

Behar v Quaker Ridge Golf Club, Inc.

2011 NY Slip Op 34311(U)

June 14, 2011

Supreme Court, Westchester County

Docket Number: 11594/10

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED AND ENTERED.
ON 6-14 2011
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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LEON BEHAR and GAIL BEHAR,

Plaintiffs,

-against-

QUAKER RIDGE GOLF CLUB, INC.,

FILED
JUN 14 2011

Defendant,

TIMOTHY C. INDI
COUNTY CLERK

DECISION & ORDER

Index No. 11594/10
Motion Date: 6/13/11

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LEFKOWITZ, J.

The following papers numbered 1 to 23 were read on this motion by plaintiffs for an order extending the discovery deadline in this action and directing defendant to serve a supplemental bill of particulars. Plaintiffs filed a subsequent motion brought by order to show cause for an order directing defendant to serve a supplemental bill of particulars. Defendant essentially moves for an order pursuant to CPLR 3108 for the issuance of an open commission to take the deposition of Tramontano & Rowe and Woodlands Tree Care, LLC in Connecticut. For purposes of this order the motions are being considered together.

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| Motion to Modify Preliminary Conference Stipulation and Order and for a Proper Bill of Particulars - Affirmation in Support - Exhibits | 1-7 |
| Order to Show Cause - Affirmation of Julius Cohn - Exhibits | 8-11 |
| Affirmation in Opposition - Exhibits | 12-16 |
| Order to Show Cause - Affidavit in Support - Exhibits | 17-23 |

Upon the foregoing papers and the proceedings held on June 13, 2011, this motion is determined as follows:

Plaintiffs' home shares a common property line with defendant Quaker Ridge Golf Club. It is alleged that in 2008 a storm caused a large tree to fall knocking down three other trees, which provided protection from golf balls being hit into plaintiffs' backyard. It is alleged golf balls have continually hit plaintiffs' residence, property, and swimming pool area, some of which have caused personal injury to persons on plaintiffs' property. Plaintiffs seek monetary damages and a permanent injunction, enjoining defendant and its members from using the second hole of the golf course until adequate remedial measures are taken and from entering onto plaintiffs' property to recover golf balls.

In its amended answer, defendant asserts two counterclaims alleging the planning board, through a 1999 Resolution, conditioned approval of the subdivision on submission and approval

of a detailed plan identifying trees to be preserved and required that no vegetation along the common boundary with the Golf Club be removed without the approval of a detailed tree inventory and tree preservation plan. Defendant alleges that plaintiffs' house was conveyed to the plaintiffs subject to a Declaration of Easements and Restrictions made by the developer, including a tree preservation easement which provides there shall be no vegetation removed along the common property line without the submission and approval of a detailed tree inventory and a detailed tree preservation plan. It is alleged that plaintiffs removed trees from their yard in violation of the tree preservation plan and have failed to comply with their obligations under the restrictive covenants contained in their deed and the 1999 Resolution. Defendant seeks injunctive relief directing plaintiffs to replace trees identified on the tree preservation plan incorporated into the 1999 Resolution and the Declaration of Easements and Restrictions and by taking all other reasonable steps to achieve the requirements set forth therein. Defendants also seek monetary damages, alleging defendant is a beneficiary of the 1999 Resolution and the Declaration of Easements and Restrictions, plaintiffs have breached these agreements, and defendant is entitled to damages representing the remediation cost of the breach.

Plaintiffs move for an order extending the discovery deadline from April 28, 2011 to a date to be set by the Court and directing defendant to serve a supplemental bill of particulars. In violation of the Westchester Supreme Court Differentiated Case Management Protocol (revised effective May 31, 2011), this discovery related motion was made prior to the parties attending a pre-motion conference in the Compliance Part. Such conferences are held to permit the Court and the parties the opportunity to resolve discovery issues before motion practice ensues. Accordingly, the motion is denied.

Plaintiffs move by order to show cause seeking an order directing defendant to serve a supplemental bill of particulars. Plaintiffs sought to have defendant particularize each act defendant claims plaintiffs committed which form the basis of the first counterclaim. In response, defendant asserted each particular act is set forth in paragraphs 38 through 83 of the amended answer with counterclaims (Plaintiffs' Exhibit B, Defendant's Verified Bill of Particulars, paragraph 1). Plaintiffs sought to have defendant particularize each item of damages and the total damages which defendant claims constitute the remediation cost (Plaintiffs' Exhibit B, Defendant's Verified Bill of Particulars, paragraph 3), and the name and address of each person or entity to whom defendant claims it paid any portion of such remediation cost including the date of payment, the number of any check used, the amount of each such payment and the payee listed thereon (Plaintiffs' Exhibit B, Defendant's Verified Bill of Particulars, paragraph 4). In response, defendant refers to and attaches a response to plaintiffs' notice to produce which includes invoices and expenditures for costs incurred by defendant.¹

