

**Debevoise & Plimpton LLP v Candlewood Timber
DVLPM T LLC**

2011 NY Slip Op 33001(U)

November 9, 2011

Supreme Court, New York County

Docket Number: 603479/09

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
J.S.C.

PART 8

Index Number : 603479/2009
DEBEVOISE & PLIMPTON LLP
vs.
CANDLEWOOD TIMBER DVLPMNT LLC
SEQUENCE NUMBER : 009
COMPEL

INDEX NO. 603479/09
MOTION DATE 1/8/11
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

this motion to Compel

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ... Memo of Law
Answering Affidavits – Exhibits + Memo of Law in app
Replying Affidavits _____

PAPERS NUMBERED
<u>1-3</u>
<u>4-15</u>
<u>16</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM OF DECISION**

FILED

NOV 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/9/11

JOAN M. KENNEY
J.S.C. J.S.C.

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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
DEBEVOISE & PLIMPTON LLP,

Plaintiff,

DECISION & ORDER

Index No.: 603479/09

-against-

CANDLEWOOD TIMBER GROUP, LLC
and JEFFREY M. KOSSAK,

Defendants.
-----X

JOAN M. KENNEY, J.:

FILED

Papers considered in review of this motion:

NOV 16 2011

Papers	Numbered
Notice of Motion & Aff. (007)	1-2
Memorandum of Law in Support	3
Aff. in Opp. & Exhibits	4-14
Memorandum of Law in Opp.	15
Aff. in Reply	16

**NEW YORK
COUNTY CLERK'S OFFICE**

In motion sequence number 009, defendants Candlewood Timber Group, LLC (Candlewood) and Jeffrey M. Kossak (Kossak) (together, defendants) move, pursuant to CPLR 3101, 3106 and 3124, for the second time, to compel plaintiff to: (1) produce for depositions Donald Donovan (Donovan), Dietmar Prager (Prager), Catherine Amirfar (Amirfar) and Dennis Hranitzky (Hranitzky); (2) answer interrogatories 1, 7, 9 and 11 of defendants' second set of interrogatories; and (3) produce redacted time records for Donovan for the period from June 1, 2005 through May 31, 2006, referred to as the redacted Bates stamp number DP0016697-98.

FACTUAL BACKGROUND

The facts of this case have been recited in detail in several previous decisions and will not be repeated herein. It is noted that defendants' first motion seeking relief was denied because notices of deposition had not been submitted as exhibits. Subsequently, those notices were presented to the court at a conference, and the court ordered the depositions of Hranitzky, Amirfar and Donovan, denied the request to depose of Prager, and limited each deposition to two hours. Aff. in Opp., Ex. H. Defendants admit that the two-hour depositions of these three witnesses have taken place.

Defendants' contentions with respect to each of the items of discovery sought are as follows:

Donovan's billing records.

Defendants assert that the discovery that they now seek is necessary to the defense of the action. Defendants maintain that Donovan's billing records are germane to determine the amount of time that he was devoting to their representation in the underlying matter.

Depositions

Defendants claim that taking the deposition of Prager, Donovan's associate, is necessary to ascertain his handling of the expert retained on defendants' behalf by plaintiff.

Defendants also assert that further testimony is needed from

Hranitzky, a former employee of plaintiff's, who was the senior associate assigned to prepare, defend and depose the environmental and engineering expert, for which defendants were billed \$615,000.00. Similarly, defendants say that additional testimony is needed from Amirfar, for whose time defendants were billed \$725,000.00.

Interrogatories

Number 1: defendants request the case caption, court and docket number for each and every jury trial prior to July, 2005, for which Daniel Abuhoff (Abuhoff) participated, indicating the name and status of the client, whether Abuhoff was lead counsel, the names of all parties who went to trial with Abuhoff's clients and whether Abuhoff took the lead at trial. Plaintiff objected on the grounds that it was unduly burdensome and called for irrelevant detail. It is defendants' position that they were fraudulently induced to retain plaintiff based on plaintiff's representation of Abuhoff's trial experience.

Number 7: defendants request that plaintiff identify all matters in which one of plaintiff's attorneys provided legal services for British Petroleum (BP). Plaintiff objected on the ground that it calls for the production of confidential material. Defendants state that it is necessary to indicate whether plaintiff had an undisclosed conflict of interest which goes to its counterclaim for fraudulent inducement.

* 5]

Number 9: defendants request that plaintiff identify all individuals who conducted the investigation into the potential conflict with BP. Plaintiff objected, stating that this question had been fully answered previously. Defendants' state that the information is necessary to determine a conflict of interest which goes to their counterclaim for fraudulent inducement.

Number 11: defendants request that plaintiff identify and describe with specificity, including the date, time, recipient, subject matter and content of the e-mail exchanged with "Dimitri" regarding BP. Plaintiff objects on the grounds of privilege, whereas defendants again assert the necessity of this information for their counterclaim of fraudulent inducement.

