance with the directives of the subpoena. As grounds, Plaintiff untimely served the subpoena in circumvention of the Court’s discovery deadlines and seeks discovery not authorized by the Court’s October 11, 2023 Order (the “October 11 Order”). For these reasons, the Court should quash Plaintiff’s subpoena and issue a protective order. In the alternative, the Court should substantially modify the subpoena.

PROCEDURAL BACKGROUND

On July 19, 2023, the Court entered an order granting in part and denying in part Defendants’ motion to dismiss Plaintiff’s “Second Amended Complaint.” (July 19, 2023 Order,

at 1.)¹ After a case management conference, the Court entered the October 11 Order, granting Plaintiff's oral motion for additional written discovery. (October 11 Order, at 1.) In the October 11 Order, the Court granted "Plaintiff . . . thirty days" from its entry "to propound discovery limited to the following topics:" "[r]ace/ethnicity in conviction data;" "[v]oting pattern data;" and "[l]egislative history of the 1986 and 2006 versions of the challenged felon disenfranchisement statute(s)." (*Id.*) The October 11 Order further provided Defendants with "an additional thirty days to respond to the discovery requests." (*Id.*)

On December 8, 2023, Plaintiff caused a subpoena *duces tecum* to issue to OLS. (Pl.'s December 8, 2023 Subpoena, at 1.) The subpoena listed 16 separate requests for OLS to produce documents. (*Id.* at 5-7.) Plaintiff served the subpoena on OLS on December 12, 2023, but has not yet filed a return of service.

ARGUMENT

The Court Should Grant Defendants' Motion to Quash and for a Protective Order.

Tennessee courts "possess inherent, common-law authority to control their dockets and the proceedings in their courts." *Hodges v. Attorney General*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000). A trial court's authority in this regard is "quite broad," *id.*, including the authority to make rulings "in . . . adherence to [its] scheduling order," *Duke v. Duke*, No. M2009-02401-COA-R3-CV, 2012 WL 197144, at *17-18 (Tenn. Ct. App. June 1, 2012), *perm. app. denied* (Tenn. Oct. 18, 2012 & Nov. 1, 2012).

¹ Defendants note that, while the Court granted Plaintiff leave to file her pleading to become the "operative complaint once filed of record in this cause" (Oct. 28, 2023 Order, at 1-2), to date, Plaintiff has not complied.

Additionally, the “general scope and limits of discovery are governed by Tennessee Rule of Civil Procedure 26.02(1).” *West v. Schofield*, 460 S.W.3d 113, 133 (Tenn. 2015) (Wade, J., concurring). A party may obtain discovery by use of depositions, written interrogatories, production of documents, physical and mental examinations, and requests for admission. Tenn. R. Civ. P. 26.01. A trial court may limit the “frequency or extent of use” of these discovery methods if it determines that “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.” Tenn. R. Civ. P. 26.02(1). Further, “[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown,” a trial court may issue a protective order to prevent “annoyance, embarrassment, oppression, or undue burden or expense” to a party or person. Tenn. R. Civ. P. 26.03.

The issuance and service of subpoenas in civil cases is governed by Tenn. R. Civ. P. 45. A court “clerk shall issue a subpoena . . . for the production of documentary evidence . . . to a party requesting it.” Tenn. R. Civ. P. 45.01. Service of the subpoena is complete if it is “made by delivering or offering to deliver a copy thereof to the person to whom it is directed.” Tenn. R. Civ. P. 45.03. The subpoena may “command a person to produce and permit inspection” of documents. Tenn. R. Civ. P. 45.02.

The party responsible for issuing and serving a subpoena “must take reasonable steps to avoid imposing an undue burden or expense” on a witness and provide the witness at least 21 days to respond. Tenn. R. Civ. P. 45.07(1). A witness may respond by complying with the subpoena or providing the issuing party a “written objection.” Tenn. R. Civ. P. 45.07(2).

Here, the Court should quash Plaintiff’s subpoena directed to OLS and enter a protective order. *First*, Plaintiff’s subpoena is untimely, and her attempt to circumvent the Court’s discovery deadlines must be quashed. The October 11 Order granted Plaintiff thirty days to “propound

discovery limited to [three] topics.” (Oct. 11 Order, at 1.) Plaintiff, however, caused the clerk to issue a subpoena on December 8, 2023, and served the subpoena on December 12, 2023—both dates beyond the October 11 Order’s deadline for Plaintiff to request discovery.

