

**Savarese v Hilton Hotels Corp.**

2007 NY Slip Op 30805(U)

April 13, 2007

Supreme Court, New York County

Docket Number: 0122195/2003

Judge: Paul G. Feinman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: \_\_\_\_\_  
Justice

PART 52

Michael Savarese

INDEX NO. 122195/03

MOTION DATE 11/29/07

- v -  
Hilton Hotels Corp.

MOTION SEQ. NO. 009

MOTION CAL. NO. 16

The following papers, numbered 1 to 3 were read on this motion to/for work

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied in

audience with the annexed  
decision & order.

**FILED**

APR 19 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/13/07

[Signature]

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  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

Michael Savarese,  
Plaintiff,  
- against -  
Hilton Hotels Corporation, Nicotra Group, LLC,  
Theodore Williams Construction Company, LLC and  
C&M Tile & Marble Contractors, Inc.,  
Defendants.

Index Number 122195/2003  
Submission Date Nov. 29, 2006  
Motion Seq. Nos. 009, 010, 011  
Calendar Nos. 16, 12, 13

**DECISION AND ORDER**

-----X

Theodore Williams Construction Company, LLC  
Fourth Third-Party Plaintiff,  
- against -  
Nicotra Hotel I, LLC,  
Fourth Third-Party Defendant.

T.P. Index No. 590895/2005

-----X

C&M Tile & Marble Contractors, Inc.  
Fifth Third-Party Plaintiff,  
- against -  
Nicotra Hotel I, LLC,  
Fifth Third-Party Defendant.

T. P. Index No. 591208/2005

-----X

Papers considered in review of these motions for trial costs and legal expenses:

	<b>Papers</b>	<b>Numbered</b>
Mot. Seq. 009	Order to Show Cause, Affidavits & Exhibits	1
	Answering Affirmation	2
	Reply Affirmation & Invoices	3, 4, 5
Mot. Seq. 010	Notice of Motion, Affidavits & Exhibits	1
	Answering Affirmation	2
	Reply Affirmation	3
Mot. Seq. 011	Order to Show Cause, Affidavits & Exhibits	1
	Answering Affirmation	2

**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**PAUL GEORGE FEINMAN, J.:**

The above-captioned action and third-party actions were sent to this part for trial after a jury was selected. After the case was sent to this part for trial and during the course of the trial, the court, with the express permission of counsel for all parties, made attempts to settle the case. Those settlement negotiations, with the express permission of counsel for all parties,

involved ex parte conversations between the court and counsel for the various parties in the robing room. On May 16, 2006, the court granted a mistrial on the condition that the plaintiff's attorney pay the attorneys' fees for the aborted trial in an amount not to exceed \$10,000.

The mistrial was provoked by material misrepresentations made by plaintiff's counsel in open court as to the contents of conversations held with the court during settlement negotiations. During the earlier conversations, which were not recorded, plaintiff's counsel brought up the subject of the worker's compensation lien and the court identified to plaintiff's counsel problems of proof regarding past medical expenses and lost wages. This conversation was had in the context of evaluating the value of the case.

The court was unambiguous and perfectly clear as to its view of how these issues needed to be addressed. During those earlier conversations, the court was clear that absent a stipulation of the parties, it was the court's view that plaintiff had a duty to introduce evidence of past medical expenses or that item would not be submitted to the jury. Any setoff for a worker's compensation lien would then be addressed at a collateral source hearing outside the jury's hearing. Plaintiff's counsel was on fair notice of the court's view. While plaintiff's counsel advocated for a different approach, he was on fair notice of how the court intended to proceed.

On May 16, 2006, when counsel could not obtain the consent of the parties to proceed as he desired, he then made statements on the record which blatantly and, in the court's view, deliberately, misrepresented the substance of the ex parte conversations held earlier. The clear purpose of the misrepresentations was to have the record appear that the court's denial of the continuance was an abuse of discretion and to preserve the issue for appeal based on factually incorrect statements. There was no room for misunderstanding or confusion, as the court had

been explicit in its conversations with plaintiff's counsel. Counsel was dissatisfied with the court's approach, which the court knew, but the court would not allow countenance the creation of a false record as to what had transpired.

The mistrial application was clearly made by the plaintiff's counsel.

MR. GOLDSTONE: Are you declaring a mistrial?

THE COURT: Is that your request?

...

MR. GOLDSTONE: Unless I can get a continuance or they stipulate.

THE COURT: I'm not giving you a continuance.

MR. GOLDSTONE: I request a mistrial.

Transcript of Proceedings of May 16, 2006 at p. 12.

The court did indicate that it would allow the plaintiff an opportunity to put the records in if they could be obtained in admissible form by the next trial date, which was the following Monday.

THE COURT: I will see you all Monday morning.

MR. LOFRESE: 10:00, Judge?

THE COURT: Yes.

MR. GOLDSOTNE: You said you would grant a mistrial.

THE COURT: What was that?

MR. GOLDSTONE: You said you would grant a mistrial if I requested it. And if I'm not going to be given time to get the records in --

THE COURT: ... [W]e have not gotten to the point of the close of the trial, which I don't believe that you can't get those in by the close of trial. This trial is not going to end until Tuesday, given the current schedule. I don't see why you can't get those documents here Monday or first thing Tuesday morning.

MR. GOLDSTONE: I have to have a witness with them.

THE COURT: I don't know that's accurate. Depending on if they are [subpoenaed] certified paid medical bills, they may be self-authenticating.

MR. GOLDSTONE: What about the lost earnings?

