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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 601954/2005
LAPIDUS & ASSOCIATES, LLP
VS
REIVER, ALLAN S.
Sequence Number : 002
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 _____

	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 decided per attached

FILED
JUN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/11/07

EJG
EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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LAPIDUS & ASSOCIATES, LLP,

Plaintiff,

-against-

Index No.: 601954/05

ALLAN S. REIVER AND DENCORP INVESTMENTS, INC.

Defendants.

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ALLAN S. REIVER AND DENCORP INVESTMENTS,

Third-Party Plaintiffs,

-against-

STEVEN R. LAPIDUS, ESQ.,

Third-Party Defendant.

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EMILY JANE GOODMAN, J.S.C.:

In this case, plaintiff Lapidus & Associates, LLP (Associates), a law firm, seeks to recover $414,720.80 in legal fees from its former clients, defendants Allan S. Reiver (Reiver) and Dencorp Investments, Inc. (together, Defendants). Defendants have interposed claims against Steven R. Lapidus, Esq. (Lapidus) and Associates (together, Plaintiffs), for legal malpractice and breach of fiduciary duty. Defendants contend that Associates billed them for

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$510,000 in excessive legal fees in the underlying case (the Underlying Case),[1] and negligently failed to advise them on when and how to exercise an option to buy a business, Urban Archaeology Ltd., in which Dencorp Investments, Inc. was one of two equity partners.[2]

In their supporting affidavit and memorandum of law, Defendants seek a protective order, pursuant to CPLR 3103, barring Plaintiffs' inquiry at Defendants' continued EBT about matters that Defendants assert are outside the scope of this litigation and subject to attorney-client privilege. Specifically, Defendants state that they seek to limit Plaintiffs' inquiry to "communications relating to the underlying litigation giving rise to the fee dispute and legal malpractice claim and only at a point of time before the termination of the relationship between Lapidus, Lapidus's firm, the lawyers who worked with him, and the [D]efendants" (Arnoff Aff., at 8).

While the Defendants' detailed notice of motion states that they seek an order, pursuant to CPLR 3103, precluding Plaintiffs from examining Reiver concerning a prior criminal proceeding and Defendants' current assets and financial position, these and other discovery issues have since been resolved by the parties.[3] The notice omits mention of anything about an order concerning

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[1] *Urban Archaeology Ltd., Gil Shapiro and Geraldine Ronan v Dencorp Investments, Inc. and Allan S. Reiver* (Sup Ct, NY County, Index No. 601353/03).

[2] The court's prior order in this case, dated January 12, 2006, and *Urban Archaeology Ltd. v Dencorp Invs., Inc.* (12 AD3d 96 [1st Dept 2004]), contain additional background information concerning the Underlying Case, which will not be repeated here.

[3] The parties have repeatedly sought court intervention at discovery conferences and by telephone, during which time, with the exception of the issue addressed in this decision and order, the motion was otherwise resolved. What follows is a brief description of the issues in this motion that were resolved and that will not be further addressed herein. In a stipulation and order dated August 17, 1996, Lapidus agreed to appear for a continued EBT. Thereafter, at a discovery conference on October 6, 2006, the parties entered into a stipulation concerning the EBT of Robert Fass, and that portion of the motion to compel Fass's EBT was withdrawn on consent. Defendants also withdrew their request for coordination of disclosure with *Lapidus & Assoc. LLP v Elizabeth St. Inc.*, (Sup Ct, NY County, Index No. 601955/05). In addition, in a telephone conference held on December 14, 2006, the parties

attorney-client privilege or matters outside the scope of this litigation, the specific ground for relief discussed above. CPLR 2214 [a] provides that a notice of motion must state "the relief demanded and the grounds therefor." Although where the notice of motion contains a general prayer for relief, a court may, in certain instances, grant relief other than that specifically requested in the notice of motion, Defendants' notice does not contain such a prayer (*HCE Associates v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774 [2d Dept 1991]. Therefore, Defendants' motion must be denied.

Furthermore, Defendants have not demonstrated their entitlement to a protective order pursuant to CPLR 3103. CPLR 3103 provides for a protective order that can "be used to limit, condition or regulate" disclosure devices (*Velez v Hunts Point Multi-Serv. Ctr, Inc.*, 29 AD3d 104, 110 [1st Dept 2006]), and states that such an order may be issued to prevent "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." The party seeking the protective order must make a factual showing to be entitled to such relief (*see Hartheimer v Clipper*, 288 AD2d 263 [2d Dept 2001]). The court then must balance the preference for allowing discovery,[4] against the factors listed in CPLR 3103, such as

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represented to the court that they had arranged an inspection date for the documents Defendants sought in this motion. The parties have further informed the court that the inspection has occurred, thus resolving that portion of the motion. Finally, in a stipulation and order dated May 17, 2007, the parties resolved those portions of the motion in which Defendants moved: (1) to compel Lapidus's testimony concerning discussions about fee arrangements with Robert Fass; (2) for an order of protection concerning the outcome of a Colorado criminal case prosecuted against Reiver in 1989; and (3) for an order precluding Plaintiffs from inquiring about Defendants' current financial condition at Reiver's continued EBT.

[4]CPLR 3101 [a] directs that there be full disclosure of all matter material and necessary in the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The court's discretion in supervising disclosure is broad and will not be disturbed unless clear abuse is shown (*People v Pharmacia Corp.*, 2007 WL 1216525 [3d Dept]; *Bohlke v General Elec. Co.*, 27 AD3d 924, 924 [3d Dept 2006]; *Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002]; *Kamhi v Dependable Delivery Serv., Inc.*, 234 AD2d 34 [1st Dept 1996]).

unreasonable annoyance and prejudice (*see Matter of Ettinger*, 7 Misc 3d 316 [Sur Ct, Nassau County 2005]).

"It is well settled that the scope of examination permissible at deposition is broader than the scope of examination permissible at trial" (*Horowitz v Upjohn Co.*, 149 AD2d 467, 468 [2d Dept 1989]; *see Allen*, 21 NY2d 403, *supra*). Furthermore, questions posed at deposition should be fully answered unless they invade a recognized privilege, or are palpably irrelevant (*Tardibuono v County of Nassau*, 181 AD2d 879 [2d Dept 1992]; *Dibble v Consolidated Rail Corp.*, 181 AD2d 1040 [4th Dept 1992]; *White v Martins*, 100 AD2d 805, 805 [1st Dept 1984] ["[i]n general the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115"]; *see* 22 NYCRR 221.2[5]).

Defendants state that there were attorneys, other than Plaintiffs, who consulted on the Underlying Case, remain Defendants' attorneys, and continue to communicate with Defendants in a professional capacity. Defendants argue such communications are privileged as attorney-client confidences, for which they have not waived privilege. Consequently, Defendants seek the court's assistance in preventing "Plaintiff[s] from improvidently inquiring into and receiving information on communications Mr. Reiver made to counsel on matters unrelated to Mr. Lapidus's representation" of Defendants (Def. Memo. of Law, at 10).

On a motion for a protective order concerning an EBT, however, "[r]ulings on the propriety of deposition questions should only be made once a specific question has been asked

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[5]22 NYCRR 221.2 provides:

"[a] deponent shall answer all questions at a deposition, except:

(a) to preserve a privilege or right of confidentiality. . . ."

and its answer refused" (*Eliali v Aztec Metal Maintenance Corp.*, 287 AD2d 682, 682 [2d Dept 2001]; *Tardibuono v County of Nassau*, 181 AD2d 879, *supra*; *Continental Lighting Sys., Inc. v Lighting & Supplies Inc.*, 2003 WL 21361762 (App Term, 1st Dept). A court should not rule on the propriety of deposition questions which have not yet been asked because such a ruling is both in the nature of an advisory opinion and may only lead to further disputes between parties "as to which questions may or may not be asked" (*Tardibuono*, 181 AD2d at 881; *cf White*, 100 AD2d at 805 ["[i]t was improper to direct prospectively that all questions to be asked in the future be answered, reserving objections for the trial court, without knowing what those questions may be"]).

Defendants do not point to a specific question that Reiver was asked at his EBT, but, instead, cite to a 22-page block of deposition transcript in which the court finds nothing concerning an attorney-client communication and no "specific question [that] has been asked and its answer refused" about which Defendants complain here (*Eliali*, 287 AD2d at 682).[6] Consequently, Plaintiffs have not met their burden on the motion. In addition, Defendants' argument that the court should grant relief in the nature of a prospective proscription against Plaintiffs' possible future infringement on attorney-client privilege at Defendants' continued EBT is unpersuasive (*see Eliali*, 287 AD2d at 682; *Tardibuono*, 181 AD2d at 881; *Continental Lighting Sys., Inc.*, 2003 WL 21361762, *supra*). Finally, in the event that Plaintiffs question Reiver about privileged attorney-client confidences, Defendants may simply refuse to answer the question (22 NYCRR 221.2 [a]), obviating the need for the type of prospective relief they seek here.

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[6]The only objection found within pages 60-82 of Reiver's May 3, 2006 EBT is a single objection to the form of the question.

Accordingly, it is

ORDERED that the motion of defendants and third-party plaintiffs, Allan S. Reiver and Dencorp Investments, Inc., is denied.

This Constitutes the Decision and Order of the Court.

Dated: June 1, 2007

Enter:

J.S.C.

EMILY JANE GOODMAN