Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Birnbaum
2011 NY Slip Op 34331(U)
February 25, 2011
Supreme Court, New York County
Docket Number: 109752/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP,

Plaintiff,

Index No.
109752/2009

-against-

ARTHUR BIRNBAUM AND BETH BIRNBAUM,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover for attorneys' fees allegedly due and owing, plaintiff Warshaw Burstein Cohen Schlesinger & Kuh, LLP ("plaintiff") moves to disqualify Liviu Vogel, Esq. ("Vogel") and his law firm, Salon Marrow Dykman Newman & Broudy LLP ("Salon Marrow"), as counsel for defendants Arthur ("Mr. Birnbaum") and Beth Birnbaum ("Mrs. Birnbaum") (collectively, "defendants") pursuant to the Rules of Professional Conduct §1200.29, and for a 30-day stay of all proceedings to allow defendants to obtain new counsel, to compel defendants to appear for their depositions upon the expiration of the stay and/or strike defendants' Answer and affirmative defenses, and for attorneys' fees, costs and disbursements of this motion.

Factual Background

In October 2007, Mr. Birnbaum retained plaintiff pursuant to a written retainer agreement to represent him in an action by Scarola Ellis LLP ("Scarola Ellis") for failure to pay his legal bills to Scarola Ellis LLP (the "Scarola Action").[1] During its representation of Mr. Birnbaum,

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[1] The underlying action was entitled *Scarola Ellis LLP v Arthur Birnbaum, Diamlink Jewelry, Digico Holding Ltd., and Nehal Doe, (fictitious name, true name unknown, party intended being the principal of the corporate defendant and the employer of Arthur Birnbaum on or about January 1, 2006).*

plaintiff repeatedly sought authority from him to settle the action with Scarola Ellis, thereby causing additional fees to be incurred.[2] Although Mr. Birnbaum later agreed to pay these fees, the issue of his outstanding legal fees remained outstanding, and plaintiff withdrew as counsel on January 22, 2009 upon Mr. Birnbaum's consent.

In May 2009, Mr. Birnbaum retained Salon Marrow to represent him in the in the Scarola Action (Aff. in Opp, ¶4). Ms. Birnbaum email dated September 3, 2010 indicates that Vogel and Salon Marrow were retained in this action based on Vogel's participation in negotiations with Mr. Scarola *(pro se* counsel for Scarola Ellis) and because Salon Marrow "already has a good deal of familiarity with the situation." According to defendants' "Answers to Interrogatories" in this action, Salon Marrow negotiated a settlement agreement with Scarola Ellis in November 2009.

In support of disqualification, plaintiff argues that the advocate-witness rule under Rule 3.7 states that if it becomes obvious that an attorney is likely to be a witness, on a significant issue, the lawyer must withdraw and is disqualified unless there is substantial hardship to the client. Plaintiff contends that it needs to call Salon Marrow as a necessary and material witness in plaintiff's action for legal fees, to show what was involved in settling the Scarola Action. Plaintiff argues that it needs to ask Salon Marrow such questions as: (a) when and for what purposes was Vogel and Salon Marrow initially hired by Mr. Birnbaum, and what were the terms of such representation; (b) what time and effort was spent representing defendants and representing defendants for the settlement, (c) what was Salon Marrow paid to handle their action

[2] Mr. Birnbaum allegedly incurred $60,756.00 in attorneys' fees and $878.01 in disbursements, totaling $61,634.01 plus interest for the services rendered and disbursements incurred from in or about May 2007 through in or about February 2009.

and for the settlement that it negotiated, (d) what are the details of all the negotiations which occurred between Salon Marrow and Scarola Ellis, (e) on what date did Salon Marrow receive settlement authority from Mr. Birnbaum; (f) was Vogel aware that plaintiff claimed that it was owed a significant amount of money from defendants at the time that defendants had hired Salon Marrow to replace plaintiff and (g) various other questions relating to Salon Marrow's representation of Mr. Birnbaum. As Vogel is the only person who can answer these questions, Vogel must be disqualified so that he can testify.

