

**Hulse v Simoes**

2008 NY Slip Op 30165(U)

January 11, 2008

Supreme Court, Nassau County

Docket Number: 8549-07/

Judge: Daniel R. Palmieri

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*Sum*

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**MARION T. HULSE,**

**TRIAL TERM PART: 48**

**Plaintiff,**

**INDEX NO.: 18549/07**

**-against-**

**MOTION DATE: 11-28-07  
SUBMIT DATE: 11-28-07  
SEQ. NUMBER - 001,  
002 & 003**

**JOSE SIMOES,**

**Defendant.**

-----x

**The following papers have been read on this motion:**

**Notice of Motion, dated 1-9-07.....1**  
**Affidavit in Opposition, dated 1-17-07.....2**  
**Reply Affidavit, dated 1-30-07.....3**  
**Notice of Cross Motion, dated 1-25-07.....4**  
**Affirmation in Opposition, dated 2-7-07.....5**  
**Reply Affirmation, dated 2-13-07.....6**  
**Notice of Cross Motion, dated 2-7-07.....7**  
**Affirmation in Opposition, dated 2-13-07.....8**  
**Reply Affirmation, dated 2-16-07.....9**

This matter was transferred to the Supreme Court, Nassau County, pursuant to an order of the Supreme Court, Suffolk County (Whelan, J.), dated October 3, 2007.

Motion by defendant Jose Simoes for an order disqualifying Jeffrey B. Hulse, Esq., counsel to plaintiff Marion T. Hulse, pursuant to 22 NYCRR 1200.21 on the grounds that

he is a witness to significant fact issues is denied. Cross-motion by plaintiff Marion T. Hulse for an order striking defendant's answer for failure to comply with discovery or in the alternative, striking defendant's answer in the event that the defendant fails to produce all documents demanded in plaintiff's notice for discovery and inspection dated May 25, 2006 is denied except to the extent indicated below. Cross-motion by defendant for an order striking plaintiff's answer based upon plaintiff's failure to comply with a preliminary conference order dated April 14, 2006 and discovery demands dated February 21, 2006, November 27, 2006 and December 18, 2006 or in the alternative for an order compelling plaintiff to respond is denied except to the extent indicated below.

This action for property damage is premised upon the collapse of a pool on property located at 3 North Harbor Down, Miller Place, New York owned by plaintiff Marion T. Hulse. The complaint alleges that Jose Simoes, the owner of property lying directly to the south at 17 Griffen Court in Miller Place, "in the course of constructing" his new home "drastically altered the topography" of his premises and "created conditions which caused extensive water run-off" to enter plaintiff's premises. The alleged run-off caused the soil to become saturated, and the earth and support for the pool structure to be undermined, all of which caused its complete collapse in April of 2005.

Plaintiff is represented by her husband Jeffrey B. Hulse Esq. (Hulse) who also resides at the subject premises. He and plaintiff purchased the premises in 1995, and Hulse transferred title to plaintiff in 1999.

On the present applications defendant Simoes seeks to disqualify Jeffrey Hulse from

representing plaintiff on the grounds that he is a fact witness and should testify on her behalf, and the parties also cross-move for disclosure.

Addressing defendant's motion to disqualify plaintiff's counsel, the court concludes that the circumstances of this case militate in favor of plaintiff, and in the exercise of this court's discretion, the motion is denied.

In assessing the application of a party to disqualify an adversary's counsel, the rules contained in the Code of Professional Responsibility "provide guidance" not a mandate, to the exercise of the court's of discretion (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp.*, 69 NY2d 437, 440 [1987]). Factors to be considered, against a backdrop of the particular setting, are a party's "valued right to choose its own counsel" and "the fairness and effect . . . of granting disqualification or continuing representation" (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp.*, *supra*). A finding that counsel's testimony is "necessary" is required, as mere knowledge or involvement is not sufficient (*Matter of Southampton Brick & Tile*, 159 Misc2d 519 [Supreme Court Suffolk County 1993]).

Several factors are affected by counsel's relation to plaintiff. Normally, a trial lawyer who functions "as a trial witness is thought to be more easily impeachable for interest, and thus a less effective witness for the client" (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp.*, *supra* at p 444). Here Hulse would be impeachable for interest whether he represents plaintiff or doesn't. He has an interest as plaintiff's husband, a resident of the premises and an inchoate ownership interest based upon the relation. Thus disqualification would not provide him with the credibility of a disinterested witness to better serve his client.

