

**Galasso Langione & Botter, LLP v Liotti**

2009 NY Slip Op 30753(U)

March 27, 2009

Supreme Court, Nassau County

Docket Number: 019276/07

Judge: Daniel R. Palmieri

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

**Present:**

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

-----X  
**GALASSO LANGIONE & BOTTER, LLP,  
PETER J. GALASSO and JAMES LANGIONE,**

**TRIAL TERM PART: 47**

**INDEX NO.: 019276/07**

**Plaintiffs,**

**-against-**

**MOTION DATE: 3-13-09  
SUBMIT DATE: 3-13-09  
SEQ NOS. - 010, 011, 012**

**THOMAS F. LIOTTI,**

**Defendants.**

-----X  
**THOMAS F. LIOTTI,**

**Third-Party Plaintiff,**

**-against-**

**FREDERICK K. BREWINGTON,**

**Third-Party Defendant**

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

- Order to Show Cause, dated 1-26-09.....1**
- Notice of Cross Motion, dated 2-26-09.....2**
- Affidavit in Support of Cross Motion, dated 2-26-09.....3**
- Memorandum of Law in Op.  
to Order to Show Cause, dated 2-25-09..... 4**
- Order to Show Cause, dated 3-13-09.....5**
- Affidavit in Reply, dated 3-10-09.....6**
- Memorandum of Law, dated 3-10-09.....7**

The motion by the defendant and third-party plaintiff Thomas F. Liotti (seq. no. 010)

for an order 1) vacating the prior decisions of this Court dated May 12, 2008, August 19, 2008, November 3, 2008 and January 7, 2009 pursuant to CPLR 2221; discontinuing the third-party action without prejudice, pursuant to CPLR 3217; temporarily restraining the third-party defendant from enforcing a judgment signed January 26, 2009 and imposing costs against the third-party defendant; and for recusal of this Justice, is granted to the extent that a stay of enforcement of the judgment for costs is granted pending the outcome of the appeal of this Court's order dated November 3, 2008, and is otherwise denied.

The cross motion by the third-party defendant Frederick K. Brewington (seq. no. 011) for an order awarding additional sanctions and costs against the third-party plaintiff pursuant to 22 NYCRR § 130-1 is denied.

The motion by the third-party plaintiff (seq. no. 012) vacating the judgment signed January 26, 2009, and for a stay of enforcement of that judgment during the pendency of the other applications decided herein is granted to the extent that enforcement of the judgment is stayed as indicated in this order, and is otherwise denied.

The contents of the prior determinations of this Court are matters of record and will not be referred to here except as necessary.

The branch of the motion by defendant and third-party plaintiff Thomas F. Liotti to vacate the prior orders of this Court is deemed one for reargument pursuant to CPLR 2221(d), as it is based on his contention that this Court committed error in considering what is claimed to be inadmissible evidence, leading to the decisions noted above. This evidence is comprised of affirmations submitted by Frederick K. Brewington. Brewington has had two

roles from the inception of this litigation, as he is both counsel to plaintiffs, and the third-party defendant. He has represented himself *pro se* in the latter role. Liotti contends that because Brewington is a party, none of the affirmations he submitted should have been considered, fatally compromising each of this Court's decisions.

A review of the Clerk's court file containing the papers submitted on the prior motions reveals that Brewington submitted nine statements to the Court, one of which was an affidavit and the rest of which were affirmations.<sup>1</sup> Liotti is correct that statements of an attorney who is also a party should be in affidavit form (CPLR 2106), and, if not, may be excluded from consideration. *Lessoff v 26 Court Street Assocs., LLC*, 58 AD3d 610 (2d Dept. 2009); *LaRusso v Katz*, 30 AD3d 240 (1<sup>st</sup> Dept. 2006); *Samuel & Weininger v Belovin & Franzblau*, 5 AD3d 466 (2d Dept. 2004).

However, the circumstances here are not as clear-cut as in the cases cited above. Only one of the affirmations submitted by Brewington, dated March 5, 2008, is devoted exclusively to the third-party complaint, in which he is the third-party defendant. This was submitted on his motion to dismiss the third-party action commenced against him. The other affirmations either were submitted solely in his role as attorney for the plaintiffs, or contained "mixed" content, in that they were made in his role as both attorney and party. While it certainly would have been the better practice in this case to have submitted only affidavits in view of Brewington's dual status, the Court would not necessarily be bound to

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<sup>1</sup> It should be noted, however, that all of Brewington's testimony at the hearing for costs, leading to the November 3, 2008 order, was under oath.

ignore so much of the affirmations that concerned the main action, in that he was allowed to affirm as attorney for the plaintiffs. CPLR 2106. Indeed, there is authority for the proposition that if the issue is raised, defects of this nature may be corrected. *Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 (1<sup>st</sup> Dept. 2009); *Wester v Sussman*, 304 AD2d 656 (2d Dept. 2003); *DiLeo v Blumberg*, 250 AD2d 364 (1<sup>st</sup> Dept. 1998).

