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

PRESENT: FEINMAN HON. PAUL G. FEINMAN PART 12
Justice

WARNER DAVIS, P.C.,

- v -

CALYPSO SISICOPOULOS

INDEX NO. 111965/04 E
MOTION DATE
MOTION SEQ. NO. 6
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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

RECEIVED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

Dated: NOV 11 2011

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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WAGNER DAVIS, P.C.,
Plaintiff,

Index Number 111965/2004E
Mot. Seq. Nos. 006, 007, 008

against

KALYPSO SISKOPOULOS and JOHN SISKOPOULOS as Executor of the Estate of ANGELO SISKOPOULOS,
Defendants.

DECISION AND ORDER

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For Plaintiff on the counterclaim:
McDonough Law, LLP
By: Diane K. Kanca, Esq.
Michael V. Kuntz, Esq.
145 Huguenot St., ste 320
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(914) 632-4700

For Kalypso Siskopoulos:
Alexandra Siskopoulos, Esq.
111 Langham St.
Brooklyn, NY 11235

For John Siskopoulos as Executor:
John Siskopoulos, *pro se*
111 Langham St.
Brooklyn, NY 11235
(347) 893-6886

For the Plaintiff:
Wagner Davis P.C., *pro se*
By: Bonnie Reid Berkow, Esq.
99 Madison Ave.
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Efiled papers considered in review of these motions to dismiss the counterclaims, to compel disclosure, to strike the complaint, to quash, and to impose sanctions:

	Papers	**Efiling Document Number:**
Seq. No. 006	Order to Show Cause, Affidavits, Exhibits	54 (1), 55 - 64, 68 - 79, 81
	Memorandum of Law in Support	65, 80
	Affirmation in Opp., Exhibits	96, (1 - 8)
	Memorandum of Law in Opp.	97
	Reply Affirmation, Exhibits	100 - 102
	Memorandum of Law in Reply	103
Seq. No. 007	Order to Show Cause, Affirmations, Exhibits	66 (1-7), 67, 83 (1-8)
	Memorandum of Law in Support	66-8, 83-9
	Affirmation in Opp., Exhibits	92 - 94
	Memorandum of Law in Opp.	95
Seq. No. 008	Notice of Motion, Affirmation, Exhibits	85 (1), 86 - 90
	Memorandum of Law in Support	91
	Affirmation in Opp., Exhibits	98 (1-7)
	Memorandum of Law in Opp.	99
	Reply Affirmation, Exhibits	104, 105
	Memorandum of Law in Reply	106

PAUL G. FEINMAN, J.:

Motion sequence numbers 006, 007, and 008 are consolidated for purposes of disposition.

In motion sequence number 006, plaintiff moves by order to show cause for an order dismissing the counterclaims pursuant to CPLR 3126 (3), or precluding defendants from producing at trial any evidence related to the disputed items of discovery pursuant to CPLR 3126 (2), or compelling defendants to properly respond to plaintiff's supplemental demand for discovery and inspection, pursuant to CPLR 3124. As explained below, this motion is granted in part and otherwise denied.

In motion sequence number 007, defendants move by order to show cause for an order compelling disclosure pursuant to CPLR 3124 and striking the pleadings pursuant to CPLR 3126. As explained below, this motion is denied in its entirety.

In motion sequence number 008, plaintiff moves pursuant to CPLR 2304 to quash the subpoena duces tecum addressed to Zurich, N.A., and for sanctions against Alexandra Siskopoulos, Esq., pursuant to 22 NYCRR § 130-1.1 (a). As explained below, this motion is granted in part and otherwise denied.

Plaintiff law firm commenced this action on August 19, 2004, seeking legal fees owed by defendants (Doc. 2). The complaint contains two causes of action: account stated and quantum meruit.[1] Defendants' verified answer, dated September 24, 2004, contains three counterclaims: fraud, breach of fiduciary duty, and breach of contract (Doc. 56 Ver. Ans.).

