

<b>Retamozzo v Friedland</b>
2010 NY Slip Op 32799(U)
October 7, 2010
Supreme Court, New York County
Docket Number: 113920/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_

PART 10

Index Number : 113920/2009  
 RETAMOZZO, ARMAND  
 vs.  
 FRIEDLAND, DIANA  
 SEQUENCE NUMBER : 001  
 COMPEL

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

**FILED**  
OCT 08 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 10/7/10

J. G.  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x

ARMAND RETAMOZZO,

Plaintiff,

-against-

DIANA FRIEDLAND (In her individual capacity),  
MICHELLE MIRANDA (In her individual capacity),  
JASON QUINONES (In his individual capacity),  
MANUEL CHAPARRP (In his individual capacity),  
BRIAN MURPHY (In his individual capacity), and  
MICHELE DONEY (In her individual capacity),

Defendants.

-----x

**DECISION/ORDER**

Index No.: 113920/09

Seq. No.: 001

**Present:**

Hon. Judith J. Gische

J.S.C.

**FILED**  
**OCT 08 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

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

<b>Papers</b>	<b>Numbered</b>
Def Quiniones & Chaparro's n/m (compel) w/CGG affirm, exhs . . . . .	1
Pltf's x/m w/AR affid . . . . .	2
Pltf's opp w/AR affid, exhs . . . . .	3
Def Quiniones & Chaparro's opp w/CGG affirm, exh . . . . .	4

*Upon the foregoing papers the court's decision is as follows:*

In the underlying action, plaintiff, *pro se*, asserts causes of action against defendants for, *inter alia*, defamation, assault, battery, false imprisonment, and intentional infliction of emotional distress. Defendants, Jason Quinones ("Quinones") and Manuel Chaparro ("Chaparro"), who are jointly represented, now move, *inter alia*, to compel plaintiff to respond to certain discovery demands and appoint a judicial hearing officer ("JHO") to oversee discovery.

Plaintiff opposes defendants' motion and cross-moves, seeking a default judgment against Quinones and Chaparro for failure to file an answer to the amended complaint, sanctions, and failure to respond to plaintiff's interrogatories and document demands.

Plaintiff commenced this action by filing a verified amended complaint on January 19, 2010. Quinones and Chaparro answered the complaint. On or about March 1, 2010 they served interrogatories and document demands. On March 25, 2010, plaintiff responded to Quinones and Chaparro's discovery demands with 3 pages of general objections without substantively providing any of the information requested.

The parties appeared before this court for a preliminary conference on May 6, 2010. At that time, plaintiff was directed to substantively respond to the March 1, 2010 interrogatories within 60 days and appear for deposition on September 13, 2010. The court also directed that plaintiff provide defendants with certain authorizations. In addition, at the conference, plaintiff served document demands and interrogatories upon Quinones and Chaparro. On June 2, 2010 Quinones and Chaparro served their objections and/or answers to plaintiff's discovery demands.

Plaintiff claims that he unsuccessfully called Quinones and Chaparro's attorney on July 4, 2010 (Sunday) and appeared with a process server to present documents at the attorney's office on July 5, 2010 (Monday), but the office was closed for the July 4<sup>th</sup> holiday. Quinones and Chaparro's denies the communications. In any event, there is no dispute that Quinones and Chaparro have not yet received the court ordered discovery.

Since this motion was returnable on September 1, 2010, plaintiff's EBT did not proceed as scheduled, but was suspended. CPLR § 3103 (b).

### **Discussion**

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "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." Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 (1968).

There are, however, three categories of matters protected from disclosure. They are privileged matters which are absolutely immune from discovery (CPLR § 3101[b]); attorney's work product, also absolutely immune; and 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 (CPLR § 3101[d][2]; Spectrum Systems Intern. Corp. v. Chemical Bank, 78 N.Y.2d 371 [1991]).

### Quinones and Chaparro's Motion

Quinones and Chaparro move to compel plaintiff to answer interrogatories # 29 and 30 in their request for interrogatories dated March 1, 2010. Both of these questions address specific allegations made by plaintiff in the complaint that defendants made false statements. Since this information is "useful" to the defendants, plaintiff shall answer them no later than **20 days** of the date of this decision/order.

