

**Ponce v Howard Simmons, P.C.**

2008 NY Slip Op 30800(U)

March 18, 2008

Supreme Court, New York County

Docket Number: 0108692/2007

Judge: Martin Shulman

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PRESENT: MARTIN SHULMAN  
J.S.C. *Justice*

PART 1

Index Number : 108692/2007  
**PONCE, JUANA FRANCO**  
VS.  
**SIMMONS, HOWARD**  
SEQUENCE NUMBER : 001  
COMPEL DISCLOSURE

INDEX NO. 108692/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-G  
Answering Affidavits — Exhibits A-D  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
MAR 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 18, 2008

MARTIN SHULMAN J.S.C.  
J.S.C.

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 1

-----X  
JUANA FRANCO PONCE and FELIPE ROJAS,

Plaintiffs,

-against-

Index No. 108692/07

HOWARD SIMMONS, P.C. and HOWARD D.  
SIMMONS,

Defendants.

-----X  
**MARTIN SHULMAN, J.:**

**FILED**  
MAR 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Howard Simmons, P.C. and Howard D. Simmons (collectively "defendants") move for an order compelling plaintiffs Juana Franco Ponce ("Ponce") and Felipe Rojas ("Rojas") (collectively "plaintiffs") to produce the following discovery:

- 1) documents defendants requested in their Notice of Discovery and Inspection dated August 27, 2007 (Exh. C to motion); and
- 2) full and complete answers to Interrogatories defendants posed on September 28, 2007 (Exh. F to motion).<sup>1</sup>

In this legal malpractice action, plaintiffs allege that defendants failed to meet a filing deadline under the immigration laws that would have enabled them to obtain legal residency in the United States. Defendants seek documents and admissions in support of their argument that, even if they had not missed the filing deadline, plaintiffs would not have been able to obtain legal residency. With respect to Ponce, defendants argue that she was under an order of a United States Immigration Judge, dated December 22,

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<sup>1</sup> Since defendants filed this motion, plaintiffs have agreed to provide signed releases on United States Citizenship and Immigration Services Forms G-639 allowing defendants to obtain plaintiffs' immigration and Homeland Security files.

1994, granting her voluntary departure to Mexico in lieu of deportation. Defendants contend that, despite the order, Ponce did not depart the country and that, therefore, she was in violation of the order and ineligible for legal residency. Thus, according to defendants, even if they had not missed the filing date, plaintiffs would not have been able to obtain an adjustment of status, and defendants would not be liable for legal malpractice.

In relation to their contention, defendants seek:

6. Documents and evidence that tend to show the plaintiffs, or either of them, left the United States at any time since their first arrival; and

10. Airline and train tickets, Embassy receipts, toll records, boarding passes, bail receipts, rent receipts, exit and entry documents, and other documents tending to show the plaintiffs' entries and exits from the United States.

Notice of Discovery and Inspection, ¶¶ 6 & 10.

Plaintiffs argue that they were eligible to qualify for permanent residency in the United States pursuant to section 245 (i) of the Immigration and Nationality Act (8 U.S.C. §1255[i]), regardless of whether they were legally in the United States at the time they applied for an adjustment of status, as long as they were physically present in the United States on December 21, 2000, when section 245 (i) was enacted. Plaintiffs assert that they had hired defendants to represent them to obtain an adjustment of status, and that when defendants failed to meet the April 30, 2001 filing deadline, they were forever barred from legal immigration to the United States.

Regarding document demands 6 and 10, plaintiffs contend that those documents were included in the "client file plaintiffs obtained from the defendants," that "was purported to be a 'complete' file by defendants," and that the file has been provided to

defense counsel as an exhibit to plaintiffs' Notice to Admit dated August 22, 2007. (Exh. D to motion, at ¶¶ 6 & 10). Defendants contend that no such documents were contained in defendants' file, although plaintiffs' attorney had stated that Ponce did leave the country and that she had documents to establish that fact. Neither plaintiffs' Notice to Admit nor the "client file" purportedly annexed thereto were provided to the court. Thus, the court is not in a position to determine what, if anything, was contained in the "client file" purportedly annexed to plaintiffs' Notice to Admit.

Plaintiffs further argue that since the purpose of section 245 (i) was to enable immigrants who were not legally present in the United States to apply for legal residency, documents regarding their entry into the United States would have been irrelevant to their application, and they should not be forced to provide them to defendants.

The court expresses some frustration with the fact that, although section 245 (i) of the Immigration and Nationality Act appears to be central to all aspects of this litigation, neither defendants, nor plaintiffs, provide the court with any meaningful legal analysis of this complex statute, or with case law discussing the potential significance of the voluntary departure order entered against Ponce. In support of their position, plaintiffs merely submit two United States Department of Justice documents: a fact sheet concerning the Legal Immigration Family Equity Act, dated December 21, 2000 (Exh. A to Monaco Opp. Aff.), and a document entitled "Adjustment of Status under Section 245 (i) in Context of the Legal Immigration Family Equity (LIFE) Act Amendment (enacted 12/21/00), Employer Information Bulletin 25" (*Id.* at Exh. B). These two documents are not an adequate substitute for statutory analysis and a

discussion of relevant case law. Defendants, for their part, provide even less, merely making an unsupported statement that illegal entry into the United States would bar plaintiffs from obtaining an adjustment of status.

It appears from at least a cursory reading of federal cases, that the voluntary departure order against Ponce, whether she complied with it, and how and when she returned to the United States might indeed have some significance to plaintiffs' legal malpractice case against defendants. See, e.g., *Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1<sup>st</sup> Cir.), *cert den.* 546 U.S. 938 (2005)(alien was "statutorily ineligible for adjustment of status because of his earlier failure to adhere to the voluntary departure deadline"); *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1164-1165 (10<sup>th</sup> Cir. 2004)("[p]etitioner may not seek adjustment of status under § 1255 (i) because § 1231(a)(5) bars illegally reentering aliens from 'any relief' under the INA"); *but see, Afful v. Ashcroft*, 380 F.3d 1, 8 (1<sup>st</sup> Cir. 2004)(availability of waiver of inadmissibility).

Without determining, at this stage of the litigation, whether Ponce was eligible for adjustment of status pursuant to section 245 (i), this court concludes that the question of whether she did indeed depart in compliance with the voluntary departure deadline and whether and how she re-entered the country may be relevant to this case. Defendants' request is, however, overbroad in that it contains no temporal limits. Plaintiff Ponce is, therefore, directed to produce documents responsive to document demands 6 and 10 covering the period from December 22, 1994 through and until December 21, 2000.<sup>2</sup> To the extent that plaintiffs claim to have provided documents

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<sup>2</sup> The court notes with respect to demands 6 and 10, and interrogatories 4-6, 13 and 14, that it is less than clear from defendants' papers whether they are seeking

from the "client file", they shall identify the specific documents claimed to be responsive to the demands.

In document demand number 11, defendants seek "any and all documents" which plaintiffs may produce at trial. Such a demand has been characterized as "blunderbuss discovery" because it is not carefully tailored, does not specify categories of documents, or a relevant time period. *See Indo Canadian Realty Corp. v. Arroyo*, 14 Misc.3d 132(A), 836 N.Y.S.2d 485 (App Term, 1<sup>st</sup> Dept. 2007). Defendants' motion to compel is denied as to demand number 11.

In document demands 15 and 16, defendants seek any and all documents relating to or supporting plaintiffs' claims for compensatory and/or punitive damages. In their response to those document demands, plaintiffs objected on the ground that the demands are overly broad, burdensome and vague. With respect to demand number 15, and without waiving other objections, plaintiffs refer defendants to the rules and regulations of the U.S. Immigration Service and Department of Labor with respect to the April 30, 2001 filing date. In response to demand number 16, plaintiffs also state that "the demand seeks to invade the providence [*sic*] of the finder of fact." (Exh. D to motion at ¶16).

It is hard to see how defendants' demands for documents supporting plaintiffs' claims for damages invade the province of the finder of fact. Nor, without some further

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documents and answers from both plaintiffs or only from Ponce. Defendants' papers focus on the voluntary departure order against Ponce and defendants do not indicate any basis for seeking exit and re-entry information regarding Rojas. Thus, the ruling of the court applies only to Ponce with respect to these document demands and interrogatories.

explanation of the nature of the burden, do demands 15 and 16 seem extraordinarily burdensome. Thus, plaintiffs are directed to produce documents supporting their claim for damages.

In interrogatories 4-6, defendants seek the following information from plaintiff

Ponce:

4. Set forth every single date, and the place(s) thereof, of entry that you have made into the United States.

5. For each date of entry into the United States listed in response to the previous interrogatory, please set forth the method of entry into the United States (*i.e.*, without inspection, tourist visa, student visa, etc.).

6. If your responses to the previous interrogatory included reference(s) to visas, please attach a copy of each such visa and set forth the date and place of issuance and the expiry date for each visa.

In response to interrogatories 4-6, plaintiffs state:

Objection - the question posed seeks a response that may be deemed self-incriminating and/or otherwise violate the plaintiffs' constitutional rights. Further, the question posed is unduly burdensome, vague and harassing. Without waiving the objections and by counsel; the plaintiffs were in this country for a sufficient period of time to qualify for the amnesty program for which the defendants were retained to represent them.

(Exh. G to motion at ¶¶ 4-6).

While a party is entitled to relevant discovery, that discovery must be narrowly tailored. Here, defendants seek detailed information concerning every time Ponce entered the country, regardless of whether the time period has any bearing on her alleged eligibility for an adjustment of status pursuant to Section 245 (i). Furthermore, in light of the fact that interrogatories 4-6 seek information that could reveal Ponce's illegal entry or failure to leave the country pursuant to an order of the U.S. Immigration

[ 8 ]

Judge, she has asserted the privilege against self-incrimination. Ponce is certainly entitled to assert that privilege, though it should be noted, that it will not relieve her of the normal evidentiary burden of providing competent evidence to prove her case. *Access Capital, Inc. v. DeCicco*, 302 A.D.2d 48, 51, 752 N.Y.S.2d 658 (1<sup>st</sup> Dept. 2002). Thus, defendants' motion to require Ponce to answer interrogatories 4-6 is denied.

In interrogatory 13, defendants ask:

13. If you were granted Voluntary Departure at any of the above mentioned proceedings, kindly state whether you left the United States in compliance with such relief, together with the date(s) of your departure and method of departure (*i.e.*, airplane, boat, foot, auto, etc.). Attach copies of such Orders.

In response to interrogatory 13, plaintiffs state: "Juana left voluntarily pursuant to an immigration order dated December 22, 1994 (copy included in the Simmons file)."

Plaintiffs' response to interrogatory 13 is incomplete and they are directed to answer that interrogatory or, in light of their answer to interrogatories 4-6, assert an appropriate constitutional privilege.

In interrogatory 14, defendants ask:

14. If the answer to the preceding interrogatory was yes, kindly state your destination, together with the dates of your arrival at said destination. Attach all documents, concerning your said departure from the USA and your arrival in another country.

Plaintiffs respond to interrogatory 14 as follows:

Mexico further documentation contained in the Simmons legal file.

As noted above, without seeing the "client file" that was purportedly annexed to plaintiffs' Notice to Admit, the court is unable to determine whether requested documents were in fact provided to defendants, as plaintiffs assert. Plaintiff Ponce is,

therefore, directed to respond to interrogatory 14, and produce responsive documents. To the extent that plaintiffs claim to have provided documents from the "client file", they shall identify the specific documents claimed to be responsive to the interrogatory.

In Interrogatory 31, defendants ask:

31. If the answer to the preceding interrogatory [did you have conversations with Howard Simmons, P.C. or any of its employees concerning such "deadline"] is in the affirmative, kindly identify the employee of Howard Simmons, P.C. with whom you had such conversations, the approximate date thereof, and set forth the nature of such conversations, specifically stating who said what.

In response, plaintiffs state:

All conversations of substance with the defendants were with Mr. Simmons with the assistance of an interpreter.

It is unclear from plaintiffs' answer whether the interpreter was provided by Howard Simmons, P.C. or by plaintiffs. If the latter, then plaintiffs are directed to provide the name of that person. If the interpreter was provided by Howard Simmons, P.C., defendants presumably have that information and/or are in a better position than plaintiffs to find the information, and plaintiffs are not required to respond further.

In Interrogatories 39-41, defendants ask:

39. State when you first learned that your immigration case, as it was pursued by Howard Simmons, P.C., was unsuccessful, and how you learned that it was unsuccessful.

40. State what you did after learning that the case was unsuccessful.

41. Set forth the date on which you first learned that Howard Simmons, P.C. or any of its employees were negligent or made an alleged "error", and state how you learned of such negligence or "error."

In response to interrogatories 39-41, plaintiffs state that these interrogatories seek information that is protected by the attorney-client privilege.

To the extent that plaintiffs learned that their immigration case was unsuccessful in the context of attorney-client conversations with a new attorney, they are not required to reveal the content of those discussions. It is difficult to see how the date on which plaintiffs learned that the defendants made the alleged error of failing to timely file for an adjustment of status is protected by the attorney-client privilege, and plaintiffs are directed to answer interrogatories 39 and 41. Similarly, if plaintiffs took a specific action, such as filing this lawsuit, upon learning that defendants were unsuccessful in filing for an adjustment of status on their behalf, plaintiffs are directed to answer interrogatory 40.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that, within 20 days of service of a copy of this decision and order with notice of entry:

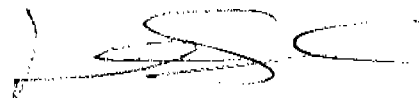
- a) plaintiff Ponce is directed to produce documents responsive to document demands 6 and 10 covering the period from December 22, 1994 through and until December 21, 2000 as set forth herein above;
- b) plaintiffs are directed to produce documents supporting their claim for damages in response to demands 15 and 16;
- c) plaintiff Ponce is directed to answer interrogatory 13;
- d) plaintiffs are directed to answer interrogatory 14, and provide responsive documentation as set forth herein above;
- e) in response to interrogatory 31, plaintiffs are directed to state whether the interpreter who assisted them in conversations with defendant Simmons was an employee of defendants or was provided by plaintiffs, and, if the latter, plaintiffs are directed to provide the name of that interpreter; and

f) in response to interrogatories 39-41, plaintiffs are directed to provide the date on which they learned that their immigration case was unsuccessful, and, to the extent that they can provide that information without revealing any attorney-client confidences, how they learned it was unsuccessful, and what, if any, acts they took after learning that their immigration case was unsuccessful; and it is further

ORDERED that defendants' motion is otherwise denied.

The foregoing constitutes this court's decision and order. A copy of this decision and order has been sent to counsel for plaintiffs and defendants.

Dated: New York, New York  
March 18, 2008



Hon. Martin Shulman, J.S.C.

**FILED**  
MAR 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE