

Soviero v Carroll Group International, Inc.
2006 NY Slip Op 30118(U)
March 31, 2006
Supreme Court, New York County
Docket Number: 0060178/2004
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 601788/2004

SOVIERO, PATRICIA

vs

CARROLL GROUP INTERNATIONAL

Sequence Number : 003

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

and cross motion

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the attached

FILED

APR 05 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/31/06

[Signature]
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
Patricia E. Soviero,

Plaintiff,

-against-

Carroll Group International, Inc.,
Sheila C. Carroll, Maureen T. Carroll, and
Fiona P. Johnson,

Defendants.
-----X

Index No. 601788/04

FILED
APR 05 2006
COUNTY CLERK'S OFFICE
NEW YORK

Emily Jane Goodman, J.:

In this contentious action which originally alleged, among other things breach of an oral contract to pay an earned commission, plaintiff, Patricia E. Soviero (Ms. Soviero), moves for an order pursuant to CPLR 3124, compelling defendant, Carroll Group International, Inc. (CGI) to fully and completely respond to her interrogatories and document requests, or in the alternative for an order pursuant to CPLR 3126, striking various allegations in the answer.

CGI cross-moves for an order (1) pursuant to CPLR 3126 striking Ms. Soviero's complaint for refusal to appear at her duly noticed deposition, or (2) alternatively, pursuant to CPLR 3126 prohibiting her from offering any of her testimony as evidence because of her refusal to appear for her deposition, or (3) alternatively, pursuant to CPLR 3124, compelling her to appear for and testify at a deposition, or (4) pursuant to NYCRR 130-1.1, awarding sanctions against Ms. Soviero for her failure to appear for her deposition, or (5) pursuant to NYCRR 130-1.1 awarding sanctions for bringing a frivolous motion.

Background

On August 13, 2003, Ms. Soviero became a real estate salesperson associate with CGI, a real estate firm. She was hired for that purpose by Sheila C. Carroll (Ms. Carroll), the president and sole shareholder of CGI. As part of her selling arrangement with CGI, Ms. Soviero alleges that Ms. Carroll promised her that she would receive 50% of the commission from any transaction which resulted from Ms. Soviero's procurement of an exclusive right to sell contract for CGI. On September 5, 2003, Ms. Soviero arranged for a meeting between a friend of hers, Professor Werner F. Ebke, and Ms. Carroll regarding the exclusive right to sell a penthouse for Professor Ebke which was part of the Leo Fromm estate. As result of that meeting, Ms. Carroll allegedly promised that Ms. Soviero would receive 50% of the commission from that sale, with the other 50% to go to CGI. The property was sold on February 19, 2004 through CGI, but Ms. Soviero never received her share of the broker's commission from that sale after CGI received its commission payment. The record now before this court includes a copy of the "Exclusive Right to Sell" Agreement (see Ms. Soviero's July 14, 2004 Order to Show Cause, Exhibit 5) and an affidavit from Professor Ebke on the history of how that document came to exist (id., Ebke affidavit).

Procedural History

This action was commenced on June 10, 2004. The parties have not yet appeared for a preliminary conference, or conducted party depositions, but instead have entered into motion practice prior to this motion which sought, amongst other things, to allow for or prevent the deposition of an out-of-state key witness, the non-party, Professor Ebke, a law professor from Germany. Ms. Soviero moved to hold the deposition of Professor Ebke. The defendants

[* 4]

opposed such deposition. Defendants also moved, pursuant to CPLR 3211 to dismiss the complaint in its entirety. This court entered an order and decision on July 23, 2004 order which provided for the deposition of Professor Ebke on August 3, 2004 when he was to be in America. That deposition was held.

The July 23, 2004 Order

The July 23, 2004 order and decision which was issued pursuant to a stipulation dated the same day, provided (1) for the deposition of Professor Ebke; (2) that the “plaintiff” agreed to respond to the “defendants” interrogatories and document demands and requests¹ by July 29, 2004 at 5:00 P.M.; and (3) that defendants would withdraw their motion for a protective order.

To date, the only person who has appeared for a deposition² in this action is Professor Ebke. He is the co-executor for the Leo Fromm estate (the Fromm estate), who entered into preliminary negotiations with CGI for the sale of the Fromm penthouse at 330 East 68th Street in Manhattan, and who eventually gave CGI the exclusive right to sell the New York City penthouse. Ms. Soviero allegedly was involved in every stage of obtaining the exclusive right to sell agreement. Her association with CGI was terminated a little more than a month after the exclusive right to sell agreement had been signed and a mere six days before her open house of the Fromm estate was to occur.