### *B. Document Demands*

Quinones and Chaparro move to compel plaintiff to produce documents and audio recordings pursuant to demands # 1-12, 14-15 and 21-76 of their demand for documents dated March 1, 2010. Upon reviewing Quinones and Chaparro's document demands, the court hereby orders plaintiff to provide documents, materials, and items in accordance with demands # 1, 3-10, 12, 14, 15 and 21-76, as they are directly derived from allegations contained in the complaint. Document demands # 2 and 11 are overly broad and vague, they are stricken and plaintiff does not have to answer them.

Plaintiff shall provide Quinones and Chaparro's attorney with the original documents, in accordance with this decision, no later than **20 days** from the date of this decision/order. Quinones and Chaparro are to make copies of the documents received and then return all original documents to plaintiff no later than **5 days** thereafter.

*C. Authorizations*

Quinones and Chaparro move to compel plaintiff to provide defendants with a HIPAA authorization for the release of psychiatric, psychological and mental health treatment records from the Zucker Hillside Hospital, Long Island Jewish Medical Center, in the form provided by Quinones and Chaparro, requiring plaintiff to initial that records relating to mental health information and drug/alcohol treatment should be released.

The court hereby directs plaintiff to sign a completed HIPAA authorization, in the form provided by defendants, indicating that the following information shall be released: (1) release of medical records from 11/10/2005 to 11/10/2011 (3 years prior to and after the time of incident); (2) entire medical record, including patient histories, office notes

(except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers; (3) other: including psychiatric and psychotherapy treatment notes.

Plaintiff is further directed to place his initials next to "alcohol/drug treatment" and "mental health information." The date or event on which the authorization will expire is "end of litigation." Quinones and Chaparro are to provide plaintiff with the HIPAA form for signature no later than **10 days** of the date of this decision/order. Upon receiving the form, plaintiff is directed to sign, initial, and date the form in the appropriate locations and then mail the completed form to Quinones and Chaparro's attorney, no later than **20 days** of the date of this decision/order.

*D. Appoint Judicial Hearing Officer ("JHO")*

Quinones and Chaparro move to appoint a JHO to supervise discovery and to be present at plaintiff's deposition. Plaintiff does not object to this request, and due to the fact that plaintiff is *pro se* and this case has already had a rocky start to discovery, the court grants defendants' motion to appoint a JHO or a special referee to supervise discovery and plaintiff's deposition.

*E. Deposition*

Plaintiff shall appear for his deposition on a date to be set by the JHO ultimately assigned to supervise discovery.

*F. Audio Recordings*

Quinones and Chaparro argue that plaintiff has a habit of recording conversations between plaintiff and defendants' counsel and should be instructed not to

do so.

“Mechanical overhearing of a conversation” is defined as the “intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” Penal Law § 250.00[2]; People v. Clark, 19 Misc.3d 6 (2008). CPLR § 4506 bars the use of eavesdropping evidence obtained by private individuals in violation of Penal Law § 250.05, as there is a strong public policy of protecting citizens against eavesdropping. See People v. Capolongo, 85 N.Y.2d 151 (1995).

The situation defendants described does not fall within the definition of eavesdropping, since one party has consented to the recording (i.e.- plaintiff). However, for purposes of transparency in the discovery process, the court hereby directs that plaintiff notify opposing counsel, or any other party to this litigation, when he is using a recording device. Plaintiff shall not sue any kind of recording device while in court or during depositions.

#### Plaintiff's Cross-Motion

##### *A. Timeliness of Cross-Motion*

Quinones and Chaparro contend that plaintiff's opposition papers and cross-motion are untimely and should, therefore, not be considered. Even though plaintiff's cross-motion and opposition papers are untimely, they have been addressed by the defendants on the merits, and we will likewise address plaintiff's cross-motion and opposition papers on the merits.

