

Norman Annenberg, Inc. v Calvo

2004 NY Slip Op 30197(U)

June 9, 2004

Supreme Court, New York County

Docket Number:

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
NORMAN ANNENBERG, INC.,

Plaintiffs,

INDEX NO. 601552/2002

- against -

MOTION DATE _____

ANTONIO CALVO, NORMAN MANAGEMENT CORP.,
CALVO MANAGEMENT CORP, TATI'S PLACE LLC,
and LINDA CALVO,

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Defendants.
-----X

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits _____	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

FILED
JUL 15 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 9 2004



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X

NORMAN ANNENBERG, INC.,

Index No. 601552/2002

Plaintiffs,

-against-

DECISION & ORDER

ANTONIO CALVO, NORMAN MANAGEMENT CORP.,
CALVO MANAGEMENT CORP, TATI'S PLACE LLC,
and LINDA CALVO,

Defendants.

-----X

KARLA MOSKOWITZ, J.:

Plaintiff Norman Annenberg moves (1) to strike defendants' first affirmative defense of **lack** of jurisdiction as a sanction for failure to provide discovery on the issue (CPLR 3126), (2) to vacate that part of this court's March 4, 2003 Order (the "March 2003 Order") which referred the jurisdictional question to a Special Referee to hear and report, and (3) to impose monetary sanctions upon defendants for obstructing discovery. Plaintiff also moves, in the alternative, for summary judgment dismissing the jurisdictional defense. Defendants cross-move for an order resolving all issues in their favor and dismissing the complaint (CPLR 3216) for plaintiff's alleged obstruction of discovery.

This is an action for attorney's fees of approximately \$300,000 for services rendered between 1987 and 2001.

Defendants served a document demand in June 2002 and, at some

point, interrogatories. Because of the pendency of a summary judgment motion, discovery was stayed until November 2002 when the court issued a Preliminary Conference Order (the "PC Order"). The PC Order directed, inter alia, that responses to interrogatories and document demands be served by February 15, 2003 and that depositions be held on April 15, 2003.

Plaintiff served interrogatories on January 15, 2003. Both sides submitted interrogatory responses as scheduled on February 15. However, instead of responding to defendants' document demand, plaintiff offered to make the documents available for discovery and inspection on February 18. Defendants objected to the rescheduling of the compliance date but nevertheless consented to accept production if made before plaintiff's counsel left for vacation in March. The parties thereafter exchanged letters bickering over photocopying logistics and costs and threatening motion practice.

Shortly thereafter, however, the court issued the March 2003 Order, staying all discovery except as to the question of whether the individual defendants had engaged in sufficient purposeful activity for the purpose of jurisdiction under CPLR 302(a)(1). That order further directed that discovery on the jurisdictional issue be completed by April 30, 2003, and that the matter then be referred to a Special Referee to hear and

report with recommendation. Plaintiff's motion for reargument and renewal was denied by order dated May 22, 2003.¹ On April 7, 2003, plaintiff served a notice of deposition accompanied by a rider demanding eight categories of documents. Defendants appeared for examination on April 28 but did not supply any of the documents at that time. In the course of the deposition, plaintiff called for the production of additional documents.

By Compliance Conference Order dated June 5, 2003 (the "CC Order"), the court directed that the continued deposition of defendants take place on June 25, 2003. No provisions regarding document production were incorporated into the CC Order. However, after the conference, plaintiff sent defendants' counsel a letter requesting seven categories of financial records that had been identified at the first session of the deposition.

Defendants did not bring any documents to the deposition held on June 25. During his examination, defendant Antonio Calvo maintained that plaintiff had retained all of defendants' business records and that defendants had discarded everything

¹ On May 4, 2004, the Appellate Division, First Department affirmed that part of the March 2003 order (see, Annenberg v Calvo, 776 NYS2d 38 [1st Dept 2004]). Although the court modified the order to the extent of finding that a question of fact remained as to whether the statute of limitations had been **tolled**, and struck the ninth affirmative defense of laches and estoppel, it agreed that "\further discovery is needed **before** determining whether long-arm jurisdiction **was** properly acquired over the individual defendants" (Id. at 40).

"[m]ere lack of diligence in furnishing some of the requested materials is not grounds for dismissal *of* the action" (Postel v. New York Univ. Hosp., 262 AD2d 40).

Neither party has met the high standards governing the sanction of preclusion or default for non-compliance. Neither party ever moved to compel discovery, and the court never issued conditional orders of preclusion. Both sides responded to each other's interrogatories and plaintiff deposed defendants for fifteen hours. At most there was a lack of diligence in pursuing or complying with document demands. Defendants waived strict compliance with their demand by extending plaintiff's time to respond until March 2003 and by failing to renew the demand or tailor it to the court's March 2003 Order. Plaintiff, for his part, made no formal demand other than the unnumbered rider to the notice of deposition, choosing to pursue other discovery through letters and oral requests at the depositions.

To complete discovery on the jurisdictional issue, the parties are directed to serve upon each other, within thirty days of notice of entry of this order, specific, written, numbered demands for whatever discovery they deem to be outstanding. Each party shall then submit, within thirty days, a written response replying to each numbered demand and

older than seven years **old** at the advice of their accountant. By letter dated August 17, 2003, plaintiff reiterated his prior demand for documents requested in the original notice of deposition, in his June 5 letter and certain documents identified at the deposition. Defendants, in turn, demanded the 53 exhibits that plaintiff had introduced at the examination. In September, 2003, plaintiff also produced the deposition exhibits. Following an additional document search, defendants produced certain cancelled checks and sale documents. Defendants also annexed a number of responsive documents to their opposition papers to this motion.

The parties' motions are denied. "[I]n furtherance of the policy of favoring the resolution of actions on the merits, the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious **or** due to bad faith" (Corner Realty 30/7, Inc. v Bernstein Mgt Corp., 249 AD2d 191, 193). The party seeking dismissal must demonstrate conduct such as the deliberate destruction of evidence, repeated failure to appear at scheduled depositions or answer questions thereat (see, Cespedes v Mike & Jac Trucking Corp., 305 AD2d 222), or repeated non-compliance with conditional orders of preclusion (see, Pimental v City of New York, 246 AD2d 467). However,

identifying with specificity which responsive documents are being produced. Where there are no documents responsive to a particular demand, the parties shall so state, and, where appropriate, detail what efforts were made to locate the material demanded.

Finally, plaintiff's request to withdraw the reference to the Special Referee and decide the jurisdictional question on the merits is denied. The record reflects that there are significant questions of fact as to the number of trips each defendant made to New **York**, whether those visits were for personal or business reasons, whether those visits were related to the legal service which are the subject of this suit, and whether defendants' other contacts with the state were of sufficient quantity and quality to confer jurisdiction. Moreover, the record **also** raises serious issues of credibility which only a hearing can resolve. For example, Antonio Calvo alleges that he slept overnight in plaintiff's apartment between 100 and 110 times during the course of the parties' relationship, even sharing the same bed at times. Plaintiff, on the other hand, asserts that Antonio slept there on only two occasions, once because of weather conditions and a second time because Antonio had worked late in the apartment and was too tired to drive.

The disparity in testimony on this point, which is potentially relevant to the issue of defendants' business contacts with New York, is too great to be attributed to honest mistake. One party is likely fabricating events, and the court cannot even properly evaluate the authenticity and weight and of the documentary evidence without a resolution of the credibility of the parties proffering it.

Accordingly, it is

ORDERED, that plaintiff's motion is denied, and it is further

ORDERED, that defendants' cross-motion is denied, and it is further

ORDERED, that the parties are directed to serve written document demands and responses upon each other as set forth in this decision, and it is further

ORDERED, that discovery concerning the individual defendants' contacts with the State of New York shall be completed by September 15, 2004, and it is further

ORDERED, that pursuant to this court's March 4, 2003 order all other discovery in this case shall continue to be stayed pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt

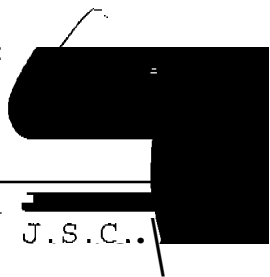
of the determination of the Special Referee or the designated referee, and it is further

ORDERED, that a copy of this order with notice of entry shall be served on the **Clerk** of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee to take place subsequent to September 15, 2004, and it is further

ORDERED, that the parties are directed to appear for a compliance conference on September 28, 2004 at 10:00 a.m. in room 248, 60 Centre Street, New **York**, NY.

Dated: July 9, 2004

ENTER :

A large black rectangular redaction covers the signature area. Below the redaction, the text "J.S.C.." is visible, indicating the initials of the judge.

FILED
JUL 15 2004
COUNTY CLERK'S OFFICE
NEW YORK