Motion Sequence Number 006

[1]An amended complaint filed on February 11, 2010 (Doc. 42) was later withdrawn (see Doc. 52, Dec./Order 01/06/2011, p. 4).

Plaintiff-counterclaim defendant argues that defendants-counterclaimants have repeatedly failed over the course of several years to provide sufficient responses to its demands for disclosure. Most recently after this court granted it leave to serve a supplemental demand, defendants served "joint responses" which, plaintiff argues, are incomplete and insufficient (Doc. 61 Suppl. Demands; Doc. 62 Joint Responses). Plaintiff-counterclaim defendant filed this motion after defendants did not respond to its March 22, 2011 correspondence requesting further amended responses (Doc. 63). It seeks dismissal of the counterclaims pursuant to CPLR 3126 (3), or that defendants be precluded from producing at trial any evidence related to the disputed items of discovery pursuant to CPLR 3126 (2), or that they be compelled to respond properly to plaintiff's supplemental demand for discovery and inspection, pursuant to CPLR 3124.

Plaintiff's attorney on the counterclaim argues that the documents previously produced by defendants in response to discovery demands are not identified as responding to particular demands, and thus do not comply with the requirement in CPLR 3122 (c) to "organize and label" the documents in a manner that corresponds to the categories in the request. She also argues that the joint responses pertaining to items 7, 9, and 12 seeking disclosure as to the allegations in the three counterclaims, are completely insufficient in that they each state that the demand is "improper" (Doc. 62, answers Responses 7, 9, 12).[2] She argues that from the disclosure provided, neither the amount of defendants' alleged damages nor the basis of defendants' allegations can be determined (Doc. 54-1 Aff. in Supp. of Mot. ¶ 10). She argues

[2]For 9 out of the 12 items demanded, defendants-counterclaimants indicated that responsive documents had already been provided in their responses to the first demand for discovery and inspection, had been submitted "throughout numerous filings submitted to this Court, and are contained within public records," and "should be in Plaintiff's possession" (Doc. 62, answers Responses 1-6, 8, 10-11).

that defendants are prejudicing plaintiff-counterclaim defendant's ability to prepare for trial, and should be sanctioned or compelled to provide sufficient responses.

The crux of defendants' opposition is that plaintiff has waived any argument about insufficient production based on its own actions over the course of the litigation (Doc. 96 Aff. in Opp.). Plaintiff twice filed a Note of Issue certifying that discovery was complete and the matter ready for trial. In court papers submitted in March 2010, plaintiff states that, "[s]ubject to the pendency of a motion to disqualify Alexandra as the attorney for defendants, this case is ready for trial." (Doc. 96-3 ¶ 70). It reiterated this position at oral argument on April 28, 2010 (Doc. 96-4 Tr. of Oral Arg. 04/28/2010, p. 13:7-8 ["since all discovery is completed . . . ."]). During the same oral argument, plaintiff's attorney on the counterclaims never broached the need for further more specific disclosure (Doc. 96-4 Tr. of Oral Arg. 04/27/2010, p. 18:17-25). It also never moved to strike the note of issue (Doc. 96 Aff. in Opp. ¶ 6). Plaintiff never previously moved to compel (Doc. 97 Memo of Law in Opp. p. 5). During an appearance in February 2011, when asked by this court to state what disclosure was outstanding, plaintiff's law firm never mentioned that the items served six years ago were at issue (Doc. 96 Aff. in Opp. ¶ 9, citing Docs. 52, 96-8 [Order filed 02/10/2011]).

