

**Matter of Martinez v Weinberg-Brod**

2010 NY Slip Op 32952(U)

October 12, 2010

Supreme Court, New York County

Docket Number: 110048/2008

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 110048/2008  
**MARTINEZ, MANUEL**  
 VS.  
**WEINBERG-BRODT, CHAYA F.**  
 SEQUENCE NUMBER : 002  
 COMPEL

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for Compel

PAPERS NUMBERED

1, 2, 3

4

5

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

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

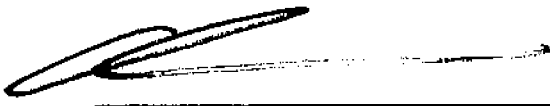
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *to compel by petition*  
*is denied in accordance with the attached*  
*memorandum decision.*

**FILED**  
OCT 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/12/10



**HON. DORIS LING-COHAN** 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- NEW YORK COUNTY  
PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

In the Matter of the Application of  
MANUEL MARTINEZ,

DECISION/ORDER

Petitioner,

For an Order taking the deposition of  
Chaya F. Weinberg-Brodth and Withers  
Worldwide a/k/a Withers Bergman, LLP

Index No.: 110048/2008

Respondents,

For use in an action pending in the Eleventh Judicial  
Circuit Court of Miami-Dade County, Florida entitled

Manuel Martinez v. Atlantis Properties, Inc. et al.  
Civil Action No.: 07-14636 CA 06

Motion See: 02

**FILED**

OCT 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE

LING-COHAN J.:

BACKGROUND

Before this court is petitioner Martinez's motion to compel certain non-party disclosure and compliance with *subpoena duces tecum* and *ad testificandum* pertaining to a case pending in the Circuit Court of Miami, Dade County, Florida, titled *Martinez v. Atlantis Properties, Inc., et al.*, in which a Justice of this court merely issued an *ex parte* order on July 25, 2008, pursuant to CPLR 3102(e), effectuating a Florida court order directing certain non-party discovery pertaining to such Florida action. Although not explicitly authorized in CPLR §3102(e), this type of *ex parte* application is permitted in New York; thus, no pleadings were in fact ever served to commence this case. *See* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7 B, CPLR C3102:9. Thus, upon the signing of the submitted *ex parte* order, the application was resolved and marked "disposed".

Approximately two years after the signing of such *ex parte* order, without purchasing a new index number or serving pleadings, petitioner Martinez brings this motion

specifically seeking an order pursuant to CPLR 3124: (1) overruling and/or striking respondent's objections to the *subpoena duces tecum* served upon them; (2) compelling respondents to comply with this court's order dated July 25, 2008; (3) compelling Chaya Weinberg-Brodt ("Weinberg-Brodt") to respond to the deposition questions she refused to answer based on the alleged application of the attorney-client and/or work product doctrine; (4) compelling respondents to produce the requested documents as specified in "Schedule A" to the *subpoenas duces tecum*; and (5) compelling David Hirsberg, as the corporate representative of Withers Bergman LLP ("Withers Bergman") with the most knowledge as to the Florida Action, to appear for deposition in New York.

As indicated, no pleadings have been served under this index number. Further, this court was not supplied with a copy of the pleadings filed in Florida. However, from the submissions, it appears that the underlying Florida action was commenced by Manuel Martinez based upon claims for libel, tortious interference with contract and intentional interference with a business relationship, arising in part from a letter dated April 9, 2007 executed by Chaya Weinberg-Brodt, of Withers Bergman, LLP, to AXA Equitable Life Insurance Company ("AXA" & "AXA letter"). Counterclaims have apparently been asserted by the defendants in the Florida action against Martinez for, *inter alia*, breach of fiduciary duty, fraudulent misrepresentation, negligence and accounting. The court reiterates that since the pleadings from the Florida action have not been supplied, this court is unable to verify the assertions made by counsel in the within papers.

The AXA letter appears to have originated out of Withers Bergman, LLP's (a Delaware limited liability partnership) New York office, regarding Martinez who resides in Florida. Martinez maintains that the letter contains various unsupported allegations which damaged Martinez's reputation. The letter was written on behalf of Carmela A. Burillo ("Burillo"), a citizen and resident of Mexico, approximately 81 years of age, alleging misconduct by Martine (a resident of Florida), an insurance agent for Burillo. [Rhodes Affidavit in Opposition, ¶16 & Exh. 13, at 3]. Carmela Burillo testified during her deposition that she retained attorney David Hirsberg of Withers LLP (a limited liability partnership registered in England), whom she met in Mexico, for the purposes of limiting the amount of money she was paying for life insurance. [Rhodes Affidavit in Opposition, ¶16 and Exhs. 5 & 6]<sup>1</sup>.

The court notes that it is extremely unclear from the submissions the precise legal relationship existing between the law firm of Withers Bergman, LLC (a limited liability partnership registered in Delaware), and Withers LLP (a limited liability partnership registered in England), which both appear to be known as "Withers" and/or "Withersworldwide". [Exh. 10, Rhodes Affidavit in Opposition]. As indicated, Carmela Burillo testified that she hired David Hirsberg of Withers LLP, the limited liability partnership registered in England as her attorney. The AXA letter does not indicate that

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<sup>1</sup> Only limited excerpts from Burillo's depositions have been supplied to this court in the within submissions. [Rhodes Affidavit in Opposition, Exhs. 5 & 6].

[5]

Chaya Weinberg-Brodt is the attorney for Carmela Burillo, but rather that “[t]he firm serves as legal advisors to the Burillo Azoarraga family of Mexico”. [Exh. I, Appendix Containing Decision, Original Motion Papers]. Moreover, at her deposition, Chaya Weinberg-Brodt, despite repeated questioning, did not identify Carmela Burillo as the client for whom the AXA letter was drafted, but rather, ambiguously identifies the “interests of the Burillo, Azoarraga family”, as opposed to an individual, corporation or other legal entity. [Exh. XX at 35, lines 6-7].

#### FLORIDA PROCEDURAL HISTORY

On or about March 3, 2008, plaintiff filed a motion in the Florida action, to appoint a commissioner for the taking of the out-of-state (New York) depositions of Weinberg-Brodt, a lawyer employed by Withers Bergman, as well as the law firm of Withers Bergman, LLP. By order dated April 10, 2008, the Hon. Scott J. Silverman of the Eleventh Judicial Circuit Court, in Miami Dade County, Florida, granted plaintiff's motion for such out-of-state discovery.

Significantly, it is undisputed that, prior to the issuance of the April 10, 2008 order by the Florida court, a hearing was held at which counsel for Weinberg-Brodt and Withers Bergman affirmatively appeared to object to the appointment of such a commissioner for the taking of their depositions. Despite the objections made by counsel for Weinberg-Brodt and Withers Bergman, the Florida court granted Martinez's motion for the out-of-state discovery, which adjudicated the same issues which are the subject of this motion.

As detailed further in this decision, the Florida court entertained a subsequent motion on discovery issues similar to the instant motion.

NEW YORK PROCEDURAL HISTORY AND THE SUBSEQUENT FLORIDA COURT DISCOVERY MOTION ON THE SAME ISSUES

On or about July 22, 2008, in order to effectuate the April 10, 2008 Florida court order with respect to out-of-state discovery, and in accordance with CPLR §3102(e), an *ex parte* order was submitted in this court, *for the limited purpose* of taking the depositions of Weinberg-Brodth and Withers Bergman. On July 24, 2008, the Hon. John E.H. Stackhouse of this court, signed the submitted *ex parte* order for the taking of the depositions of Weinberg-Brodth and the “[p]erson with the [m]ost [k]nowledge of the Florida [a]ction employed by Withers Bergman, LLP”.<sup>2</sup>

On or about August 14, 2008, Weinberg-Brodth and Withers Bergman responded to the subject subpoenas, with objections. In response thereto, in Florida, on or about October 28, 2008, plaintiff Martinez filed an emergency motion in the Florida action to compel discovery against Weinberg-Brodth and Withers Bergman, as non-parties. This court, however, has not been supplied with a copy of the decision rendered by the Florida court on such emergency motion to compel which contains many of the issues presented herein.

