

Dabrowski v ABAX Inc.
2012 NY Slip Op 31652(U)
June 19, 2012
Supreme Court, New York County
Docket Number: 106778-07
Judge: Judith J. Gische
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 108778/2007
DABROWSKI, JERZY
vs.
ABAX INC.
SEQUENCE NUMBER : 016
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 016

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

FILED

JUN 21 2012

JUN 19 2012

Dated: _____

NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.

HON. JUDITH J. GISCHE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

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**Jerzy Dabrowski, Sebastian Gajewski and
Bogan Cwalina, individually and o/b/o all
other persons similarly situated who were
employed by ABAX Incorporated and/or
any other entities affiliated with or
controlled by ABAX Incorporated,**

DECISION/ ORDER
Index No.: 106778-07
Seq. No.: 016

Present:
Hon. Judith J. Gische
J.S.C.

Plaintiffs,
-against-

**ABAX Incorporated and any related
corporate entities, John Bleckman and
Edward Monaco, individually and
John Doe Bonding Companies 1- 20,**

Defendants.

FILED

JUN 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----x
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
ABAX n/m (compel) w/JML affirm (sep back) exhs	1,2
Pltffs' opp w/LML affirm, exhs	3
ABAX reply w/exhs (2)	4,5
Deposition transcripts SG, JC	6,7,8,9
Correspondence 4/13/12	10

Upon the foregoing papers, the decision and order of the court is as follows:

The facts of this class action and the nature of the underlying disputes between the parties are set forth in extensive detail in prior orders of this court. Discovery has been an ongoing bone of contention between the parties. The motion presently before the court involves the completeness of answers provided by class representatives Jerzy Dabrowski and Sebastian Gajewski at their respective depositions (collectively "testifying class representatives").

There are two prominent issues in this case: 1) whether the plaintiffs were

deprived of paid overtime and 2) whether the plaintiffs were misclassified under the wrong prevailing wage title and, therefore, underpaid.

Defendants contend that the answers provided by the testifying class representatives are unresponsive and/or evasive. Defendants seek an order requiring that the testifying class representatives, and all other class members who will be deposed, "fully and properly respond to questions posed to them at their depositions" (CPLR 3124). Defendants also seek the imposition of monetary sanctions on the basis that the testifying class representatives have "wasted" the defendants' time and resources because *inter alia* defendants had to pay for Polish language interpreters (CPLR 3126)

Initially defendants provided the court (and plaintiffs) with only a few pages from each of the testifying class representatives' deposition transcripts. This issue was raised by plaintiffs in their opposition to defendants' motion. Plaintiffs argued that the defendants should have provided them full transcripts of their deposition testimony so they could review them and make any necessary corrections. The court ordered that defendants provide and serve plaintiffs with copies of the complete transcripts and that same be filed with the court for consideration on this motion. Defendants complied with that order and those complete transcripts are before the court in deciding this motion.

In separate correspondence dated April 13, 2012, defendants provide approximately 20 instances which they contend highlight testifying class representatives' unresponsive or evasive answers. One example involves how long it took Dabrowski to replace/ install a door frame. Dabrowski was asked several times and in different ways how long this particular task usually took him. He first responded, "I can't say but I was doing it as fast as I could." When asked to estimate whether it took him an hour to do

that job, he responded "I can't say." When asked what the longest amount of time it ever took him to do that particular job was, he responded again "I don't remember." At Gajewski's EBT, he was asked about what he did when he worked on walls, Gajewski responded "one of the activities that I performed in the apartment, which was one of the carpenter's duties, was to cover the walls with the sheet rock." When asked whether he painted walls, he responded "probably." When asked why he was doing painting if he was a carpenter, Gajewski responded "I have many skills and the company required that from me. I painted the walls, but I also wanted to add that in the renovation of the apartment, over 90 percent of the work that I did was work concerning carpentry."

The transcripts show that Dabrowski was deposed over the course of three full days (12/8/11, 12/9/11 and 1/23/12). Gajewski was only deposed for one full day (1/25/12), but it was originally stipulated by the parties that he appear for his continued deposition on January 30, 2012 with defendants' deposition to follow thereafter.

Immediately after Gajewski's deposition was adjourned on January 25, 2012, defendants' attorney ("Attorney Newberger") sent plaintiffs' attorney ("Attorney Lusher") an email stating that the depositions had to rescheduled because of a conflict and a "health issue" concerning one of the defendants. In a subsequent email dated January 27, 2012, Attorney Newberger stated, for the first time, that he would be bringing a motion for discovery sanctions and that no further depositions would take place "until this issue is resolved."

Discussion

Plaintiffs contend this motion was not brought in compliance with the requirements of 22 NYCRR § 202.7 [a][2]. 22 NYCRR § 202.7[a][2] requires that a motion relating to disclosure be accompanied by an affirmation that counsel has

conferred with counsel for the opposing part in a good faith effort to resolve the issues raised by the motion (Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d 393 [1st Dept 2007]). Although defendants provide the affirmation of Attorney Labuda, and he claims to have "undertaken good faith efforts to resolve this matter prior to bringing this motion," his affirmation does not satisfy the requirements of this court rule in substance or form (Chichilnisky v. Trustees of Columbia University in City of New York, 45 A.D.3d at 394). At most, all Attorney Labuda does is show that he and Attorney Lusher disagreed with her objections and the answers provided by the testifying class representatives. The failure to comply with this court rule is a sufficient reason to deny defendants' motion for disclosure sanctions (Chichilnisky v. Trustees of Columbia University in City of New York, supra).

Even were the court persuaded that Attorney's Labuda's affirmation substantially complies with 22 NYCRR 202.7 et seq., defendants' motion for discovery sanctions fails on the merits. CPLR § 3124 provides that if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, the party seeking disclosure may move to compel compliance or a response. CPLR §3126 sets forth examples of sanctions that are if a person refuses to comply with an order to disclose. The imposition of such sanctions, however, is only appropriate where the movant meets its burden of showing that the resisting party failed to comply with discovery demands and that such non-compliance is deliberate and contumacious (Pimental v. City of New York, 246 A.D.2d 467 [1st Dept 1998]).

Although some of the testifying class representatives' responses are vague, it is clear from the transcripts that both deponents made meaningful efforts to answer the questions posed of them and they struggled to remember events that transpired ten (10)

years before they were deposed. Some questions called for estimates in time of matters that both deponents either did routinely or did not give much thought to as they were doing them. Other testimony highlighted by defendants as being non-responsive is, in fact, completely responsive, but apparently the answers the deponents gave were not what defendants expected or had hoped for.

Defendants have not shown that the testifying class representatives were evasive in answer, non-responsive to questions asked of them or in any way willfully failed to disclose information known to them. Nor have the defendants shown that either of the deponents refused to answer any question asked of them. For example, when Dabrowski was asked what work did he consider hazardous material abatement work, he responded "[replacing] the windows and doors.." Examining the testimony, Dabrowski completely answered the question, although it took him several attempts to do so because he stated he did not understand what the word "abatement" means. It is noteworthy that both testifying class representatives testified with the assistance of a polish language interpreter.

Plaintiffs correctly argue that an order directing future class representative deponents to answer their questions "fully" is overly broad, that branch of defendants' motion is denied as well. Although the court can make orders on the scope of discovery, it cannot rule on objections or the completeness of responses until they are made.

Having failed to meet their burden on this motion, defendants' motion pursuant to CPLR § 3124 and 3126 is denied in all respects.

The continued deposition of Gajewski shall take place no later than 30 days after this decision/order appears on SCROLL as having been entered. The defendants' deposition shall commence no later than 10 days immediately after Gajewski's

deposition is completed. The depositions shall take place day by day until completed.

Conclusion

It is hereby

ORDERED that defendants' motion pursuant to CPLR 3124 and 3126 is denied in all respects; and it is further

ORDERED that the continued deposition of Gajewski shall take place no later than 30 days after this decision/order appears on SCROLL as having been entered; and it is further

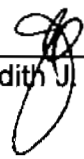
ORDERED that the defendants' deposition shall commence no later than 10 days immediately after Gajewski's deposition is completed. The depositions shall take place day by day until completed; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 19, 2012

So Ordered:



Hon. Judith J. Gische, JSC

FILED

JUN 21 2012

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