Plaintiffs seek an order directing defendant to serve a supplemental bill of particulars as

¹ It is unclear what invoices and receipts were attached to the response to plaintiffs' notice to produce, as these documents were not submitted on this motion.

to paragraphs 1, 3, and 4, arguing the responses are insufficient as they refer to portions of the complaint and defendant's response to a notice to produce. As to paragraph 1 in the bill of particulars, plaintiffs argue they are entitled to particulars as to exactly what trees they are being charged with taking down or failing to preserve in allegedly violating the Scarsdale Planning Board Resolutions and restrictive covenants. As to paragraphs 3 and 4, plaintiffs argue they are entitled to a delineation of expenditures for which the defendant seeks reimbursement without reference to documents outside the bill. In opposition, defendant argues the trees which plaintiffs allegedly removed or failed to preserve are referenced in the second paragraph of defendant's bill of particulars. Defendant argues the third and fourth demands improperly seek evidence concerning general damages. Defendant also argues that invoices and expenditures for costs incurred were previously provided to plaintiffs in defendant's April 4, 2011 response to plaintiffs' notice to produce.

The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial (*see Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 877 NYS2d 424 [2d Dept 2009]; *Scott v General Motors Corp.*, 117 AD2d 662, 498 NYS2d 399 [2d Dept 1986]). “Whatever the pleading pleads, the bill must particularize since the bill is intended to ‘[afford] the adverse party a more detailed picture of the claim... being particularized’” (*Linker v County of Westchester*, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995], *quoting Laukaitis v Ski Stop*, 202 AD2d 554, 609 NYS2d 285 [2d Dept 1994]). Even where the complaint sets forth facts sufficiently informative, it is insufficient to respond to a demand for bill of particulars merely by referring to portions of the complaint and to other part of the bill of particulars itself. (*Whirl Knits, Inc. v Adler Business Machines, Inc.*, 54 AD2d 760, 387 NYS2d 699 [2d Dept 1976]).

In defendant's verified bill of particulars, defendant improperly refers to portions of the complaint and previously served discovery responses. Plaintiffs are entitled to a supplemental bill of particulars setting forth the information sought as to each particular act that defendant claims plaintiffs committed, which form the basis for the first counterclaim (Plaintiffs' Exhibit B, Defendant's Verified Bill of Particulars, paragraph 1). In the second counterclaim, defendant alleges as a result of plaintiffs breaching the 1999 Resolution and the Declaration of Easements and Restrictions, defendant is entitled to damages related to the remediation cost of such breach. Defendant has exchanged invoices and expenditures for costs incurred. Plaintiffs are entitled to particulars as to each item of damages and the total damages which defendant claims constitute the remediation cost. (Plaintiffs' Exhibit B, paragraphs 3). Plaintiffs are also entitled to particulars as to the name of each person or entity to whom the defendant claims it paid any portion of the remediation cost, the date of payment, the number of any check paid by the defendant for such costs, and the amount of each such payment (Plaintiffs' Exhibit B, paragraphs 3 and 4).

Defendant moves for an order pursuant to CPLR 3108 for the issuance of an open commission to take the deposition of Tramontano & Rowe and Woodlands Tree Care, LLC in Connecticut. Defendant argues Tramontano & Rowe was retained by plaintiffs for services

related to landscaping, screening their property, removal of trees. Woodlands Tree Care was reportedly retained by plaintiffs following the 2008 storm to do work on trees bordering the property. Defendant submits a December 8, 2009 letter written by Robert Tramontano to the Zoning Board of Appeal referencing a pending application. The letter states that following the 2008 storm a tree on the Quaker Ridge Golf Club property fell knocking three large trees on the Behars' property, which had given protection from golf balls being hit into their backyard. The Behars hired an arborist, Woodlands Tree Company, to assess the fallen and damaged trees and assist in removing any dead or damaged branches. Three twenty foot tall Red Maples were planted. The letter refers to the factors considered in planting the trees and states "we planted the trees in a way that we hoped would provide some protection."

