

State of New York v Grecco

2008 NY Slip Op 30838(U)

March 20, 2008

Supreme Court, Suffolk County

Docket Number: 0009384/2002

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/19/07 (#010)
MOTION DATE 10/30/07 (#011)
MOTION DATE 11/30/07 (#012)
ADJ. DATES 11/30/07
Mot. Seq. # 010 - MG
Mot. Seq. # 011 - MD (moot)
Mot. Seq. # 012 - XMG

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THE STATE OF NEW YORK and THE PEOPLE	:	ANDREW CUOMO, Attorney General
OF THE STATE OF NEW YORK by ELIOT	:	State of New York
SPITZER, ATTORNEY GENERAL OF THE	:	By: Monica Stamm
STATE OF NEW YORK,	:	Assist. Attorney General
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Plaintiffs,	:	New York, NY 10271
	:	
-against-	:	HARVEY B. BESUNDER, P.C.
	:	Atty. For Def. Grecco
ALLAN GRECCO, ROBERT TOUSSIE and	:	1601 Veterans Hwy.
CHANDLER PROPERTY, INC.,	:	Islandia, NY 11740
	:	
Defendants.	:	HAMBURGER, MAXSON, YAFFE, ETAL
	:	Attys. For Defs. Toussie & Chandler Prop.
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Upcn the following papers numbered 1 to 32 read on these motions to renew and reargue and cross motion for discovery; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-6; 10-11; 12; 13-14; Notice of Cross Motion and supporting papers 7-9; Answering Affidavits and supporting papers 15-16; 17; 18; 19-20; Replying Affidavits and supporting papers 21-22; Other 23-24 (memorandum); 25-26 (memorandum); 27-28 (memorandum); 29-30 (memorandum); 31 (memorandum); 32 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that the Order To Show Cause (#010) to reargue and the cross motion (#012) for discovery by the plaintiff, State of New York, and the motion (#011) to renew by the Town of Brookhaven are hereby consolidated for determination; and it is further

ORDERED that plaintiff's Order To Show Cause (#010) for an Order pursuant to CPLR 2221(d) seeking leave to reargue and to vacate the Order of August 27, 2007 is granted; and it is further

ORDERED that the Order of August 27, 2007 is hereby vacated and defendant, Allen Grecco, is granted leave without prejudice to serve a further new and proper interrogatory demand upon the plaintiff on or before April 30, 2008 and plaintiff shall respond on or before but not later than May 30, 2008; and it is further

ORDERED that in the event plaintiff objects to defendant's new and proper interrogatory demand, plaintiff in responding to this set of interrogatories, shall set forth its responses "with reasonable particularity the reasons for each objection" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3120.10); and it is further

ORDERED that, in the event the redrafted interrogatories do not comply with the Court's Order or plaintiff's responses are not set forth with reasonable particularity, plaintiff or defendant, Allen Grecco, are given leave to request that this matter be set down before a referee; and is it further

ORDERED that the motion (#011) by the Town of Brookhaven seeking an Order pursuant to CPLR 2221(e) to renew the Order of June 27, 2007 consolidating the above action with the action bearing Suffolk

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County Index No. 06-25310, and upon renewal or in the alternative to continue the current stay of discovery pursuant to CPLR 3214(b) to be extended to allow the Town of Brookhaven the opportunity to renew the documents previously exchanged prior to depositions, is denied as academic and moot in view of the of the decision rendered on March 12, 2008, severing the actions; and it is further

ORDERED that the cross motion (#012) by the plaintiff is granted and all discovery demands shall be served on or before April 18, 2008. Responses shall be served on or before May 30, 2008 if said discovery demands have not already been served and complied with. The parties shall set forth a deposition schedule of the defendants on or before April 10, 2008 allowing for the process of interrogatory discovery to be completed before depositions are to be held. The resultant dates agreed upon by the parties shall be such that all depositions will be completed on or before August 8, 2008. Said discovery shall take place without delay and/or further application; and it is further

ORDERED that this Order shall supersede the Preliminary Conference Order dated December 19, 2006, including all discovery demands set forth therein; and it is further

ORDERED that the Temporary Restraining Order signed on September 19, 2007 staying the Order of this Court, directing plaintiff to appear for a deposition and to respond to certain interrogatories is hereby vacated; and it is further

ORDERED that the moving plaintiff and moving defendant herein shall each serve a copy of this Order with Notice of Entry upon respective counsel in both actions within forty (40) days of the date herein pursuant to CPLR 2103(b)(1), (2) and (3) and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that a compliance conference is scheduled for **June 3, 2008**, at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York.

Familiarity with this matter and the previous Orders are presumed and only relevant facts will be restated where necessary.

Plaintiff in the above action moves for an order granting reargument of the Order, dated August 27, 2007, which granted defendant's application to compel plaintiff to appear for depositions and to respond to the individual defendant, Allen Grecco's (hereinafter "Grecco") interrogatories. The motion is opposed by the defendants.

A motion to reargue is designed to afford a party the opportunity to establish that the court overlooked or misapplied any controlling principle of law (*see Schneider v Solowey*, 141 AD2d 813, 529 NYS2d 1017 [2d Dept 1988]) and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]; *Town of Riverhead v TS Haulers*, 275 AD2d 774, 776, 713 NYS2d 740 [2d Dept 2000]; *see McGill v Goldman*, 261 AD2d 593, 691

NYS2d 593 [2d Dept 1999]). It is within the Court's sound discretion to grant a motion to reargue (*see Schneider v Solowey*, 141 AD2d 813, *supra*). The purpose of the motion to reargue, however, is not to afford the aggrieved party a second chance to argue over the very questions previously decided (*see Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]; *app after rem* 86 AD2d 887 [2d Dept 1982]; *app den* 56 NY2d 507 [1982]). The party seeking a motion to reargue must set forth the facts or law the court overlooked in making the original decision.

In seeking leave to reargue, plaintiff states that there are two factual inaccuracies relied on by the Court in its decision of August 27, 2007. The first inaccuracy, which is plaintiff's ground for reargument, is that it did not consent to appear for a deposition as the Court found in its August 27, 2007 Order based upon the Preliminary Conference Order dated December 19, 2006. Rather, plaintiff consented to a briefing schedule to litigate the propriety of the defendant's deposition notices and that in accordance with the briefing schedule, the defendants thereafter filed motions to compel seeking that relief. This position is set forth in the affirmation of plaintiff's counsel in support of the motion.

In reviewing the papers submitted in support of the plaintiff's motion, the Court finds that it did overlook this fact in stating that the plaintiff, as a signatory to the Preliminary Conference Order, agreed to appear for a deposition. Therefore, plaintiff's application for reargument and to vacate that specific part of the August 27, 2007 Order is granted. It is well settled that where the State's Attorney General is acting in representative capacity as *Parens patriae*, as in the matter before the Court, neither the Attorney General nor his staff will be subject to being deposed (*see State v Volkswagen of America*, 41 AD2d 827, 342 NYS2d 749 [1st Dept 1973]), in the absence of special circumstances which has not demonstrated in this matter (*see Lefkowitz v Raymond Lee Org., Inc.*, 94 Misc2d 875, 405 NYS2d 905 [Sup Ct New York County 1978]; *judgment affirmed by* 66 AD2d 656, 411 NYS2d 191 [1st Dept 1978]). Furthermore, interviews prepared from an investigation by the Attorney General are prepared in anticipation of litigation by the Attorney General (*see Lefkowitz v Raymond Lee Org., Inc.*, 94 Misc2d 875, *supra*).

The second material fact, which the plaintiff seeks to reargue, is that the Court erred and misapplied the law in the August 27, 2007 Order in that it directed the plaintiff to respond to Grecco's interrogatories and now seeks to reargue the prior motion in order to correct the record and address the merits of the parties' arguments.

The Court also finds that it overlooked the applicable facts on plaintiff's motion to reargue regarding its response to defendant Grecco's interrogatories. The interrogatories consisted of 410 individual questions in 72 pages. While the disclosure provisions of the CPLR are to be liberally construed (*see Andon ex rel Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 709 NYS2d 873 [2000]), it does not stand for the proposition that *carte blanche* demands are to be honored (*see Capoccia v Spiro*, 88 AD2d 1100, 453 NYS2d 70 [3d Dept 1982]; *app dismiss* 57 NY2d 774 [1982]), or where they are overly broad, unduly burdensome, or lacking in specificity (*accord Stever v Stever*, 10 AD3d 358, 780 NYS2d 382 [2d Dept 2004]; *Finn v Town of Southampton*, 266 AD2d 429, 698 NYS2d 539 [2d Dept 1999]; *Harrison v Bayely*

Seton Hosp., Inc., 247 AD2d 513, 668 NYS2d 912 [2d Dept 1998]; *Parimist Funding Corp. v Rydzinski*, 215 AD2d 738, 739, 627 NYS2d 95 [2d Dept 1995]). The court possesses broad discretion to limit discovery in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice (see CPLR 3101[a]; *Lipin v Bender*, 84 NY2d 562, 620 NYS2d 744 [1994]; *rearg. den.* 84 NY2d 1027, 623 NYS2d 182 [1995]; *Allen v Crowell-Collier Pub. Co.* 21 NY2d 403, 288 NYS2d 449 [1968]; *Wegman v Wegman*, 37 NY2d 940, 380 NYS2d 649 [1975]; *Saratoga Harness Racing Inc. v Roemer*, 274 AD2d 887, 711 NYS2d 603 [3d Dept 2000]).

