

**Matter of Everett Labs. v Leyse**

2007 NY Slip Op 31505(U)

June 1, 2007

Supreme Court, New York County

Docket Number: 0113695/2006

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN  
*Justice*

PART 11

EVERETT LABORATORIES,

INDEX NO.

113695/08

Plaintiffs,

MOTION DATE

- v -

MOTION SEQ. NO.

007

LEYSE, MARK

MOTION CAL. NO.

Defendants.

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

PAPERS NUMBERED

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 this motion

*is decided in accordance with the annexed decision and order.*

**FILED**

JUN 07 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 1, 2007

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: PART 11

-----X  
In the Matter of the Application of  
Everett Laboratories,

INDEX NO. 113695/06

Petitioner,

For an Order Directing:

Mark Leyse, Harold Bonime and Carol Totino,

Respondents,

To Give Testimony for Use in the Actions Pending in  
the Superior Court in New Jersey, Essex County  
entitled Ari Weitzner, M.D., individually and on  
behalf of all others similarly situated v. Everett  
Laboratories, Inc.; ESX -L-737-05.

-----X  
JOAN A. MADDEN, J.:

Petitioner Evcrett Laboratories, Inc., (“Everett Labs”) moves for an order compelling respondent herein Harold Bonime (“H. Bonime”) and Maurice Bonime (“M. Bonime”) respondent in a related matter, to reappear for depositions to respond to numerous questions which they did not answer at their respective depositions based on the objections of their attorney. Petitioner also moves for an order compelling payment of a cancellation fee in connection with the non-appearance of respondent Mark Leyse (“Leyse”) at a deposition. Respondents H. Bonime and M. Bonime oppose the motion to compel their reappearance for continued depositions arguing that the questions in issue are not relevant and material to the underlying litigation. Respondent Leyse opposes the motion for costs alleging his failure to appear was due to illness.

This proceeding relates to an action involving alleged unsolicited faxes, captioned Ari

Weitzner, M.D. Individually, and on Behalf of All Others Similarly Situated v Everett Laboratories, Inc., New Jersey Superior Court, Essex County, Docket No. ESX-L-737-05. In that action Everett Labs obtained a commission in the New Jersey Superior Court to take the deposition of the non parties, H. Bonime and M. Bonime. Based on the commission and pursuant to CPLR §3102(e), Everett Labs moved in this court for an order directing the depositions of respondents, including H. Bonime, and moved in Westchester County for an order directing the deposition of M. Bonime. The deposition of H. Bonime was ordered on October 11, 2006 by the Hon. Phyllis Gangel-Jacob and on January 4, 2007, this court signed an order limiting the scope of the depositions to questions which were material and relevant to the New Jersey litigation. As to the deposition of M. Bonime, it was ordered by the Hon. W. Dennis Donovan, of the Supreme Court Westchester County on September 29, 2006 (Everett Laboratories, Inc., v Maurice Bonime Index No. 18356/2006). As M. Bonime's deposition was ordered by Justice Donovan the issues relating to the scope of his deposition are not properly before this court and will not be addressed.

“The court's inquiry with respect to objections raised by persons required to testify pursuant to CPLR §3102 (c) is limited to determining (1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-State action; and (3) whether the examination is fair. (*Matter of Brandes Harris*, 78 AD2d 638, 639). The courts ‘will not prejudge the materiality or the competency of the evidence in a case pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations.’ (*Matter of Roberts*, 214 App Div 271, 275).” *Matter of Ayliffe & Cos.*, 166 AD2d 223,224 (1<sup>st</sup> Dept. 1990). However, the court retains authority to grant a protective

order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.” CPLR §3103(a).” Id.

Petitioner alleges that at the deposition of H. Bonime conducted on January 4, 2007, the attorney representing him, Mr. Todd Bank (“Bank”), objected to and instructed him not to answer sixty-one questions on the grounds of immateriality and irrelevancy.<sup>1</sup>

Petitioner seeks to question H. Bonime about background information, his relationship with Ari Weitzner (“Weitzner”), complaints by Weitzner about unsolicited faxes, and certain lawsuits concerning unsolicited faxes in which H. Bonime was the plaintiff and in which Bank represented him.

In the order granting the commission, the New Jersey Court found that H. Bonime “may have knowledge of facts that are reasonably calculated to lead to discovery of admissible evidence with respect to, among other things, the adequacy of counsel for the putative plaintiff class and the adequacy of Ari Weitzner, M.D. as a class representative” Thus, petitioner’s questions of H. Bonime relating to background information and those relating to H. Bonime’s relationship with Ari Weitzner (“Weitzner”) are proper. H. Bonime is to respond to questions seeking such information including those numbered 4, 5, 6, 7, 8, 14, 15 (background information) and those numbered 16, 17, 18, 19, and 22 (relationship with Weitzner). Questions relating to complaints by Weitzner generally about unsolicited faxes are also proper and H. Bonime is to respond to questions 34, 60, and 61.

As to questions relating to the lawsuits, it is undisputed that Bank was for a time co-

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<sup>1</sup>Petitioner further alleges that Bank failed to respond to a letter dated February 13, 2007 in which petitioner requested he explain the basis of his objections.

counsel for the plaintiff in the New Jersey action, and that he represented H. Bonime in six lawsuits based on unsolicited faxes. Petitioner alleges that the fee arrangements between Bank and H. Bonime are relevant and material to the New Jersey action because Bank had arrangements with his various clients as to "the sharing of proceeds" which bear on Weitzner's arrangements with Bank in the New Jersey action. According to petitioner, these arrangements are relevant and material to the issue of whether Weitzner is an adequate class representative in the New Jersey action. To the extent ascertainable from the submissions, including those in the connection with the underlying motion for the commission in New Jersey, petitioner's basis for the conclusion that Bank had an agreement with clients for "the sharing of proceeds" is based on sections of the deposition testimony of Weitzner in which he stated that he learned of Bank from M. Bonime who he described as a friend from childhood. Specifically, Weitzner testified that M. Bonime told him he received \$10,000.00 from the action in which Bank represented him and that he thought this was fifty percent of the proceeds.

In his affirmation in opposition, Bank states that the action to which Weitzner was referring, was one in which he represented H. Bonime, not M. Bonime; that the results of the litigation included injunctive relief for absent class members, and a settlement of \$11,000 of which "H. Bonime received his full statutory damages of \$3,000" and Bank received attorney's fees of \$8,000. Bank also states that his fee arrangement in the New Jersey action is "no longer in force" due to the denial of his pro hac vice application to the New Jersey court. Thus, Bank argues, his fee arrangement is no longer relevant and material to the New Jersey action.

As to Bank's argument that his fee arrangement is "no longer in force," the commission was issued subsequent to the denial of his pro hac vice application, as is evident from the parties'

references in their letter briefs in the New Jersey action to the denial of Bank's application and to the related fact that Bank was no longer to act as co-counsel in that action. Thus, when the commission was signed, the New Jersey Court was aware that whatever the nature of Bank's fee arrangement with Weitzner, presumably it was no longer in effect.

Furthermore, as indicated above, the New Jersey court's order was based in part on allegations that H. Bonime possessed information relevant to Weitzner's adequacy as a class representative. While this court may properly determine whether the scope of the inquiry at the deposition falls within the issues pending in the New Jersey litigation, it may not prejudge the materiality and competency of the evidence. Matter of Ayliffe & Cos., supra. Based on the foregoing, as the New Jersey court has defined one of the issues as the adequacy of Weitzner as a class representative, and has determined that H. Bonime may have knowledge relating to this issue based on allegations that Bank represented him in six similar types of actions and based on allegations regarding Bank's fee arrangements, it cannot be said that petitioner's questioning about the lawsuits and fee arrangements is outside the ambit of issues pending in the New Jersey action. Therefore, H. Bonime is to respond to questions related to the six actions including his fee arrangements, and specifically to questions 23 through 31, and questions 40 through 59.

As to Everett's application for an order compelling payment of the \$125 cancellation fee in connection with respondent Leyse's failure to appear at the March 15, 2007, it must be noted that Everett had to make a motion to hold Leyse in contempt for failing to appear at a previously scheduled deposition and the March 15<sup>th</sup> date was set as a result of the motion. It must also be noted that while in his affirmation Bank alleges Leyse failed to appear due to illness, Leyse fails to submit an affidavit attesting to this. However, as Bank alleges that at 11 am he notified a

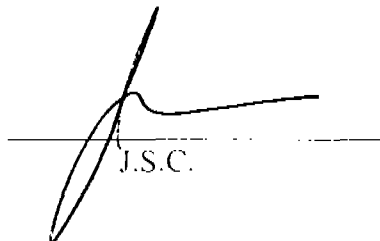
Michael Haratz ("Haratz") of Everett's attorney's office regarding Leyse's unavailability for the 2 pm deposition, not at the last minute as claimed by Everett, the failure of Everett to submit an affidavit from Haratz must be considered. Under these circumstances, the \$125 cancellation fee should be split between Leyse and Everett.

Accordingly, it is

ORDERED that within 14 days of service of a copy of this order with notice of entry H. Bonime is to appear for a deposition to be questioned in accordance with this decision and order; and it is further

ORDERED that within 14 days of service of a copy of this order with notice of entry, Mark Leyse is to pay the law firm of Orloff, Lowenbach, Stifelman & Siegel, P.A. the sum of \$62.50.

Dated June 1, 2007



J.S.C.