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<sup>2</sup> A summons and complaint were not filed in this case, as the case was commenced merely to effectuate a Florida court order directing certain non-party discovery pertaining to the Florida action. Thus, upon the signing of the submitted *ex parte* order, this case was marked “disposed”.

[\*7]

In fact, in the affidavit submitted by Weinberg-Brodt and Withers Bergman in opposition to the within motion, their counsel states that “[w]hile the Florida Court announced that it would issue a ruling on the motion to compel, upon information and belief, the Florida Court has not yet done so.” [Rhodes Affidavit, ¶13]. In the within application before this court, movant Martinez seeks essentially the same relief as it sought in Florida, when the issues pertain solely to the Florida pending action.

On or about October 30, 2008, the deposition of Chaya Weinberg-Brodt was conducted and documents responsive to the subpoenas were supplied. However, it appears that the New York deposition of Withers Bergman, LLP has not yet been conducted, notwithstanding that it was required to be conducted by the Florida Court in its April 10, 2008 order.

#### DISCUSSION

After almost two years had passed from the signing of the *ex parte* order by Justice Stackhouse, Martinez brings this motion. In seeking the within relief, petitioner Martinez maintains that the discovery at issue is necessary, material and relevant to Martinez’s claims and defenses to the counterclaims in the Florida action, not protected by the attorney-client privilege and/or work-product doctrine, and that the information is within respondents’ custody, possession and control and therefore should be produced.

According to Martinez, the information sought from Weinberg-Brodt and Withers Bergman pertains to the circumstances surrounding the AXA letter (including the reasons

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for the letter, the factual circumstances leading up to the letter, who authored the letter, and who authorized the sending of such letter to AXA), and is relevant to both Martinez's claims and the asserted counterclaims in the Florida action.

In opposition, respondents maintain that the discovery at issue is irrelevant, harassing, privileged, work-product, has already been produced and/or is not in respondents' possession, but rather in the possession, custody or control of the Geneva offices of Withers LLP, a limited liability partnership registered in England and Wales.

As a preliminary matter, notwithstanding the request by both sides to determine whether the discovery at issue is relevant to the Florida case, as indicated, neither side has supplied the pleadings of the Florida case, and therefore, this court would improperly be speculating as to relevancy of any disputed discovery.

As stated, the subpoenas served upon Weinberg-Brodts and Withers Bergman were served pursuant to CPLR §3102(e)<sup>3</sup> and in accordance with the Florida court order specifically

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<sup>3</sup> CPLR 3102(e) provides in relevant part, as follows:

“Action pending in another jurisdiction: When under any mandate, writ or commission issued out of any court of record in any other state...it is required to take the testimony of a witness in the state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court...shall make any appropriate order in aid of taking such deposition”.

directing such non-party discovery in connection with the Florida action, after a hearing was held, at which counsel for Weinberg-Brodt and Withers Bergman appeared, and such discovery was ordered over their objections. Presumably, as they affirmatively appeared in the Florida action, Weinberg-Brodt and Withers Bergman raised, or had an opportunity to raise, the same arguments in Florida as they have herein. Nonetheless, the Florida court issued an order directing such discovery. Further, a motion as to these issues was subsequently filed by Martinez in the Florida court. Thus, it would be improper for this court to substitute its judgment when Florida is most familiar with the facts and issues involved in the pending Florida case, particularly since Weinberg-Brodt and Withers Bergman affirmatively appeared in the Florida court to raise the same arguments. Such Florida court has been dealing with the underlying case since approximately 2007, and is most familiar with the issues and facts involved. Moreover, the Florida court has the benefit of the underlying pleadings, which this court does not, to determine the relevancy of the disputed discovery.

