Vinar v Litman
2013 NY Slip Op 30632(U)
March 14, 2013
Sup Ct, Queens County
Docket Number: 700017/07
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ALEKSANDER VINAR, Plaintiff,	Index No. 700017/07 Motion Date January 15, 2013
-against-	Motion Seq. No. 26
JOHN LITMAN, et al., Defendants.	Motion Cal. No. 11

	Papers Numbered
Notice of Motion....................	EF 870
Affirmation of Good Faith...........	EF 871
Affirmation in Support..............	EF 872
Affidavit of Service................	EF 873
Notice of Cross Motion..............	EF 1290
Affirmation in Opposition to Motion and in Support of Cross Motion.....	EF 1291
Exhibits............................	EF 1292
Affirmation in Reply................	EF 1320
Affidavit of Service................	EF 1321
Affirmation in Opposition to Cross Motion...................	EF 1322
Affidavit of Service................	EF 1323

Upon the foregoing papers it is ordered that the motion by plaintiff for an order compelling defendant John Litman to appear for a continued deposition because he improperly refused to answer questions at his deposition of July 3, 2012 and for an order of precluding the defendant John Litman from testifying at trial if he does not appear for a further deposition within thirty (30) days is hereby decided as follows:

This is an action for, among other things, breach of contract, attorney malpractice and fraud. Plaintiff alleges in the verified complaint that he purchased 20% shares of outstanding

stock in two corporations defendants Terryville Associates Inc. and Golden Horizon Terryville Corp. by providing his attorneys, defendants Robert Monahan, Esq. of Monahan & Sklavos P.C. and Alexander Sklavos, Esq., $444,000.00 in escrow. Plaintiff further alleges that his attorneys acted in concert with defendants John Litman and Ella Gleizer, among others, to permanently deprive plaintiff of his money without providing plaintiff his share certificates or ownership interest in the corporations.

Via the instant motion, plaintiff maintains that defendant Litman refused to answer the following questions:

1. He refused to answer if defendant attorney Monahan followed the same course of conduct in 2003 as alleged in this case -- that Monahan provided legal counsel at the same time to multiple clients all with financial conflicts of interest (to Litman and his partners of 2409 Ocean Ave LLC, 2417 Ocean Ave LLC and 2417 Management LLC).

2. He refused to answer if defendant Monahan prepared an operating agreement for all shareholders of 2409 Ocean Ave and thus provided legal representation to multiple clients all with financial conflicts of interest.

3. He refused to answer if he recognized his signature.

4. He refused to answer if he received approximately $70,000 per year from Terryville Associates Inc. as dividends.

5. He refused to answer if he financially spent large sums of money in Spring 2005 (the time period of his alleged conversion of Plaintiff's $440,000 escrow monies) to purchase an apartment for his daughter Rona Gleizer.

6. He refused to answer questions about the value of any appraisals of the underlying land owned by defendant Terryville Associates Inc. (his private company)

Under CPLR 3101 there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The purpose of disclosure proceedings is to advance the function of trial, to ascertain truth and to accelerate disposition of suits. The CPLR further provides that disclosure should be construed broadly to effectuate this purpose (CPLR 3101[a][1][2]; *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]). "Evidence" is defined to mean not the equivalent to that evidence which might be admissible on trial of the action,

but means evidence required in preparation for trial. The information sought need not qualify as evidence admissible at the trial of an action, but only lead to such evidence. Disclosure is required as to all relevant information calculated to lead to relevant evidence (Siegel, NY Prac § 344, at 550 [4th ed 2005]). It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (*see, Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (*Anonymous v. High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006] [citations omitted]). The Court is given broad discretion to supervise discovery (*Lewis v. Jones, et. al.*, 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd[a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (Weinstein-Korn-Miller, NY Civ Prac, par. 3101.07, p. 31-13)" (*Allen, supra*). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance, Inc.*, 226 AD2d 175 [1st Dept 1996]; *Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339 [1st Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). Moreover the adequacy and circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests" (*Id.*; *Santariga v. McCann*, 161 AD2d 320 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

As the Court stated in *Staten Island University Hospital v. Comprehensive Habilitation Services Inc.*, 2007 NY Misc Lexis 1248 [Sup Ct, Richmond County, 2007]):

> Section 3101(a) embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the

[* 4]

possibility for ambush and unfair surprise (*see*, *Delta Financial Corp. v. Morrison*, ___ Misc3d ___, 829 NYS2d 877, 2007 WL 283039 [Sup Ct, Nassau County, Jan. 26, 2007]). Parties are entitled to ask broad questions at depositions in an effort to ascertain the truth and to flush out the relevant issues that may assist them in the prosecution or defense of their action (*see*, *Seaman v. Wyckoff Heights Medical Center, Inc.*, 8 Misc3d 628, 632, 798 NYS2d 866 [Sup Ct, Nassau County, 2005]). The structure of CPLR Article 31 "envisages a maximum disclosure of Facts with a minimum of supervision" ([*5] *Wiseman v. American Motors Sales Corp.*, 103 AD2d 230, 232, 479 NYS2d 528 [2d Dept 1984]), to "create an environment conducive to open, expansive disclosure during the taking of the deposition" (*Mora v. St. Vincent's Catholic Med. Ctr.*, 8 Misc3d 868, 800 NYS2d 298 [Sup Ct, NY County, 2005]).

On October 1, 2006 a new Part 221, entitled "Uniform Rules for the Conduct of Depositions" became effective. Section 1 of the Rule provides that every objection raised during an deposition shall be stated succinctly. Section 2 provides that the proper procedure for a deposition is to permit the witness to answer all questions subject to objections pursuant to CPLR 3115 (b), (c) and (d), except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) if the question is plainly improper and would, if answered, cause significant prejudice to any person, and '[a]n attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this subdivision".

* * *

"[T]he scope of questioning and testimony which may be elicited at a deposition may be more extensive than that which may be admissible at trial" (New Rules on Conducting Depositions, Robert S. Kelner and Gail S. Kelner, NYLJ, Sept. 19, 2006). While the answer to these questions may prove to be [*7]

> irrelevant to this litigation, such a determination cannot be made until the questions are posed and answered (*see*, *Lipp v. Zigman*, 14 Misc. 3d 1217(A) [Sup Ct, Nassau County, 2007]). All issues regarding admissibility in evidence of questions asked and answered at a deposition, except those relating to form, are reserved for the trial court (*see*, *Shapiro v. Levine*, 104 AD2d 800, 479 NYS2d 1006 [2d Dept 1984]).

As none of the questions which John Litman refused to answer fall within any of the exceptions enumerated in Part 221 of the "Uniform Rules for the Conduct of Depositions," and as the stated basis for the attorney directing Mr. Litman not to answer is because the questions are irrelevant, with no mention made at any time of any prejudice, significant or otherwise, It is ordered that John Litman is to appear to complete his examination before trial on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

Should defendant Litman fail to comply with this order, defendant Litman shall be precluded from offering any evidence at trial.

The cross motion by defendants, John Litman, Ella Gleizer, Terryville Associates Inc., Golden Horizon Terryville Corp., XYZ Partnership, Rainbow Associates Inc., and 2417 Management LLC for an order awarding costs and/or sanctions against plaintiff's counsel pursuant to 22 NYCRR 130-1.1(a) and for removal of plaintiff's counsel from this matter based upon his continued practice of engaging in frivolous conduct is denied.

At this stage, the court finds that the defendants have not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have defendants established sufficient cause to warrant sanctions (*see*, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2020]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]).

This constitutes the decision and order of the court.

Dated: March 14, 2013

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Howard G. Lane, J.S.C.