

**Trojanowski v Con Edison**

2009 NY Slip Op 31668(U)

July 27, 2009

Supreme Court, Queens County

Docket Number: 27399/2007

Judge: Charles J. Markey

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: PART 32

-----X  
ANNA TROJANOWSKI,

Plaintiff,

-- against --

**AMENDED  
DECISION and ORDER**  
Index No.27399/2007

CON EDISON and ANTHONY PAGANO,

MOTION SEQ. NO: 2

Defendants.  
-----X

The following papers numbered were read on this motion: Papers Numbered

Notices of Motion, Affirm., Exhibits.....	1
Affirmations in Opposition.....	2
Affirmations in Reply.....	3
Sur-reply [accepted by the Court].....	4

**CHARLES J. MARKEY, J.:**

Judges usually have ample work to do without having to act as a referee of whether all papers have been turned over from one lawyer who was discharged by a party to that client’s new counsel. In the present dispute, brought by order to show cause by plaintiff’s new counsel, the significant issue is whether the outgoing or former counsel has failed to turn over all papers necessary for the plaintiff to prosecute her negligence case against the defendants. In the present matter, the Court is required to resolve numerous issues involved in the acrimonious exchange of a file, or refusal to produce it in its entirety, between predecessor and successor counsel.

This order to show cause on behalf of the plaintiff is brought by Dan Mesterman, Esq. (“Mesterman”), retained by plaintiff in late February, 2009, seeking the plaintiff’s former counsel John J. Ciafone, Esq. (“Ciafone”), to relinquish the file to him. Four months after being retained, Mesterman contends that to date he does not have the entire file because, allegedly, Ciafone is trying to conceal certain documents. Mesterman, in addition, requests that sanctions be meted out against Ciafone.

Ciafone, however, contends vigorously that he turned over every paper to Mesterman’s support staff at his, Ciafone’s, office. Of course, the package had been prepared by Ciafone’s office staff for Mesterman, who sent an office staff person to Ciafone’s office to pick up the package, so that there was no examination of what was turned over and what was allegedly not provided. Both the motion by order to show cause by Mesterman and the opposition papers by Ciafone contain additional affidavits by their support staff backing their respective bosses’ position. Also obvious from the papers is the mutual hostility and enmity between Ciafone and Mesterman. Although clients change counsel frequently in litigation, and the outgoing and new

attorneys usually cooperate in turning over the papers, knowing that the cornerstone of the attorney-client relationship is that the client is the principal, in the present case, the undersigned is required to arbitrate and referee every minute element of this nasty dispute.

Having reviewed the submissions, the Court is convinced that Ciafone, whether through design, inadvertence, or failure by his staff, has not turned over all the papers. The Court is persuaded by the fact that several individuals have complained about Ciafone's failure to deliver papers, including:

1. **Mesterman.** Mesterman has gone to impressive lengths in the present order to show cause to observe why he could not have received all the papers. He mentions that his client recalls testifying at some deposition. Perhaps a telephone call by Mesterman to defense counsel, in the face of plaintiff's inability to be more specific, could have resolved this question. At any rate, the Court has to pause to consider: if it is true that Ciafone turned over all the papers as he insists, why would Mesterman be investing valuable hours and resources busily pursuing Ciafone instead of the defendants?

2. **Honorable Patricia Satterfield.** In *Nazario v. Ciafone*, Index No. 22698/2007 [Sup Ct Queens County January 8, 2008], Justice Satterfield issued a seven page, single-spaced opinion, annexed as Exhibit C to Mesterman's reply papers, granting a similar order to show cause requiring Ciafone to produce a file and ordering that he pay \$5,000 in sanctions to the Lawyers' Fund for Client Protection. Justice Satterfield, a prominent and well-respected jurist, leveled numerous criticisms of Ciafone. Ciafone explains that he has appealed Justice Satterfield's decision. Putting aside whether Justice Satterfield's opinion and sanctions award will be affirmed or reversed on appeal, the undersigned has to pause to wonder that (1) the present occasion is not the only time that Ciafone has been accused of not turning over the entire client file to a successor attorney and (2) Justice Satterfield, must have been driven to unusual lengths, by Ciafone's excuses and failure to cooperate, to produce the opinion she issued.

3. **Alexander C. Aviles, Esq.** ("Aviles"). Aviles is the attorney for defendant Con Edison. On the return date of the instant order to show cause, June 18, 2009, he and defendant Pagano's counsel appeared in court regarding a companion motion on this case [that was adjourned to July 30, 2009]. Aviles explained, on the call of the motion calendar, that despite the affidavit of service attached to Ciafone's motion papers, he had not received a copy of the motion papers and knew about it only when he was notified by Mesterman. In this regard, Con Edison's interests are antithetical to those of plaintiff; yet, Aviles appeared in court to complain that he did not receive a copy of the motion papers, regardless of a contrary sworn statement by Ciafone's staff person in an affidavit of service.

Thus, a pattern emerges from several persons - - not one - - complaining that, despite statements made by Ciafone and his office staff in letters, affidavits of service, and motion papers, that Ciafone's office cannot be reliably counted on in serving or sending out complete papers. To bring the point home, one isolated criticism might be dismissed as an aberration or a

mistake. The same criticism, however, here, of not producing a complete file to successor counsel or serving papers, is leveled at Ciafone by different persons, especially when they have varying differing perspectives - - litigation adversary, former client, and jurist. Thus, even if Ciafone insists that he produced all the papers or served motion papers as attested in affidavit of service, and has no desire for introspection to a criticism made by several persons, this Court must stand up to take notice. "So attention must be paid . . . . Attention, attention must finally be paid to such a person." Arthur Miller, *Death of a Salesman*, Act I, page 56 [1949; Viking Press ed. 1958].

The evidence is sufficient that Mesterman did not conjure this order to show cause that evidently required numerous hours of meticulous work to prepare, complete with detailed exhibits, simply to create a spectacle, as Ciafone contends, but because he, Mesterman, needed documents to represent the plaintiff competently and did not receive the full file.

Ciafone offered in Court, on the return date, to hold a hearing on whether the papers were sent out and wanted to put his assistant on the witness stand. When my Law Secretary, Howard L. Wieder, Esq., offered that we had an adjournment of a hearing for the afternoon and thus available to take evidence on this motion, both Ciafone and Mesterman declined, citing other plans. Since Ciafone's assistant, to keep her job, obviously, is not going to testify in a fashion inimical to her boss's interests, conducting a hearing on whether or not she made a full copy of the plaintiff's file or mailed copies of motion papers to opposing counsel, as contended in her affidavits of service, would be an exercise in futility. This Court, furthermore, has little interest in making what should be a simple and civil gesture of turning over the complete office file of a client from a discharged attorney to successor counsel into a full-fledged hearing.

The Court, furthermore, determines that Ciafone has no retaining lien in this file. To the extent that he has a charging lien and would be entitled to a portion of any recovery, including his disbursements, is a determination to be made in the future. To be short, Ciafone cannot cling to a client who no longer wants his services, and he must produce the entire file, short of pencil notes, and not selective excerpts of it.

The order to show cause is granted only to the following extent:

1. Ciafone is required to make THREE copies of the ENTIRE file of the plaintiff. Ciafone's "pencil notes" or notes made by him or any of his staff are exempted from being turned over. *See generally, Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581 [1<sup>st</sup> Dept. 2009]. Internal memoranda, however, must be duplicated and turned over. Whether or not he makes the photocopies himself or delegates the task to his staff or any outside photocopy shop, Ciafone shall be held fully responsible or accountable for their legibility and completeness of ALL of the three copies of plaintiff's file. As a cover sheet for each set of the file, Ciafone shall make a certified statement that he has examined the original file and that the attached copy represents a full and complete copy of plaintiff's file, including memoranda and transcripts, but without his or his staff's "pencil notes." Ciafone shall keep one set, and he shall

hand-deliver or cause to be hand-delivered the two other sets to my Chambers on July 31, 2009, no later than 11:00 A.M. My Chambers will keep one set, and the other will be given by my Chambers to Mesterman or his authorized representative;

2. Mesterman or someone from his office shall arrive to my Chambers on July 31, 2009, no later than 12:00 noon, to receive one of those copies to be hand-delivered from Ciafone's office;
3. The Court vacates the note of issue. Plaintiff was required to attend a compliance conference and file a note of issue on March 6, 2009. The Court records reveal that no one attended the compliance conference before the Honorable Martin Ritholtz. The motion papers describe that, after calls between Mesterman's and Ciafone's offices, the note of issue was filed on March 6, 2009, so as to avoid dismissal of plaintiff's case. The note of issue was signed by Ciafone, even though he had effectively been discharged by plaintiff by her execution of a notice to change counsel on February 12, 2009. This motion alone has taken months to litigate until submission to the undersigned on June 18, 2009. In order not to compromise plaintiff's rights further, the undersigned is vacating the note of issue so as to permit an opportunity to Mesterman to acquaint himself with the entire file, once he receives it, and to take any appropriate further steps to protect plaintiff's rights.; and
4. The branch of the motion seeking sanctions against Ciafone will be held in abeyance.

