

**Fletcher v Dakota**

2012 NY Slip Op 32504(U)

September 28, 2012

Sup Ct, New York County

Docket Number: 101289/11

Judge: Eileen A. Rakower

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SCANNED ON 10/2/2012

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

**PRESENT: HON. EILEEN A. RAKOWER**  
Justice

PART 15

Index Number : 101289/2011  
FLETCHER, ALPHONSE  
vs.  
DAKOTA  
SEQUENCE NUMBER : 011  
COMPEL

INDEX NO. 4  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 2  
Replying Affidavits \_\_\_\_\_ | No(s) 3

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

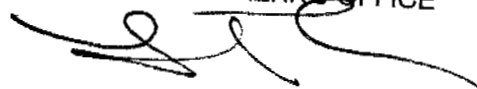
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

OCT 02 2012

NEW YORK  
COUNTY CLERK'S OFFICE



Dated: 9/28/12

\_\_\_\_\_, J.S.C.

**HON. EILEEN A. RAKOWER**

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 15

-----X  
ALPHONSE FLETCHER, JR. and FLETCHER ASSET  
MANAGEMENT, INC.

Plaintiffs,

Index No.  
101298/11

- against -

**FILED** **DECISION**  
**and ORDER**

THE DAKOTA, et al.,

**OCT 02 2012**

Defendants.

Mot Seq. 11, 12

NEW YORK  
COUNTY CLERK'S OFFICE

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HON. EILEEN A. RAKOWER

Plaintiffs Alphonese Fletcher, Jr. ("Fletcher") and Fletcher Asset Management, Inc. ("FAM") (collectively, "Plaintiffs") commenced this action on February 1, 2011. Plaintiffs' action concerns the Board of The Dakota's denial of Fletcher's application to purchase an apartment adjacent to the one (Apartment 50) he owns for purposes of combining the two. Fletcher has been a resident of The Dakota and a shareholder of the corporation since 1992 and has previously served on the Board of The Dakota, including two terms as Board President. Fletcher alleges that The Dakota discriminated against him, inter alia, based on his race, in their refusal to approve his application to purchase the adjacent apartment. Fletcher also alleges retaliation against him for his protecting the rights of others, including minority and Jewish shareholders and applicants of The Dakota. Fletcher alleges that in early 2007 he objected to the discriminatory treatment of a Jewish couple applying to purchase an apartment and in another instance protested the Board's unjustified denials of an African-American shareholder's requests to fix her bathroom. Fletcher also alleges that during the period in which his application was pending, Defendants defamed Fletcher by making numerous false statements to others regarding his financial condition in order to taint consideration of his application, including that he had not fulfilled binding charitable commitments; that Fletcher was "playing the race card" and using his status as an African-American to persuade the Board to approve his application; that Fletcher's assets were illiquid and difficult to value; and that FAM's business loans left it overextended and at risk of collapse.

Certain claims and defendants were dismissed by this Court in an order dated July 21, 2011 and additional claims were dismissed, on appeal of that order, by the Appellate Division, First Department, by decision dated July 3, 2012. The claims currently remaining in the action are as follows:

- As to The Dakota, claims of discrimination, retaliation, tortious interference with contract, and defamation based upon statements made before the filing of the Complaint that Fletcher had not fulfilled binding charitable pledges but instead “owed” money to charity, that Fletcher was living on “borrowed money,” and that “[b]ased on the financial information submitted by Fletcher,” approving Fletcher’s application was not in the best interest of The Dakota;
- As to defendant Barnes, discrimination; and
- As to defendant Nitze, defamation based only upon the statement allegedly made to Craig Hatkoff that Fletcher had not given the money he promised to give to charity and that “he owes it.”

