

**Ferrara Bros. Bldg. Materials Corp. v Goldstein,
Lieberman & Co. LLC**

2015 NY Slip Op 32912(U)

June 24, 2015

Supreme Court, Queens County

Docket Number: 700316/2011

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

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QUEENS COUNTY

-----x
FERRARA BROS. BUILDING MATERIALS CORP.,

Index
Number 700316/ 2011

Plaintiff,

-against-

Motion
Date April 15, 2014

GOLDSTEIN, LIEBERMAN & CO. LLC,

Motion Seq. No. 5

Defendant.
-----x

The following papers numbered E103 to E143 read on this motion by defendant to compel discovery pursuant to CPLR 3124.

	Papers Numbered
Order to Show Cause - Affidavit - Exhibits.....	E103-E128
Memorandum of Law in Support.....	E126
Answering Affidavits - Exhibits.....	E129-E138
Reply Affidavits - Exhibits.....	E140-E142
Memorandum of Law in Reply.....	E143

Upon the foregoing papers, it is ordered that defendant's order to show cause is determined as follows:

Plaintiff commenced this action for monetary damages based upon alleged acts of negligence, professional malpractice, and breach of contract, against defendant, plaintiff's former accountants, in 2011. After the disclosure of significant amounts of documentation by plaintiff, defendant now moves to compel further discovery from plaintiff, and from a nonparty witness, Grassi & Co., CPAs, P.C. (Grassi), plaintiff's accountants from 2010 to the present.

Initially, defendant contends that by admittedly waiving any continued claim of privilege for its October 14, 2011 Spreadsheet,

plaintiff has waived such claim of privilege for any and all other schedules and spreadsheets, which were specifically exchanged "for settlement purposes only," or to "be afforded the protections provided for in" CPLR 4547. Defendant does not dispute the aforementioned characterization of such material, nor does it demonstrate that such designation was objected to prior to, or during, settlement negotiations.

Plaintiff opposes the waiver of privilege for such information, contending that it consisted of attorney work product, prepared specifically for the purpose of settlement, and was thereby privileged material, pursuant to CPLR 3101(d)(2). Defendant has failed to factually demonstrate otherwise.

Defendant's reliance on *Hoenig v Westphal*, 52 NY2d 605 [1981] is unavailing. In that matter, the requested evidence consisted of attending physicians' reports, which plaintiff did not claim had been prepared solely for the purposes of litigation. While the *Hoenig* court permitted the disclosure of such medical reports, it also acknowledged that materials prepared for litigation are exempt from discovery, pursuant to CPLR 3101(d)(2), bolstering plaintiff's argument in the case at bar. Plaintiff's reference to the decision in the matter of *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [1991], is more compelling, as it grants privileged status to materials prepared to render "legal service" to the client, for which purpose the subject schedules and spreadsheets were allegedly initially generated.

Accordingly, that branch of defendant's motion that seeks a ruling that plaintiff has waived any claim of privilege, not already voluntarily waived, regarding the various schedules and spreadsheets exchanged for settlement purposes, is denied.

Defendant additionally seeks a direction by the court that plaintiff submit a further bill of particulars, for the purpose of explaining and calculating its alleged damages in detail. A bill of particulars is not the appropriate mechanism to request such information. The purpose of a bill of particulars is to amplify pleadings, limit proof, and prevent surprise at trial, not to disclose evidentiary information (see *Fremont Inv. & Loan v Gentile*, 94 AD3d 1046 [2012]; *Mahr v Perry*, 74 AD3d 1030 [2010]; *Toth v Bloshinsky*, 39 AD3d 848 [2007]). Plaintiff's bill of particulars satisfied this standard by providing a general statement of the acts or omissions constituting the alleged negligence (see *Contreras v Adeyemi*, 102 AD3d 720 [2013]). The contested demands herein "largely sought disclosure, rather than amplification" and were "unduly burdensome and oppressive" (*Matter of People v Imported Quality Guard Dogs, Inc.*, 88 AD3d 800, 801

[2011]). Additionally, the instant malpractice action is not claiming a *prima facie*, intentional tort, and plaintiff has not instituted any specific claim for special damages in its pleadings (see *Posner v Lewis*, 18 NY3d 566 [2012]; *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; *Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]; *Epifani v Johnson*, 65 AD3d 224 [2009]). General damages need not be specifically pleaded, nor disclosed in response to a demand for a bill of particulars. Such damages are not subject to the pleading requirements for consequential damages. (*Bi-Economy Mkt., Inc. v Harleystville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008]; *American List Corp. v U.S. News & World Report*, 75 NY2d 38, 42-44 [1989]; *Estate of Coppersmith v Blue Cross & Blue Shield of Greater N.Y.*, 177 AD2d 373, 374 [1991].)

Accordingly, that branch of defendant's motion directing plaintiff to comply with those portions of the demand for bill of particulars which compel the explanation and calculations of damages is denied.

With regard to the branch of defendant's motion seeking discovery from nonparty Grassi, defendant's Amended Notice to Take Deposition Upon Oral Examination, dated September 10, 2013, satisfied the statutory language requirement, mandated by CPLR 3101(a)(4). It states the "circumstances or reasons" disclosure was sought by including, with the Notice, a copy of plaintiff's verified amended complaint, dated January 15, 2013, detailing the relationship between plaintiff and defendant (*Kapon v Koch*, 23 NY3d 32, 39 [2014]; see *Needleman v Tornheim*, 88 AD3d 773 [2011]). Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of "material and necessary" evidence which will assist in trial preparation "by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642 [2014]). However, unlimited disclosure will not be countenanced (see *Spohn-Konen v Town of Brookhaven*, 74 AD3d 1047 [2010]; *Varveris v Hermitage Ins. Co.*, 24 AD3d 537 [2005]). The court, in its discretion, may deny, limit, condition, restrict or regulate the use of a disclosure device to prevent abuse, unreasonable expense or other prejudice to the court or a party (see CPLR 3103 (a); *Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 1283 [2011]).

Defendant asserts that all of the requested information and documents listed in the subpoena are useful and reasonable, and should be discoverable (see *Kooper v Kooper*, 74 AD3d 6 [2010]). In opposition, plaintiff argues, *inter alia*, that defendant failed to demonstrate that the disclosure sought from the nonparty was not

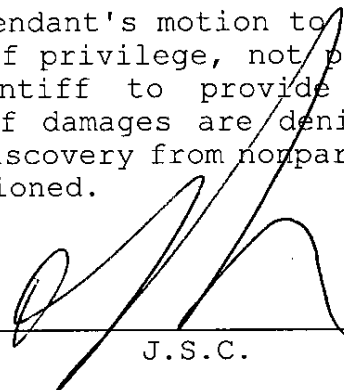
available from other sources. Such contention by plaintiff is untenable, as the language of CPLR 3101(a)(4) does not require that consideration (see *Kapon v Koch*, 23 NY3d 32). Interpreting the demands for information contained in the subject subpoena liberally, the court finds that portions of the requested disclosure fall within the definition of "material and necessary" evidence, are not "unduly burdensome" (see *Kooper v Kooper*, 74 AD3d 6), and are discoverable.

Accordingly, this branch of defendant's motion is granted to the extent that nonparty Grassi is directed to appear at the offices of defendant's counsel for a deposition, at a date and time to be agreed upon, but not later than 90 days from the date of service of a copy of this order with notice of entry, and a copy of the September 10, 2013 Amended Notice to Take Deposition Upon Oral Examination, upon Grassi's counsel. Nonparty Grassi, is to comply with the Amended Notice to the extent that he produce at such deposition only the items requested in paragraph (iii); in paragraph (iv) solely with regard to "any computation of damages for each of the claims in the Amended Complaint"; and in paragraph (vi) solely for the period "commencing on or about August 13, 2010" and including the year 2011.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the branches of defendant's motion to determine that plaintiff has waived any claim of privilege, not previously voluntarily waived, to direct plaintiff to provide bill of particulars responses on the issue of damages are denied. The branch of defendant's motion seeking discovery from nonparty Grassi is granted to the extent as aforementioned.

Dated: June 24, 2015



J.S.C.

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