

**Attorri v Waller**

2011 NY Slip Op 30298(U)

February 3, 2011

Sup Ct, NY County

Docket Number: 601681/09

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 601681/2009

ATTORRI, GREGORY J.

vs

WALLER, JOHN

Sequence Number : 004

PRECLUDE

INDEX NO. 601681/09

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

MOTION SEQ. NO. 004

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

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

15

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

FEB 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 2/4/11



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 15

-----X

GREGORY J. ATTORRI,

Plaintiff,

- against -

JOHN WALLER, WALLER CAPITAL CORP. and  
WALLER CAPITAL PARTNERS,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.  
601681/09

**DECISION  
and ORDER**

Mot. Seq.  
004&005

Plaintiff brings this action against defendants for fraud, breach of contract, and breach of the covenant of good faith and fair dealing based upon alleged misrepresentations made by Defendant John Waller ("Mr. Waller") as to the financial condition of Waller Capital Corp. and Waller Capital Partners (collectively "Waller Capital"). Plaintiff now moves to compel a further deposition of a Waller Capital witness, along with the imposition of sanctions. By separate motion, plaintiff seeks an order directing the deposition of two additional Waller Capital employees. Waller Capital opposes both motions.

Plaintiff alleges that a recruiter, retained by Waller Capital, represented to him that Waller Capital was generating approximately \$15,000,000 in revenue in both 2005 and 2006, and had expenses of approximately \$3,000,000. Based upon his initial discussions with the recruiter, plaintiff had several meetings with Mr. Waller, Chairman of Waller Capital. During those meetings, Mr. Waller allegedly reiterated that the revenues of Waller Capital in both 2005 and 2006 were \$15,000,000, or more and that expenses for the company were approximately \$2,000,000-\$3,000,000. Mr. Waller also provided, at plaintiff's request, a spreadsheet detailing Waller Capital's expenses in 2005. The spreadsheet showed expenses in the amount of approximately \$2,400,000.

**FILED**

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COUNTY CLERK'S OFFICE

Plaintiff alleges that Mr. Waller offered him a compensation package that would include a percentage of profits and share ownership in the company. Plaintiff alleges that, based on Mr. Waller's representations he entered into an employment contract on January 19, 2006. In addition to a base salary, the contract provided for a bonus comprised of 15% of net profits and a 15% share interest in the company. In February 2006, plaintiff joined the firm as "Senior Managing Director" and "Managing Partner."

Plaintiff states that, upon joining Waller Capital, he began to discover that Mr. Waller's representations as to the firm's performance in 2005 and 2006 were false. In fact, once Plaintiff had organized the firm's "pipeline" reports, which tracked projects and revenues, he discovered that the firm's actual revenues were only a small fraction of the \$15,000,000 for both 2005 and 2006. After approaching Mr. Waller with these discrepancies, Mr. Waller agreed to increase Plaintiff's equity participation to 25%, and increase his bonus to 25% of net profits. Additionally, plaintiff was promoted to President and Chief Operating Officer.

Plaintiff further alleges that, in 2007, he was able to review Waller Capital's true expenses, at which time he discovered that the firm's expenses were significantly higher than previously represented. At this point, Plaintiff states that he and Mr. Waller conflicted over the direction of the firm, with the former seeking to cut expenses and collect unpaid bills from clients.

In February 2009, Plaintiff states that he was terminated from Waller Capital without notice. Plaintiff claims that he has been damaged by Mr. Waller and Waller Capital's material representations as to the condition of the company. In addition, Plaintiff claims that Defendants have failed to compensate Plaintiff pursuant to the revenue and expense formula set forth in his contract, even under the firm's actual revenues and expenses. Further still, Plaintiff claims that, pursuant to his contract, he is entitled to payment of his 25% equity share of Waller Capital, which is to be valued as of the date of his termination.

Plaintiff previously moved to compel production of documents in response to Plaintiff's First Notice of Discovery and Inspection ("D&I") dated July 21, 2009. By Order of this Court, dated December 6, 2010, Defendants were ordered to produce Waller Capital's 2009 tax returns and an affidavit stating that a search was performed, and that no further responsive records were located, with respect to

certain documents. Prior to making the motion, Plaintiff had requested depositions of four people associated with Waller Capital; John Waller, Garrett Baker, previously a Managing Partner and the current President of Waller Capital, Jeffrey Brandon, and Linda Bailey<sup>1</sup>. Waller Capital responded that it would produce only Mr. Baker, as a representative of Waller Capital, and that after his deposition, plaintiff must “show a need to take any further deposition(s) of Waller Capital personnel.”