In Professor Ebke’s July 7, 2004 affidavit (see Ms. Soviero’s July 14, 2004 Order to

¹The record does not reflect that interrogatories and a demand for discovery and documents was served on plaintiff by defendants, but that plaintiff had served a set of interrogatories and a demand for discovery and documents on defendants.

²Pursuant to this court order Professor Ebke was deposed on August 3, 2004 while here on a trip from Europe. A copy of Mr. Ebke’s deposition is not part of the record before the court.

Show Cause, Ebke Affidavit), he avers, among other things, the following essential facts regarding both Ms. Soviero's oral contractual selling arrangement with CGI, and her involvement in CGI's procurement of the "Exclusive Right To Sell" agreement for the Kromm estate penthouse:

I have known plaintiff since the summer of 1978. In August of 2003, plaintiff told me that she had just started to work as a licensed real estate salesperson for defendant Carroll Group International ... and I offered to give her an exclusive to sell the Condo Unit.

Plaintiff told me that she had an agreement with the Carroll Group wherein she would be designated the principal salesperson and would receive fifty percent of the commission which would be paid to the Carroll Group upon consummation of the sale unless the Condo Unit were sold with the assistance of another brokerage firm in which case she was to receive fifty percent of the net amount earned by the Carroll Group....

After a lengthy discussion, Sheila Carroll and I agreed that the Carroll Group was to receive a commission of six percent of the sale price, that plaintiff was to receive fifty percent of the commission payable by the estate. In addition, we agreed that plaintiff's name would appear on all the promotional materials and flyers of the Carroll Group for the sale of the Condo Unit and in advertisements placed in the New York Times and other media....

... I authorized Glenn G. Fox, Esq. as Ancillary Administrator of the estate in New York to execute the Exclusive Right to Sell agreement dated September 26, 2003....

But for the employment of plaintiff by the Carroll Group and Sheila's personal agreement to designate plaintiff as the salesperson who was to have the prime responsibility for marketing the condo Unit and that plaintiff was to receive fifty percent of the commission payable by the estate, the estate never would have given Carroll Group the exclusive.

An open house was held on November 10, 2004. There were two serious buyers out of a potential twelve attendees at the open house (see August 31, 2005 Notice of Motion, Affirmation in Support, paragraph 12 [November 10, 200(4)] e-mail; bates numbered CGI 00019). A

* 6]
contract was offered and accepted on December 11, 2004. A closing occurred on February 19, 2005, and a commission of \$96,000.00 was paid to CGI on February 20, 2005. Nothing was paid to Ms. Soviero, who then commenced this action. Professor Ebke did not indicate in his affidavit whether he had been made aware that Ms. Soviero had been terminated from her employ with CGI.

This Court's January 5, 2005 Decision and Order

On January 5, 2005, this court dismissed all actions against the individual defendants recited in the caption along with five of the six causes of action leaving only the first cause of action against the corporate defendant for breach of contract.³ On January 13, 2005, Ms. Soviero filed an appeal from the January 5, 2005 decision and order with the Appellate Division, First Department. On March 14, 2006, the Appellate Division unanimously affirmed this court's January 5, 2005 decision and order, which, among other things, found that a basis for a breach of contract action existed between Ms. Soviero and CGI. This court's decision and order as affirmed by the Appellate Division recites in relevant part:

In her complaint, plaintiff alleges that it was 'agreed that plaintiff would receive fifty percent of the commission on *any transaction which resulted* from plaintiff securing for the Carroll Group an "Exclusive Right To Sell" [emphasis added].' Complaint, ¶ 11. These allegations are repeated in plaintiff's memorandum of law as the facts upon which the defense of her arguments against dismissal would be based. Plaintiff's Memorandum of Law, at 5-6.