In opposition to the instant motion, plaintiff argues that defendants have failed to meet their burden of demonstrating why they would be entitled to additional deposition time beyond that previously ordered by the court. Moreover, plaintiff avers that defendants have waived their right to depose Hranitzky further because they declined Hranitzky's offer to continue his deposition at the time that it was taken. Aff. in Opp., Ex. D. Further, plaintiff contends that Donovan's billing records for other clients are irrelevant to the issue at hand, since defendants have already received his billing records for the time he spent on their matters. In addition, plaintiff maintains that defendants are not entitled to additional interrogatory responses, since Abuhoff's

prior trial experience has been sufficiently explained and plaintiff's alleged conflict of interest is non-existent, rendering interrogatories numbered 7, 9 and 11 irrelevant.¹

In reply, defendants maintain that the artificial time restraints imposed by the court were insufficient to enable counsel to question the witnesses regarding hundreds of hours of billing. Moreover, the reason why defendants declined to continue to question Hranitzky further was because it was conditioned on defendants' agreeing not to seek additional time from the court for deposing the other witnesses.

With respect to Donovan's records, defendants aver that they are necessary to show that Donovan was too preoccupied with other clients to devote appropriate energies to their representation. In addition, defendants claim that Abuhoff's prior trial experience is relevant because it goes to the heart of their counterclaim for fraudulent inducement.

Lastly, defendants argue that plaintiff's relationship with BP is relevant to the determination regarding plaintiff having an irreconcilable conflict with respect to representing defendants in the underlying matter.

¹Plaintiff also makes an argument against what it claims are spoliation allegations contained in defendants' affirmation in support; however, these "allegations" never rise to the level of a legal accusation and, therefore will not be addressed by the court. It is noted that defendants do not respond to this in their reply either.

DISCUSSION

Defendants' motion is granted in part and denied in part.

That portion of defendants' motion seeking to produce Donovan, Prager, Amirfar and Hranitzky for depositions is denied.

This court previously ordered the depositions of Donovan, Amirfar and Hranitzky, limiting the time for questioning them to two hours each, and denied defendants' request for deposing Prager. The appropriate procedure to have a court change one of its orders is to move, pursuant to CPLR 2221, to renew or reargue the motion, not to file a second motion seeking the same relief previously denied or limited. Therefore, this portion of defendants' motion is denied as procedurally defective.

However, even if the court were to consider defendants' requests, defendants have failed to meet their burden, aside from conclusory statements, that the depositions already taken were inadequate. *Thristino v County of Suffolk*, 78 AD3d 927 (2d Dept 2010); *Zollner v City of New York*, 204 AD2d 626 (2d Dept 1994).

That portion of defendants' motion seeking Donovan's redacted time sheets is denied.

Plaintiff has already provided Donovan's time sheets for the work he performed on defendants' behalf. Whether or not Donovan performed work for other clients is irrelevant to the issue of whether defendants were appropriately billed for time expended on their behalf. Further, information regarding plaintiff's other

clients as reflected on attorney time sheets is privileged and confidential. *De La Roche v De La Roche*, 209 AD2d 157 (1st Dept 1994).

That portion of defendants' motion seeking to compel plaintiff to respond to interrogatories numbered 1, 7, and 9 of defendants' second set of interrogatories is granted.

In this court's earlier decision, on motion sequence number 007, defendants were permitted to amend their answer and assert a counterclaim for fraudulent inducement, based on plaintiff's alleged representations regarding Abuhoff's trial experience and its denial of a conflict of interest by its representation of defendants and BP. Whether or not such counterclaim will eventually prevail, which forms the sum and substance of plaintiff's opposition argument, does not limit defendants' right to discovery on this issue at this point in the proceedings.

"The scope of disclosure provided by CPLR 3101 is generous, broad, and is to be construed liberally.

* * *

[T]he interpretation of CPLR 3101's disclosure standard by the courts of this state 'demonstrates New York's commitment to ensuring that cases be decided on their merits after a full vetting of the facts' [internal citations omitted]."

Mann v Cooper Tire Company, 33 AD3d 24, 29 (1st Dept 2006).

As a consequence, in the exercise of the court's discretion, plaintiff is ordered to respond to the above-referenced interrogatories. *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843 (2008).

That portion of defendants' motion seeking responses to interrogatory number 11 of their second set of interrogatories is denied.

Plaintiff objected to this interrogatory, stating that the communications sought represented work performed on behalf of a client, which is absolutely privileged. Defendants do not challenge that the communications are between counsel and client, but assert that they are discoverable because they are relevant to their counterclaim concerning fraudulent inducement. The court disagrees.

"The attorney-client privilege applies to confidential communications between clients and their attorneys made 'in the course of professional employment', and such privileged communications are absolutely immune from discovery [internal citations omitted]."

New York Times Newspaper Division of The New York Times Company v Lehrer McGovern Bovis, 300 AD2d 169, 171 (1st Dept 2002).

Therefore, that branch of defendants' motion seeking answers to interrogatory number 11 of their second set of interrogatories is denied. Based on the foregoing, it is hereby


ORDERED that the branch of defendants' motion seeking to compel plaintiff to respond to interrogatories numbered 1, 7 and 9 in defendants' second set of interrogatories is granted and plaintiff is ordered to adequately respond with specificity to said interrogatories within 20 days after being served with notice of entry of this order; and it is further

ORDERED that the portion of defendants' motion seeking to compel plaintiff to respond to interrogatory number 11 in defendants' second set of interrogatories is denied; and it is further

ORDERED that the remainder of defendants' motion is denied.

Dated: November 9, 2011

ENTER:



Joan M. Kenney, J.S.C.

FILED

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