THE COURT: There has been absolutely no proof in this trial there is [sic] lost earnings. If you get the evidence in by the time you rest, you know, then that goes to the jury. If you don't get the evidence to the jury by the time you rest --

MR. GOLDSTONE: Well, if I don't get it and the Court won't grant me the continuance, I'm asking for a mistrial.

THE COURT: We have not gotten there yet. **And if grant the mistrial, you can assume there is [sic] certain costs associated with that, that you are going to be expected to reimburse.** You can't have it both ways.

May 16, 2006 Transcript of Proceedings at pp 16 -17. (Emphasis added)

This exchange makes clear that the Court had in essence attempted to forestall a mistrial because of the inherent unfairness of the costs associated with same to the defendants. Plaintiff persisted, and attempted again to create a record whereby it would appear that the mistrial was due to a "misunderstanding" between the court and plaintiff's counsel. Plaintiff's counsel then persisted in making material misrepresentations about the what the court had said about the issue of his burdens regarding lost wages and past medical expenses.

After the court dealt with other issues raised by the defense, the court attempted to adjourn the matter to allow a plaintiff's counsel renewed his application for a mistrial, which had not yet been ruled upon. Each attempt by the court to "salvage" the case was met by a renewed attempt by plaintiff's counsel to frame the record such that any failure of proof would appear to be due to the court's unwillingness to grant a continuance until plaintiff could prepare his case. No continuance was warranted given 1) that from May 16, 2006 to the following Monday, when the trial was scheduled to resume was in fact a six day period and 2) the issues raised were foreseeable by prepared counsel.

As the tenor of the conversation deteriorated, and as plaintiff's counsel continued to misrepresent the substance of the conversations had earlier during settlement negotiations, the following exchange occurred:

MR. GOLDSTONE: All right, lets say I did so, it was due to a misunderstanding. There was --

THE COURT: There is no misunderstanding. I was perfectly clear.

MR. GOLDSTONE: You man have been clear; I was perfectly clear and yet we both thought different things. This is what a misunderstanding is.

THE COURT: You didn't say what you said you said.

MR. GOLDSTONE: Well, I say I did. Now, are you calling me a liar?

THE COURT: Yes. ... If you say that you said what you said, yes.

May 16, 2006 Transcript of Procecdings at p. 18.

Importantly, there was no mistrial application at this time. There was more discussion of the issues of how the medical bills could be admitted into evidence. The court attempted again to diffusc the matter saying, "I will see you all on Monday morning." Id. at p. 19. However, the plaintiff's counsel wanted a firm ruling on the mistrial application. Only at this juncture, did the plaintiff's application for a mistrial inject the issue of the word "liar," injected by plaintiff's counsel, as the transcript shows, when in fact the real issue was the lack of certain proof in plaintiff's case. The court **denied** the mistrial and apologized to plaintiff's counsel. (Id. at 23, l. 20). Plaintiff's counsel persisted and the court made clear it would only grant the mistrial with costs. (Id. at 24 ll. 6 - 11). The application was renewed, and granted on the condition that counsel pay costs to the defense counsel not to exceed \$10,000.00. **After the application was granted**, plaintiff's counsel attempted to backtrack (Id. at pp. 26 - 30).

A few observations are in order. The word liar was uttered by plaintiff's counsel, not the court. The court merely assented to his characterization. Even after all of this transpired, it is also clear that counsel did not believe that the court had been unfair in its rulings as he made the following statement:

MR. GOLDSTONE: I would like to clarify one thing. I didn't say you were unfair up to this point. I didn't make that claim.

May 16, 2006 Transcript of Proceedings at p. 28.

The true motivation behind the conduct of plaintiff's counsel is belied by the totality of the record: counsel's concern that the issue of past medical expenses and lost wages would not be submitted to the jury absent proof on these issues. In short, while the plaintiff was granted his mistrial after several efforts of the court to steer the proceedings in a different direction, he attempted at the end to avoid the costs associated with that application. At a certain point, it is not for the court to save the plaintiff's counsel from himself. His application was granted and defense counsel should be awarded costs.

The instant motion practice was scheduled to set the amount of the costs, not revisit the decision to award them. The court has reviewed the detailed affirmations of counsel and finds no need for a further fact-finding hearing. Baxter and Smith, P.C.'s actual costs actually exceed the \$10,000.00 cap set by the court, and thus it is awarded costs in the amount of \$10,000.00. Vincent P. Crisci, Esq. requests \$9,722.40 in costs and waived attorney's fees. That application is granted. Billig Law, P.C. requests costs totalling \$38,578.30, and the basis for the request is amply documented. However, the court will abide by its original ruling capping the costs at a maximum of \$10,000.00.

CPLR 4402 provides that "at any time during the trial, the court, on motion of any party, may order ... a new trial in the interest of justice on such terms as may be just". The court finds that the just terms here were that the defense be reimbursed at least some, if not all, of the costs associated with having to retry the case. Objectively speaking, viewing the trial as a whole, the mistrial was not necessitated by the court taking the bait of plaintiff's counsel and answering "Yes" to plaintiff's counsel's inquiry about whether he was a liar. Rather the true cause of the mistrial was that plaintiff's counsel was not prepared to proceed on the issue of damages in

accordance with the court's clearly articulated directives. Accordingly, it is

ORDERED that the respective motions by defense counsel are all granted to the extent that plaintiff's counsel shall pay costs to Baxter and Smith, P.C. in the amount of \$10,000.00, to Vincent P. Crisci, Esq. in the amount of \$9,722.40 and to Billig Law, P.C. in the amount of \$10,000 within thirty days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: April 13, 2007  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE