

Todd Rotwein, D.P.M., P.C. v Nader Enters., LLC

2010 NY Slip Op 31031(U)

April 14, 2010

Supreme Court, Nassau County

Docket Number: 454/08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
TODD ROTWEIN, D.P.M., P.C.,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 454/08
Motion Seq. No: 5
Submission Date: 3/24/10**

**NADER ENTERPRISES, LLC and REZA
NABAVINEJAD a/k/a REZA NABAVI,**

Defendants.

-----x

The following papers have been read on this motion:

- Order to Show Cause, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendants Nader Enterprises, LLC (“LLC”) and Reza Nabavinejad a/k/a Reza Nabavi (“Reza”) (collectively “Defendants”) on February 18, 2010 and submitted on March 24, 2010. For the reasons set forth below, the Court denies Defendants’ motion and directs Nader Nabavinejad (“Nader”) to testify at a deposition at the offices of Defendants’ counsel located at Suite 420, One Old Country Road, Carle Place, New York 11514, or at another location agreed upon by the parties, on or before May 28, 2010. If Nader does not appear for his deposition as directed, the Court will entertain an application by Plaintiff for dismissal of the action or sanctions against Defendants.

BACKGROUND

A. Relief Sought

Defendants seek an Order 1) granting an “order of protection” in favor of Nader Nabavinejad (“Nader”) from testifying at a deposition because he currently resides in Iran; or,

alternatively 2) permitting Nader to respond to specific written interrogatories, or permit Defendant to produce another member of the LLC to be deposed.

Plaintiff Todd Rotwein, D.P.M., P.C. ("Plaintiff") opposes Defendants' application.

B. The Parties' History

This action involves Plaintiff's breach of lease claim against Defendants with respect to property located at 131 Fulton Avenue, Hempstead, New York ("Premises"). Plaintiff filed its Amended Verified Complaint ("Complaint") (Ex. A to O'Hara Aff.) on or about March 7, 2008 which contains allegations regarding Defendants' alleged breach of the parties' lease agreement by, *inter alia*, failing to provide heat and elevator service. The Complaint contains six (6) causes of action: 1) breach of the lease contract against the LLC, 2) constructive eviction against the LLC, 3) breach of the warranty of quiet enjoyment against the LLC, 4) creation of a nuisance against the LLC, 5) fraudulent inducement against Reza based on his alleged misrepresentations that he was using his own money to modernize the Premises and fill its vacant tenancies on which Plaintiff relied to its detriment, and 6) for a permanent injunction against the LLC requiring specific performance under the applicable lease and rider until Plaintiff is able to remove its business from the Premises.

On February 6, 2009, the Court (Austin, J.) signed a Preliminary Conference Stipulation and Order ("PC Order"). That Order directed Defendant to serve an Answer to Amended Complaint by February 13, 2009. Defendants thereafter served their Amended Verified Answer and Verified Counterclaims which is dated February 17, 2009. Plaintiff then served its Verified Answer to Counterclaim with Affirmative Defenses on or about March 5, 2009.

By Order dated September 2, 2009 ("Prior Decision"), the Court denied Plaintiff's motion, pursuant to CPLR § 3126, for an Order, *inter alia*, imposing penalties on Defendants for their failure to comply with their discovery obligations. In the Prior Decision, although Plaintiff had demonstrated that Defendants did not comply with their discovery obligations in a timely manner, the Court considered the fact that substitute counsel had recently entered this case on behalf of Defendants in denying Plaintiff's motion for sanctions.

Counsel for Defendants provides an Affirmation in Support dated February 17, 2010 in which he affirms as follows:

Reza, appearing on behalf of himself and the LLC, was deposed at length by Plaintiff's counsel on October 15, 2009. Reza testified, *inter alia*, that 1) he was the manager of the Premises; and 2) he was the individual that Todd Rotwein ("Rotwein") communicated with

regarding all aspects of his tenancy.

The deposition of Rotwein took place on November 16, 2009. At that time, counsel for Defendants advised Plaintiff's counsel that Nader, one of the principals of the LLC, was residing in Iran with his wife. Plaintiff's counsel placed the following statement on the record (Ex. A to Goldklang Aff.):

We will adjourn it [the deposition of Nader] without a date. I will get to you a writing of what I need from him in order to avoid him having to come in here to be deposed and we will try to resolve it without bring [sic] him in. At that point if we can do that, I will withdraw my application to have him deposed.

Following Rotwein's deposition, Plaintiff's counsel served discovery demands to which Defendants responded. At a conference before the Court, Plaintiff's counsel requested the deposition of Nader and the Court directed that a videotaped deposition be conducted. Counsel for Defendants contacted Reza who advised him that he was having difficulties speaking with Nader, his son, "based upon the current political climate in Iran" (Goldklang Aff. at ¶ 2). Defendants' counsel asked Plaintiff's counsel instead to 1) prepare interrogatories for Nader to answer; or, alternatively, 2) conduct the deposition of a different member of the LLC. Plaintiff's counsel rejected these alternatives, stating that Nader's deposition was necessary because of the numerous conversations between Nader and Plaintiff regarding the Premises and the tenancy.

