

**406 Broome St. Rest Inc. v Lafayette Ctr., LLC**

2011 NY Slip Op 33911(U)

April 22, 2011

Supreme Court, New York County

Docket Number: 650358/08E

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN  
Justice

PART 12

406 Broome Street Restaurant Inc,

INDEX NO. 650358/08E

Lafayette Center LLC

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

MOTION SEQ. NO. 011

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


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE APPLICABLE DECISION AND ORDER.

*NOI ext.*

*cc 6/1/2011 2:15 PM*

Dated: April 22, 2011

*[Signature]*

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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

406 BROOME ST REST INC.,  
Plaintiff,  
- against -

Index No. 650358/2008E  
Mot. Seq. No. 011  
Submission Date Feb. 18, 2011

LAFAYETTE CENTER, LLC,  
Defendant.

**DECISION and ORDER**

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**For Plaintiff:**  
The Stolper Group, LLP  
By: Randolph K. Adler, Jr., Esq.  
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New York, NY 10013

**For Defendant:**  
Guzov Ofsink, LLC  
By: D. Reeves Carter, Esq.  
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New York, NY 10022

**E-filed papers considered in review of this motion to compel:**

<b>Papers</b>	<b>Efiling Document No.</b>
Order to Show Cause, Affirmation, Exhibits	87 - 89
Affirmation in Opposition, Exhibits	90 - 91

**PAUL G. FEINMAN, J.:**

Plaintiff, a commercial lessee in defendant's building, moves for an order directing that Edmond Li and Brett Nidel be produced for further depositions. It also seeks an award of costs and sanctions associated with the motion, and costs associated with the further depositions of both Li and Nidel. For the reasons set forth below, plaintiff's motion is granted in part and otherwise denied.

While this case involves a relatively straightforward claim by plaintiff that the defendant unreasonably refused to allow it to assign its lease to a non-party, the parties have bitterly contested each and every aspect of discovery, and have required a disproportionate degree of judicial intervention either at compliance conferences or by motion to resolve even the most basic of discovery disputes. Among affirmative defenses asserted by defendant are its claims

that (1) plaintiff was not in compliance with the terms of the lease at the time it sought to sublet, (2) plaintiff failed to reasonably respond to a questionnaire regarding the proposed assignee, and (3) plaintiff's claim was caused or contributed to by third parties or events over which defendant had no control (Doc. 13 [Ans. & Counterclaims ¶¶ 6, 8, 10]).

The two witnesses, Li and Nidel, were produced and deposed on January 20, 2011, and copies of their deposition transcripts are provided by plaintiff (Adler Aff. in Supp. Ex. 3, 4). Plaintiff moves to compel further depositions of both witnesses on the ground that defendant's counsel, Mr. Carter, improperly instructed the witnesses not to answer questions, repeatedly made improper "speaking objections," asserted attorney-client privilege concerning communications that were not privileged, and failed to conduct a thorough review of the defendant's files, the efforts of which he misrepresented to the court. Plaintiff also argues that Mr. Carter's objections and instructions not to answer during the Li and Nidel depositions should be sanctioned as frivolous conduct under 22 NYCRR § 130-1.1, and that a sanction in the form of costs should be imposed to compensate plaintiff's counsel for the costs incurred in making this motion and conducting a second round of depositions.

Plaintiff first argues that Mr. Carter conducted himself in contravention of this court's October 20, 2010 directives concerning deposition conduct articulated during colloquy addressing a previous discovery-related motion brought by defendant (Adler Aff. Ex. 1 [Tr. of oral arg. 10/20/2010]). On that October date, the court, having read the transcripts of the depositions then at issue, warned all attorneys that they risked being subject to sanctions because neither side was comporting with the rules set forth in the Uniform Rules for Trial Courts at 22 NYCRR 221 pertaining to depositions, as well as the Standards of Civility in the Disciplinary

Rules of the Code of Professional Responsibility, 22 NYCRR P 1200, Appendix A (Ex. 1 [Tr. p. 2-3]). In particular, the court explicitly noted that attorneys may not instruct witnesses not to answer questions unless the question is “palpably improper” or when a matter is privileged (Ex. 1 [Tr. pp. 506]). The court stated explicitly that the objecting attorney is to simply say: “‘Objection.’ And then you say as to form and then either a one or two-word objection as to what the proper form is.” (Ex. 1 [Tr. p. 22]).

Plaintiff points to many instances in the Li and Nidel transcripts where Mr. Carter refused to allow his witnesses to answer questions in violation of 22 NYCRR 221. As described by plaintiff’s counsel, “Most of the questions to which Mr. Carter posed improper instructions had to do with the Defendant landlord’s treatment of other similarly situated commercial tenants during the same time period . . . at issue in the lawsuit” (Adler Aff. ¶ 10). Plaintiff further explains that the questions by plaintiff’s counsel, Mr. Stolper, grew out of the testimony received at an earlier deposition of defendant’s transactional attorney, who had “identified a number of similarly situated commercial tenants, testified that financial information would have been requested and/or provided, but deferred to Brett Nidel and Edmond Li as the witnesses with more knowledge and the details.” (Adler Aff. ¶ 10). According to plaintiff, Mr. Carter’s insistence that neither witness answer questions posed by Mr. Stolper concerning the other commercial tenants was “unlawful” and deprived plaintiff of follow-up inquiry (Adler Aff. ¶ 10).