On October 20, 2010, plaintiff took Mr. Baker’s deposition. At the deposition, the attorney for Waller Capital instructed Mr. Baker not to answer a question regarding what parts of his own “partnership agreement” he found “unimportant.” Waller Capital describes the partnership agreement as a Fourteen page single spaced document, as opposed to Mr. Baker’s “employment agreement,” a separate document that is described as being three pages long.

Waller Capital asserts that having Mr. Baker go through the entire partnership agreement, line by line, to subjectively identify the unimportant portions, would not lead to any relevant discovery and was “burdensome and for the purposes of harassment and annoyance.” Counsel for Waller Capital also invoked confidentiality when Mr. Baker was asked about the current ownership in Waller Capital. Counsel stated that he would only permit questions about ownership during the time period when plaintiff was still employed.

Plaintiff, in support of his motion, argues that he is entitled to a further deposition of Mr. Baker, wherein he should be compelled to answer the questions blocked by counsel. Further, plaintiff claims he is entitled to unrestricted depositions of Mr. Brandon and Ms. Bailey. Waller Capital disputes the need for a continuing deposition of Baker, but has agreed to produce Mr. Brandon and Ms. Bailey, as long as the questioning is limited to the narrow issues of financial statements(Ms. Bailey) and regulatory filings (Mr. Brandon).

CPLR §3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this

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<sup>1</sup>No description is given of Mr. Brandon’s or Ms. Bailey’s position in the company.

article . . . the party seeking disclosure may move to compel compliance or a response.

A corporation may designate, in the first instance, which of its employees will represent it at a deposition. Following that, plaintiff must make a "detailed showing of the necessity for taking the deposition" of additional witnesses. (*Faber v. New York City Transit Authority*, 177 AD2d 321322[1st Dept. 1991]). The Court, in its discretion, may limit the subject matter testified to at a deposition. (*Garfunkel v. Restaurant Associates*, 251 AD2d 135[1st Dept. 1998]).

Plaintiff has established the necessity of deposing additional witnesses, as it is undisputed that Mr. Baker was unable to answer questions relating to actions taken by either Ms. Bailey or Mr. Brandon. However, plaintiff's questioning of Ms. Bailey should be limited to the issue of financial statements, and Mr. Brandon's deposition should be limited to questions regarding regulatory findings.

Pursuant to Section §221.2 of the Uniform Rules for NYS Trial Courts states:

. . . An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

Generally, questions asked during a deposition should be "freely permitted and answered unless violative of a witness' constitutional rights or a privilege recognized in law, or are palpably irrelevant." (*Hertz Corporation v. Avis, Inc.*, 106 AD2d 246[1st Dept. 1985]).

The disputed portion of Mr. Baker's deposition is as follows:

Q: . . . take a look at this document and tell me if there are any unimportant provisions in it.

MR. MOORE: Oh, that's not happening, This is a 14-page - - in text it's over 13 pages, single spaced. It's not happening.

MR. CONWAY: Why not?

MR. MOORE: Because there's no way that that is relevant or likely to lead to relevant evidence what he thinks in his opinion is important to him or not important to him in this agreement . . . if you can give me a proffer of why you think it's going to lead to something relevant, I will be happy to reconsider.

Waller Capital asserts that Mr. Baker's view of what he thought was important in his own contract is irrelevant because he played "no role whatsoever in negotiating plaintiff's contract-that was done by John Waller." Indeed, as plaintiff seeks information regarding negotiations to which Mr. Waller was a party, it is Mr. Waller, not Mr. Baker, who could best answer questions regarding his view of which contract provisions he deemed important.

The questions regarding current ownership interest in Waller Capital are palpably irrelevant as plaintiff states in his complaint that "[t]he value of Mr. Attorri's equity share is to be valued at the time of Mr. Attorri's termination."

Wherefore it is hereby

ORDERED that plaintiff's motion, Seq: 005, is granted to the extent that defendants shall produce Linda Bailey and Jeffrey Brandon for a deposition, to be limited in accordance with this Decision, within 60 days of service of a copy of this Order with notice of entry; and it is further

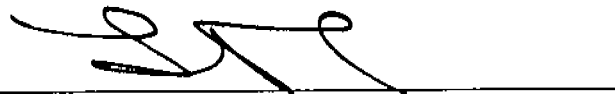
ORDERED that plaintiff's motion, Seq. 004, is denied; and it is further

ORDERED that defendants shall produce Mr. Waller for a deposition within 60 days of service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of the court. All other relief requested is denied.

DATED: February 3, 2011

**FILED**



EILEEN A. RAKOWER, J.S.C.

FEB 09 2011

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