An additional factor, whether opposing counsel is “handicapped in challenging the credibility of a lawyer-witness” (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp., supra*) is not presented for the same reason. If there be a handicap in challenging Hulse as counsel, it is ameliorated by his being open to challenge as an interested witness based upon his marital relation to plaintiff, his residence, former ownership, and inchoate interest.

Finally, it has not been established that counsel is a necessary witness. His testimony may be “relevant” and “highly useful” but is not “strictly necessary” (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp., supra* at p 446). “A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence” (*S & S Hotel Ventures, Ltd. v. 777 S.H. Corp., supra*).

Although defendant has not yet deposed Hulse, he nevertheless argues that his testimony is necessary.

Plaintiff avers that her husband’s testimony would be duplicative and that she and her husband both hired the original pool company and landscaper who installed the pool and patio. She witnessed the collapsed pool at the same time her husband did, and both were present when they hired a pool company and masons to build a new pool and patio. Plaintiff also avers that she would be required to pay counsel fees if her husband is disqualified, and that she would be deprived of her counsel of choice.

Defendant responds by pointing to testimony of counsel which appears to be duplicative, i.e., that he discovered the collapsed pool, and participated in hiring the original pool and patio installers. This testimony is unnecessary.

Defendant also avers that it was counsel who reported the pool's collapse to their homeowner's insurance company, handling the reporting of loss and filing the claim. Plaintiff was unaware of why the claim was denied. Here there is an alternate source for this evidence, i.e., the claim file for which an authorization has been provided. Again Hulse's testimony concerning the filing is not necessary.

Regarding the permits to build the original pool, Jeffrey Hulse's testimony may be necessary to explain why two permit applications were filed. However, defendant has not shown the weight or significance of this testimony, not having deposed Hulse. Nor has he produced the public record to support a claim that an explanation from Hulse is required.

With regard to photographs, Jeffrey Hulse's testimony is not necessary to provide a foundation for the admission of photographs of the collapsed pool. To lay a foundation for the admission of photographs, any "competent witness with knowledge of the matter may identify the subject of a photograph and confirm that it 'accurately represent[s] the subject matter depicted'" (*Cubeta v. York Intern. Corp.*, 30 AD3d 557, 561 [2d Dept 2006]). As plaintiff witnessed the collapsed pool, she would be competent to testify that the photographs accurately represent the subject matter depicted.

In sum, defendant has pointed out testimony that may be necessary in this action, but has not negated the availability of other sources. Moreover, the outcome of this action will depend upon the testimony of experts regarding causality and the construction that was done, as asserted by plaintiff's counsel. The testimony of the parties is less significant in such circumstances. Accordingly, defendant has not shown that disqualification is warranted, and the motion to disqualify is denied.

Turning to plaintiff's cross-motion for disclosure, plaintiff's Notice for Discovery and Inspection dated May 25, 2006 contains six simple paragraphs seeking photographs and documents concerning the construction of defendant's residence. For example, paragraph one seeks production of photographs depicting the Simoes' property prior to construction, during excavation, and during construction of the improvements including the house. Paragraph two seeks "all contracts, correspondence, bills and documents . . . constituting, referring or relating to . . . site work performed at the Simoes' property, including but not limited to, excavation, installation of fill, grading, concrete work, dry well installation, leaders, gutters and drainage", and paragraph three seeks "receipts, bills, checks and evidence of payment for the materials and work referred to in the preceding demand". Defendant's response dated August 4<sup>th</sup> states that defendant was not in possession of any of the above. Simoes' later deposition testimony indicates otherwise and belies the answers set forth by counsel. Simoes testified at deposition that he does have some items demanded but that he has not made a search. This admission reveals a lack of good faith, as counsel cannot represent that a client does not have records before a search has been conducted. Here the sense of Simoes' entire deposition testimony is that no search was ever conducted prior to the Discovery & Inspection response.

Defendant has now engaged in belated and inadequate production of some documents and photographs in opposition to plaintiff's application. He has not provided checks or pay stubs or invoices notwithstanding his deposition testimony that he received and paid all invoices. He has produced 47 black and white unclear photographs which do not provide any visual detail. And, he belatedly raises a defense that plaintiff's demands are vague and

overbroad. The raising of this issue at this time is disingenuous, given the original response that none of the documents or photographs were in defendant's possession or control.

Defendant is directed to comply fully with the plaintiff's demand dated May 25, 2006 with respect to paragraphs one through six within fifteen days after service of a copy of this order upon his counsel. Photographs shall be laser color copies, and shall include reproduction in laser color of the photographs previously produced in unclear black and white (Exhibit "E"). If defendant is not in possession or in control of the requested material, he shall, within said time period for compliance, submit a detailed affidavit "concerning the past and present status" of each disputed document (*Wilensky v. JRB Marketing & Opinion Research, Inc.*, 161 AD2d 761 [2d Dept 1990], *accord*, *Mercado v. St. Andrews Housing Development Fund Company, Inc.*, 289 AD2d 148 [1<sup>st</sup> Dept 2001]; *Longo v. Armor Elevator, Co., Inc.*, 278 AD2d 127 [1<sup>st</sup> Dept 2000]). His affidavit "must show that production of documents is impossible" (*Abbadessa v. Sprint*, 291 AD2d 363 [2d Dept 2002]; *Wilensky v. JRB Marketing & Opinion Research, Inc.*, *supra*).

Turning to defendant's cross-motion for disclosure, defendant lists those items to which plaintiff has not responded. In opposition, by affidavit, plaintiff provides certain information and answers. She also states that certain documents do not exist, for example color photographs of her new pool or her pool house. She also states that there isn't a company that built the foundation for her pool house. Plaintiff also avers that certain documents have not been found after a diligent search, i.e., she does not have records for the maintenance of her collapsed pool, although she testified that it was maintained for openings

and closings. Nor does she have photographs of her house as it was when she moved in.

As to those items demanded which document maintenance of plaintiff's collapsed pool, plaintiff's sworn assertion that she is not in possession of such documents now precludes her from introducing such documents at trial (*see, Bivona v. Trump Marina Casino Hotel Resort*, 11 AD3d 574, [2d Dept 2004]). Nor shall plaintiff introduce any existing and demanded photographs of the premises which have not been provided to defendant with fifteen days after service of a copy of this order upon her counsel.

With respect to plaintiff's supplemental bill of particulars served in May of 2006, defendant did not reject same or demand a further supplement. Moreover, insofar as defendant asserts that plaintiff has not provided a full response item number "6" of his demand for a bill of particulars, plaintiff stated in a supplemental response to defendant's demand:

6. Plaintiff will claim that the defendant had actual notice and reserves the right to respond further to this demand following the completion of discovery. In addition, plaintiff will claim that the defendant actually caused the condition complained of, that he was in fact aware of the condition created and that it would cause a substantial likelihood of rainwater run-off escaping from the Simoe's property onto plaintiff's property resulting in damage to the plaintiff's property.

It has been held that lack of knowledge regarding the particulars of actual notice may be set forth in a response to a demand for a bill of particulars, i.e., a "plaintiff may set forth in the bill of particulars his or her lack of present knowledge . . . and these specifics can be alleged in a supplemental bill if, after discovery, the plaintiff acquires the information" (*Jaiman v. Hock*, 178 AD2d 508 [2d Dept 1991]). Accordingly plaintiff may and shall

provide a supplemental bill with regard to the date or dates that defendant acquired actual notice upon completion of disclosure should plaintiff acquire such information.

Defendant's reply papers identify outstanding disclosure alleged to be owed notwithstanding plaintiff's belated provision of disclosure in opposition to his motion. Accordingly, plaintiff shall, within the fifteen day time period described above, provide a copy of the Certificate Of Occupancy for her house, including the new swimming pool and pool house if such document exists and she is in possession and control of same. In the event that she is not, she shall provide an affidavit so stating and indicating that production is impossible.

Plaintiff has provided an affidavit stating that there have been no repairs to her 10 year old swimming pool. Such sworn statement is sufficient (*Wilensky v. JRB Marketing & Opinion Research, Inc.*, 161 AD2d 761[2d Dept 1990], *supra*). She has also stated by affidavit that she is not in possession of maintenance records, and has been precluded from producing same at trial.

With regard to the remaining items outlined in defendant's reply ("d" through "j") they are adequately addressed in plaintiff's affidavit, and counsel's affirmation. Accordingly, both motions to dismiss pleadings are denied except that disclosure shall be produced in accordance with this order.


All parties shall appear at a Compliance Conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on January 29, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in

Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 11, 2008

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Jeffrey Hulse, Esq.  
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**ENTERED**

JAN 15 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**