Defendants' counsel provides excerpts of Rotwein's deposition testimony in support of Defendants' assertion that Nader's deposition is unnecessary. That testimony (Ex. B to Goldklang Aff.) was as follows:

Q: Other than [Reza], had you ever spoken to anyone else at Nader Enterprises during your tenancy there?

A: I did meet his son.

Q: When you say you met him, on one occasion?

A: Two or three occasions.

Q: Two or three occasions between 2002 and when you left the premises in 2008?

A: Yes.

Q: What were the circumstances when you met him, was it, you know, to say hello or was there a specific reason, did you have a meeting with him or something else?

A: Just to talk with him about the building.

Q: And when were these occasions that you spoke with his son and had meetings with him about the condition of the building?

A: When he first purchased the building and when I was discussing the proposed construction - -

Q: In 2004?

A: In 2000 - - the end of 2003, beginning of 2004.

Q: Any other times that you could recall or was that it?

A: That was it.

Following the questioning of Rotwein by Defendants' counsel, Plaintiff's counsel posed several questions to Rotwein, his client, who testified as follows (Ex. C to Goldklang Aff.):

Q: From the time around when you moved into the premises and while you had a lease with the Defendant, you stated that you spoke to Nader several times?

A: That's correct.

Q: How many times did you speak to him?

[Defendants' Counsel]: Note my objection to questions that have been asked and answered.

[Plaintiff's Counsel]: No, just to clarify what he may have misunderstood.

A: I spoke to Nader three times from what I remember, I - -

Q: When was the first time?

A: The first time when his father was looking to purchase the building and they both came in and the father said to me - -

Q: When was the last time you spoke to him?

A: The last time - -

Q: What date?

A: I believe in December of 2003

Plaintiff's counsel submits an Affirmation in Opposition dated March 5, 2010 in which

he affirms as follows:

Despite Defendants' claims to the contrary, Nader has relevant information that no other representative of the LLC possesses and, therefore, his deposition is essential. Plaintiff provides the deposition testimony of Reza (Ex. D to O'Hara Aff.) in support, including the following:

Q: Are you an owner of [the LLC]?

[Defendants' counsel]: What do you mean an owner of the LLC?

Q: Do you have an equity interest in [the LLC]?

[Defendants' counsel]: Do you understand the question?

A: Not understand. Nader Enterprises for this corporation [sic]?

Q: Right, who owns that corporation?

A: Nader, my son.

Q: You do not own it?

A: Nader, not - -my son is corporation name [sic].

Q: I'm asking who owns the corporation?

A: My son Nader.

Reza Tr. at p.13

Q: So what are your connections to [the LLC]?

A: Help management.

Q: Tell me when you say help management, who is the management of [the LLC]?

A: Nader is.

Q: Who is Nader?

A: It's my son.

(Reza Tr. at p. 15)

Q: Did there come a time that you had a discussion with [Rotwein] regarding the lease?

[Defendants' counsel]: When you say the lease, can - -

Q: Regarding a lease.

A: My son speak with him, not me.

Q: You never spoke to him?

A: He make a contract with him.

Q: Before Todd Rotwein entered into a lease on the part of [Plaintiff], before that time, did you ever meet with Todd Rotwein to discuss his remaining a tenant in the building?

A: Exactly I don't remember. My involved with him he make the contract with him [sic].

(Reza Tr. at pp. 21-22)

Q: Nader your son was the manager of the building owned by [the LLC]?

A: Yes.

(Reza Tr. at p.24)

C. The Parties' Positions

Defendants submits that a protective order is appropriate because Nader's deposition is unnecessary. Defendants argue that 1) in light of Rotwein's testimony that he dealt exclusively with Rez regarding tenant complaints, rent payments and necessary repairs, the testimony of Nader would not be material and necessary; 2) Rotwein's own testimony does not support Plaintiff's claim that Nader made certain representations to him; 3) the testimony supports the inference that on those occasions that Rotwein spoke with Nader, Reza was with him and, the Court surmises, therefore Reza would be able to provide relevant testimony regarding those conversations; and 4) Defendants have offered to send written interrogatories to Nader or produce another member of the LLC to be deposed.

Plaintiff submits that the Court should deny Defendants' motion for a protective order, arguing that 1) at a conference on February 2, 2010, the Court ordered that Nader appear for a videotaped deposition on behalf of the LLC; 2) Nader is the only person identified in this action who has knowledge regarding the LLC's operations; 3) the LLC owns the Premises that is the subject of the suit; 4) the LLC has appeared in this action and asserted counterclaims against

Plaintiff in which it alleges that Plaintiff was in default of the lease agreement and seeks an award of possession of the Premises (Ex. C to O'Hara Aff.); and 5) Defendants have not demonstrated that the deposition of Nader would cause them undue hardship or constitute harassment.