Grecco's voluminous interrogatories are unduly and patently burdensome (see *Blank v Schafrann*, 180 AD2d 886, 580 NYS2d 113 [3d Dept 1992] where a twenty-five (25) page set of interrogatories which included five (5) pages of definitions were prolix, verged on harassment and were "patently burdensome"). The remedy is not judicial pruning but vacatur of the interrogatories (see CPLR 3101[a]; *Village of Mamaroneck*, 16 AD3d 674, 792 NYS2d 538 [2d Dept 2005]; *EIFS Inc. v Morie Co., Inc.*, 298 AD2d 548, 749 NYS2d 43 [2d Dept 2002]; *Lewis v Hertz*, 193 AD2d 470, 597 NYS2d 368 [1st Dept 1993]; *Eiditel, N.Y. v Liberty Studios*, 162 AD2d 345, 557 NYS2d 21 [1st Dept 1990]) on the grounds that they are excessive and overly burdensome. Therefore, Grecco's interrogatories are vacated (*accord Botas v Grossman*, 7 AD3d 654, 776 NYS2d 519 [2d Dept 2004]; *Suffolk Bus. Ctr. v Applied Digital Data Sys., Inc.*, 128 AD2d 861, 513 NYS2d 780 [2d Dept 1987]; *Jimbo Corp. v Langtry Realty Corp.*, 120 AD2d 642, 502 NYS2d 241 [2d Dept 1986]), without prejudice to the service by Grecco of a new and proper set of interrogatories that seek discovery. Therefore, the Court grants Grecco leave to serve a further new and proper interrogatory demand on or before April 30, 2008 and plaintiff shall respond on or before but not later than May 30, 2008.

By this Order, the Court does not intend to establish a maximum number of interrogatories that may be served, particularly in light of the fact that there will not be a deposition permitted of the Attorney General nor his staff. The Court is simply stating that this particular set of interrogatories are unduly burdensome.

Plaintiff has set forth valid grounds for reargument by showing that the Court overlooked factual matters and legal authority (cf. *Flynn v Town of No. Hempstead*, 114 Misc2d 125, 451 NYS2d 352 [Sup Ct, Nassau County 1982]; *aff* 97 AD2d 430, 467 NYS2d 395 [2d Dept 1983]; *Cisco v Levine*, 72 Misc2d 1087, 341 NYS2d 719 [Sup Ct, Nassau County 1973]) which warrant reargument and a change in its prior determination (cf. *Elarac v Masara*, 96 NY2d 847, 729 NYS2d 60 [2001]). All the facts put forward by plaintiff on this motion were not previously considered by the Court. While plaintiff's response to the interrogatories was not as specific as contemplated under the CPLR (see Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3120.10), plaintiff did object in a timely fashion pursuant to CPLR 3103(a) and preserved its right to contest the interrogatories and did not waive its right (cf. *McMahon v Aviette Agency, Inc.*, 310 AD2d 820, 753 NYS2d 605 [3d Dept 2003]). Applying these principles to the matter before the Court, the plaintiff's motion for reargument of the August 27, 2007 Order is granted and the Order is vacated.

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The motion by the Town of Brookhaven for an Order pursuant to CPLR 2221(e) seeking renewal of this Court's Order of June 27, 2007 consolidating the above action with the action bearing Index No. 25310-06, and to vacate said Order upon renewal, or in the alternative, to continue the current stay of discovery pursuant to CPLR 3214(b) to be extended to allow the Town of Brookhaven the opportunity to renew the documents previously exchanged prior to depositions is denied as being academic and moot in view of the fact that by Order dated March 12, 2008, the respective motions for summary judgment of the County of Suffolk and the Town of Brookhaven were granted and the action was severed from the above action.

The motion by the plaintiff seeking an Order pursuant to CPLR 3214(b) allowing discovery to proceed is granted and a discovery schedule is indicated above.

As to that application of the plaintiff seeking to vacate this Court's Order of June 27, 2007 regarding consolidation of the actions, the Court is not empowered to grant such relief which is not contained in movant's Notice of Motion or wherefore clause (*see* CPLR 2214; *Northside Studios, Inc. v Treccagnoli*, 262 AD2d 469, 692 NYS2d 161 [2d Dept 1999]; *Arriaga v Michael Laub, Co.*, 233 AD2d 244, 649 NYS2d 707 [1st Dept 1996]).

Accordingly, the motions and cross motion are determined as noted herein. This constitutes the Order and decision of the Court.

DATED: 3/20/08



THOMAS F. WHELAN, J.S.C.