Defendants point to *Think Pink, Inc. v Rim, Inc.*, 19 AD3d 331 (1st Dept 2005) which held that as the plaintiff in that litigation had filed "several" notes of issue and certificates of readiness, it had waived further discovery (see also *Chichilnisky v Trustees of Columbia University of the City of N.Y.*, 52 AD3d 206 [1st Dept 2008] [holding that by signing two stipulations agreeing that discovery was complete and filing note of issue and certificate of readiness thereafter, plaintiff waived any right to supplemental disclosure although she contended

her expert could not complete an updated analysis of damages based on data previously received]). They also argue, pursuant to *Malloy v Madison Forty-Five Co.*, 13 AD3d 55, 57 (1st Dept 2004), that because plaintiff twice filed a note of issue, the court may properly exercise its discretion to deny the motion to strike the answer based on any failure to comply with discovery orders. In addition, they argue that as held in *Tavares v New York City Health & Hosps. Corp.*, 2003 N.Y. Slip Op. 51278U (Sup Ct, Kings County 2003), when a plaintiff files a note of issue, it cannot seek sanctions based on a failure to produce.

Unlike in the cases cited by defendants, plaintiff here was specifically granted by the court an opportunity to serve supplemental demands. Nonetheless, to the extent that plaintiff, at this late juncture and after previously filing two notes of issue and stating that discovery was completed, now seeks clarification as to the nature of the documents provided several years ago, its motion is indeed untimely and will not be granted. Clearly plaintiff waived any complaints it may have regarding responses and documents served years ago by failing to raise them in a timely fashion. However, to the extent that defendants-counterclaimants responded that plaintiff's supplemental demands concerning the allegations in the counterclaims were "improper," such response is itself improper. Defendants-counterclaimants are directed to supplement their response by providing either actual documents (even if previously provided) or, explicit and specific references to the documents previously provided that are responsive to the demands. Should defendants fail to comply, plaintiff may move in limine before the trial court to restrict proof by counterclaimants. In all other respects, plaintiff's motion is denied.

Motion Sequence Number 007

Defendants seek an order compelling disclosure pursuant to CPLR 3124, and striking the

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pleadings for willful failure to disclose insurance information. At issue is plaintiff's response to defendants' demand for production of all insurance policies in effect during the time plaintiff represented defendants, that is from August 2000 through August 2003. Plaintiff provided a summary dated March 4, 2011 as to "a policy of insurance through Zurich, N.A." (Doc. 66-3 [Pl. Disclosure of Ins. Cov.), and then on about April 4, 2011, provided a "copy of the plaintiff's relevant insurance policy" through Zurich, N.A., for the period of September 21, 2003 to September 21, 2004 (Doc.66-5 Lawyers Prof. Liab. Ins. Policy).

Defendants argue that plaintiff is obligated to provide copies of all insurance policies carried by it during the time it was hired as defendants' attorney, citing *Sullivan v Brooklyn-Caledonian Hosp.*, 213 AD2d 474, 475 (2d Dept. 1995), a medical malpractice action in which the court directed that the defendant doctor provide "primary and excess liability insurance policies for the period during which the plaintiff was under the defendant's care." Plaintiff argues that this Second Department case is not controlling, and that what defendants are entitled to discover under CPLR 3101 (f) is what policies may be available to satisfy part or all of the judgment. Plaintiff points to *Weiner v Lenox Hill Hosp.*, which held that "where insurance information is relevant to the substance of the case, that information may be discoverable under CPLR 3101 (a). . . . However, where it is not relevant to the case itself, information about pending claims is not discoverable." (164 Misc 2d 759, 763 [Sup Ct, NY County 1995], *aff'd* 224 AD2d 299 [1st Dept. 1996]).

Here, the first page of the plaintiff's policy clearly states, under "Declarations," that the "policy is limited to liability for only those Claims that are first made against the Insured and reported to the Company during the Policy Period" (Doc. 66-5, p. 3 [Policy]). The policy period

is, according to Item 3 on the same page, from September 21, 2003 - September 21, 2004 (*id.*). Thus, plaintiff has provided all that defendants are entitled to as far as insurance policies are concerned. As defendants show no reason for the earlier policies, and because they are not entitled to data pertaining to unrelated claims against plaintiff covered by the subject insurance policy (*see Bolton v Weil, Gotshal & Manges, LLP*, 2005 N.Y. Slip Op. 52329U (Sup Ct, New York County 2005), the branch of their motion seeking to strike the pleadings for failure to produce all insurance policies owned by plaintiff from August 2000 through August 2003, is denied.

The remaining branch of defendants' motion concerns seeking to compel Steven R. Wagner, Esq., president of Wagner Davis, P.C., to respond to particular questions posed to him at his recent supplemental deposition, in particular whether he "ingested and or was under the influence of cocaine for the years 2000, 2001, 2002, 2003" (Doc. 83-2 A. Siskopoulos Aff. in Support ¶ 2). At the supplemental deposition, which the court directed to be held based on defendants' assertions that newly provided documents required a further deposition of plaintiff, defendants' attorney asked two questions concerning drug use to which Wagner's attorney objected as being outside the scope of the deposition's subject matter (Doc. 92 Aff. in Opp. to Mot. to Compel ¶¶ 8-12, citing Doc. 94 Wagner EBT Tr. pp. 20-22).

Defendants's attorney argued then, and now, that they should be allowed to follow this line of inquiry, as the "use of illegal narcotics would obviously be a factor with regard to the [d]efendants' breach of fiduciary duty claim," and "may serve as a factor in the fraudulent billing claim" (Doc. 83-2 A. Siskopoulos Aff. in Supp. ¶ 7). Defendants contend that this line of questioning arises from the allegations contained in a recently discovered litigation commenced

[* 9]

in 2010 against Wagner Davis, P.C. and Steven Wagner, which proffers detailed allegations of cocaine use during the time the firm represented those plaintiffs, beginning in August 2004 (Doc.66-7 ¶¶ 38 [f] *et seq.*). Those allegations, even if true, concern a time beginning a year after plaintiff ceased representing defendants herein. Thus, contrary to defendants' contentions, they have not shown that this line of questions bears any actual relevance to their counterclaims or is anything other than a fishing expedition, and this branch of their motion is denied (*see Farrakhan v N.Y.P. Holdings*, 226 AD2d 133, 135 [1st Dept. 1996] [trial courts possess wide discretion in deciding what is material and necessary in the prosecution of an action]; *Mora v Saint Vincent's Catholic Med. Ctr.* 8 Misc 3d 868, 869 [Sup Ct, New York County 2005] [palpably irrelevant questions need not be answered at deposition]; *White v Martins*, 100 AD2d 805, 805 [1st Dept. 1984] [holding that questions that are so improper that to answer them would substantially prejudice the parties, and questions that are palpably or grossly irrelevant, should not be answered]).[3]

Motion Sequence Number 008

Plaintiff moved pursuant to CPLR 2304 to quash the March 29, 2011 subpoena duces tecum addressed to Zurich, N.A., and for sanctions against Alexandra Siskopoulos, Esq. pursuant to 22 NYCRR § 130-1.1 (a).

[3]Defendants mention in a footnote of their April 6, 2011 affirmation in support that there remains an "outstanding request" as to the names of the Office Managers employed by plaintiffs from 2000-2003 and that they seek "any and all documents relating to suggestions for settlement and/or settlement figures in the underlying action at issue" (Doc. 83-2 A. Siskopoulos Aff. in Supp. ¶ 2 n 1). The court explicitly asked what disclosure remained outstanding at an oral argument on February 9, 2011, and based on what was stated, provided an opportunity for defendants to serve any "final document demands" by February 10, 2011 (Doc. 52 [Order Filed 02/10/2011]). Unless defendants included these demands in a correspondence to plaintiff by February 10, 2011, they are deemed waived. If the demands were timely, then plaintiff is to respond within 10 days of the date of entry of this decision and order.

The subpoena duces tecum seeks eleven categories of items (Doc. 86). Plaintiff argues that it is overly broad in seeking "any and all" documents in the file of the insurance carrier as concerns plaintiff, and makes no distinction between materials that are non-privileged and those that were produced in anticipation of litigation or settlement which are generally immune from discovery, citing *Recant v Harwood*, 222 AD2d 372, 373-374 (1st Dept 1005) (insurance documents produced in anticipation of litigation are immune from discovery unless it is established that a substantial equivalent of the material cannot be obtained by other means without undue hardship). Plaintiff argues that as the subpoena makes no distinction, it should be quashed, citing *Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383, 383 (1st Dept. 1983) which held that as it was not responsibility of the court or the opposing parties to "cull the good from the bad," and an overly broad subpoena should be quashed.

