

Oscar Blandi Salon, Inc. v CPS 1 Realty LP

2009 NY Slip Op 32160(U)

September 21, 2009

Supreme Court, New York County

Docket Number: 108774/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Oscar Braneli

Plaintiff (s),

INDEX NO.

108774/ae

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

chs 1 Realty

-v-

Defendant(s)

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated:

9/21/09

J. Gische
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Supreme Court of the State of New York
County of New York: Part 10

Oscar Blandi Salon, Inc.

Plaintiff,

Decision/Order

-against-

Index# 108774/06
Mot. Seq. #004

CPS 1 Realty LP d/b/a The Plaza
and El-Ad Properties NY LLC.

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review
of this (these) motion(s):

| PAPERS | NUMBERED |
|------------------------------------|-----------------|
| Notice of Motion..... | 1 |
| LJR affirm in opp, exhs..... | 2 |
| LKK Affirm. In fur supp, exhs..... | 3 |
| 8/13/09 Transcript..... | 4 |

Gische J.:

Upon the foregoing papers the decision and order of the court is as follows:

It is undisputed that plaintiff is entitled to reimbursement from the defendant for the costs of alterations. A key issue in this case is what those costs actually were. Defendant moves to compel: the deposition of plaintiff's counsel, Louis J. Rotondi, and the production of corporate documents from plaintiff and Oscar Blandi at the Plaza, Inc. Plaintiff opposes the motion in its entirety.

The court will first address that portion of the motion seeking to compel Attorney Rotondi's deposition. Defendant claims that Attorney Rotondi "possess intimate knowledge and information particularly relating to the costs of alterations in the Fall of 1999, when substantial completion of the alterations were performed at the plaintiff's

salon." Defendant bases this claim on a series of documents produced by plaintiff which it claims shows that Attorney Rotondi "acount[ed] for and authoriz[ed] payments to various vendors and subcontractors" and thereby "acted as plaintiff's *de facto* construction project manager" during the course of renovations which took place between August 1999 and October 1999.

The documents upon which defendant's argument is premised are fax transmissions. In each fax, Debbie, then bookkeeper of the law offices of Rotondi & Associates, P.C., plaintiff's attorneys, requests that plaintiff's accounting manager issue checks or cash payments. With respect to these documents, Attorney Rotondi states in his affirmation:

While your affiant was certainly aware of the existence of a protocol involving these faxes at the time they were issues, they were generated without my review, except in a few cases. Your affiant never authorized payment, as these payments were authorized directly by Oscar Blandi or his project manager Jack Kaltner. Your affiant never examined or reviewed any invoices, nor did Debbie, relating to these payments. The law firms (sic) involvement was simply related to preparation for litigation against the general contractor.

An attorney witness "ought" to be called "only when it is likely that the testimony to be given by the witness is necessary." Talvy v. American Red Cross in Greater New York, 205 AD2d at 152 (*citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437 (1987)). "Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony necessary. Talvy v. American Red Cross in Greater New York, supra at 152 (*citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, supra at 445). Thus, the court has to take into account a number of factors, including the significance of the matters, weight of the

testimony, and availability of other evidence. Id.

While the issue of the costs of plaintiff's alterations is a significant matter, and evidence of the cost of alterations is not available from any other sources, the the defendant has failed to demonstrate that Attorney Rotondi has relevant knowledge. Therefore, Attorney Rotondi's deposition is not necessary.

The court finds that the defendant has failed to establish entitlement to depose Attorney Rotondi. Defendant's claims that Attorney Rotondi has first hand knowledge and independent information relating to the costs of alterations performed during 1999 is not established by a few faxes from his law office. Plaintiff's account manager, Krim Debbah, testified at his deposition that Attorney Rotondi's firm merely acted as a conduit for payment requests made by Oscar Blandi, plaintiff's principal, or Jack Kaltner, plaintiff's Project Manager. Moreover, Attorney Rotondi himself has represented to the court that he was not involved personally in the day to day affairs of plaintiff.

The court rejects defendant's argument that Attorney Rotondi's deposition is necessary because the invoices attached to the fax transmissions are the "sole evidence of payment" relating to alterations for which plaintiff seeks reimbursement. Attorney Rotondi maintains that the subject faxes were not submitted to him or his firm for approval or otherwise reviewed by him or his firm. Similarly, just because Krim Debbah referred and relied upon spreadsheets during the course of his deposition does not make Attorney Rotondi's deposition is necessary, either.

With regards to the defendant's motion to compel the production of certain documents, the defendant has not identified any demand that it made for the production

of the "corporate organizational records of Oscar Blandi Salon Inc. and/or Oscar Blandi at the Plaza Inc. including the names of the officers and directors of each entity."

Nonetheless, plaintiff does not argue that the corporate organizational documents are irrelevant. Rather, plaintiff relies on the technical argument that without a demand, an order compelling a response is not warranted.

While plaintiff is correct, in order to keep this case on track, the court deems the motion to serve as a demand for the aforementioned discovery. CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407.

Here, it is undisputed that on or about April 16, 2009, plaintiff "produced documents demonstrating that Oscar Blandi at the Plaza, Inc. incurred approximately 50% of the costs incurred for alterations at the plaintiff's salon." The defendant thereafter requested plaintiff to produce its corporate records and the corporate records for Oscar Blandi at the Plaza, Inc. By letters dated May 13, 2009 and June 1, 2009. The court cannot find that the requested information is not material, necessary or likely to sharpen the issues. Nor is this demand seemingly calculated to delay this case.

Accordingly, defendant's motion is granted only to the extent that the court hereby orders plaintiff to respond to defendant's demand for "corporate organizational records of Oscar Blandi Salon Inc. and/or Oscar Blandi at the Plaza Inc. including the

names of the officers and directors of each entity" within thirty days from the date of this decision. The motion is otherwise denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the defendant's motion is granted only to the extent that the plaintiff is directed to respond to defendant's demand for "corporate organizational records of Oscar Blandi Salon Inc. and/or Oscar Blandi at the Plaza Inc. including the names of the officers and directors of each entity" within thirty days from the date of this decision; and it is further


ORDERED that the motion is otherwise denied.

Any requested relief not otherwise expressly addressed herein has nonetheless been considered by the court and is hereby expressly denied.

This constitutes the decision and order of the court

Dated: New York, New York
September 21, 2009

So Ordered:



Hon. Judith J. Gische, JSC

FILED

SEP 23 2009

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NEW YORK