More importantly, given the multiple applications and resulting orders now attacked for this reason, and whether one could have argued that these affirmations should not have been considered at all, an objection from the defendant was required to insure that the Court had the issue of admissibility before it. Absent the objection, the issue was waived. It is well established that in the absence of an objection waiver occurs even in more egregious circumstances than the present one, such as when the person submitting the statement is never authorized to do so unless that statement is a properly notarized affidavit. *See, Santiago v Rodriguez*, 38 AD3d 639 (2d Dept. 2007); *Akamnonu v Rodriguez*, 12 AD3d 187 (1<sup>st</sup> Dept. 2004); *Shinn v Catanzaro*, 1 AD3d 195 (1<sup>st</sup> Dept. 2003); *Scudera v Mahbubur*, 299 AD2d 535 (2d Dept. 535); *see also, Kibler v Gillard Constr.*, 53 AD3d 1040 (4<sup>th</sup> Dept. 2008). Accordingly, the use of affirmations by Brewington is no basis for overturning the prior determinations, and therefore there is no reason to grant reargument.

That branch of the motion that is for a voluntary discontinuance of the third-party action without prejudice pursuant to CPLR 3217 is denied. This action has been dismissed, and because the present application to vacate has been denied a discontinuance is not possible. In addition, permitting a discontinuance without prejudice after a dismissal effectively allows a party to circumvent the order of dismissal, which is not a legitimate use

of CPLR 3217. *See, DuBray v Warner Bros. Records, Inc.*, 236 AD2d 312 (1<sup>st</sup> Dept. 1997); *Schultz v Kobus*, 15 AD2d 382 (4<sup>th</sup> Dept. 1962).

The branch of the motion that is, in effect, for a stay of enforcement of the judgment entered upon the hearing for costs is granted. The denial of a stay by the Appellate Division, Second Department, referred to in this Court's order dated January 7, 2009, preceded the award of costs upon the hearing therefor, and thus does not bar this Court from considering the stay requested. It should be granted as a matter of judicial economy.

This Court noted in the January 7 order that "it would be inefficient to stay any proceedings based solely on that decision [November 3, 2008, setting amount of costs] pending an appeal of whether there should have been costs imposed in the first instance. If imposition of costs is affirmed, the Appellate Division might then have to hear a second later appeal on the amount thereof." However, a corollary to this statement is that now that the appeals from both these orders are pending enforcement could also create unnecessary litigation, in that a reversal of either would provide a basis for disgorgement of sums paid over to the third-party defendant under the resulting judgment. Accordingly, a stay of enforcement of the judgment granted January 26, 2009 pending the outcome of the appeal of the November 3, 2008 order is warranted, and is hereby granted. CPLR 5519(c).

The branch of the motion that is for recusal of this Court is denied. This issue has already been raised and decided, and the Court finds that no new basis for renewing the

request has been tendered which would alter the previous result. <sup>2</sup>

The cross motion by Brewington for additional sanctions is denied. As indicated above, the central basis for this motion is the question of Brewington's use of affirmations, and Liotti's position finds support in case law. Although this branch of Liotti's motion is denied for the reasons stated, the Court does not find Liotti's motion to be frivolous as that term is defined in 22 NYCRR § 130-1.

This shall constitute the Decision and Order of this Court.

DATED: March 27, 2009

ENTER



HON. DANIEL PALMIERI

Acting Supreme Court Justice

**TO: Law Offices of Frederick K. Brewington  
Attorney for Plaintiffs and Third-Party Defendant, Pro Se  
50 Clinton Street, Ste. 501  
Hempstead, NY 11550**

**Thomas F. Liotti, Esq.  
Defendant Pro Se and Third-Party Plaintiff Pro Se  
600 Old Country Road Ste. 530  
Garden City, NY 11530**

**ENTERED**

APR 01 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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<sup>2</sup> Without addressing every instance of alleged bias raised by Liotti, the Court would note in passing that plaintiffs have not been the victor on every application made. Notwithstanding his statement to the contrary (Liotti Aff., ¶ 27), in its order dated August 19, 2008 the plaintiffs' motion for summary judgment on the issue of liability was denied, not granted.