A subpoena duces tecum is not to be used for the purpose of discovery or to ascertain the existence of evidence (*People v Gissendanner*, 48 NY2d 543, 551 [1979]). Its purpose is to direct a person or entity to produce and bring specific documents or other evidence which the witness can refer to in the course of testimony (CPLR 2307; *see People ex rel. Hickox v Hickox*, 64 AD2d 412, 414 [1st Dept. 1978]). A subpoena will be quashed when it is used as a "fishing expedition to ascertain the existence of evidence" (*Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept. 2010]).

Defendants' arguments as to why the motion should be denied are unpersuasive. They do not rebut the argument that the subpoena is overly broad and also improperly seeks to discover evidence, some of which is clearly not relevant to this litigation. As this court has previously indicated, allegations about other litigations against plaintiff are not at issue in this instant

litigation. As the subpoena is improperly overbroad, plaintiff's motion to quash is granted.

Plaintiff also seeks sanctions against Alexandra Siskopoulos, Esq. pursuant to 22 NYCRR § 130-1.1 (a). Plaintiff contends that Siskopoulos "has engaged in obstructionist tactics as to discovery throughout this case," including her objections to the cross-examination of a non-party witness deposition held on March 30, 2011 (Doc. 85-1 Aff. in Supp. ¶¶ 17, 19-33).

Under § 130-1.1 of the New York Rules of Court, the court may award sanctions costs, in the form of reimbursement for actual expenses incurred and attorneys' fees, resulting from "frivolous conduct." Conduct is frivolous when it is "completely without merit in law or fact and cannot be supported by a reasonable extension, modification or reversal of existing law," or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or "asserts material factual statements that are false." (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 73 [1st Dept 2006] [citing 22 NYCRR 130-1.1 [c]]). While the conduct of all counsel in this case has at times been characterized by a lack of civility and cooperation, the particular behavior by Siskopoulos complained of in this motion fails to warrant the imposition of sanctions at this juncture.

Counsel are reminded that this action is now seven years old and needs to brought to be expeditiously brought to a final resolution. It is therefore

ORDERED that in Motion Sequence 006, plaintiff's motion is granted only to the extent that defendants-counterclaimants are directed to supplement their responses in the manner set forth above, within 10 days of entry of this order; their failure to comply will allow plaintiff to move in limine for preclusion before the trial court; and it is further

ORDERED that defendants' motion in Motion Sequence 007 is denied in its entirety,

except that, as noted in footnote 1, if defendants timely demanded the names of the Office Managers employed by plaintiffs from 2000-2003 as well as documents relating to settlement in this action, plaintiff shall provide its response within 10 days of entry of this order; its failure to comply will allow defendants-counterclaimants to seek preclusion in limine before the trial court; and it is further

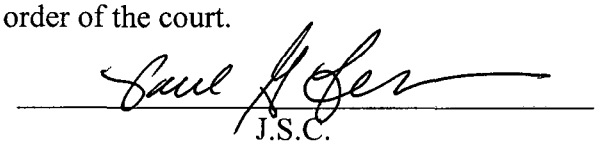
ORDERED that in Motion Sequence 008, plaintiff's motion to quash the March 29, 2011 subpoena issued as to Zurich, N.A., is granted; and the branch of its motion seeking sanctions is denied; and it is further

ORDERED that plaintiff is to file a note of issue no sooner than December 1, 2011 and no later than December 31, 2011; and it is further

ORDERED that the Clerk of Trial Support shall, upon the filing of the Note of Issue, set this matter for trial rather than Mediation-I Part.

This constitutes the decision and order of the court.

Dated: November 11, 2011
New York, New York



J.S.C.