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| Strachman v Palestinian Auth. |
| 2008 NY Slip Op 31346(U) |
| May 6, 2008 |
| Supreme Court, New York County |
| Docket Number: 0102101/2006 |
| Judge: Shirley W. Kornreich |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 102101/2006

YARON UNGAR

vs

PALESTINIAN AUTHORITY

Sequence Number : 010

STRIKE

INDEX NO. 102101/2006

MOTION DATE _____

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

MAY 13 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 5/6/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

DAVID STRACHMAN, as administrator of the Estate of YARON UNGAR, PROFESSOR MEYER UNGAR, JUDITH UNGAR, RABBI URI DASBERG, JUDITH DASBERG, individually and in their capacity as legal guardians of YISHAI UNGAR & DVIR UNGAR, AMICHAH UNGAR, DAFNA UNGAR & MICHAEL COHEN, & THE BANK OF NEW YORK,

Index No. 102101/2006

DECISION AND ORDER

Plaintiffs,

- against -

THE PALESTINIAN AUTHORITY, d/b/a, THE PALESTINIAN AUTHORITY, d/b/a, PALESTINIAN PENSION FUND OF THE STATE ADMINISTRATIVE EMPLOYEES and/or PALESTINIAN PENSION FUND FOR THE STATE ADMINISTRATIVE EMPLOYEES OF THE GAZA STRIP, & THE INSURANCE AND PENSION FUND,

Defendants.

-----X

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is one of many cases instituted by plaintiffs in an attempt to collect on an \$116,000.000 federal judgment entered, upon default, in Rhode Island. The Palestinian Authority (PA) and the Palestinian Liberation Organization (PLO), among others, were named as defendants in the Rhode Island action. Plaintiffs allege, *inter alia*, that The Palestinian Pension Fund (PPF) is an alter ego of the PA and seek to execute against PPF assets in New York. The PPF has filed a motion to strike the affirmation of counsel and three witness affidavits filed by plaintiffs in support of both their cross-motion for summary judgment and their opposition to

PPF's motion for summary judgment. Plaintiffs have in turn filed a cross-motion *nunc pro tunc* to enlarge the page limit of counsel's affirmation, and to strike two witness affidavits filed by PPF in support of its motion for summary judgment. The court will assume the parties' familiarity with the procedural and factual background of this case, as well as pending related matters.

Discussion and Ruling

PPF's Motion to Strike

1. Counsel's Affirmation

PPF objects to the length of the affirmation by plaintiffs' counsel. The affirmation is seventy-nine pages in length, a fact the court verified without the benefit of pagination. Rule 14(b) of the Local Rules of the Supreme Court, New York County, Civil Branch, limits affirmations and affidavits to twenty-five pages in length "[u]nless advance permission otherwise is granted by the court for good cause..." and cautions that "[m]aterials presented in violation of this Rule will not be read." Plaintiffs' counsel explains that he was unaware of the local rules as they are "accessible on an off-the beaten-track area of the court's website." Cross-Motion, Tolchin Aff. at ¶ 31. The New York County Supreme Court's website does provide a link to these rules, but the link refers the user to "Rules of Justices," which a user could assume refers only to the rules of individual justices in their respective court parts. The linked site does provide access to the individual part rules, but it also includes the Local Rules, which are uniform throughout the Civil Branch of the New York County Supreme Court. These rules were made effective as of April 17, 2006.

The court finds good cause under the circumstances for the excessive pagination of

counsel's affirmation and exercises its discretion to grant the requested relief *nunc pro tunc*. See CPLR 2101 ("Mistakes, omissions, defects and irregularities"); Judiciary Law 2-b ("General powers of courts of record"). PPF's motion to strike is denied on this ground. Plaintiffs' counsel is warned, however, to familiarize himself with the Local Rules and to ensure that future filings are in strict compliance with all applicable rules both as to length and pagination.

2. *Witness Affidavits*

PPF challenges the affidavits of Dr. Jacques Neriah, Col. (Ret.) Shlomo Politis, and Daniel Reisner. First, PPF argues that plaintiffs failed to identify these witnesses within the time required by the Preliminary Conference ("PC") Order of July 6, 2006. Second, PPF argues that plaintiffs further violated the PC Order and CPLR 3101(d) by failing to serve expert disclosure statements of Politis and Reisner. PPF's motion to strike these three witness affidavits is denied. Plaintiffs identified the witnesses prior to the close of discovery on February 15, 2007. PPF itself identified two witnesses less than three weeks before the discovery deadline, and subsequently filed a Note of Issue and Certificate of Readiness swearing that discovery had been completed, there were no outstanding requests for discovery, and there had been compliance with the court's orders. Exh. B, Cross-Motion. PPF has waived any objection to the discovery infractions it cites as bases for its motion to strike.

Specifically, as to Neriah, plaintiffs' counsel represents that he only became aware of the witness' significance at the January 10, 2007 deposition of PPF's witness James Tanenbaum, Esq., and that it took "several weeks" to locate him and "secure his agreement to be a witness." Cross-Motion, Tolchin Aff. at ¶ 17. The court has no reason to question this representation. PPF also objects to the inclusion of hearsay statements in Neriah's affidavit, citing specifically

statements “against interest” made by PPF’s previously undisclosed witness, Dr. Freih Abu Meddain. Motion, Kerr Aff. at ¶ 13. The use of hearsay is not a legal basis for striking the affidavit, or even the statement alone, but rather will be considered by the court in deciding whether plaintiffs have met their burden of proof on summary judgment. *See Baker v. City of Elmira*, 271 A.D.2d 906, 909 (3d Dept. 2000) (finding affidavits containing hearsay admissible to oppose summary judgment).

As to Politis and Reisner, to the extent these witnesses are to be called as experts at trial, CPLR 3101(d)(1)(i) does not preclude their testimony. That statute requires disclosure of expert information on request and a “sufficient period of time before the commencement of trial to give appropriate notice thereof.” *Id.* It does not mandate disclosure prior to filing a summary judgment motion. *See Aversa v. Taubes*, 194 A.D.2d 580 (2d Dept. 1993) (finding that noncompliance does not mandate preclusion unless intentional and prejudicial); *followed by McDermott v. Alvey, Inc.*, 198 A.D.2d 95 (1st Dept. 1993). Although neither party has made a specific demand for disclosure of expert information, the court deems the parties’ motions to strike as demands for disclosure of expert information and, to the extent not already provided, orders the parties to produce all expert information no later than thirty days prior to the date scheduled for trial, if any.

Plaintiffs' Motion to Strike

Plaintiffs challenge the reply affidavits of Farouk M. A-Franji and Freih Abu Meddain filed by PPF in support of its motion for summary judgment. Plaintiffs argue that these affidavits were not properly executed, and that Meddain was never identified as a witness. Plaintiffs’ motion is denied. The parties previously stipulated to waiving, for purposes of the summary judgment motions, the CPLR’s formal requirements concerning the notarization of foreign

affidavits. Cross-Motion, Exh. A. Plaintiffs' counsel does not dispute this stipulation yet asks the court to strike the affidavits, apparently as *quid pro quo* for PPF's motion to strike. This type of gamesmanship, which is unprofessional and imposes an unnecessary burden on the court and its staff, will not be condoned. In any event, although the court will not strike the affidavits in question, it will consider the issue of authenticity for purposes of summary judgment.

Finally, the court will not strike the reply affidavit of Meddain filed by PPF. Although PPF did not previously identify him as a witness, plaintiffs' use of the Neriah affidavit that includes a statement by Meddain invited a response. Accordingly, it is

ORDERED that the PPF's motion to strike the affirmation of plaintiffs' counsel and affidavits of three witnesses is denied; and it is further

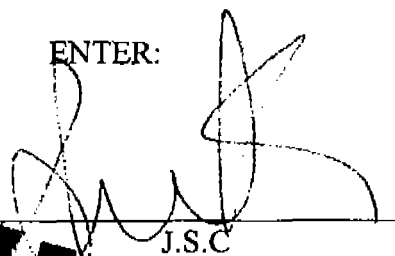
ORDERED that plaintiffs' cross-motion to strike PPF's reply affidavits of two witnesses is denied; and it is further

ORDERED that plaintiffs' cross-motion to enlarge counsel's affirmation *nunc pro tunc* is granted; and it is further

ORDERED that the parties shall produce all expert information no later than thirty days prior to the date scheduled for trial, if any.

Date: May 6, 2008
New York, N. Y.

ENTER:



J.S.C

FILED

MAY 13 2008

COUNTY CLERK
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NEW YORK