In addition, plaintiff argues that Mr. Carter made many improper speaking objections (see Adler Aff. ¶¶ 11-15), and encouraged Li at one point to assert the attorney-client privilege when the contents of the communications at issue were factual in nature, rather than privileged matter (Adler Aff. ¶¶ 18-19). Plaintiff also points to the deposition testimony of Brett Nidel that no

searches of defendant's files have been made since June 2009, although document requests were made after that time and responses issued by defendant subsequently, and that although there was testimony by Li concerning possible information contained in defendant's mortgage loan documents, no "pro formas or documents contained representations or requirements about any such information were produced or even searched for" (Adler Aff. ¶¶ 24-27). Brett Nidel's testimony included statements that no one asked him to look for emails from representatives of Despana (Adler Aff. ¶ 23, citing B. Nidel EBT, Ex. 4, p. 51), or notes by him or anyone else taken during or after the introductory meeting between plaintiff, defendant, and the proposed assignee (Adler Aff. ¶ 28, citing Ex. 4, B. Nidel EBT, pp. 18-19).

Defendant's counsel argues that his objections during the depositions were grounded in the court's instructions that discovery is limited to the commercial tenants in defendant's building at 199 Lafayette Street, and not tenants in defendant's other buildings. Specifically, defendant points to the transcript of the oral argument on January 5, 2011, in which the court reiterated its previous ruling that unless there was a motion to expand the scope of discovery, plaintiff was limited to seeking information from the tenants in 199 Lafayette Street (Tr. p. 15-16). In the ensuing discussion during which plaintiff's counsel asserted that there were only four tenants in defendant's building at issue, the court ruled that the scope of discovery would include defendant's tenants: Dispana, Odin, and Calypso (Tr. p. 17-18).<sup>1</sup> Based on this, it was improper for plaintiff's counsel to assert early in the deposition of Li, that he would ask him "about the other seven properties" (Ex. 3, at 15), and proper for defendant's counsel to object.

Under the rules of discovery, the trial court is vested with broad discretion to supervise

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<sup>1</sup>The identity of the fourth tenant is not apparent.

the discovery process (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1<sup>st</sup> Dept. 2003]). The scope of discovery here was explicitly limited by the court to include the four commercial tenants, three of which have been identified, at the 199 Lafayette Street building. Plaintiff's counsel, therefore, improperly sought to circumvent the court's ruling by seeking testimony pertaining to tenants in other buildings, and the branch of its motion on this issue is therefore devoid of merit. The branch of plaintiff's motion concerning Mr. Carter's speaking objections, although pertaining to objections that often were somewhat lengthy in nature, is not persuasive given that the content of most of Mr. Carter's objections was to articulate his perception that Mr. Stolper was seeking information beyond the parameters of discovery already defined by this court. Similarly, the branch of plaintiff's motion claiming that defendant improperly asserted the attorney-client privilege when Li started to state what he knew from his attorney concerning the attorney's evaluation of the questionnaire, is also unpersuasive, in that Li would be testifying to his attorney privately offered legal opinion, which is privileged.

Remaining is plaintiff's argument that defendant has failed to look for and turn over all relevant documents. While some of its arguments relying on certain of the testimony are not persuasive, there is a certain lack of clarity as concerns the "files" and the "emails" or computerized files of defendant's tenants. Plaintiff argues that in the court's oral decision and order issued on the record on January 5, 2011 required "certain documents, including requests for financials from Defendant to prospective or actual tenants Calypso, Despana and Odin" to be produced by defendant (Adler Aff. ¶ 22, citing Ex. 5 [Order of Jan. 5, 2011]). Nidel's January 20, 2011 deposition testimony indicates that there have been no searches of any of defendant's files or emails since June 2009. He testified that "[t]ypically, we don't keep records of financials

if we lease space to tenants past the lease date.” (Ex. 4, Nidel EBT 49:13-16). He also testified that they had “looked at all the tenant files” for “financial statements” at some point during the litigation (Ex. 4, Nidel EBT 50:20-21; 51:2-5), that no one had asked him to look for emails to or from Despana representatives (Ex. 4, Nidel EBT 51: 21-24), that they looked at the Despana file and it contains the leases and pay stubs (Ex. 4 Nidel EBT 52:22-55, 53:2-17), and that while he was not sure if he would have received financial emails from Despana, he had not looked for such emails (Ex. 4, Nidel EBT, 54:10-16). Accordingly, defendant is directed to conduct another search of the three or four tenants’ physical files and online files, for financial information and to provide any relevant documents within 20 days of the date of entry of this decision and order. An affidavit setting forth the particulars of the search, including who conducted it and when, what was looked for and where it was looked for, shall be provided whether or not any documents are discovered.

Turning to the mortgage loan documents referred to by Li in his testimony, which may or may not contain a requirement by the lender to state how much income defendant needed to derive from its tenants (Ex. 3, Li EBT 23-24), as plaintiff contends that these documents have not been produced, and defendant does not indicate whether it had been previously demanded, the court directs that the mortgage loan documents referred to by Li, be turned over to plaintiff within 20 days of the date of entry of this decision and order. As to the issue of whether Nidel did or did not take notes at the March 2008 meeting between plaintiff, defendant, and the proposed assignee, defendant is directed to have Nidel search for any notes that he may have taken at the meeting, since his answer that, “[n]o, I don’t think [he had taken notes],” is not definitive. Defendant shall turn over any notes, if found, within 20 days of entry of this decision

and order, and otherwise to inform plaintiff in writing in the same time span that a search was undertaken and that nothing was found.

In sum, plaintiff's motion seeking further depositions of Li and Nidel is denied, however, defendant shall conduct the further search for documents set forth above. The branch of plaintiff's motion seeking sanctions is denied. It is

ORDERED that the motion is granted to the limited extent of directing defendant to conduct the document searches set forth above and otherwise denied; and it is further

ORDERED that the time to file a note of issue in this matter is extended to June 17, 2011.

This constitutes the decision and order of the court.

Dated: April 22, 2011  
New York, New York

  
\_\_\_\_\_  
J.S.C.