In opposition, plaintiffs argue the witnesses are nonparty witnesses and plaintiffs do not have control over them. The Court notes that plaintiffs' counsel served a plaintiffs' witness list dated March 4, 2011 stating plaintiffs intend to call Robert Tramontano as a witness at the time of trial. Insofar as plaintiffs request relief related to costs associated with the out of state deposition and the discovery schedule, the requested relief is denied as plaintiffs have failed to make an appropriate motion demonstrating entitlement to the requested relief.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." A party seeking disclosure from a nonparty pursuant to CPLR 3101(a)(4) must state the "circumstances or reasons" warranting discovery from the nonparty (*Tenore v Tenore*, 45 AD3d 571; 844 NYS2d 704 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449, 819 NYS2d 66 [2d Dept 2006]). The party must demonstrate the nonparty discovery sought is material, necessary, and unavailable by means other than the nonparty (*Kooper v Kooper*, 74 AD3d 6, 901 NYS2d 312 [2d Dept 2010]; *Kondratik v Orthodox Church in America*, 73 AD3d 708, 900 NYS2d 360 [2d Dept 2010]).

An open commission may be issued where necessary or convenient for the taking of a deposition outside of the state (CPLR 3108). A party seeking an open commission must demonstrate not only that the information sought is necessary to the action, but also that the proposed deponent would not cooperate with a notice of deposition or would not voluntarily come within the State (*Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219, 873 NYS2d 58 [1st Dept 2009]; *Susan A. v Steven J. A.*, 141 AD2d 790 [2d Dept 1998]). Under such circumstances, the movant demonstrates that the judicial imprimatur accompanying a commission will be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination (*Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219, 873 NYS2d 58 [1st Dept 2009]; *Susan A. v Steven J. A.*, 141 AD2d 790 [2d Dept 1998]). The disclosure devices set forth in CPLR 3108 are available to a party seeking disclosure from a witness who is outside the State, regardless of the fact that said witness may have a residence or domicile in New York (*Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 479 NYS2d 528 [2d Dept 1984]). Here, defendant argues they sent a letter to Tramontano & Rowe and in Greenwich, Connecticut requesting that a witness voluntarily appear at a deposition in New York. Defense counsel followed up by leaving a message on the company's

answering machine. Tramontano & Rowe did not respond. Defendant has demonstrated that the testimony of Robert Tramontano is material and relevant to the defense of this case and the discovery sought is unavailable by means other than the nonparty. No showing has been made that this witness is presently a resident of this state and it does appear that he has a business address in Connecticut. Defendant is entitled to an open commission permitting them to depose Robert Tramontano.

Insofar as defendant seeks a deposition of Woodlands Tree Care, LLC, defense counsel has not identified a specific witness who he seeks to depose. Under the circumstances, defendant has failed to demonstrate on this motion that a commission is necessary or convenient. In view of the foregoing, it is

ORDERED that plaintiffs' motion brought by notice of motion for an order extending the discovery deadline from April 28, 2011 to a date to be set by the Court and directing defendant to serve a supplemental bill of particulars is denied as violating the Westchester Supreme Court Differentiated Case Management Protocol; and it is further

ORDERED that plaintiffs' subsequent motion brought by order to show cause for an order directing defendant to serve a supplemental bill of particulars is granted to the extent that defendant shall provide on or before June 27, 2011 a supplemental bill of particulars as to paragraphs 1, 3, and 4 to the extent set forth above; and it is further

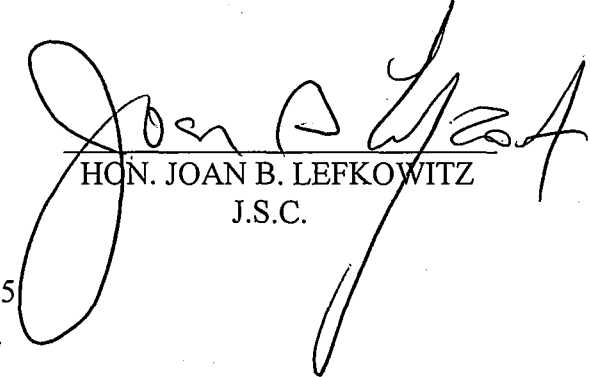
ORDERED that defendant's motion for the issuance of an open commission to take the deposition of Tramontano & Rowe is granted to the extent that an open commission shall issue authorizing defendant to take the nonparty deposition of Robert Tramontano out of state. Defendant must make the appropriate application to the appropriate Court, out of state, for issuance of a subpoena, in accordance with the practice of that Court. Defendant is direct to submit an order with notice and Open Commission within ten (10) days of the date of this order to Carolyn Carpenito, Compliance Part Clerk, Room 809; and it is further

ORDERED that defendant's motion for the issuance of an open commission to take the deposition of a witness from Woodlands Tree Care, LLC is denied with leave to renew should defendant identify a relevant witness from the company who is outside the state; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on July 11, 2011 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 14, 2011


HON. JOAN B. LEFKOWITZ
J.S.C.