

<b>Kammerman v Kimmel</b>
2008 NY Slip Op 33118(U)
November 17, 2008
Supreme Court, New York County
Docket Number: 601796/07
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 1

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JOSHUA KAMMERMAN,  
Plaintiff,

-against-

Index No.: 601796/07

EUGENE M. KIMMEL, GREGORY S. KIMMEL,  
KIMMEL & KIMMEL, LLC and KIMMEL &  
KIMMEL OF NY, INC.,

**Decision & Order**

Defendants.

**FILED**

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**HON. MARTIN SHULMAN:**

NOV 20 2008

COUNTY CLERK'S OFFICE  
NEW YORK

The court has before it a discovery dispute between three members of a small law firm which had offices in Connecticut and New York. There are many disputed issues of fact, but what is indisputable from these motion papers is the utter disregard of the discovery obligations of the defendants and their attorneys resulting in the waste of valuable judicial resources to basically order defendants to do what, by law, they are already obligated to do. Plaintiff, too, is not above criticism for his failure to adequately respond to certain of the defendants' proper demands for information.

Plaintiff Joshua Kammerman ("plaintiff") moves, pursuant to CPLR 3124, to compel defendants Eugene M. Kimmel, Gregory S. Kimmel (collectively, the "Kimmels"), Kimmel & Kimmel, LLC ("K&K LLC"), and Kimmel & Kimmel of NY, Inc. ("K&K Inc.") to respond to his interrogatories and to his first and second document requests or, in the alternative, for an order pursuant to CPLR 3126 striking defendants' answer and counterclaims. Defendants cross-move, pursuant to the same CPLR sections, to compel "full and proper responses" from plaintiff to their two sets of

interrogatories and two sets of document requests, or, in the alternative, for an order striking the plaintiff's pleadings.

It is undisputed that, in 2003, the Kimmels hired plaintiff as an associate attorney. It is also undisputed that, sometime in the fall of 2004, the Kimmels agreed that plaintiff could become a member of K&K LLC and its tax returns for the years 2005 and 2006 list him as having a 25% share of profits, losses and capital. Plaintiff contends that his former law partners cheated him out of his full 25% share of profits for several years, refused to provide and/or share financial information about the firm, and refused to provide him with the necessary support to run the firm's New York office, allegedly forcing plaintiff to resign from the firm in May of 2007. He commenced this lawsuit on May 30, 2007. His amended verified complaint asserts numerous causes of action, including claims for a partnership accounting and dissolution, breach of fiduciary duty, conversion, breach of contract and fraud.

The Kimmels, for their part, contend that this lawsuit is merely an abusive and spiteful attempt by the plaintiff to continue to maliciously harm the law firm that formerly employed him, and from which he abruptly quit, improperly taking with him one of the firm's most significant clients, retaining legal fees belonging to the firm, and taking over \$36,000 of equipment and office furniture from the New York office, as well as assigning to himself the lease for the New York office. Defendants have counterclaimed with nearly as many causes of action against the plaintiff, alleging, for example, that he breached his fiduciary duty, misappropriated confidential information, and engaged in unfair competition.

## **Document Discovery From Defendants**

Plaintiff's First Notice For Discovery and Inspection was served on July 26, 2007 and contains 28 requests. Defendants served a response on August 30, 2007, in which they asserted a boilerplate objection to all requests, and raising, for the most part, completely frivolous objections. For example, defendants have taken the position that a member of a limited liability company with a 25% ownership interest is not entitled to see the ledger books, cancelled checks and other financial documents of the company to determine if he received a fair distribution of the profits of the firm, objecting on such ridiculous grounds as relevance and trade secrets. And while defendants agreed to produce an extremely limited and selective number of documents relating to payments to plaintiff, despite that agreement, not one document was produced until three months later, when defendants' counsel produced the federal income tax returns for K&K LLC for the years 2004, 2005 and 2006, and a handful of cancelled checks and invoices regarding start-up costs for the New York office.

Accordingly, defendants are ordered to produce, within 30 days of the date hereof, documents responsive to Request Nos. 3-17, 20-24 and 26-28. Failure to fully and adequately comply will lead to the imposition of monetary sanctions, pursuant to 22 NYCRR §130-1.1 and/or the striking of defendants' pleading pursuant to CPLR §3126. Request No. 1 seeking the firm's tax returns for 2004, 2005 and 2006 has been complied with for K&K LLC, but to the extent that any such returns exist for K&K Inc., they must be turned over. Request No. 2, seeking all of the firm's financial records

from October 1, 2004 to May 8, 2007,<sup>1</sup> is unduly broad and duplicative of the other more detailed requests. Request Nos. 18 and 19, seeking all communications with accountants and financial advisors, both to the firm and partners, individually, is also unduly broad and does not appear likely to lead to any relevant evidence. Finally, Request No. 25, calling for all documents reflecting “work in progress as of March 8, 2007 that was not billed as of that date” is too broad, and is hereby limited to the hourly time records of the Kimmels and any other attorneys and paralegals of the firm from January 1, 2007 through May 8, 2007.

On January 24, 2008, plaintiff served his Second Notice for Discovery and Inspection, containing 21 more document requests. Defendants responded on February 13, 2008, again promising to provide a handful of documents relating to the plaintiff only, but producing nothing as late as March 3, 2008. Defendants’ objections are overruled, and they are ordered to respond to each and every document request within 30 days, except that Request No. 18, seeking all documents regarding the operation and/or management of the firm, is limited to the time frame of October 1, 2004 to May 8, 2007. Again, failure to fully and adequately comply will lead to the imposition of sanctions as set forth above.

#### **Document Discovery From Plaintiff**

On August 14, 2007, defendants served their first request for the production of documents, seeking over 59 different categories of documents from plaintiff. Plaintiff responded on November 26, 2007, producing some documents, but contending that

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<sup>1</sup> The reference to March 8, 2007 in plaintiff’s notice appears to be a typographical error since he resigned from the firm on May 8, 2007.

most of the relevant financial information was in the defendants' custody and control since he had resigned. He also properly refused to produce any documents concerning legal work for firm or new clients since his resignation, since any such disclosure would violate his duty of confidentiality.

However, with respect to Request Nos. 9 and 45, if plaintiff retained hard copies of any e-mails between the parties, and it seems inconceivable that he did not, he will be precluded from relying on them if not produced. Plaintiff is ordered to produce any and all documents responsive to Request Nos. 11, 15 and 16, since it seems inconceivable that he would not have, in his own possession, not one piece of paper regarding payments received from the firm or personal expenses paid on his behalf. With respect to Requests Nos. 17, 18, 19, 22, 23, 24, 25 and 26, plaintiff must produce any communications with firm clients, including WAMU, regarding plaintiff leaving the firm. With respect to Request Nos. 21, 28 and 29, plaintiff's objections based on relevance and attorney-client privilege are overruled since he fails to make any case that either the identity of his clients nor any legal fees received therefrom is privileged information. *Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 678-79 (2005); *Matter of Priest v Hennessy*, 51 NY2d 62, 69 (1980); *see also Matter of Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F2d 61, 63 (2d Cir 1984); *Colton v United States*, 306 F2d 633, 637 (2d Cir 1962), *cert denied* 371 US 951 (1963); *Litton Indus., Inc. v Lehman Bros. Kuhn Loeb Inc.*, 130 FRD 25 (SD NY 1990). As for Request No. 27, any handwritten, typed or electronic version of any type of list of firm clients that plaintiff may have kept, copied or created, even a holiday card address list, must be produced. Request Nos. 30, 31,

32 and 34 are unduly broad and duplicative of the other more detailed requests.

Plaintiff's response to Request No. 33 appears inadequate; he must produce any and all documents concerning what happened with the lease for the New York office since his May 2007 resignation. The remainder of plaintiff's responses appear adequate.

Plaintiff shall supplement his response within 45 days.

On November 20, 2007, defendants served their second request for the production of documents from plaintiff, seeking an additional 21 categories of documents. Plaintiff responded on January 23, 2008, and his response appears adequate.

### **Interrogatories**

Defendants have served two sets of interrogatories. The first set, served on August 14, 2007, asks 57 questions. Plaintiff served a verified response on November 26, 2007, in which he provided detailed responses to most of the defendants' questions, objecting, however, to providing any information about client matters, both before his resignation and after, on grounds of relevance and attorney-client privilege. The fact that many responses are duplicative of the Amended Complaint is merely a result of the pleading being very detailed. The court will, however, order plaintiff to respond to Interrogatories Nos. 16 (limited to fees or other monies payable directly to the plaintiff, as opposed to the firm), 17 (amount of legal fees plaintiff has received from former firm clients since his resignation), 18, 19 and 21 (limited to communications with firm clients, including WAMU, regarding plaintiff leaving the firm), 23, 25, 26, 28, 51 and 52 (identity of fact and expert witnesses).

With respect to the defendants' second set of 26 additional interrogatories, the questions are, for the most part, duplicative of the first set of questions, but plaintiff is ordered to respond to Interrogatory Nos. 2 and 3 concerning the clients he allegedly introduced to the firm.

On January 23, 2008, plaintiff served his own set of interrogatories that contains 170 separate questions and counting sub-parts, brings the amount to 236 separate interrogatories. Defendants refused to respond on the ground, *inter alia*, that they were overly broad, burdensome and harassing. The court agrees that they are excessive in length, but having demanded that plaintiff respond to 83 of defendants' own questions, it would only be fair to require the defendants to do likewise. Plaintiff is hereby ordered to pair down his interrogatories to 83 in number, including sub-parts, and to omit any questions where the documentation speaks for itself, i.e., Interrogatories 26 through 30 regarding the content of the firm's tax returns.

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff's motion to compel discovery is granted to the extent that defendants shall respond and produce documents in response to plaintiff's First and Second Notices For Discovery and Inspection in accordance with the directives contained in this decision and order within thirty (30) days of the date hereof; and it is further

**ORDERED** that defendants' cross motion is granted to the extent that plaintiff is ordered to supplement his response to defendants' First Notice For Discovery and Inspection and defendants' First and Second Set of Interrogatories in accordance with

the directives contained in this decision and order within forty-five (45) days of the date hereof; and it is further

**ORDERED** that plaintiff serve a new pared-down set of interrogatories limited to 83 questions on defendants within fifteen (15) days of the date hereof, and defendants shall serve a verified response no later than thirty (30) days after service.

The parties are directed to appear for a preliminary conference on January 13, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York  
November 17, 2008



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Hon. Martin Shulman, J.S.C.

**FILED**  
NOV 20 2008  
COUNTY CLERK'S OFFICE  
NEW YORK