Vinar v Litman
2014 NY Slip Op 33155(U)
July 30, 2014
Supreme Court, 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** **IA Part 6**
Justice

ALEKSANDER VINAR, Plaintiff,	Index Number 700017/07
-against-	Motion Date February 13, 2014
JOHN LITMAN, et al., Defendants.	Motion Cal. Nos. 253, 255 & 254
	Motion Seq. Nos. 35, 36, & 37

The following numbered papers read on this motion by order to show cause by plaintiff Aleksander Vinar (plaintiff) to strike the answer of defendants Honig, Mongioi, Monahan, Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos, P.C., and Alexander E. Sklavos, P.C. (collectively referred to as defendants), to compel defendant Robert Anthony Monahan, Esq., sued individually (Monahan), to complete his deposition, to compel defendant Edward H. Honig, Esq., sued individually (Honig), to appear for deposition, for an order compelling defendants Honig, Mongioi, Monahan, Sklavos LLP, Honig, Alexander E. Sklavos, Esq., sued individually (Sklavos), Monahan and Sklavos, P.C., and Alexander E. Sklavos, P.C., to comply with plaintiff's disclosure demands dated July 13, 2010, August 9, 2012, August 10, 2012, August 11, 2012, and October 24, 2013, to compel defendants' disclosure in answer to plaintiff's interrogatories dated November 21, 22, 25 and 26, 2013, and for an extension of time to file the note of issue past December 23, 2013; by separate notice of motion by defendants for a protective order to strike plaintiff's various interrogatories, to strike certain deposition notices, and for costs and sanctions; and by separate notice of motion by plaintiff to vacate his note of issue and strike the case from the trial calendar.

[* 2]

	Papers Numbered
Notice of Motion #253..............................	EF 1400
Affirmation in Support..............................	EF 1401-1402
Affirmation of Good Faith........................	EF 1403
Exhibits..	EF 1404-1423
Affidavit of Service.................................	EF 1424
Memorandum of Law in Support.............	EF 1425
Affirmation in Opposition........................	EF 1525
Affirmation in Reply................................	EF 1566
Exhibits..	EF 1567
Affidavit of Service.................................	EF 1568
Memorandum of Law in Reply.................	EF 1569
Proposed Order to Show Cause #255........	EF 1429
Affirmation in Support............................	EF 1430
Affirmation in Support............................	EF 1431
Affidavit of Good Faith...........................	EF 1432
Affirmation in Support..............................	EF 1433
Exhibits...	EF 1434-1472
Affidavit of Service..................................	EF 1560-1561
Affirmation in Opposition.........................	EF 1533
Affirmation in Opposition.........................	EF 1534
Exhibits...	EF 1535-1557
Affidavit of Service..................................	EF 1558
Memorandum of Law in Opposition..........	EF 1559
Affirmation in Reply.................................	EF 1570-1571
Notice of Motion #254...............................	EF 1476
Affirmation in Support..............................	EF 1477
Exhibits..	EF 1479
Affirmation..	EF 1517
Affirmation in Opposition..........................	EF 1518
Exhibits..	EF 1519-1522
Affidavit of Service..................................	EF 1523

Upon the foregoing papers it is ordered that the motions are determined together as follows:

This is an action sounding in breach of contract, legal malpractice, breach of fiduciary duty, fraud, conversion, dissolution and for an accounting, relating to plaintiff's alleged participation and investment in a business venture involving a shopping mall.

Plaintiff has moved to vacate his note of issue and strike the case from the trial calendar. However, in light of this court's decision dated October 15, 2013, and entered on October 18, 2013 which decision, vacated the note of issue and restored this matter to its pre-note of issue status, this motion is denied as moot.

Plaintiff has also moved, by order to show cause, to strike defendants' answer and has argued that defendants have willfully and contumaciously failed to comply with six court orders. In opposition, defendants have argued that they responded to the demands, timely moved for protective orders and did not act in a contumacious fashion. "The drastic remedy of striking a pleading or dismissal pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious" (*Moray v City of Yonkers*, 76 AD3d 618 [2010]; *see Tornheim v Blue & White Food Prods. Corp.*, 73 AD3d 749, 750 [2010]). The record contains various responses by defendants to plaintiff's demands and defendants have timely moved for a protective order with respect to plaintiff's interrogatories, which are also at issue on the instant motions (CPLR 3103 [b]). In light of the evidence in the record, plaintiff has failed to make the required showing on this branch of his motion and is not entitled to the relief sought (CPLR 3126; *see Paca v City of New York*, 51 AD3d 991, 993 [2008]).

Plaintiff has moved to compel Monahan to complete his deposition. Defendants have moved to strike plaintiff's deposition notice dated November 22, 2013, to have Monahan appear for a further deposition. Plaintiff has argued that Monahan was previously deposed on June 22, 2010, that he refused to answer questions related to his prior conduct that was the subject of a disciplinary proceeding at that time and has now refused to appear a second time to complete his deposition. Defendants have argued that the prior questions that Monahan refused to answer are unrelated to the instant matter, were plainly improper and, if answered, would cause Monahan significant prejudice and embarrassment.

Judiciary Law § 90 (10) provides, in pertinent part, that "[a]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential." Inasmuch as the Appellate Division, Second Department, has already denied plaintiff's

attempt to unseal the records regarding Monahan's previous disciplinary proceeding, plaintiff may not circumvent the Appellate Division's ruling by exposing the facts and details protected as a part of that proceeding through depositions conducted for the purpose of litigation in the instant matter. Furthermore, the prior actions of Monahan, which are unrelated to the instant matter, are not an appropriate subject for disclosure (*see generally Wojtusiak v Elardo*, 43 AD3d 436 [2007]). Under the circumstances, plaintiff is not entitled to further depose Monahan and plaintiff's further deposition notice dated November 22, 2013, to Monahan is stricken.

Plaintiff has also moved to compel defendant Honig to appear for deposition and has argued that Honig failed to appear pursuant to a notice of deposition dated November 25, 2013, while defendants have opposed and argued that Honig provided an agreed-upon affidavit attesting that he was not involved in the instant matter, did not know plaintiff and had retired from the practice of law prior to the occurrence of the events at issue in this matter. Plaintiff has argued that Honig's deposition is necessary to determine that he was not a part of the law firm in 2005, when the events in this matter occurred, and has alleged that the deposition of Honig is necessary because the facts relating to his action prior to his retirement are sufficient to demonstrate that defendants had notice of certain activity regarding their attorney escrow accounts. However, Honig's affidavit is sufficient to establish that he was retired at the time of the alleged wrongdoing in the instant matter, that he had no contact with plaintiff and did not know who plaintiff was. Furthermore, plaintiff is not entitled to depose Honig about an entirely unrelated matter (*see id.*), and nothing in Honig's affidavit has demonstrated that he knew of any events relating to the instant matter. Thus, it is entirely speculative whether he would provide any relevant information during a deposition. Therefore, plaintiff is not entitled to depose Honig.

Plaintiff has moved to compel defendants' compliance with plaintiff's disclosure demands dated July 13, 2010, August 9, 2012, August 10, 2012, August 11, 2012, and October 24, 2013. Defendants have opposed and argued that the notices exceed the bounds of reasonable disclosure, are of a harassing nature, are irrelevant to the instant matter, and are not reasonably calculated to lead to admissible or relevant evidence. Plaintiff himself states in his motion papers that the standard for disclosure is "all matter material and necessary" (CPLR 3101).

Inasmuch as the record contains defendants' responses to the various disclosure demands listed above and at issue here, defendants have, in fact, responded to plaintiff's demands. While their responses object to the demands on grounds that, among other things, they are not in possession of the records, that the request is improper and that the material sought is privileged and/or confidential, plaintiff has failed to adequately

demonstrate how the requested items would lead to further relevant evidence or disclosure. Therefore, plaintiff is not entitled to a further response to these demands.

Plaintiff has moved to compel defendants' disclosure in answer to plaintiff's interrogatories dated November 21, 22, 25 and 26, 2013. Defendants have opposed and moved to strike plaintiff's interrogatories. Plaintiff has argued that the answers to the interrogatories at issue are necessary to determine the involvement of the parties, their employees, alleged misconduct, and the nature of the business partnership at issue. Defendants have argued that the interrogatories are palpably improper, over-broad, lack specificity, and seek irrelevant and confidential information.

When disclosure amounts to a "fishing expedition," "the remedy is not a categorical cancellation of disclosure, but rather a protective order under CPLR 3103(a) aimed only at those matters which are clearly beyond the compass" (*Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B*, CPLR C3101:8). Plaintiff's interrogatories are over-broad, oppressive, appear to demand irrelevant and confidential information and make it impossible for defendants to comply with. Plaintiff has failed, upon his motion, to adequately demonstrate a compelling and particularized need for the material sought in the interrogatories. Therefore, under the circumstances, defendants are entitled to a protective order under CPLR 3103 (a), as to plaintiff's various interrogatories dated November 21, 22, 25 and 26, 2013.

Plaintiff has moved for an extension of time to file the note of issue past December 23, 2013. In light of the circumstances of the case, plaintiff is entitled to an extension of time to file the note of issue. However, the court notes that this matter has entailed an extremely protracted disclosure process, and the parties are directed to expeditiously complete disclosure in the interest of judicial economy.

Defendants have also moved for costs and sanctions against plaintiff. 22 NYCRR 130-1.1 (a) permits sanctions for frivolous conduct (*see Glenn v Annunziata*, 53 AD3d 565, 566 [2008]; *Breslaw v Breslaw*, 209 AD2d 662, 663 [1994]), which is defined as conduct that is "completely without merit in law," undertaken "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or which "asserts material factual statements that are false" (22 NYCRR 130-1.1 [c] [1], [2], [3]). In determining if conduct was frivolous "the court shall consider . . . the circumstances under which the conduct took place" (22 NYCRR 130-1.1 [c]). In light of facts apparent in the record relating to defendants' alleged involvement in the instant action and plaintiff's explanations as to his reasons for seeking particular disclosure, although not sufficient to achieve his demands, his explanations reflect that his conduct was not frivolous within the definition of 22 NYCRR 130-1.1. Therefore, defendants are

not entitled to the relief sought on this branch of their motion.

Accordingly, plaintiff's motion to vacate the note of issue and to strike the case from the trial calender is denied as moot. The branches of defendants' motion to strike plaintiff's further notice of deposition to Monahan dated November 22, 2013, to strike plaintiff's notice of deposition to Honig dated November 27, 2013, and for a protective order striking plaintiff's various interrogatories to defendants are granted, while their motion is denied in all other respects. The branch of plaintiff's motion for an extension of the time to file the note of issue is granted and his motion is denied in all other respects.

The note of issue shall be filed by January 30, 2015.

Dated: July 30, 2014

Howard G. Lane, J.S.C.