

**Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman
& Dicker**

2005 NY Slip Op 30471(U)

December 16, 2005

Sup Ct, NY County

Docket Number: 602229199

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARCY S. FRIEDMAN, J.S.C.

Index Number : 602229/1999

PART 57

ULICO CASUALTY CO.

vs

WILSON, ELSER, MOSKOWITZ

Sequence Number : 008

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

| |
|---|
| 1 |
| 2 |
| 3 |

Memoab Lew
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted to the extent set forth in accompanying decision/order dated 12/16/05.

FILED
DEC 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/05

Marcy Friedman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

ULICO CASUALTY COMPANY,

Index No.: 602229/99

Plaintiff(s),

against

DECISION / ORDER

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER, and WILSON,
ELSER, MOSKOWITZ, EDELMAN &
DICKER LLP,

Defendant(s).

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

FILED
DEC 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

In this action for legal malpractice and breach of fiduciary duty, among other claims, defendants Wilson, Elser, Moskowitz, Edelman & Dicker, and Wilson, Elser Moskowitz, Edelman & Dicker LLP move for an open commission to take the deposition of out-of-state, non-party witness Robert Georgine ("Georgine"), the former Chief Executive of ULLICO Inc. ("ULLICO"), the parent company of plaintiff Ulico Casualty Company ("Ulico").

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." It is well settled that the words "material and necessary" are to be interpreted liberally to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968].) A party is thus entitled to full disclosure of all material and necessary evidence, "or information leading to [such] evidence." (Northway Eng'g, Inc. v. Felix Indus., Inc., 77 NY2d 332, 335 [1991]; Matter of Estate of Matthews v. Bank of NY, 266 AD2d 290 [2d Dept 1999].)

Here, defendants claim that they are entitled to question Georgine about his knowledge, as chief executive officer of ULLICO, of the business dealings of plaintiff subsidiary company. Defendants also allege that Georgine engaged in financial improprieties that affected plaintiff's profitability, and that the effect of Georgine's financial dealings is relevant to the issue of plaintiff's claim for damages for lost business, which is approximately \$35 million.

In opposition, plaintiff submits an affidavit from Georgine in which he asserts that he was not involved in the day-to-day operations of plaintiff and has no recollection of the financial reports or condition of plaintiff company for the period 1996 through 2001. (Georgine Aff., ¶¶ 3, 6.) Plaintiff also argues that in view of the parties' stipulation to conduct depositions of numerous non-parties, including the former president of plaintiff and the former chief legal officer of ULLICO, who do have knowledge of plaintiff's day-to-day operations, Georgine's deposition is not necessary to obtain the information sought by defendants.

In reply, defendants submit deposition testimony of Charles Sorbani, former president of plaintiff, and Mark Rattner, former president of PIA, that Georgine was involved in management decisions related to plaintiff's operations. Georgine's wholly conclusory, carefully worded denial of involvement in plaintiff's day-to-day management cannot serve to avoid discovery.¹

In view of the liberal approach to disclosure endorsed by the courts, this court finds that the information sought from Georgine as to the management and operations of plaintiff and as to plaintiff's financial condition may lead to evidence sufficiently related to the defenses in the case to make its discovery useful and reasonable.

¹Nor may Georgine avoid a deposition based on his unsubstantiated assertion as to his medical condition.

On the record on this motion, the court will not, however, authorize defendants to depose Georgine regarding his alleged self-dealing (e.g., stock transactions and personal loans) that came to light after December 2001, the cut-off date for the damages sought by plaintiff. Defendants claim that the “scandal that rocked Ulico, Inc. in 2003,” involving accusations of unfair dealing and insider trading on the part of Georgine and others, “undermined their own clients’ confidence and trust in the Ulico companies.” (Brennan Aff. In Support, ¶¶ 8, 13.) However, defendants do not offer a plausible explanation as to how a 2003 “scandal” could have affected profitability prior to 2001. To the extent that defendants’ claim is that Georgine’s alleged self-dealing predated plaintiff’s 2001 cut-off date for damages, and that the self-dealing had a quantifiable financial impact on Ulico’s profitability prior to the cut-off date, they rely solely on innuendo and make no showing whatsoever, by expert testimony or otherwise, that the particular items of self-dealing that they have cited (e.g., stock transactions and personal loans) may or could have affected profitability under generally accepted accounting principles. Defendants will, however, be granted leave to seek to make such showing.

It is hereby ORDERED that defendants’ motion to take the deposition of Robert Georgine is granted; and it is further

ORDERED that the deposition shall be limited to the management and operations of plaintiff, and plaintiff’s financial condition prior to December 2001; and it is further

ORDERED that this order is without prejudice to a motion, if defendants are so advised, to extend the scope of the deposition to Georgine’s alleged self-dealing with ULLICO or plaintiff in the period prior to December 2001. Provided that: Such motion shall be made upon papers which shall 1) specifically set forth the relevance of the alleged self-dealing to the issues in this

action; and 2) if defendants' claim is that the self-dealing had a quantifiable financial impact on Ulico's profitability prior to December 2001, defendants shall make a competent showing as to the basis for this claim for each identified item of self-dealing about which defendants seek to inquire. In the event defendants seek to expand the scope of Georgine's deposition beyond that authorized by this order, they shall so move prior to commencement of Georgine's deposition; and it is further

ORDERED that, pursuant to CPLR 3108, a Commission shall issue in this action to a Judge of the Circuit Court for Montgomery County, Maryland, or any other authorized person who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions under oath of Robert Georgione, a resident of Silver Spring, Maryland, as a non-party witness in this action and that he/she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission with any exhibits produced and proved before him/her, to the Clerk of the Supreme Court of the State of New York, County of New York, 60 Centre Street, New York, New York 10007, by certified or registered mail, with all convenient speed.

Dated: New York, New York
December 16, 2005


MARCY FRIEDMAN, J.S.C.

FILED
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COUNTY CLERK'S OFFICE