

<b>Bleakley Platt &amp; Schmidt, LLP v Barbera</b>
2015 NY Slip Op 32542(U)
February 10, 2015
Supreme Court, Westchester County
Docket Number: 50984/12
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

BLEAKLEY PLATT & SCHMIDT, LLP,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 50984/12  
Motion Date: Feb. 10, 2015

LISA G. BARBERA,

Seq. No. 5, 6

Defendant.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendant for a protective order pursuant to CPLR 3103(a), precluding further questioning of the defendant at a deposition. Plaintiff moves for an order pursuant to CPLR 3124 and 3126, striking defendant's answer and awarding judgment in favor of plaintiff, or alternatively, precluding defendant from offering evidence at trial concerning defendant's objections to plaintiff's invoices which are the basis of plaintiff's claims, or alternatively compelling defendant to appear for a further deposition and respond to questions concerning her objections to plaintiff's invoices, and awarding plaintiff attorneys' fees related to the instant motion.

- Order to Show Cause - Affirmation of James Reich, Esq.
- Affirmation in Opposition of Richard Markert, Esq.
- Order to Show Cause - Affirmation of Richard Markert, Esq. - Exhibits
- Affirmation in Opposition of James Reich, Esq. - Exhibits

Upon the foregoing papers and the proceedings held on February 10, 2015, these motions are determined as follows:

Plaintiff seeks to recover more than \$500,000 in outstanding legal fees and expenses for services rendered to the defendant. It is alleged that from 2005 continuing until January 2011 plaintiff provided certain legal services to the defendant at defendant's request. Plaintiff alleges that during the relevant time period, it provided defendant with numerous invoices for services rendered and expenses incurred on behalf of the defendant in connection with various matters (Affirmation of Richard Markert, Esq., Exhibit A, Verified Complaint). Defendant commenced a separate action against plaintiff law firm (Index No. 64986/2013), alleging legal malpractice for improper billing, negligence, and other wrongful conduct. Defendant argues plaintiff law firm owes the defendant an amount in excess of what it claims in unpaid legal fees.

Defendant moves for a protective order, precluding plaintiff's counsel from questioning her at a further deposition session. Defendant argues she was produced for deposition sessions on December 3, 2014 and December 4, 2014, and she provided over four hundred pages of deposition testimony. Defendant contends that during her deposition, she was shown nearly 200 pages of invoices and questioned on what errors were found within each of the invoices. Defendant testified that she found items in the invoices in which attorneys' work was bundled together so that the amounts charged for specific tasks were unclear and confusing. Defendant testified she had spoken to the attorneys about these invoices and expressed her concerns in writing, but she received no response. At a December 16, 2014 compliance conference, plaintiff's counsel sought a further deposition of the defendant. Defense counsel argues this is an effort to harass the defendant and cause her distress.

In opposition, plaintiff argues defendant improperly refused to answer questions at her deposition regarding if there was anything in an invoice dated January 7, 2010 that she considered objectionable. Defendant testified that she had not seen the complaint or the list of invoices at issue before the deposition. She testified she was tired and did not have a good understanding of the question, but she would be willing to answer it another day. Plaintiff's counsel requested that she review the invoices to prepare for the second deposition session the following day, but defense counsel argued it would be unreasonable to expect her to review the invoices and be prepared to testify about them the following day. Plaintiff argues defendant has provided no testimony regarding her objections to the specific invoices. Plaintiff contends that defendant and counsel are willfully obstructing discovery and defendant should be directed to appear for a further deposition to answer the questions she refused to answer. Alternatively, plaintiff argues defendant should be precluded from offering at trial any new objections to the invoices at issues.

Plaintiff moves for an order striking defendant's answer, precluding defendant from offering evidence at trial concerning objections to the invoices, or compelling defendant to appear for a further deposition to respond to questions regarding her objections to the invoices. In the complaint, plaintiff lists forty invoices at issue by legal matter, number, date and amount, as well as the amounts paid by the defendant (Plaintiff's Exhibit A, Complaint, p. 5-6). Plaintiff argues if defendant has specific objections to the invoices as a basis for refusing to make payment, plaintiff is entitled to question her regarding the invoices at a deposition. At the first session of defendant's deposition she was unable to answer questions concerning her objections to the invoices, defense counsel objected to questioning her on this issue at the second deposition session, and counsel has refused to produce her for a further deposition on this issue.

Defendant submits opposition papers, arguing defendant testified to the transactions and meetings with plaintiff's personnel, her problems with the billing practices, and her questioning of the billing practices. Defendant submits her affidavit in support of a pending motion for leave to amend defendant's answer to assert a counterclaim. In the affidavit, defendant states she has objected to paying more because she questioned the charges in various invoices, made her objections known, and had her attorney draft a letter setting forth some of her objections with respect to mistakes and excessive billing (Affirmation in Opposition of James Reich, Exhibit B).

Pursuant to the Uniform Rules of the Trial Courts 22 NYCRR §221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (see *Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts 22 NYCRR §221.1(b) provides that “[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent... Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.” “[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115” (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]).

Upon review of defendant’s deposition transcript, she was questioned on whether there was anything objectionable in the January 7, 2010 invoice. Defendant answered that she was tired and did not have a good understanding of the question, but she would be willing to answer it another day. Plaintiff’s counsel indicated his intention of going through the invoices so defendant could testify as to her specific objections to each of the invoices (Affirmation in Support of Richard Markert, Exhibit D, defendant’s deposition transcript, p.178-179). Defense counsel objected, stating it was unreasonable to ask the defendant to review hundreds of pages of invoices and be prepared to testify about them the following day. Counsel indicated his client would need more time to review the documents (Affirmation in Support of Richard Markert, Exhibit D, defendant’s deposition transcript, p.184-185). The invoices at issue are specifically listed in the complaint. Defendant has been on notice of the allegations pertaining to these invoices since the action was commenced. In defendant’s affidavit in support of the motion to amend the answer, defendant states she has objected to paying more money to the firm because she questioned the charges in the invoices. She alleges there are uncorrected mistakes and excessive billing (Affirmation in Opposition of James Reich, Esq, Exhibit B, p.1-2). Plaintiff is entitled to question the defendant regarding the invoices and any objections the defendant may have to the invoices at a deposition. It is clear from the transcript that counsel for defendant improperly blocked and interfered with the questioning of the witness in violation of 22 NYCRR§221.

In view of the foregoing, it is

ORDERED that plaintiff’s motion is granted to the extent that on or before March 3, 2015, defendant shall appear for a further deposition limited to questions regarding the invoices listed in the complaint and what objections, if any, she has to the invoices. The deposition shall commence at 10 a.m., continue until 5 p.m., and continue day to day until completed; and it is further

ORDERED that if the defendant does not appear for a further deposition as directed, she is precluded from testifying at trial as to any objections to the invoices, which she has not

previously testified to at a deposition; and it is further

ORDERED that the branch of plaintiff's motion seeking an order striking defendant's answer is denied; and it is further

ORDERED that defense counsel is directed to pay plaintiff's counsel a monetary award in the amount of \$500 for costs and fees incurred as a result of these unnecessary motions and the related court appearances resulting from the improper interference with the deposition within ten (10) days of entry of this Order; and it is further

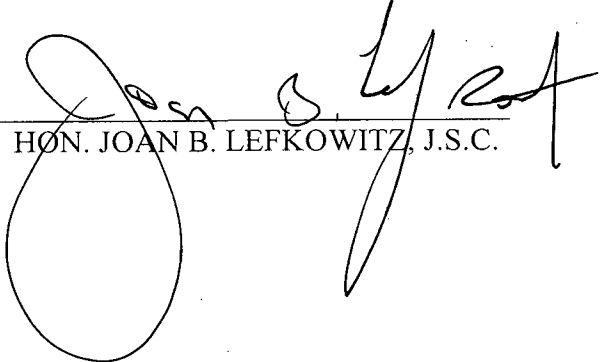
ORDERED that defendant's motion for a protective order is denied; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defense counsel within ten days of entry; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 10, 2015 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
February 10, 2015

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

TO: Bleakley, Platt & Schmidt LLP  
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BY NYSCEF

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cc: Compliance Part Clerk

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