RULING OF THE COURT

CPLR § 3101(a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. *See Allen v. Cromwell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Quevedo v. Eichner*, 29 A.D.3d 554 (2d Dept. 2006). The Court of Appeals in *Allen, supra*, held that “[t]he words ‘material and necessary’ are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Id.* *See also Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 746 (2000); *Spectrum Systems International Corporation v. Chemical Bank, supra*; *Parise v. Good Samaritan Hosp.*, 36 A.D.3d 678 (2d Dept. 2007). This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. *Spectrum Systems*, 78 N.Y.2d at 376, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. paragraphs 3101.01-3101.03.

CPLR § 3103(a) provides that “a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.” The CPLR also establishes three categories of protected materials, also supported by policy considerations: 1) privileged matter, which is immune from discovery pursuant to § CPLR 3101(b), 2) attorney's work product, which is also immune from discovery pursuant to CPLR § 3101(c), and 3) trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means, pursuant to CPLR § 3101(d)(2). *Spectrum Systems*, 78 N.Y.2d at 376-377. The burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed and its application must be consistent with the purposes underlying the immunity. *Id.* at 377.

A party seeking discovery from a nonparty witness must show special circumstances.

Tannenbaum v. Tannenbaum, 8 A.D.3d 360 (2d Dept. 2004), quoting *Lanzello v. Lakritz*, 287 A.D.2d 601 (2d Dept. 2001); *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 334 (2d Dept. 1988). A party does not establish the existence of special circumstances merely by showing that the information sought is relevant. A party can establish special circumstances by establishing that the information sought cannot be obtained through other sources. *Tannenbaum v. Tannenbaum*, supra, citing *Murphy v. Macarthur Holding B.*, 269 A.D.2d 507 (2d Dept. 2000). See also *Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725 (2d Dept. 2006).

The case of *Rodriguez v. Infinity Insurance*, 283 A.D.2d 969, 970 (4th Dept. 2001) is instructive on the issue of hardship. In *Rodriguez*, the plaintiffs, who were Mexican seasonal farm workers, commenced an action seeking damages from the individual defendants for personal injuries sustained when the motor vehicle in which they were passengers overturned. *Id.* at 969. The plaintiffs also sought damages from the defendant insurer for breach of contract based on its failure to pay no-fault benefits. *Id.* The plaintiffs left New York a few months after the accident and moved for a protective order when defendants demanded that they appear for depositions. *Id.* The plaintiffs requested telephonic depositions, written interrogatories or depositions within one week of the trial, to avoid alleged hardship or expense. *Id.* The Court held that the trial court had not abused its discretion in denying plaintiffs' motion, concluding that the pleadings and attorney's affidavit contained only conclusory allegations of hardship. *Id.* at 970.

Of course, Nader is not a named party here, unlike the plaintiffs in *Rodriguez*. Nevertheless, the principles in *Rodriguez* regarding hardship are applicable. Indeed, the Court is not persuaded by Defendants' conclusory assertion that Reza has had difficulty speaking with Nader, his son, "based upon the current political climate in Iran." Moreover, special circumstances exist for the deposition of Nader in light of 1) deposition testimony that there were conversations between Rotwein and Nader about the Premises that may be relevant both to Plaintiff's claims and Defendants' counterclaims, 2) testimony that Nader was the manager of the LLC, and 3) Reza's testimony, which appears both confusing and evasive at times, thereby suggesting that Nader's testimony is necessary to flesh out the relevant conversations between Rotwein and Nader regarding the Premises. Accordingly, the Court concludes that Plaintiff has established the need for the discovery sought, as well as special circumstances warranting the deposition of Nader.

In light of the foregoing, the Court 1) denies Defendants' motion for a protective order;

and 2) directs Nader Nabavinejad to testify at a deposition at the offices of Defendants' counsel located at Suite 420, One Old Country Road, Carle Place, New York 11514, or at another location agreed upon by the parties, on or before May 28, 2010. The Court is mindful that Defendants have been delinquent in the past with respect to their discovery obligations and hereby advises the parties that if Nader does not appear for his deposition as directed, the Court will entertain an application by Plaintiff for dismissal of the action or sanctions against Defendants.

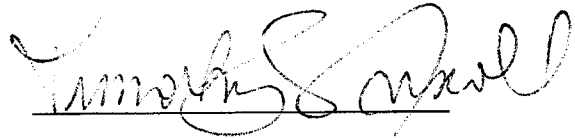
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Certification Conference on June 16, 2010 at 9:30 a.m.

DATED: Mineola, NY
April 14, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
APR 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE