

**Morales v Zherka**

2014 NY Slip Op 33753(U)

March 24, 2014

Supreme Court, Westchester County

Docket Number: 69022/12

Judge: Alan D. Scheinkman

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NYSCEF Docket No. 213  
To commence the statutory time period of appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 03/24/2014

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,  
Justice.**

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GENARO MORALES,

Plaintiff,

-against-

SELIM ZHERKA, ABCZ CORP., THREE AMIGOS SJL, INC., CT REALTY HOLDINGS AND MANAGEMENT, INC., MARSHALL APARTMENTS, LLC, CT METRO HOLDINGS I CORP., CT METRO HOLDINGS II CORP., and the ZHERKA TRUST,

Defendants.

**DECISION AND ORDER**

Index No.: 69022/12

Motion Seq. #6

Motion Date: 3/14/14

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Scheinkman, J:

Plaintiff Genaro Morales ("Plaintiff" or "Morales") moves to compel the production by Defendant Selim Zherka ("Zherka") of a tape recording of August 9, 2013 and a transcript of said tape recording and also moves for sanctions against Zherka for his refusal to comply with discovery requests and for his submission of allegedly false and fraudulent papers in opposition to a prior motion. Responsive papers have been received from Zherka, who represents himself, and from counsel for the other Defendants (the "Entity Defendants").

It is undisputed that the branch of the motion as seeks to compel the production of the August 9, 2013 tape recording and transcript thereof is academic. As is set forth in Zherka's affidavit in opposition sworn to March 12, 2014, in the affirmation in opposition of counsel to the Entity Defendants (Affirmation of Stuart L. Melnick, Esq. dated March 12, 2014), and in a letter to the Court from Plaintiff's counsel dated March 11, 2014, a transcript of the tape recording has been produced. Accordingly, the portion of the motion that relates to the production of the tape recording and transcript shall be denied as academic, without prejudice.

That leaves the issue of sanctions.

The request for sanctions is based solely on the submission by Zherka of an allegedly fraudulent and false statement made in both a memorandum of law and an affidavit

on a prior motion by Morales, seeking to vacate the Note of Issue and for other relief.<sup>1</sup> This prior motion was determined, along with other motions, in this Court's Decision and Order entered January 10, 2014.

Plaintiff's papers do not precisely specify the statement claimed to be fraudulent, with counsel citing an entire page of the memorandum of law (p 3 of Ex. F to the present affirmation) and an entire page of an affidavit (p 6 of Ex G to the present affirmation). However, counsel refers to his prior affirmation in which he explained "how Zherka falsely stated that an agreement had been reached by counsel relating to Zherka's acting as a witness on behalf of the defendant entities in this case" (Affirmation of Gerry E. Feinberg, Esq. dated March 3, 2014 at ¶14). In the prior affirmation (Ex. H to the present affirmation), counsel alleged that Zherka had the "outright gall" to assert in his memorandum of law:

As to the production of a witness on behalf of the entities, at the conclusion of the second day of my deposition on October 21, 2013, myself and counsel to the entities, Mr. Melnick discussed with opposing counsel the fact that I, as the agent for the entities, was the person who they were producing to be deposed about the case.

The Court has located that statement on page 5 of the prior memorandum of law.

Plaintiff's counsel argues that the quoted statement was false because no such agreement was discussed, let alone reached.

In response, Zherka states that he never used the word "agreement", that he said that the subject of his being deposed as a witness for the Entity Defendants was "discussed" and, in fact, it was. Zherka pinpoints the disputed statement in the prior affidavit as being his statement: "Mr. Melnick, counsel to the Defendant entities represented to opposing counsel that the entities designated me as their agent and as a result I would answer questions as to the entities." Zherka asserts that he never stated that counsel for Plaintiff had agreed to this. Zherka's position is that the subject of his being deposed as a witness for the Entity Defendants was discussed, at least that is his best recollection.

Counsel for the Entity Defendants, in his affirmation, states that the subject statements by Zherka did not claim that there was any agreement. While counsel for the Entity Defendants contends that Zherka is an agent for the Entity Defendants, he does not assert that the subject of Zherka being a witness for the Entity Defendant was discussed.

This Court deeply resents having been dragged into a petty debate over a matter of no significance. The Decision and Order of January 10, 2014 reflects that the issue of

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<sup>1</sup>While the Notice of Motion refers to sanctions being sought because of Zherka's refusal to comply with discovery requests, the supporting affirmation of Plaintiff's counsel plainly states that the basis for the sanctions request is the allegedly false statements (see Affirmation of Gerry E. Feinberg, Esq. dated March 3, 2014 at ¶14).

whether there was an agreement or discussion about Zherka being a witness for the Entity Defendants was not mentioned at all. In other words, the challenged statements by Zherka had no impact on the decision of the Court. Hence, even if the Court were convinced that the statements were, in fact, false, the Court is absolutely convinced that the statements were not "material" (see 22 NYCRR §130-1.1 [c][3]).

Furthermore, even if Plaintiff had established that the subject statements were materially false, the Court would not have awarded sanctions, repeating again its prior observations that neither side in this litigation has a monopoly on litigation incivility. While the Court has given consideration to the idea that the present motion for sanctions is itself sanctionable, given the absence of an argument as to how the subject statements could possibly viewed as material, the Court does not wish to waste any more judicial resources on these side-shows and notes, in any event, that Zherka should have produced the tape recording long ago and Zherka should have made himself available for telephone conference that, perhaps, would have avoided the necessity for this round of motion practice.

While there may well come a time when this Court will have to impose sanctions on either Plaintiff or Defendants or their counsel, this is not that time. The parties and counsel would make better use of their time by devoting themselves to completing discovery so that this matter can be resolved on its merits.

The Court has considered the following papers on this motion:

- 1) Order to Show Cause, issued March 3, 2014; Affirmation of Gerry E. Feinberg, Esq. dated March 3, 2014, together with the exhibits annexed thereto;
- 2) Plaintiff's Memorandum of Law dated March 3, 2014;
- 3) Affidavit of Selim Zherka, sworn to March 12, 2014, together with the exhibits annexed thereto;
- 4) Affirmation of Stuart I. Melnick, Esq. dated March 12, 2014, together with the exhibits annexed thereto;
- 5) Letter to the Court from Gerry E. Feinberg, Esq. dated March 11, 2014.


Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Plaintiff Genaro Morales, made by Order to Show Cause issued March 3, 2014, is denied, except that to the extent that the said motion seeks to compel Defendant Selim Zherka to produce a copy of an August 9, 2013 tape recording together with any transcript thereof, that branch of the said motion is denied as academic and without prejudice.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 27, 2014

E N T E R :



ALAN D. SCHEINKMAN  
Justice of the Supreme Court

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