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| Candlewood Timber Group, LLC v Candlewood Tib |
| 2011 NY Slip Op 33994(U) |
| November 9, 2011 |
| Supreme Court, New York County |
| Docket Number: 603479/09 |
| Judge: Joan M. Kenney |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

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

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

PART 8

Debevoise & Plimpton LLP

INDEX NO. 603479/04

MOTION DATE 8/2011

- v -

MOTION SEQ. NO. 006

Candlewood Timber Development LLC

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for an open commission

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits NO Reply Papers

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

and Commission.

FILED

NOV 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/9/11

JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 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 |
| Affs. in Opp. | 3-4 |

**NEW YORK
COUNTY CLERK'S OFFICE**

In motion sequence number 006, defendants Candlewood Timber Group, LLC (Candlewood) and Jeffrey M. Kossak (Kossak) (together, defendants) move, pursuant to CPLR 3102 and 3108, for an order issuing an Open Commission for a Judicial Subpoena *Ad Testificandum* to depose nonparty Elsie Zecchino (Zecchino) of 26 Spicy Pond Road, Howell, New Jersey 07731-1358.

Zecchino was the paralegal designated as the "Case Manager" for the underlying legal action that forms the basis of this lawsuit in which plaintiff seeks legal fees from defendants. Zecchino is no longer in the employ of plaintiff, and has indicated that she will not be deposed without a judicial order. Defendants assert that, as the Case Manager, Zecchino is in a position to have material information regarding the nature and quality of

* 3]
plaintiff's professional performance.

In opposition to the instant motion, plaintiff avers that defendants have known about Zecchino and her whereabouts for a significant period of time, but have delayed in making the request for the subpoena. Further, plaintiff contends that Zecchino did not play a vital role in its representation of defendants, rendering her testimony unnecessary.

It is noted that there has been a long delay in the court's determination of this motion due to the judiciary budget crisis, which created a tremendous backlog in the workload of the Special Referee initially assigned to this matter.

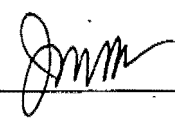
CPLR 3108 provides that a commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside the state. Where information is sought from a nonparty witness, which is material and necessary for the prosecution or defense, an open commission may be granted. *Meckert v Sears Roebuck & Co.*, 275 AD2d 308 (2d Dept 2000). Defendants have made out a prima facie case for the necessity of deposing Zecchino, whereas plaintiff's opposition is primarily based on the delay in seeking such judicial intervention. The court finds the opposition insufficient to preclude granting defendants' motion.

Based on the foregoing, it is hereby

ORDERED that, pursuant to CPLR 3108, a commission issue in this action to the Superior Court in Monmouth County, State of New

Jersey, or any other authorized person who may administer oaths pursuant to the law of that state, to take the deposition upon oral questions of Elsie Zecchino of 26 Spicy Pond Road, Howell, New Jersey 07731-1358 as witness on behalf of defendants in this action and that she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission, with any exhibits produced and proved before her, to the Clerk of the Supreme Court of the State of New York, County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed.

Dated: 11/9/11

ENTER: 

 Joan M. Kenney, J.S.C.

FILED
NOV 16 2011
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 COUNTY CLERK'S OFFICE