##### *B. Default Judgment*

Plaintiff cross-moves pursuant to CPLR § 3215, seeking to enter a default judgment against Quinones and Chaparro for failure to file an answer to plaintiff's verified amended complaint. "A defendant appears by *servicing* an answer or a notice of appearance. . . within twenty days after service of the summons . . ." CPLR § 320(a) (emphasis added). Plaintiff does not allege that Quinones and Chaparro failed to *serve* an answer, only that they failed to *file* an answer with the county clerk's office. The court, therefore, denies plaintiff's cross-motion for a default judgment against Quinones and Chaparro.

*C. Plaintiff's Interrogatories and Document Demands*

Plaintiff cross-moves to compel Quinones and Chaparro to respond to plaintiff's first set of interrogatories and document demands dated May 6, 2010, specifically, for Quinones to respond to interrogatories # 1, 2, 4-6, 7(a), 8(a), 9(a), 10, 14, 15(a)-(j), 15(l), 16(c), 17, 18(a), 19(a), 20-26, and 28-41 and document demands # 1-8; and for Chaparro to respond to interrogatories # 1-7, 8(a), 10, 11, 14-17, 18(a), 19(a), 20(a), 21-25, and 27-41 and document demands # 1-8.

Upon reviewing Quinones' response to plaintiff's first set of demands, the court finds that Quinones has already provided sufficient responses to interrogatories # 1, 2, 7(a), 8(a), 9(a), 14, 15 (a), (b), (d), (e), (f), (g), (h), (i), (l), 16(c), 17, 18(a), 19(a), 20, 21, 25, 28, 29, 30, and 37. Interrogatories # 4, 5, 6, 10, 31, 32, 33, 34, 35, 36, 38, 39, and 40 are irrelevant do not need to be answered; and interrogatories # 15(a), (b), (c), (j), 22, 23, 24, 25, 41 are vague and overly broad and do not need to be answered. Quinones has already provided sufficient responses to document demands # 1, 4, 7,

and 8. Document demand # 2 is irrelevant; # 3 and 6 are vague and overly broad; and # 5 is generally confidential, unless it pertains to a particular area put into controversy by Quinones.

Upon reviewing Chaparro's response to plaintiff's first set of demands, the court finds that Chaparro has already provided sufficient responses to interrogatories # 1, 2, 3, 7, 8(a), 10, 11, 14, 15, 16, 17, 18(a), 19(a), 20(a), 24, 27, 28, 29, and 36. Interrogatories # 4, 5, 6, 30, 31, 32, 33, 34, 35, 37, 38, 39 and 41 are irrelevant and are stricken; and interrogatories # 21, 22, 23, 25 and 40 are vague and overly broad and are also stricken. Chaparro has already provided adequate responses to document demands # 1, 4, 7, and 8. Document demand # 2 is irrelevant; # 3 and 6 are vague and overly broad; and # 5 is generally confidential, unless it pertains to a particular area put into controversy by Chaparro.

#### *D. Sanctions*

Plaintiff seeks sanctions against Quinones and Chaparro for willful default and abuse of the discovery process. CPLR § 3126 provides for sanctions for refusal to comply with an order to provide discovery. Here, there is no indication that Quinones and Chaparro willfully defaulted and/or abused the discovery process. Quinones and Chaparro either responded or objected to all of plaintiff's interrogatories and discovery demands. Therefore, the court denies plaintiff's cross-motion for sanctions against Quinones and Chaparro.

#### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendant, Quinones and Chaparro's motion to compel discovery is granted in the manner and to the extent provided; and it is further

**ORDERED** that plaintiff's cross-motion for a default judgment and for discovery sanctions is denied; and it is further

**ORDERED** that defendant, Quinones and Chaparro are to serve a copy of this decision/order on the Office of the Special Referee within the next 30 days so that a JHO or special referee can be assigned; and it is further

**ORDERED** that any relief requested but not specifically addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
October 7, 2010

So Ordered:



HON. JUDITH J. GISCHE J.S.C.

**FILED**

OCT 08 2010

COUNTY CLERK'S OFFICE  
NEW YORK