Tennessee courts consider Rule 45 subpoenas to be discovery devices. *See Moncier v. Harris*, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *10-12 (Tenn. Ct. App. Apr. 5, 2018), *perm. app. denied* (Tenn. Aug. 10, 2018) (affirming the trial court’s quashing of a subpoena issued pursuant to the Tennessee Rules of Civil Procedure because “document discovery [was not] contemplated” under the Tennessee Public Records Act); *Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co.*, 435 S.W.3d 202, 220-21 (Tenn. Ct. App. 2013) (affirming a trial court’s order quashing a subpoena “to prevent further discovery”); *cf. Luker v. Luker*, 578 S.W.3d 450, 459-60 (Tenn. Ct. App. 2018) (noting that the trial court “restricted discovery to the issuance of a subpoena duces tecum pursuant to Tenn. R. Civ. P. 45.02”); *see also* Tenn. R. Civ. P. 45.02 Advisory Comm’n Cmt. to 2009 Amendment (noting that Rule 45 was amended to conform “to changes in other discovery rules”); Tenn. R. Civ. P. 45.08(1)(D) (providing when a “person from whom discovery is sought” by a subpoena “need not provide discovery” and when a court “may nonetheless order discovery”). And in applying a substantially similar federal rule governing subpoenas, *compare* Tenn. R. Civ. P. 45.02, 45.07, *with* Fed. R. Civ. P. 45(d)(2)-(3); *see Downing v. Bowater, Inc.*, 846 S.W.2d 265, 268 (Tenn. Ct. App. 1992) (adopting federal courts’ interpretation of a “sufficiently similar” rule in Tennessee), federal courts overwhelmingly hold that subpoenas are discovery devices subject to a court’s discovery deadline. *See, e.g., Raymond James & Assocs. v. 50 N. Front St. TN, LLC*, No. 2:18-cv-2104-JTF-tmp, 2019 WL 12373903, at *4-5 (W.D. Tenn. Sept. 27, 2019) (Pham, M.J.) (collecting cases and holding that the service of “third-party subpoenas on the . . . written discovery cutoff date was . . . untimely”); *Dziadek v.*

Charter Oak Fire Ins. Co., No. 4:11-cv-04134-RAL, 2016 WL 1643825, at *2 (D.S.D. Apr. 22, 2016) (“The majority of courts agree that Rule 45 subpoenas constitute discovery and are therefore governed by the discovery deadlines set forth in a scheduling order.”); *Circle Grp., L.L.C. v. Se. Carpenters Reg’l Council*, 836 F. Supp. 2d 1327, 1351-52 (N.D. Ga. 2011) (“The majority of jurisdictions . . . consider subpoenas issued under Rule 45 to constitute discovery and, thus, are subject to discovery deadlines established by the Court.”); *Marvin Lumber & Cedar Co. v. PPG Indus.*, 177 F.R.D. 443, 445 (D. Minn. 1997) (Erickson, M. J.) (concluding that “allow[ing] a party to continue with formal discovery . . . whether in the guise of Rule 45[] or any other discovery methods . . . , after the discovery deadline unnecessarily lengthens [the] discovery process”). “At bottom, Plaintiff cannot now obtain through one means, Rule 45, what [s]he has been precluded from obtaining through another, the expired discovery schedule.” *Alper v. United States*, 190 F.R.D. 281, 284 (D. Mass. 2000). This Court should likewise conclude that Plaintiff’s subpoena directed to OLS was subject to the October 11 Order’s discovery cutoff.

Second, Plaintiff’s subpoena is not authorized by the October 11 Order. That order granted Plaintiff “thirty days from [its] entry . . . to propound discovery limited to [three] topics,” and provided Defendants with “an additional thirty days to respond *to the discovery requests*.” (Order, at 1 (emphasis added).) The October 11 Order did not grant Plaintiff authorization to seek third-party discovery. And with good reason: it only allowed Plaintiff to seek discovery on “limited” topics for a limited period; any further extension of discovery in this matter would “unnecessarily lengthen[the] discovery process” and “divert[] the parties’ attention” from post-written-discovery litigation. *See Marvin Lumber*, 177 F.R.D. at 445. Because the October 11 Order did not authorize her to seek third-party discovery, Plaintiff’s subpoena must be quashed and a protective order issued.

Finally, even if the Court should not quash Plaintiff’s subpoena, it must be modified. *See* Tenn. R. Civ. P. 45.07(4) (providing that a court may “modify the subpoena if it is unreasonable and oppressive”). The October 11 Order only allowed Plaintiff to seek discovery on the “limited . . . topics” of “[r]ace/ethnicity in conviction data,” “[v]oting pattern data,” and “[l]egislative history of the 1986 and 2006 versions of the challenged felon disenfranchisement statute(s).” (Order, at 1.) But Plaintiff seeks documents from OLS that far exceed those limits. For example, Plaintiff seeks “[a]ll” documents regarding “the ineligibility of persons to register and/or vote by virtue of being convicted of a felony,” “all” documents regarding “the drafting, debate, and/or passage” of Public Acts and statutes from 1972 through 2011, “[a]ll communications” discussing a person’s ineligibility to register and/or vote by virtue of a conviction of a felony, “[a]ll documents reflecting research, studies, and analysis conducted or considered by the Tennessee General Assembly” regarding the “impact of voting eligibility and/or ineligibility on offender outcomes, recidivism, and/or public safety,” “[a]ll” documents regarding the interpretation of statutes and the Tennessee Constitution “used, considered, and/or created by” OLS or the Tennessee General Assembly, and “[a]ll communications” regarding Plaintiff. (Pl.’s Dec. 8, 2023 Subpoena, at 7-10.) All of these requests are clearly beyond the scope of the Court’s October 11 Order granting *limited* discovery. The Court should quash Plaintiff’s subpoena to TDOC and issue a protective order or, in the alternative, substantially modify the subpoena.

CONCLUSION

For the reasons stated herein, the Court should grant Defendants’ Motion to Quash and for a Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of January, 2024, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court’s electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court’s electronic filing system. Additionally, a copy of the foregoing has been electronically mailed to the following:

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