

Analisa Salon, Ltd. v Elide Prop., LLC

2010 NY Slip Op 33944(U)

October 4, 2010

Sup Ct, Westchester County

Docket Number: 7582/05

Judge: Jeffrey A. Cohen

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED
AND
ENTERED
ON 10-6 2010
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
ANALISA SALON, LTD., d/b/a SUSAN
MARLOWE FIGURE SALON,

Plaintiff,

-against-

ELIDE PROPERTIES, LLC, JACK SEMINARA,
JOHN JAMES ROMEO, CONSTABLE MICHAEL
M. SEMINARA and CONSTABLE KENNETH R.
HERBERT,

Defendants.

FILED

OCT -6 2010

TIMOTHY C. IDONI
COUNTY CLERK

ORDER

Index No.: 7582/05

-----X
ANALISA SALON, LTD., d/b/a SUSAN
MARLOWE FIGURE SALON,

Plaintiff,

-against-

CONSTABLE MICHAEL M. SEMINARA and
CONSTABLE KENNETH R. HERBERT,
Defendants.

Index No.: 19232/05

-----X
COHEN, J.

The following papers numbered 1 to 25 were read on this motion by the defendants, Constable Michael Seminara and Constable Kenneth Herbert (hereinafter to be referred to as the Constables), for an order: (1) compelling a further deposition of plaintiff's expert; (2) compelling plaintiff to respond to defendants' post-deposition discovery demands; and (3) precluding plaintiff from offering any evidence at the time of trial with respect to the damages alleged in the complaint.

Order to Show Cause-Affirmations	1-2
Exhibits	3-21
Affirmation in Opposition	22
Exhibits	23-25

Upon the foregoing papers and upon the oral argument heard on October 4, 2010, this motion is determined as follows:

In this action plaintiff health club claims that the building in which it once operated was improperly sold in deprivation of its right of first refusal. It alleges that as a result of its eviction from the premises, it lost its membership base and profit margin.

According to plaintiff, it agreed to produce its economic expert, Leonard Freifelder, for a deposition, to answer questions about the report he prepared, in the hopes that this would lead to a settlement of this matter. The Constables allege that at no time were they advised that the witness was being produced for limited purposes.

The deposition of plaintiff's economic expert occurred on June 7, 2010. The Constables assert that plaintiff's counsel obstructed their deposition of Mr. Freifelder and directed him not to answer several questions.

Plaintiff's counsel objected to the following lines of inquiry on the basis of "work product":

Page 7, Lines 9-22: The expert who did not produce any documents at his deposition, is asked if anybody instructed him not to bring any documents with him.

Page 13 to 15: The expert is asked if the documents he received in this matter, including pleadings, tax returns, membership forms, etc., were organized in any particular fashion such as by year or by member. The expert is directed not to answer the question.

Page 32, Line 16 to Page 33, Line 6: The expert is asked whether he had prepared a prior draft of a report marked as Defendant's B. The expert is directed not to answer the question.

These questions are not inquiries relating to the attorney's work product (*see generally Spectrum Sys., Intl. Corp. v Chemical Bank*, 78 NY2d 371) or the expert's opinion but rather relate to the expert's investigation of this matter. Plaintiff's objections are overruled and the witness is directed to answer these questions.

Plaintiff's counsel objected to the following lines of inquiry without stating her basis of objection:

Page 41, Lines 20-23: The expert is asked whether there were occasions where he met alone with plaintiff's president. The expert is directed not to answer the question.

Page 47, Line 25 to Page 48, Line 6: After testifying that he did not verify as correct, the information given to him by plaintiff's president, the expert is asked if his analysis would be inaccurate if he had been given inaccurate information. The expert is directed not to answer the

question.

Page 58, Line 11 to Page 59, Line 7: After the expert testifies that certain data was not provided to him he is asked if that is because the plaintiff's record keeping was "so poor". The expert is directed not to answer the question.

Plaintiff's objections are overruled only as to the first two of these three questions and expert is directed to answer them.

Plaintiff's counsel objected to these lines of inquiry on the basis of relevance of the question to the issue of the expert's economic report:

Page 54, Line 19 to Page 55, Line 9: The expert is asked if lost profit is customarily the way a business loss is determined in litigation. The expert is directed not to answer the question.

Page 56, Lines 7-21: The expert is asked whether the National Association of Forensic Economists (of which he is a member) has guidelines regarding the evaluation of lost profits. Again, the expert is directed not to answer the question.

Page 86, Line 20 to Page 87, Line 6: The expert is asked if he ever prepared an economic analysis of a loss based solely on revenue. The expert is directed not to answer the question.

Plaintiff's objections are overruled and the expert is directed to answer the questions.

Generally speaking, pursuant to 22 NYCRR § 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court-ordered limitation, or when the question is plainly improper. Plaintiff's counsel improperly directed the expert not to answer the questions posed, as herein above discussed.

The Constables also seek to compel plaintiff to respond to their Supplemental Discovery Demand dated June 17, 2010, which seeks, among other things, production of the expert's file, and the documents and the data he relied upon to write his report and to calculate plaintiff's alleged damages. Although plaintiff notes that the Discovery Motion Briefing Schedule limits the Constables to seeking an order to compel it to produce its expert for further deposition, upon review of that schedule it is clear that the Constables may seek to compel plaintiff to comply with their post deposition demands.

The right to discovery of an expert is severely limited by CPLR 3101 (d)(1)(iii) and only may be obtained upon a showing of special circumstances a showing not made by the Constables in regards to their request for the production of the economic expert's file.

In view of the foregoing, the Constables' motion is granted only to the extent that

they are entitled to a further deposition of plaintiff's economic expert, Leonard Freifelder, limited to the questions set forth herein above, which the Court has directed the witness to answer.

The witness shall be produced for a further deposition on or before November 5, 2010.

All parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on November 22, 2010, at 9:30 AM.

Dated: White Plains, New York
October 4, 2010



HON. JEFFREY A. COHEN, JSC

To:

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