Under such an agreement, it would be unnecessary for the transaction arising from an Exclusive Right to Sell procured by plaintiff to occur prior to plaintiff's termination. Under the facts as alleged in the complaint, as long as a commission arose out of a 'transaction' related to an Exclusive right to Sell which

³The first cause of action seeks payment of her commission of \$48,000.00 from the CGI. To date CGI refused to pay plaintiff any portion of the commission it received from the sale of the Fromm Penthouse.

plaintiff obtained for the Carroll Group, plaintiff would have a right to receive 50%. See *Yudell v Ann Israel & Associates, Inc.*, 248 AD2d 189 (1st Dept 1998) (claim for breach of contract to pay commissions on employment placements procured by plaintiff prior to her termination survives where plaintiff cites to contract provisions supporting inference that termination was not intended to extinguish her rights to payment). Since plaintiff claims that she did procure an Exclusive right to Sell from the Estate, and that a 'transaction' resulted from the Exclusive Right to Sell, this court finds that the plaintiff has stated a cause of action for breach of the alleged oral agreement with the Carroll Group.***

While plaintiff has successfully alleged that she was contractually entitled to receive a commission even after her employment was terminated, she has failed to show her entitlement to rely on the Labor Law to recover her commission, because she cannot claim to have been an 'employee' of the Carroll Group after her termination pursuant to Labor Law § 190 (2) or (6).***

[I]t is apparent from the pleadings that the commission from the sale of the Condo Unit was payable to the Carroll Group, against whom a claim for breach of contract has been stated, and not to the individual defendants. For this reason ..., the cause of action for conversion is dismissed as redundant of the claim for breach of contract.

Defendants' Answer

Pursuant to this court's January 5, 2005 decision and order, CGI served its Verified Answer with Affirmative Defenses on February 4, 2005. The Verified Answer contains eleven affirmative defenses. The First Affirmative Defense asserts that the complaint fails to state a claim upon which relief may be granted. The Second Affirmative Defense asserts that the terms and conditions of the exclusive right to sell agreement are asserted herein as an affirmative defense. The Third Affirmative Defense asserts the terms and conditions of the contract of sale as an affirmative defense. The Fourth Affirmative Defense asserts that the Complaint is barred, in whole or in part, by the doctrines of waiver, estoppel, and ratification. The Sixth Affirmative Defense alleges that the plaintiff's claims are barred by the statute of frauds. The Eighth Affirmative Defense alleges that the plaintiff's complaint is barred by the equitable doctrines of

unclean hands and laches. The Ninth Affirmative Defense alleges that defendant's performance was excused by plaintiff's breach. The Eleventh Affirmative Defense alleges that the defendants' (now defendant's) performance was excused for failure of a condition precedent, but does not state the condition precedent. The Verified Answer was verified by Sheila Carroll.

Outstanding Document Production

Plaintiff's First Demand for Discovery and Production of Documents was sent on March 5, 2005. Plaintiff's First set of Interrogatories were also sent to CGI on that same date. Defendant's Responses to Plaintiff's First Demand For Discovery and Production of Documents were submitted on April 1, 2005. Defendant's Response to Plaintiff's First set of Interrogatories subsequently was submitted on May 24, 2005. By separate letter, CGI also submitted two responsive bates-numbered documents on May 26, 2005. In addition, bates-numbered documents CGI 00260 to CGI 00273 were sent out on June 13, 2005. Another document, which was entitled "Document Production by Defendant Carroll Group, Inc.," reflected that there are 273 bates-numbered document, i.e., 01 to 273 (*id.*, Exhibit P). The letters and list do not indicate what requests or questions the bates numbered documents are responsive to.

Despite the aforesaid recitation of items which were sent to Ms. Soviero by CGI, her motion at bar asserts that CGI's responses are non-responsive. CGI counters Ms. Soviero's assertion by alleging that plaintiff's discovery demands and interrogatory questions are over broad and irrelevant to the breach of contract cause of action. This court has decided, as affirmed by the Appellate Division, that a basis for a breach of contract cause of action has been established and, unlike the majority of contracts, the sales associate agreement under discussion is not written but oral. The contents of this oral agreement, and the actuality or non-existence of

* 9]
a breach, can only be proved or defeated by a garnering of all pertinent and relevant memoranda that exist wherever or whatever that may be. A conditional order of preclusion or other appropriate sanction may be imposed upon a party's failure to provide responsive answers (see Kihl v Pfeffer, 94 NY2d 118, 122-123 [1999]).