Furthermore, when a matter is before a New York court pursuant to CPLR §3102(e), “the extent of the supervision exercised by the courts of this State over disclosure obtained pursuant to a commission is necessarily narrow”. *Jarvis v. Jarvis*, 141 Misc 2d 404 (Sup Ct, New York County 1988). As made clear by the Appellate Division, First Department, the New York state court’s “inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102(e) is limited to determining (1) whether the witnesses’ fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues

of the pending out-of-[s]tate action; and (3) whether the examination is fair". *In re Ayliffe & Co. v. Canadian Univ. Ins. Co.*, 166 AD2d 223 (1<sup>st</sup> Dept 1990), *lv denied* 76 NY2d 714 (1990). "The courts 'will not prejudge the materiality or the competency of the evidence in a [case] pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations". *Id* at 224 (citations omitted). Further, "[w]here an examination before trial is conducted pursuant to a commission issued by a foreign court (CPLR 3102(e)), logic requires that all issues regarding the propriety of questions put to the witness be referred to the trial court...Even questions with respect to the scope of discovery are more appropriately determined under the law of the jurisdiction where the matter is to be tried". *Jarvis v. Jarvis*, 141 Misc 2d at 407.

Thus, this court declines to order the requested relief. In addition to the fact that the Florida court has ruled on these issues, and it is undisputed that movant made the same, or similar motion in Florida, neither side has raised facts which require that this court act under the standard articulated by the Appellate Division, First Department, in *In re Ayliffe & Co.*, in that: (1) no "fundamental" rights are alleged to be involved herein; (2) the scope of inquiry falls within the issues of the pending out-of-state action, as such issues were raised in Florida previously; and (3) no allegation has been made that the conduct of the examination was unfair.

As indicated, the parties here "do not argue that their fundamental rights are in any way

violated or that the procedures to be employed, and time and place of the depositions would be prejudicial or unfair". *In re Ayliffe & Co. v. Canadian Univ. Ins. Co.*, 166 AD2d at 224. Further, given that: (1) there is no claim that Burillo is a New York resident; (2) Burillo testified that she retained a law firm registered in England; and (3) the alleged harm, which is the basis of the Florida lawsuit, took place in Florida against a Florida resident, New York's nexus is tenuous.<sup>4</sup>

As stated by the court in *Matter of Shea Gould Climenko & Casey*, 98 Misc 2d 484 (Sup Ct, New York County 1979), any issues raised as to discovery should be decided by the Florida Court:

"Since the trial will be held in [Florida], the admissibility of evidence and rulings in connection therewith (including the asserted claim of privilege) will all be determined at trial by the [Florida] court. Under these circumstances the issue should be determined in accordance with the applicable rules of evidence in [Florida], and the law of [Florida] governing attorney-client privilege. The issue should also be decided upon consideration of the [Florida] law applicable to the extent of discovery. The New York law concerning these matters is irrelevant to the conduct and management of the [Florida] trial".

As this court was merely called upon to assist in implementing a Florida court order directing that discovery related to the Florida action be conducted in New York, any discovery-related request relating to such order, and in particular, determinations as to

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<sup>4</sup> See footnote 5, *infra*.

relevance and materiality are more appropriately heard and resolved by the Florida court where the case is pending and ultimately will be tried. *See Id* at 484; *Jarvis v. Jarvis*, 141 Misc 2d at 407.<sup>5</sup>

Moreover, this court would be speculating as to the relevancy, as neither side has supplied the pleadings pertaining to the Florida action. Thus, the portion of the motion by Martinez which seeks an order: (1) overruling and/or striking respondent's objections to

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<sup>5</sup> The court distinguishes *Bombardier Capital Inc. v. Schoengold Sporn Laitman & Lometti, P.C.*, 46 AD 3d 323 (1<sup>st</sup> Dept 2007) which appears to have carved a narrow exception to *Ayliffe*. In that case, unlike here, the parties did not have a previous opportunity to argue essentially the same issues in the sister-state's court; not only did Weinberg-Brodt and Withers Bergman affirmatively appear in Florida on several occasions to contest the discovery but they failed to move in New York to quash the subject subpoenas. Further, Burillo testified that she retained David Hirsberg of the England based Withers LLP law firm. Burillo also testified that she is a citizen and resides in Mexico, not New York. As indicated above, it is unclear from the submissions the precise relationship of the law firms Withers Bergman, LLP (registered in Delaware) and Withers LLP (registered in England). Moreover, it appears that David Hirsberg, a member of Withers LLP and potentially Withers Bergman, LLP was already deposed in Florida. Also, at her deposition, while testifying that she worked with David Hirsberg with respect to the AXA letter, Chaya Weinberg-Brodt merely identified the client for whom the AXA letter was drafted as the "interests of the Burillo, Azoarraga family", as opposed to an individual, corporation or other legal entity. [Exh. XX at 17, lines 17-23; at 35, lines 6-7]. Additionally, Withers Bergman claims that some of the disputed documents are in the Geneva office of Withers, which appears to be the home office of David Hirsberg. Given the above facts, it is not clear that there is in fact a New York attorney-client privilege to protect. In addition, given that Weinberg-Brodt and Withers Bergman have affirmatively engaged the Florida court on these discovery issues by appearing in the Florida action on several occasions (first to oppose the issuance of commissions and on the subsequent motion brought by Martinez on essentially the same discovery issues), there is no need for this court to act.

the *subpoena duces tecum* served upon them; (2) compelling respondents to comply with this court's order dated July 25, 2008; (3) compelling Chaya Weinberg-Brodt ("Weinberg-Brodt") to respond to the deposition questions she refused to answer based on the alleged application of the attorney-client and/or work product doctrine; and (4) compelling respondents to produce the requested documents as specified in "Schedule A" to the *subpoenas duces tecum* is denied.

The portion of petitioner Martinez's motion which seeks to compel the deposition of David Hirsberg, however, is granted *only to the limited extent that within 30 days of service of a copy of this order with notice of entry*, Withers Bergman shall comply with the subpoena dated July 24, 2008, by producing for deposition in New York the corporate representative of Withers Bergman LLP with the most knowledge as to the Florida action. As the Florida court has already ruled by its order, dated April 10, 2008, that the deposition of Withers Bergman shall be conducted by an individual with the most knowledge of the Florida action<sup>6</sup>, within 30 days, such deposition shall be completed as directed and as required by the *ex parte* order of this court dated July 24 2008, signed by the Hon. Stackhouse and corresponding subpoena. This court will not substitute its

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<sup>6</sup> The court notes that the April 10, 2008 order by the Florida Court granted plaintiff Martinez's motion to appoint a commissioner with little verbeage; however, it is undisputed that plaintiff motion which was granted by the Florida court specifically sought to take the deposition of the "[p]erson with [m]ost [k]nowledge" at Withers Bergman.

discretion for a determination made by the Florida court, relating to a case pending in such court's jurisdiction. *See In re Ayliffe*, 166 AD2d at 224. The court notes that in opposing compliance with the July 24, 2008 subpoena, Withers Bergman does not argue preservation of a fundamental right, fairness or relevance. *Id.*; nor does it appear that Withers Bergman has moved to quash such subpoena. Thus, Withers Bergman shall comply with such subpoena as ordered below.

The court further notes that while petitioner Martinez specifically seeks the deposition of David Hirsberg in the within moving papers, the *ex parte* order, which was the result of the granting by the Florida court of Martinez's motion for non-party discovery, merely requires the deposition of the employee of Withers Bergman LLP with the "[m]ost [k]nowledge of the Florida [a]ction". Moreover, it appears that petitioner Martinez has already conducted a deposition of David Hirsberg in Florida, in conjunction with the Florida action. [See Exh. A, Viniegra Affidavit in Support of Petitioner's Reply, Portion of April 20, 2010 Deposition Transcript of David Hirsberg]. Petitioner does not explain in the within submissions why an additional deposition of David Hirsberg in New York would be warranted. Such application and any further applications, should be addressed by the Florida court.

Accordingly, it is

ORDERED that petitioner's motion to compel is granted only to the extent that within 30 days of service of a copy of this order with notice of entry, Withers Bergman shall comply with the subpoena, dated July 24, 2008, by producing for deposition in New York the corporate representative of Withers Bergman LLP with the most knowledge as to the Florida action, as directed by the Florida Court; and it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon Weinberg-Brodt and Withers Bergman, LLP, as well as all parties in the Florida court action.

Dated: October 12, 2010

  
Doris Ling-Cohan, JSC

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