

<b>Brown-Jodoin v Pirrotti</b>
2012 NY Slip Op 33836(U)
December 6, 2012
Supreme Court, Westchester County
Docket Number: 51283/2011
Judge: Joan B. Lefkowitz
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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.

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

-----X  
SHARON BROWN-JODOIN, Individually, as Executor-Elect of the Estate of Selvyn D. Brown, and as Trustee of the Selvyn D. Brown Revocable Living Trust,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 51283/2011  
Motion Date: Nov.19, 2012  
Seq No. 5

ANTHONY JOSEPH PIRROTTI, LAW OFFICES OF ANTHONY J. PIRROTTI, P.C., and PIRROTTI & PIRROTTI, LLP,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff to compel defendants to: (1) provide disclosure, including electronic records that they have failed or refused to provide; and (2) requiring defendants to reimburse plaintiff for the costs, including reasonable attorneys' fees incurred as a result of defendants' refusal to provide disclosure.<sup>1</sup>

Order to Show Cause - Affirmation in Support - Exhibits 1-5  
Affirmation in Opposition-Exhibits A-D

Upon the foregoing papers and the proceedings held on November 19, 2012 this motion is determined as follows:

In this legal malpractice action, plaintiff alleges that defendants were negligent in connection with the probate of plaintiff's father's estate and breached the retainer agreement. Plaintiff alleges, among other things, that defendants failed to take necessary steps to have the decedent's will admitted to probate or to have letters testamentary issued to plaintiff.

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<sup>1</sup> Plaintiff also seeks to have its delay in filing the order to show cause excused. Given the short length of the delay, the lack of prejudice to defendants and lack of opposition to this request by defendants, plaintiff's tardiness is excused.

Plaintiff served its Notice to Produce dated May 18, 2012, which included, inter alia, the production of “[A]ll electronically stored information, in its native format, concerning each of the matters enumerated above...” (Demand no. 13). In their Response to Notice to Produce, dated June 2, 2012, defendants generally objected to that demand and responded in pertinent part: “Without waiving these objections and the general objections, Defendants have produced all responsive electronic documents in their possession in PDF format and take the position that demand for further production is subject to the aforementioned objections.”

By Compliance Conference Order dated July 11, 2012, defendants were directed to “...serve a supplemental response to ¶ 13 of the plaintiff’s Notice to Produce on or before July 17, 2012.” In their Supplemental Response to Notice to Produce dated July 16, 2012, defendants reiterated their prior objections including that the documents demanded were already in plaintiff’s possession and that defendants had produced all responsive electronic documents in their possession in PDF format.

The parties appeared for a compliance conference on August 1, 2012 at which time plaintiff was directed to serve supplemental demands for discovery of electronic data, post deposition demands and supplemental itemized demands regarding deficiencies in the previous document production by August 13, 2012. Defendants were directed to serve their responses by September 14, 2012.

On August 13, 2012, plaintiff e-filed its Supplemental Demand-Notice to Produce which included, inter alia, a number of demands for electronically stored information including defendants’: billing records, receipts and invoices for disbursements, costs or expenses, time entries for “data entry”, word processing files, spreadsheet or worksheet files, and ledgers and journals for each trust account that related to defendants’ legal representation of plaintiff or the property, affairs, estate or trust of Selvyn D. Brown after his death “to be produced as electronic data.” Plaintiff also e-filed its Supplemental Demand-Interrogatories on August 13, 2012, which included requests for information concerning, inter alia, the name of the electronic data processing program used by defendants from May 1, 2003-April 6, 2008 to record defendant Anthony Joseph Pirrotti’s (hereinafter “Pirrotti”) time for billing purposes, and to maintain records of attorney trust accounts and whether the computer with that data processing equipment was still in defendants’ possession.

In response to plaintiff’s Supplement Demand-Notice to Produce, defendants objected to the demands seeking electronically stored information as electronic data on the grounds that the terms “electronically stored information” and “electronic data” “...are not defined and are vague and ambiguous, overly broad, unduly burdensome...oppressive...and unreasonably expensive.” With respect to the demands for all receipts and invoices concerning disbursements, costs or expenses, defendants, while preserving their objections, annexed certain responsive documents and stated that all documents in defendants’ possession had been provided and that the demand contained information which may be in the possession of Anthony Nolfo, Esq. (the attorney who took over the representation of plaintiff’s in connection with the administration of plaintiff’s father’s estate in August 2006). Defendants also responded that they had already produced all of

Pirrotti's time sheets for this matter. With respect to the demand for ledgers and journals, defendants responded that no journals were maintained and any ledgers to the extent they remain in defendants' possession were already produced in discovery. In response to the Supplemental Demand-Interrogatories, defendants response stated that defendants utilized the electronic data processing program "P.C. Law (version 4.1)" to record Pirrotti's time for billing purposes and to maintain records and that defendants are still in possession of that computer.

Plaintiff contends that defendants' time, disbursement, billing and trust account records, both paper and electronic are relevant to plaintiff's claims in this matter and that defendants have failed to produce these documents. Plaintiff argues that defendants were required to maintain these records for a period of 7 years and to the extent defendants have failed to retain these documents, plaintiff is entitled to sanctions for defendants' spoliation of evidence.

In opposition, defendants argue that they have produced their entire file in this matter. Defendants further contend that to the extent that plaintiff seeks "electronically stored information" or "electronic data" plaintiff has failed, despite repeated requests by defendants to define either of those terms. Defendants further argue that plaintiff is essentially seeking to have all the documents previously produced by defendants on the CD Rom, to be produced once again in electronic format and that such a request is merely duplicative of what has already been produced. Defendants further argue that Pirrotti is a sole practitioner of advanced age with a small support staff and to require him to re-produce the documents previously provided either in hard copy or on the CD Rom again in electronic format is unduly burdensome and without justification.

This Court agrees. Defendants have submitted sworn responses and affidavits attesting that they have produced the entirety of their file in connection with defendants' representation of plaintiff in this matter. To the extent that defendants have produced all documents in their possession which are responsive to plaintiff's demands, defendants should not be required to produce those documents once again in a different format. To the extent certain documents never existed, defendants cannot be compelled to produce what they do not possess. (*Sagiv v Gamache*, 26 AD3d 368 [2d Dept 2006]). However to the extent that defendants possess documents which are responsive to plaintiff's supplemental demands located on the P.C. Law program on defendants' computers which have not been previously produced, plaintiff is entitled to production of those documents.

Accordingly, it is,

ORDERED that the branch of plaintiff's motion seeking to compel defendants to provide disclosure, including electronic records, which they have failed and refused to provide is denied except to the extent that defendants are directed to provide any documents located on defendants' computers in the P.C. Law program which are responsive to plaintiff's August 13, 2012 Supplemental Demand-Notice to Produce and which have not previously been produced by defendants. Defendants are directed to produce these documents, if any, by December 19, 2012

in hard copy format or in any other format which defendants choose. To the extent that no further documents exist which are responsive to plaintiff's August 13, 2012 Supplemental Demand-Notice to Produce, defendants shall e-file an affidavit stating that they have reviewed the documents located on the P.C. Law Program relative to their representation of plaintiff and that after such a review no documents, other than those already produced, were found; and it is further

ORDERED that the branch of plaintiff's motion seeking costs and attorneys' fees is denied; and it is further

ORDERED that counsel is directed to appear for a conference in the Compliance Part, Courtroom 800, on January 4, 2013 at 9:30 A.M.

Dated: White Plains, New York  
December 6, 2012

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

TO:

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cc: Compliance Part Clerk