A. Defendants’ Motion to Compel

Defendants The Dakota, Inc., Barnes, and Nitze move for an Order compelling plaintiffs to produce certain documents and information responsive to their document requests and interrogatories served on August 3, 2011. Defendants state that in their April 2, 2012 written responses and objections to their requests and interrogatories, plaintiffs objected to producing the following categories of relevant documents:

1. The operational structures, investments and valuation procedures of the Fletcher Entities [defined as “FAM; the Pre-1995 Entity (as further defined) Richcourt Holdings Inc., the Fletcher Funds; the Fletcher Foundation; and their officers, directors, employees, corporate parent, subsidiaries, affiliates or predecessors”];
2. Plaintiffs’ tax returns, financial statements, valuations of real estate holdings, and investments, loan obligations, and payments and obligations to each other, dating from 2010, see Responses to Requests

6, 17-18, 21, 39, 43-44 & 46;

3. The business relationship between FAM- related entities and Quantal, Duhallow, and FTI, see Responses to Requests 34-35 & 38; Responses to Interrogatories 17-19;
4. Plaintiffs' charitable donations, their binding and non-binding charitable pledges and commitments, and any failure to satisfy those pledges and commitments, see Responses to Interrogatories 30-32; [available on tax returns]
5. Fletcher's prior claims of discrimination, see Responses to Request 48-49, Responses to Interrogatory 22;
6. The Pension Funds' investment in the Fletcher Funds and the SEC investigation into Fletcher and FAM, see Responses to Requests 40-41; and
7. The identity of Fletcher's current place of residence, see Responses to Interrogatories 27-28.

As to Categories 1, 2, and 3

Defendants claim that the requested financial information regarding FAM and its related entities is relevant in order to defend against plaintiffs' defamation claims and to prove the absolute defense of truth - that Fletcher and FAM were in poor financial condition.<sup>1</sup> Defendants also contend that plaintiffs "themselves have tied the

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<sup>1</sup>Defendants allege that plaintiffs only produced "576 mundane documents that appear to be drawn solely from Fletcher's own files . . . . Notably missing from the Plaintiffs' productions are (i) any financial information regarding Fletcher or FAM or FAM's affiliates (other than that referenced in the filings relating to Plaintiffs' prior motions for a temporary restraining order and preliminary injunction;) and (ii) any previously undisclosed documents relating to Duhallow, Quantal, or FTI (entities that prepared reports regarding Plaintiffs' financial condition that were submitted to the Board or attached to the complaint)."

financial condition of Fletcher to FAM, and FAM in turn to the financial condition and holdings of the FAM-managed funds and other FAM-related entities, and thus they cannot refuse to produce the requested information.” Defendants state that in his application to purchase the subject apartment, Fletcher himself relied on the assets and income of FAM and the FAM-related entities to seek to establish that he was financially qualified.

Plaintiffs contend that it is undisputed that they have agreed to produce numerous categories of financial information for the three year period purportedly considered by the Dakota Board when it deliberated on Fletcher’s application to purchase Apartment 50 and contend that those documents are “more than sufficient to allow defendants to develop their defenses.”

CPLR §3101(a) generally provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has held that the term “material and necessary” is to be given a liberal interpretation in favor of the disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are “palpably improper.” A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, \*1 [2nd Dept. 2007]).

Defendants are entitled to “full disclosure of all matter material and necessary . . . in the defense of an action.” CPLR 3101(a). Plaintiffs are obligated to satisfy their discovery obligations and are directed to produce all documents responsive to Defendants’ discovery demands that relate to plaintiffs’ financial condition as of March 31, 2010 as they are “material and necessary” to Defendants’ defense.

Plaintiffs state, “While Fletcher’s April 23, 2010 application materials made representations concerning his financial condition as of March 31, 2010, defendants have not shown how documents from the year end that were not available and do not break down information by quarter, such as annual tax returns, would enable defendants to assess Fletcher’s qualification to purchase Apartment 50 in early 2010.” However, to the extent that plaintiffs cannot produce a substitute to show the

quarterly breakdown as of March 31, 2010 for the documents requested by Defendants, plaintiffs are required to produce the 2010 year end tax return or other financial records that are requested.

As for other documents post March 31, 2010, Defendants are entitled to only those that specifically relate to the alleged defamatory statements after March 31, 2010 asserted in plaintiffs' Complaint, as upheld by the Appellate Division. Those statements include:

"[At an April 14, 2010 board meeting,] one or more of the Individual Defendants told the other members of the Board that Fletcher had not fulfilled binding charitable commitments and pledges, that Fletcher's assets were all illiquid and difficult to value, and that FAM's business loans left it over-extended and at risk of collapse . . .

"[On or before May 7, 2010, Nitze told Dakota shareholder Craig Hatkoff that Fletcher] "had not actually given the money he had promised to give [to charity] and 'he owes it' . . .

"[At some point between June 24, 2010 and September 2010] one or more of the Individual Defendants falsely and maliciously stated to Hatkoff that Fletcher had 'checked out of his business' and was living on 'borrowed money' . . .

"On September 14, 2010, . . . the Board sent a letter to certain Dakota shareholders . . . [It stated, inter alia,] '[b]ased on the financial information submitted by Fletcher, the Board concluded that approving such a purchase would not be in the best interest of The Dakota' . . . [The letter] also contained the false and misleading statement that Fletcher had declined the Board's request to provide additional financial information."

Defendants' requests for financial information that fall within the above categories 1, 2, 3 are overly broad with respect to these alleged defamatory statements. Thus, except as previously stated, to the extent that Defendants seek financial and other information relating to plaintiffs' financial condition post March 31, 2010, Defendants must narrow their demands.

As to Categories 4 and 5 - Charitable Pledges and Prior Instances of Discrimination

Defendants' requests relating to charitable pledges is limited to plaintiffs' binding charitable pledges. Defendants' request to compel additional discovery concerning prior instances of discrimination is denied.

As to Category 6 and 7 - The Pension Funds' investment in the Fletcher Funds and the SEC investigation into Fletcher and FAM and Fletcher's Residence

Defendants' discovery demands that fall within categories 6 and 7 are denied because they are palpably improper, overly broad and unduly burdensome.

C. Plaintiffs' Motion To Compel

Plaintiffs move for an order compelling Defendants to produce documents and information pursuant to CPLR 3124, as well as costs and expenses, including attorneys' fees, incurred in connection with this motion. Plaintiffs contend that defendants have refused to produce, "among other things, documents concerning (i) defendants' historical discriminatory conduct; (ii) defendants' post filing retaliatory conduct; (iii) plaintiffs themselves; and (iv) the joint listing and sale of Apartments 50 and 51." Defendants oppose.

In discrimination cases, plaintiffs are to be "afforded liberal and thorough discovery:"

"[T]he Legislature and the Court of Appeals have clearly established that New York favors broad and effective enforcement of the discrimination laws. The "subtle and elusive" methods often characterize discriminatory practice (citations omitted), and the strong State policy in favor of the eradication of discrimination, combined with the burden of proof placed on plaintiff in these actions, requires courts to insure that plaintiffs are afforded broad and thorough discovery."

*O'Grady v. City of New York*, 164 Misc. 2d 171, 174 (N.Y. Misc. 1995).

(i) Documents Concerning Defendants' Alleged "Historical Discriminatory Misconduct"

Given Plaintiffs' claims concerning Defendants' historical and continuing discriminatory misconduct and in light of the liberal discovery standards applied in discrimination cases, Defendants are required to produce documents concerning Defendants' alleged "historical discriminatory conduct" responsive to Plaintiffs' Document Requests 9, 13, 14, 15, 19, 20, 31, 34, 53, and 55 for the ten year period preceding the Board's denial of Plaintiffs' application.

(ii) Documents Concerning Defendants' Post Filing Retaliatory Conduct

Plaintiffs' request to compel Defendants to produce documents concerning Defendants' alleged post filing retaliatory conduct is denied.

(iii) Defendants' Documents Concerning Plaintiffs

In light of the liberal discovery standards applied in discrimination cases, Defendants are required to produce documents concerning or referencing plaintiffs for the requested ten year period.

(iv) Documents Concerning the Joint Listing of Apartments 50 and 51

Plaintiffs' request to compel Defendants to produce documents relating to the planned joint listing of Apartments 50 and 51 in October 2010 which did not take place is denied based on lack of relevancy.

Wherefore it is hereby

ORDERED that defendants The Dakota, Bruce Barnes, and Peter Nitze's motion is granted to the extent that plaintiffs Alphonse Fletcher, Jr. and Fletcher Asset Management, Inc. are directed to produce any and all responsive documents in accordance with this decision within thirty (30) days of receipt of a copy of this Order with notice of entry thereof; and it is further

ORDERED that plaintiffs Alphonse Fletcher, Jr. and Fletcher Asset

Management, Inc.,’s motion is granted to the extent that defendants The Dakota, Bruce Barnes, and Peter Nitze are directed to produce any and all responsive documents in accordance with this decision within thirty (30) days of receipt of a copy of this Order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

9/28/12



EILEEN A. RAKOWER, J.S.C.

**FILED**  
OCT 02 2012  
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