CGI' Response to Plaintiff's First Demand for Discovery and Documents

This court finds that Ms. Soviero's demands are not, as a whole, over broad or irrelevant, but for those that are, this court has set parameters for CGI to adhere to. This court also finds that, on the whole, CGI's April 1, 2005 response was, and is, wholly inadequate and non-responsive. Upon a review of the nineteen (19) requests in the First Demand for Discovery and Documents, the court directs CGI to fully respond in accordance with the following analysis and modification of the requests:

- (1) Not relevant.
- (2) Permissible and relevant.
- (3) Limited to those of Sheila Carroll, the plaintiff, and Fiona Johnson.
- (4) Permissible and relevant.
- (5) Limited to those communications relevant to plaintiff's status as employee or independent contractor involving the sale of the Fromm estate.
- (6) Limited to those communications related to the sale of the Fromm estate.
- (7) Permissible and relevant, including a W-2 or 1099 form if applicable.
- (8) Permissible and relevant.
- (9) Permissible and relevant.
- (10) Permissible and relevant, as Interrogatory No. 12 seeks to identify the CGI records concerning the sale of the Fromm estate.
- (11) Permissible and relevant.
- (12) Permissible and relevant.
- (13) Permissible and relevant.
- (14) This request is over broad and will be limited to redacted copies of those accounts related to either advertising costs for the sale of the Fromm estate or receipt of and deposit of the commission from the sale of the Fromm estate.
- (15) Decision reserved until after briefs are submitted on the relevance of documents concerning the payrolls record for the requested period.
- (16) Decision reserved until after briefs are submitted on the relevance of documents concerning the employment agreement of any individual who received

compensation from the sale of the Fromm estate, or their compensation.

(17) Limited to any entry concerning the sale of the Fromm estate for those persons identified in the response to Interrogatory No. 5.

(18) Not relevant at this time.

(19) Not relevant at this time.

The court further directs that proper responses from CGI must be submitted within thirty (30) days from service of this order with notice of entry, including, where appropriate, affidavits of non-availability with an explanation of due diligence. This court reiterates that, CGI was made aware, and has been aware, of these requests since March 4, 2005.

Defendants' Response to Plaintiff's First Set of Interrogatories

This court finds that Ms. Soviero's interrogatories are not, as a whole, over broad or irrelevant, but for those that are, this court has set parameters for CGI to adhere to. This court finds that CGI's May 24, 2005 response was, and is, wholly inadequate and non-responsive.

Upon a review of the twenty-six (26) question/items in the First Set of Interrogatories, the court directs CGI to fully resend in accordance with the following analysis and modification of the questions:

- (1) Permissible and relevant.
- (2) Permissible and relevant.
- (3) Decision reserved until after briefs are submitted on the relevance of documents concerning the identification of all employees of CGI.
- (4) Decision reserved until after briefs are submitted on the relevance of documents concerning the identification of all independent contractors associated with CGI.
- (5) Permissible and relevant.
- (6) Vague, over broad and overly burdensome.
- (7) Vague, over broad and overly burdensome.
- (8) Vague, over broad and overly burdensome.
- (9) Permissible and relevant.
- (10) Vague, over broad and overly burdensome.
- (11) Vague, over broad and overly burdensome.
- (12) Permissible and relevant.

- (13) Permissible and relevant.
- (14) Permissible and relevant.
- (15) Permissible and relevant.
- (16) Vague, over broad and overly burdensome.
- (17) Permissible and relevant.
- (18) Permissible and relevant.
- (19) Permissible and relevant.
- (20) Permissible and relevant, including a W-2 or 1099 form if applicable.
- (21) Permissible and relevant but limited to plaintiff's association with CGI as either employee or independent contractor.
- (22) Permissible and relevant.
- (23) Permissible and relevant.
- (24) Permissible and relevant. This response should include a description of who or what each listed person's or entity's relationship to CGI is. The court notes that CGI listed thirteen (13) persons or entities in its May 24, 2005 response to this question.
- (25) Permissible and relevant. The same directive listed in 24, supra, applies to this question. This court also notes that CGI listed eighteen (18) persons or entities in its May 24, 2005 response to this question.
- (26) Not relevant.

The court also directs that proper responses must be submitted by CGI within thirty (30) days from service of this order with notice of entry, including, where appropriate, affidavits of non-availability with an explanation of due diligence, since CGI was made, and has been aware of these questions since its receipt of them in March 2005.

The Depositions at Issue

Once pertinent outstanding document discovery has been provided in accordance with this court's directives herein, depositions shall proceed with Ms. Soviero being first and CGI being second. Since CGI is a corporation, the principal with the best knowledge about the alleged activities shall be deposed. The court notes that, pursuant to the statements in Professor Ebke's affidavit and the verification of the Answer by Ms. Sheila Carroll, the principal with the best knowledge regarding Ms. Soviero's lawsuit against CGI, is Ms. Sheila Carroll.

