

## Litigation

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### Foreign Executives Can Be Compelled to Attend NJ Depositions

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- Diminishes testimony shield for foreign firms with NJ offices
- Business 'control' over executive linked to his part in case

Foreign companies' leaders can be forced to attend depositions in New Jersey when their American subsidiaries get sued, a state appeals court ruled Friday.

Worldwide rubber and industrial repair giant Rema Tip Top AG must produce Heinz Reiff, the chairman of the company's supervisory board, for a deposition demanded by a worker claiming he was threatened with termination and passed over for promotion in violation of a state whistleblower protection law.

The ruling has broad implications for the roughly 1,000 foreign businesses with offices in the state, who will struggle to argue the American subsidiaries don't have sufficient "control" over foreign executives to haul them stateside and force their under-oath testimony.

State law rejects the notion that "a non-party officer, director, or managing agent must be subpoenaed for a deposition," the New Jersey Superior Court Appellate Division said in an unauthored opinion. "Moreover, under the New Jersey Court Rules, parties are considered the 'directors, executives, and employees' of a corporate defendant."

The trial court originally rejected plaintiff James Whelton's demands to compel Reiff's deposition, blowing a hole in civil litigation for international corporations. Without court-made rules compelling companies to produce their executives, litigants in court battles with the New Jersey sections of foreign companies would have been powerless to make executives outside the US testify on company matters.

#### Demanding a Deposition

Whelton, a former lawyer for Rema Tip Top's US operations, alleges that he flagged an improper wire transfer of company cash that one manager sent to another to bolster the recipient's severance package from the company. Instead of receiving a New Jersey CEO position he was in line for, Whelton claims that once he blew the whistle he was passed over for promotion, told he'd be fired, and wasn't given expected compensation.

After demanding Reiff's deposition in a New York office, the company sought protection from the trial court. The judge agreed with the company that Reiff wasn't under the company's control—since this chairman of the company's supervisory board wasn't a named defendant, the company wasn't responsible for making him appear.

The appellate court disagreed, saying the trial court's reasoning would preclude litigants from key fact witnesses since Reiff was involved with employment decisions that Whelton was suing over.

"Here, although Reiff is not a directly named defendant, he serves on the board of directors of several of the named defendants in the case. Moreover, no one disputes that Reiff has knowledge concerning the facts of this case," the panel said. "Consequently, we are satisfied that defendants in the matter under review exercise much more control over Reiff" than in other cases compelling depositions.

Judges Robert J. Gilson, Lisa A. Firko, and Lorraine M. Augostini heard the case.

McMoran O'Connor Bramley & Burns PC represents Whelton. Chiesa Shahinian & Giantomasi PC represents Rema Tip Top AG, and Herrick Feinstein LLP represents its American subsidiaries.

The case is Whelton v. Rema Tip/Top N. Am. , N.J. Super. Ct. App. Div., No. A-0084-24, 3/14/25 .

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