The interests of justice require that the undersigned, acting sua sponte, vacate the note of issue. As a result of Ciafone's failure to sign a consent to change counsel that was not attached to a waiver of his lien and his refusal and his failure to cooperate with successor counsel absent court intervention, plaintiff should not be the innocent scapegoat. She was not represented at the compliance conference on March 6, 2009. On that date, Ciafone filed a note of issue to meet a deadline previously set for such action

From February, 2009 to the present, the representation of the plaintiff was in constant turmoil. Ciafone was interested in protecting his lien rights. He conditioned the turnover of the file on his receiving a share of any recovery. Mesterman refused to consent to that request, believing Ciafone was negligent in representing the plaintiff.

The correspondence reviewed by the Court, on this motion, shows great confusion as to who was the helmsman of plaintiff's case. Significantly, nothing in the stipulation to change counsel or in any other document specifically directed Ciafone to stop all work on behalf of plaintiff. Ciafone asked Mesterman for approval and guidance on steps to take, and Mesterman wisely simply instructed him to take such action as warranted to protect the plaintiff. The feud between Mesterman and Ciafone was nonstop.

The issues of who represented Trojanowski earlier this year and what Ciafone was required to do, once he received a stipulation to change counsel and had a telephone call with the plaintiff herself - - the subject of which is sharply in dispute, may be for future adjudication. In

this regard, the recent case of *Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, \_\_\_ Misc. 3d \_\_\_, 2009 WL 839357, 2009 NY Slip Op 29132 [Sup Ct N.Y. County 2009], contains Justice Carol Edmead's excellent discussion and brilliant analysis in determining when and whether a lawyer's responsibility for a case has ended.

Collateral matters can be battled in a future litigation. Plaintiff should not have to be the innocent scapegoat in a duel between predecessor and successor counsel, to the point that no one represented her interests at the compliance conference before Justice Ritholtz and that it appears that only an incomplete copy of her file has been turned over to Mesterman by Ciafone's office.

The issue of whether Ciafone may be entitled to participate for any share of an eventual recovery by the plaintiff and for his recovery of disbursements shall be put aside for present purposes, without prejudice, to be pursued, by Ciafone, on motion, to the judge to be assigned to the trial of the underlying dispute. Ciafone's compliance with this decision and order is one factor to be considered in allowing any charging lien.

This Court makes clear that Mesterman shall be substituted for Ciafone as trial counsel. Ciafone no later than July 31, 2009. By that date, Ciafone shall execute the consent to change counsel that shall make no reference on the issue of participating in the recovery or recovery of disbursements.

The idea behind the contemporary general usage of "to push the envelope," used previously as an aeronautical expression, is to try to exceed the limitations or boundaries of something. In light of Justice Satterfield's opinion, dated January 8, 2008, criticizing Ciafone for not producing records and assessing sanctions against him of \$5,000, Ciafone's failure to cooperate with successor counsel may be pushing the litigation envelope. *See, Walker v. City of Mesquite, Texas*, 129 F.3d 831 [5<sup>th</sup> Cir. 1997] ["Our close review of the record in this somewhat troublesome action persuades us that although [principal trial counsel's] tactics pushed the litigation envelope to its outer limits, we are not prepared to say that his litigation tactics descended to the level of professional misconduct."].

To hasten the resolution of this dispute and to ensure that plaintiff's rights are not compromised by any further delays, the Court is, on this date, sending faxes of this decision and order to both Ciafone and Mesterman, in addition to mailing copies to them and defense counsel.

The foregoing constitutes the decision, order, and opinion of the Court.

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Hon. Charles J. Markey  
Justice, Supreme Court, Queens County

Dated: Long Island City, New York  
July 27, 2009

**Appearances:**

**For the plaintiff:** Dan Mesterman, Esq., 61 Broadway [18<sup>th</sup> floor], New York, N.Y. 10006

**Opposing the motion:** Former counsel to the plaintiff, John J. Ciafone, Esq., 29-59 Steinway Street, [suite 2-F], Astoria, N.Y. 11103

**For defendant Con Edison:** Alexander C. Aviles, Esq., 4 Irving Place [room 1800], New York, N.Y. 10003 [no position on the order to show cause]

**For defendant Anthony Pagano:** Burns, Russo, Tarnigi & Reardon, LLP, 390 Old Country Road, Garden City, N.Y. 11530