

**Faust Harrison Pianos, Inc. v Bukai**

2013 NY Slip Op 32839(U)

October 31, 2013

Supreme Court, Westchester County

Docket Number: 51445/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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  
FAUST HARRISON PIANOS, INC.,

Plaintiff,

-against-

**DECISION and ORDER**

Index No.: 51445/2012  
Seq. No. 5

ORI BUKAI, ALLEGRO PIANOS OF MANHATTAN  
CORP., AND ALLEGRO PIANOS, LLC,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff to renew and modify this court’s January 28, 2013 order (the “January 28 Order”), which denied non-party Dorf and Nelson LLP’s (“Dorf & Nelson”) motion to quash plaintiff’s subpoena duces tecum, and which granted Dorf & Nelson a protective order limiting the scope of questioning at Dorf & Nelson’s depositions. Plaintiff now seeks to renew and modify the January 28 Order and to compel Dorf & Nelson to answer certain deposition questions. Dorf & Nelson opposes the motion.

- Order to Show Cause-Affirmation- Exhibits 1-8
- Memorandum of Law in Support
- Affirmation in Opposition - Exhibits A-I
- Memorandum of Law in Opposition

Upon the foregoing papers, this motion is determined as follows:

In this action for defamation, plaintiff alleges that an attorney acting on behalf of defendants made certain statements to Dina Sciortino (“Sciortino”), a newspaper reporter for *The White Plains Patch* (also know as the *Rivertown Patch*) (the “Patch”), that plaintiff had fraudulently procured a building permit for its new showroom in White Plains, New York. It is plaintiff’s contention that the attorney is, or was affiliated with, Dorf & Nelson, which is the law firm representing defendants in this action.

On or about October 15, 2012, plaintiff served a Deposition Notice and Subpoena (the “subpoena”) upon Dorf & Nelson, seeking, inter alia, to depose Dorf & Nelson about any communications it had “... with the *Rivertown Patch*, through Dina Sciortino or any other person,

about the plaintiff and/or about plaintiff's officers, directors, owners or employees." The subpoena also sought the production of documents reflecting communications between Dorf & Nelson and Sciortino and /or other persons affiliated with the Patch between January 1, 2011 and October 15, 2012, concerning, inter alia: plaintiff, the White Plains showroom, including renovations to the showroom, efforts and any alleged improper conduct by Plaintiff to obtain permits for the renovation of the showroom and any alleged violations of zoning regulations or ordinances by plaintiff in connection with the showroom.

Defendants, by order to show cause, brought a motion to quash the subpoena. This Court (Lefkowitz, J.) denied the motion to quash, but granted a protective order which limited the scope of the deposition of Dorf & Nelson to "...communications between Dorf & Nelson and Dina Sciortino and/or Rivertown Patch/ White Plains Patch occurring between January 1, 2011 and October 15, 2012, concerning the eight (8) categories of communications as set forth in plaintiff's subpoena issued to non-party Dorf & Nelson LLP dated October 15, 2012."

The eight categories included communications between Dorf & Nelson and Sciortino/the Patch, concerning:

1. The plaintiff Faust Harrison Pianos, Inc. or any of its officers, directors or employees;
2. The store, showroom and/or workshop of Faust Harrison Pianos, Inc. located in White Plains, New York;
3. The construction, demolition and/or renovation of the building that houses the store, showroom and/or workshop of Faust Harrison Pianos, Inc., located in White Plains, New York;
4. The spray booth located at the building that houses the store, showroom and/or workshop of Faust Harrison Pianos, Inc., located in White Plains, New York;
5. Any efforts by Faust Harrison Pianos, Inc., its officers, directors, owners, or employees, to obtain permits for the demolition, renovation and/or construction of the building that houses the facilities of Faust Harrison Pianos, Inc. in White Plains, New York;
6. Any alleged failure by Faust Harrison Pianos, Inc. its officers, directors, owners or employees, to obtain permits for the demolition, renovation and/or construction of the building that houses the facilities of Faust Harrison Pianos, Inc. in White Plains, New York;
7. Any allegedly improper conduct by Faust Harrison Pianos, Inc. its officers, directors, owners or employees, in connection with the demolition, renovation and/or construction of the building that houses the facilities of Faust Harrison Pianos, Inc. in White Plains, New York;
8. Any alleged violation of zoning regulations or ordinances in connection with the use, demolition, renovation and/or construction

of the building that houses the facilities of Faust Harrison Pianos, Inc. in White Plains, New York.

Plaintiff conducted the deposition of Dorf & Nelson by one of its partners, Jonathan B. Nelson (“Nelson”), on March 6, 2013.<sup>1</sup> During Nelson’s deposition, he testified that Marilyn Goerler (“Goerler”), a Dorf & Nelson employee, communicated, on Nelson’s behalf, to Sciortino by email. Nelson provided testimony concerning a series of emails exchanged between Goerler and Sciortino (exhibits 6 and 7 to plaintiff’s motion papers). The first email exchange was sent by Goerler to Sciortino on October 19, 2011 (“Goerler October 19 email”), and read in pertinent part:

Re: Possible fraud, illegal building, environmental hazard, violation of zoning

This matter involves a building located at 214 Central Avenue, White Plains. The tenant there, Faust Harrison Pianos, built out the space and the build out required permits.

Within the building commissioners’s file, exists a letter from General Contractor Jeff Moretti who states that his signature on a permit application was forged and that he never performed work at the location. I am paraphrasing, letter is annexed.

Upon receipt, the building commissioner issued another permit to another contractor (who upon information and belief is the boyfriend of the daughter of a principle of Faust Harrison Pianos) I saw no evidence of any inquiry or investigation into Moretti’s assertions.

Upon information and belief, the premises now houses a piano spray booth that sprays pianos with chemicals to strip their finish and emits “toxic fumes into the environment.” There is a conservatory next door in which children are taught to dance, and it might also be in “violation of zoning.”

Attached please find (in one annexed file):

1. A copy of the Old Permit
2. A copy of the New Permit
3. A copy of the White Plains Permit Application
4. A copy of a letter written from Jeff Moretti to Commissioner Damon Amadio

On October 24, 2011, Sciortino replied in pertinent part:

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<sup>1</sup> Nelson’s deposition transcript is exhibit 5 to plaintiff’s motion papers.

Can you tell me how you find (sic) out about this, and why you decided to bring it to my attention?

On October 24, 2011, Goerler replied (“Goerler October 24 email”):

Decided to send it to you in case you do some investigative journalism and subsequent reporting on local cases of fraud, illegal building permits, etc.

News travels quickly within the legal community and our director of litigation heard about all the potential problems with this situation and asked me to send out the basic info to local publications. You could start by contacting the Building Commissioner and discuss the documents I sent in the original email. You could also call General Contractor Jeff Moretti. It's his signature that was forged.

Very possible some gross injustice was done here.

On April 5, 2013, plaintiff deposed Goerler.<sup>2</sup> A review of the transcripts from both depositions (Nelson deposition transcript is plaintiff's exhibit 5 and Goerler's deposition transcript is plaintiff's exhibit 8 ) reveals numerous instances in which the attorneys for Dorf & Nelson objected to plaintiff's questions and directed Nelson and Goerler not to answer on the basis that the questions were beyond the scope of questioning permitted by the January 28 Order. Consequently, the parties contacted the court and received telephonic rulings on a number of the objected to questions.

Plaintiff contends that since the aforementioned emails were not produced until after the January 28 Order, plaintiff was unaware of their existence at the time it submitted its papers in opposition to defendants motion to quash. Plaintiff argues that had it been aware of these communications at that time, plaintiff would have argued that it was entitled to discovery as to the truth of those statements, the basis Dorf & Nelson had for making those statements, and what investigation Dorf & Nelson made as to the truth of those statements. Plaintiff argues that these emails constitute newly discovered facts that would have changed the outcome of the prior motion. Plaintiff also seeks to compel the further deposition of Dorf & Nelson to respond to certain questions which it refused to answer during the Nelson and Goerler depositions.

In opposition, Dorf & Nelson argues, inter alia, that plaintiff has failed to submit new facts sufficient to warrant a modification of the January 28 Order. Dorf & Nelson argues that after it produced the aforementioned emails, the court issued two compliance conference orders, dated March 25, 2013 and April 1, 2013 which specifically stated that Nelson and Goerler's depositions “...shall be limited as stated in the January 28, 2013 Decision and Order of the Honorable Joan B. Lefkowitz, J.S.C.” Dorf & Nelson also argues that the Court further affirmed the application of the January 28 Order through its deposition rulings during both the Nelson and Goerler depositions.

At the outset it is noted that plaintiff's application to compel answers to deposition questions was included as part of the motion to renew which was made by Notice of Motion and without the

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<sup>2</sup> Goerler's deposition transcript is exhibit 8 to plaintiff's motion papers.

benefit of a pre-motion conference as required by the Differentiated Case Management (“DCM”) Protocol of this Court. However, the Court in its discretion and in an effort to avoid additional motion practice on this same issue has reviewed plaintiff’s request as if it were properly before the Court.

To prevail on a cause of action for defamation, a plaintiff must demonstrate: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. [Restatement (Second) of Torts § 558 (1977)].

Whether the publisher of the allegedly defamatory statement had reasonable grounds for believing that the communication was true and whether the publisher acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it are relevant inquiries on a claim for defamation [See, Restatement (Second) of Torts § 580B (1977)]. However, whether a particular statement constitutes fact or opinion is a question of law to be determined by the court (*Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369 [1977]; *Schermerhorn v. Rosenberg*, 73 AD2d 276 [2d Dept 1980]). Accordingly, the January 28 Order is modified to the extent that plaintiff is allowed the further deposition of Dorf & Nelson, by Nelson and Goerler, as limited by the following questions:

1. Dorf & Nelson’s basis for the statements made by Dorf & Nelson in the Goerler October 19 and Goerler October 24 emails; and
2. What investigation Dorf & Nelson made as to the truthfulness of the statements in the Goerler October 19 and Goerler October 24 emails.

To the extent plaintiff seeks discovery not specifically allowed by this modification of the January 28 Order, the motion is denied.

Accordingly, it is:

ORDERED that the branch of plaintiff’s motion to modify this court’s prior order of January 28, 2013, is granted only to the extent that the depositions of Jonathan Nelson and Marilyn Goerler are to be continued only concerning: (i) the basis of the statements made by Dorf & Nelson in the Goerler October 19 and Goerler October 24 emails, as identified herein; and (ii) what investigation Dorf & Nelson made as to the truthfulness of the statements made in the Goerler October 19 and Goerler October 24 emails, as identified herein; and it is further

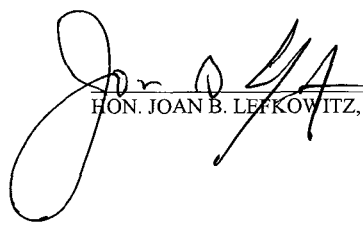
ORDERED that plaintiff’s motion is in all other respects denied; and it is further

ORDERED that Dorf & Nelson shall produce John Nelson and Marilyn Goerler for their continued depositions by November 26, 2013; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon defendants and non-party Dorf & Nelson LLP with 10 (ten) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
October 31, 2013



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

TO:  
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**BY NYSCEF**

Dorf & Nelson LLP  
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**BY NYSCEF**

cc: Compliance Part Clerk  
Hon. Mary H. Smith