Plaintiff also argues that Vogel's testimony will be adverse and prejudicial to his own clients. And, since the Salon Marrow firm has done nothing in this action other than file a Notice of Appearance, there would be no significant hardship to the defendants who are free to hire any other law firm. The only party who will suffer hardship as a result of the requested disqualification is plaintiff because it is delaying resolution of its own action. Nevertheless, plaintiff is willing to undergo this delay to be permitted to call Salon Marrow as an essential witness in this action.

Plaintiff also seeks an order directing defendants to appear for depositions and/or that their Answer be stricken for their flagrant violations of this Court's Orders and the provisions of the CPLR. Plaintiff served defendants with Notices of Deposition on September 16, 2009. Thereafter, in a Preliminary Conference Order dated March 16, 2010 ("PC Order"), defendants were directed to appear for depositions by April 30, 2010. The PC Order notes that "the failure of defendant to comply with this Order shall result in the striking of their Answer and their affirmative defenses, upon notice to the Court of such non-compliance." Although plaintiff made many attempts to take defendants' depositions, defendants have not appeared for their

depositions, apparently while pursuing efforts to retain counsel to represent them. Plaintiff also notified the Court by letters dated September 8, 2010 and November 18, 2010 as to defendants' failure to submit for their depositions. (Exhibit L). We have also sent letters to the Birnbaums on, *inter alia,* July 14, 2010 and August 2, 2010 requesting that we schedule their depositions. (Exhibit M). On September 3, 2010, Ms. Birnbaum emailed plaintiff, stating that defendants are "in the process of engaging [counsel] to represent us in this matter" and that they will schedule their depositions after their counsel is engaged. (Exhibit H). However, defendants have still not agreed to appear for their depositions which were initially noticed by plaintiff to be held on December 1-2, 2009, more than one full year ago.

In opposition, defendants argue that the testimony plaintiff seeks from Vogel and/or Salon Marrow is irrelevant, privileged, or detrimental to defendants. Neither Vogel nor Salon Marrow were involved in representing either of the defendants in connection with any underlying transaction with Scarola Ellis or involved in representing defendants in connection with any underlying transaction with plaintiff.

Mr. Birnbaum retained Salon Marrow, as substitute counsel to represent and defend him in the Scarola action on May 13, 2009, four months after plaintiff withdrew as attorneys and, as such, Salon Marrow's actual knowledge of events is limited to what occurred after plaintiff ceased representing Mr. Birnbaum in the Scarola Action. What occurred after Salon Marrow was retained is not relevant to plaintiff's claim for unpaid legal fees. Salon Marrow and Vogel have no first hand knowledge of what transpired between defendants and plaintiff, and Salon Marrow and Vogel also have no first hand knowledge if there was ever any underlying transaction between plaintiff and Mrs. Birnbaum. Salon Marrow and Vogel were not involved in

representing Mrs. Birnbaum when she supposedly promised to pay plaintiff and were not involved in previously representing her.

As to the questions plaintiff claims it needs to ask, the details of Salon Marrow's representation of Mr. Birnbaum have no bearing on plaintiff's causes of action for breach of contract, account stated, unjust enrichment, promissory estoppel, and fraud or on whether the plaintiff's claim for fees is reasonable. In any event, the answer to such questions can easily be obtained by asking Mr. Birnbaum or non-party Scarola Ellis.

Further, it would be highly inappropriate and a violation of the attorney-client privilege for Salon Marrow to reveal to plaintiff the contents of any discussions that occurred between Salon Marrow and defendants as the express purpose of the attorney-client privilege is to protect confidential communications between an attorney and a client that occur within the scope of the legal representation. Salon Marrow or Vogel should not be called as a witness to testify against Mr. Birnbaum concerning the legal work they performed and the scope of their representation of him that all occurred after the events that allegedly transpired in plaintiff's Complaint.