Ordinarily, only the parties and their legal representatives are permitted to be present at the deposition (see North Sugarman, Ch. 1-2, Deposition Strategy, Law and Forms, at Intro.03[1][b]). Since the Appellate Division has affirmed this court's January 5, 2005 decision and order, only the parties who are still in the action, and their representative counsel, will be permitted to be at Ms. Soviero's and Ms. Sheila Carroll's depositions.

The court notes that, as a result of Ms. Soviero's termination from her salesperson position with CGI prior to the sale of the Fromm estate, certain subsequent activity occurred between the originally named parties and Ms. Soviero, which resulted in certain criminal charges being brought against Ms. Soviero. The issue before this court is the nature and construction of Ms. Soviero's oral salesperson contract with CGI. The criminal charges are not relevant to the nature and construction of the contract which was allegedly breached. Her initial deposition, which will be scheduled at the preliminary conference, will be limited only to those questions related to her salesperson position and her role in procuring the exclusive right to sell the Fromm estate penthouse.

A further limited deposition on the ensuing criminal charges may be scheduled for a later date, if needed and relevant, and only after all party depositions have been completed and any outstanding discovery stemming from those depositions have been exchanged.

Any failure to provide outstanding document discovery in accordance with this order will result in appropriate sanctions (see *Curtis Properties Corporation v Grief Companies*, 236 AD2d 237, 239 [1st Dept 1997]; CPLR 3126). The failure to appear for noticed depositions of the parties shall also result in appropriate sanctions (see *Lipstick, Ltd. v Grupo Triboso, S.A. DE C.V.*, 304 Ad2d 482, 482-483 [1st Dept 2003]; compare *Park Health Center v Countrywide*

Insurance Company, 1 Misc3d 906[A] [Civil Court, City of New York, Queens County 2003]; *Sieger v Sieger*, 8 Misc3d 1029[A] [Supreme Court, Kings County 2005; but see *The Board of Managers of the Atrium v West 79th Street Corp.*, 17 AD3d 108, 109 [1st Dept 2005]).

Accordingly, it is hereby

ORDERED that Ms. Soviero's motion is granted to the extent of directing CGI to fully and completely respond to Ms. Soviero's interrogatories and document demands as modified in accordance with this court's decision and directives, and is otherwise denied; and it is further

ORDERED that CGI's cross motion is granted to the extent of directing Ms. Soviero to appear at a deposition which will be scheduled at the preliminary conference in accordance with this court's decision as stated herein, and is otherwise denied; and it is further

ORDERED that the parties are directed to respond to all outstanding discovery requests, demands, and interrogatories via provision of copies of actual originals, including pertinent electronic discovery which are related to or concerned with her employment relationship with CGI, the sale of the Kromm estate penthouse, and receipt of the commission therefrom to the extent not so already provided, or production of affidavits of non-availability with a due diligence explanation for the reason of non availability, within 30 days from date of service of this order with notice of entry, and it is further

ORDERED that the documents and affidavits, so produced, be produced in an organized manner in accordance with the provisions of CPLR 3122 (b) and (c), wherein the party providing the responsive materials must delineate, in a clear and organized manner, which items, *i.e.*, bates documents, are responsive to which document request number or interrogatory question; and it is further

ORDERED that the court appoints Court Attorney Michael Williams as Special Referee to oversee all further discovery stemming from this order and the pending depositions; and it is further

ORDERED that the parties are directed to appear for a preliminary conference after the thirty (30) day time period to provide outstanding discovery and affidavits, has expired for the purpose of scheduling depositions; and it is further

ORDERED that the parties are directed to appear in Part 17 on May ²² 2006 at 10:00 a.m. for a preliminary conference with Special Referee Williams at which time depositions will be scheduled; and it is further

ORDERED that the deposition of Ms. Soviero, as plaintiff, will occur first with the deposition of Ms. Sheila C. Carroll, as president and sole shareholder of CGI, to follow within one week from the deposition of Ms. Soviero, with the said depositions to be held at the courthouse at 60 Centre Street on the dates scheduled at the preliminary compliance conference.

Dated: March 31, 2006

ENTER:

FILED
 APR 05 2006
 COUNTY CLERK'S OFFICE
 NEW YORK

[Handwritten Signature]
 J.S.C.
EMILY JANE GOODMAN