Defendants claim they will suffer a hardship as a result of the requested disqualification. However, Salon Marrow filed a motion on behalf of defendants, which is currently pending before this court, to dismiss several of plaintiff's causes of action, amend defendants' Answer, and to sanction plaintiff for asserting frivolous claim for fraud based merely upon an alleged failure to pay a debt and for asserting frivolous causes of action against Mrs. Birnbaum, when it is clear that plaintiff never performed any services for her and that she never agreed in writing to pay the plaintiff for her husband's legal fees.

Plaintiff, for almost six months prior to Salon Marrow's appearance in this action, was

aware from defendants' May 25, 2010 *pro se* discovery response, that Salon Marrow handled Mr. Birnbaum's defense and negotiated a settlement in the Scarola Action. At no time prior to making this motion to disqualify had plaintiff sought to obtain any information from records or testimony from Salon Marrow or Vogel. Defendants contend that plaintiff filed this motion for the improper purpose of preventing defendants from obtaining counsel and to essentially perform an "end run around" defendants' motion to dismiss, to amend, and for sanctions. Plaintiff alleges a claim against Mrs. Birnbaum in order to harass defendants into paying an outrageous legal fee, and asserted causes of action for fraud to scare defendants from filing for bankruptcy protection.

Also, argue defendants, plaintiff's request to compel them to immediately appear for depositions and/or strike their Answer with an award of legal fees should similarly be denied. On October 18, 2010, defendants retained Salon Marrow to represent and defend them in this action, and faxed a copy of the notice of substitution to plaintiff on October 26, 2010. Nowhere in plaintiff's motion does it illustrate that it made any good faith effort to attempt to communicate with Salon Marrow to arrange for defendants to appear for depositions. Thus, this branch of plaintiff's motion must be denied as a good faith attempt to obtain the needed discovery must be made before resorting to a discovery motion.

Moreover, as a result of defendants' 3211 motion served on January 11, 2011, disclosure is stayed pursuant to CPLR §3214 unless the court orders otherwise. Defendants' motion also seeks to amend their *pro se* Answer and assert additional counterclaims against the plaintiff on which discovery may be sought. Therefore, depositions should be held in abeyance until defendants' motion to dismiss and amend the Answer is decided.

In reply, plaintiff contends that it served its motion to disqualify and to compel on

December 30, 2011, while defendants did not serve their motion to dismiss until January 12, 2011. Thus, defendants' motion, which was served almost two weeks after plaintiff's motion, was filed to circumvent plaintiff's motion. Defendants served their motion weeks after plaintiff served its motion in order to seek an automatic stay of discovery to delay prosecution of this action and to delay plaintiff's being paid for its services.

Plaintiff needs to call Salon Marrow as a witness to show what was involved in settling defendants' action with Scarola Ellis.

Plaintiff contends that defendants cannot argue that the questions to which defendants seek answers have nothing to do with defendants' defenses. Vogel's activities are, based on defendants' own admissions, very much related to defendants' defenses. Plaintiff allegedly elected not to pursue further discovery against Mr. Scarola at that time, and let the matter drop. Vogel, the next attorney, insisted on Mr. Scarola complying with Discovery. When Scarola could not substantiate large portions of his billing, a settlement offer was quickly reached and accepted. Had plaintiff similarly done so, it is probable that this case could have been settled well over a year earlier, and saved defendants thousands of dollars in legal fees to both the plaintiff and the successful attorney, as well as achieving further deductions in Scarola's bill.

Also, defendants do not address Mrs. Birnbaum's September 3, 2010 e-mail, which stated that defendants selected Salon Marrow based on Vogel's participation in negotiations with Mr. Scarola (*pro se* counsel for Scarola Ellis) and because Salon Marrow "already has a good deal of familiarity with the situation" and noted that "Vogel . . . was able to resolve the matter with Scarola . . . to Mr. Birnbaum's advantage." Defendants placed the actions of Vogel and Salon Marrow at issue based on their own allegations, and defendants cannot have it both ways.

Defendants argue for the relevancy of their current counsel's actions and use their current counsel's activities as a basis for comparison in order not to pay plaintiff the money it is due, and then, when plaintiff wants an opportunity to call such counsel as a witness, defendants claim that their current counsel's activities are "not relevant."

Furthermore, since defendants' motion was filed after the instant motion, their "hardship" did not even exist at the time that the instant motion was brought.

Defendants' claim that plaintiff failed to illustrate that it made a good faith attempt to communicate with Salon Marrow and Vogel to arrange for defendants' depositions is misleading. The motion illustrates that plaintiff communicated with defendants themselves. Further, defendants do not claim that plaintiff did not communicate with defense counsel, but rather states that plaintiff "failed to illustrate" that defendants communicated such with defense counsel. Defendants are aware that plaintiff repeatedly communicated with defendants' counsel to obtain defendants' compliance with the Court's discovery orders.

Discussion

Disqualification

Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.29) (formerly known as New York Code of Professional Responsibility DR 5-102), and also known as the advocate-witness rule, provides as follows:

§ 1200.29 [Rule 3.7] Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
  (1) the testimony relates solely to an uncontested issue;
  (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
  (3) disqualification of the lawyer would work substantial hardship on the

client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

"The advocate-witness rule requires an attorney to withdraw from a case 'if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client'" (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 747 NYS2d 441 [1st Dept 2002] citing DR 5-102 [A][22 NYCRR 1200.21(a)]). "But such disqualification is required only where the testimony by the attorney is considered necessary" (*Sokolow, citing Broadwhite Assocs. v Truong*, 237 AD2d 162, 162-163, 654 NYS2d 144; *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 446, 515 NYS2d 735). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (S *& S Hotel Ventures Ltd. Partnership* , 69 NY2d at 446).

Here, plaintiff failed to establish that testimony of either Vogel or his law firm Salon Marrow is necessary in the prosecution or defense of this action. Plaintiff's instant action seeks fees allegedly owed by defendants to plaintiff for legal services performed. In its Complaint, plaintiff's first cause of action is for breach of contract, namely, the written retainer agreement. The second cause of action is for account stated, based on statements sent to and received by

defendants without objection, through February 2009. The third cause of action is for unjust enrichment. All of such causes of action are essentially premised upon defendants' acceptance and receipt of the benefits of plaintiff's legal services and defendants' failure to fully compensate plaintiff for such services. Plaintiff's representation of Mr. Birnbaum began on or about October 4, 2007 and ended on or about January 28, 2009. The fourth cause of action is for fraud, based on promises defendants allegedly made to plaintiff to pay the outstanding legal fees. However, plaintiff fails to allege the dates or times during which such promises were allegedly made. The fifth cause of action is for promissory estoppel, allegedly based on defendants' repeated promises to pay plaintiff the legal fees owed, which promises were made from "July 15, 2008 through in or about February 2009." Therefore, plaintiff's claims are premised on either actions undertaken by plaintiff through February 2009, or actions undertaken by defendants through February 2009.

Salon Marrow however, did not begin representing Mr. Birnbaum until May 13, 2009, several months after plaintiff ceased representing Mr. Birnbaum. There is no indication in the record that Salon Marrow or Vogel had any communication with either plaintiff or defendants concerning plaintiff's representation of defendants at any time during the period of plaintiff's representation of defendants. Therefore, it cannot be said that Salon Marrow or Vogel has any personal knowledge of the facts constituting plaintiff's claims for unpaid legal fees.

Further, the services Salon Marrow performed subsequent to plaintiff's representation of defendant(s) bear no relationship to the legal work allegedly performed by plaintiff. Specifically, when, and for what purposes, Vogel and Salon Marrow were initially hired by Mr. Birnbaum, the terms of such representation, what time and effort Vogel and Salon Marrow spent representing defendants and representing defendants for the settlement, what compensation Salon Marrow

received to represent defendants and for the settlement that it negotiated, the details of all the negotiations, are completely irrelevant to plaintiff's claims.

The Court notes that Salon Marrow and Vogel's knowledge as to whether plaintiff had an outstanding claim against defendants is likewise irrelevant as to whether plaintiff actually performed legal services and whether the fee claimed is fair and reasonable. And, the details of any subsequent settlement negotiations that occurred between Salon Marrow and Scarola Ellis in the Scarola Action, and when Salon Marrow received settlement authority from Mr. Birnbaum, *after* plaintiff withdrew from representing Mr. Birnbaum are also irrelevant to plaintiff's claims. That Mr. Birnbaum's case could have been settled a year earlier, and saved defendants thousands of dollars in legal fees if he had provided plaintiff with settlement authority, as he did with Salon Marrow, does not warrant testimony from Salon Marrow or Vogel; plaintiff's claims rest on the work plaintiff performed and the reasonable value of such work, and whether Mr. Birnbaum withheld settlement authority from plaintiff and the effects thereof may be established through the testimony of plaintiff and Mr. Birnbaum.

Moreover, many of the questions, including questions relating to Salon Marrow's representation of Mr. Birnbaum, seek information protected by the attorney-client privilege. In this regard, CPLR 3101 [b] exempts from disclosure, upon objection, all "privileged matter." Under the attorney-client privilege (CPLR 4503[a]) the attorney-client privilege applies to confidential communications between clients and their attorneys made "in the course of professional employment" (CPLR 3101[b]; *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169 *citing Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809 [such privileged confidential

communications between clients and their attorneys are absolutely immune from discovery]).

The Court also notes that defendants' Answer alleges, *inter alia*, that plaintiff agreed to represent Mr. Birnbaum in the Scarola Action, notwithstanding an alleged conflict of interest between defendants and "Mr. Bhansali." However, ever assuming the truth of such allegation, there is no indication that Salon Marrow or Vogel had any first hand knowledge of any such conflict of interest.

Therefore, having failed to establish that the testimony of either Vogel or Salon Marrow is necessary, plaintiff's application for an order disqualifying Vogel and Salon Marrow as counsel for defendants, and for a related stay of the proceedings, is denied.

Discovery

The record indicates that after the Court issued the PC Order on March 16, 2010, plaintiff wrote to defendants in July 2010 setting forth dates (*i.e.*, August 4 and 12, 2010) on which plaintiff intended to depose defendants (Plaintiff's Motion, Exh. M). Although the PC Order set the deadline for defendants' deposition at April 30, 2010, plaintiff's March 16, 2010 correspondence indicates that defendants were unable to comply with discovery to due Mr. Birnbaum's surgeries in April and May, 2010.

On November 1, 2010, plaintiff contacted defense counsel (*via* email) stating, *inter alia*, "we have waited for several months to take your client's depositions, which they have been postponing due to their lack of representation. Please provide us with several proposed dates for Mr. Birnbaum and for Mrs. Birnbaum to be deposed." (Plaintiff's Reply Aff., Exh. C).

On November 5, 2010, plaintiff again emailed defense counsel stating, *inter alia*, "[w]e served Notices of Deposition to both defendants on September 16, 2009, more than one year ago.

. . . Moreover, our priority was recognized by the Court in the Preliminary Conference Order of March 16, 2010 which provides that 'Depositions of Defendants to be held on or before 4/30/10. Depositions of Plaintiffs to be held on or before 6/30/10.' Clearly, we were given priority by the Court. Furthermore, we have been seeking to take these depositions for a year now and defendants have been postponing their depositions because of the fact that they were unable to find counsel to represent them. If you do not promptly provide us with potential dates for your client's depositions, we will be compelled to move for sanctions and costs, as these depositions have already been delayed for far too long." (Plaintiff's Reply Aff., Exh. D).

Thus, the affirmations in support of plaintiff's motion and in reply sufficiently demonstrate plaintiff's good faith attempts to confer with its adversaries, *i.e.*, defendants and defendants' counsel, to resolve the outstanding depositions of the defendants pursuant to 22 NYCRR § 202.7.[3]

However, the drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith (*Zletz v. Wetanson,* 67 N.Y.2d 711, 713, 499 N.Y.S.2d 933 [1986]). It is equally well settled that where a party disobeys a court order and his or her conduct frustrates the disclosure scheme provided for the CPLR, dismissal of a pleading is within the broad discretion of the trial court (*see, Zletz v. Wetanson, supra*). A

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[3]N.Y.Ct.Rules 202.7. entitled, Calendaring of Motions; Uniform Notice of Motion Form; Affirmation of Good Faith, provides:

(a) . . . no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion and (2) with respect to a motion relating to disclosure . . . an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

conditional order of preclusion has been held by the Appellate Division, First Department, to constitute a proper exercise of the court's discretion (*see, Crawford v. Toyota Motor Credit Corp.*, 283 A.D.2d 184, 724 N.Y.S.2d 595 [1st Dept.2001]; *Campbell v. Peele*, 289 A.D.2d 141, 734 N.Y.S.2d 449 [1st Dept.2001]; *Green v. Mohamed*, 275 A.D.2d 599, 712 N.Y.S.2d 861 [1st Dept.2000]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kilh v. Pheffer*, 94 NY2d 118, 123 [1999]).

Based on the submissions, defendants failed to appear for a deposition as required by the PC Order. Defendants have exhibited wilful and contumacious conduct by failing to cooperate with requests for meaningful discovery warranting a conditional order striking defendants' Answer and counterclaims and affirmative defenses (22 NYCRR 202.27; *see Rocco v Advantage Securities & Protection Inc.*, 283 AD2d 317, 724 [1st Dept 2001]). The Court is mindful that defendants' pending motion to dismiss is returnable on March 16, 2011. However, the branch of defendants' motion to dismiss is aimed at the causes of action for unjust enrichment and promissory estoppel as asserted against Mrs. Birnbaum, and at the cause of action for fraud against both defendants, and would not, if granted, dispose of this action.

Therefore, the branch of plaintiff's motion to compel defendants to appear for their depositions and/or strike defendants' Answer and affirmative defenses, is granted to the extent that defendants' Answer and all counterclaims and affirmative defenses, if any, shall be dismissed and the complaint shall be granted in its entirety, unless defendants appear for depositions within 30 days of the date of the order and decision issued on defendants' pending motion to dismiss.

Attorney's Fees

As to plaintiff's request for attorneys' fees, costs and disbursements of this motion, such request is denied, at this juncture. A plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]).

As relevant herein, Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR 130-1.1 *et seq.*) permits the court to impose sanctions, including reasonable attorney's fees, for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]). Although defendants have failed to appear for depositions, it cannot be said, at this juncture, that defendants' actions fell within any of the above categories to warrant the sanction of attorney's fees, costs and disbursements.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion to disqualify Liviu Vogel, Esq. and Salon Marrow Dykman Newman & Broody LLP, as counsel for defendants pursuant to the Rules of Professional Conduct §1200.29, and for a 30-day stay of all proceedings to allow defendants

to obtain new counsel, is denied; and it is further

ORDERED that the branch of plaintiff's motion to compel defendants to appear for their depositions and/or strike defendants' Answer and affirmative defenses, is granted to the extent that defendants' Answer and all counterclaims and affirmative defenses, if any, shall be dismissed and the complaint shall be granted in its entirety, unless the defendants appear for depositions within 30 days of the date of the order and decision issued on defendants' pending motion to dismiss; and it is further

ORDERED that the branch of plaintiff's motion for attorneys' fees, costs and disbursements of this motion is denied, at this juncture.

This constitutes the decision and order of the Court.

Dated: February 25, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD