

**University Ave., LLC v Simbarl Design Architecture,
PLLC**

2015 NY Slip Op 32941(U)

February 3, 2015

Supreme Court, Cortland County

Docket Number: 12-320

Judge: Phillip R. Rumsey

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**STATE OF NEW YORK
SUPREME COURT CHAMBERS**

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February 3, 2015

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LETTER DECISION AND ORDER

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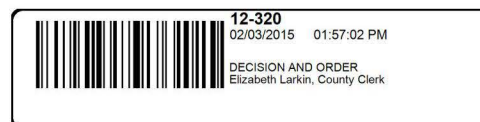
RE: University Avenue, LLC v Simbari Design Architecture, PLLC
Cortland County Index No. 12-320

Cortland Apts, LLC v Simbari Design Architecture, PLLC
Cortland County Index No. 11-591

Dear Counselors:

These related actions involve common parties and similar claims. Plaintiffs are limited liability companies owned and managed by the same principal, Christopher Calabro. University Avenue, LLC (UA) retained defendants to provide design services required in connection with renovation of a commercial rental property it owns that is located in Rochester. Cortland Apartments, LLC (CA) retained defendants to provide design services required in connection with renovation of two residential rental properties it owns that are located in Cortland. In each action, plaintiff asserts claims of professional malpractice, breach of contract and negligence associated with the respective renovation projects.

The parties voluntarily agreed to conduct depositions of the parties to simultaneously explore facts arising in both actions and to have a single transcript made of each deposition. The deposition of Mr. Calabro was completed over three separate days of testimony. Thomas



University Avenue, LLC v Simbari Design Architecture, PLLC
Cortland Apts, LLC v Simbari Design Architecture, PLLC

February 3, 2015

Page 2

Simbari, the sole member of defendant Simbari Design Architecture, PLLC who was also named a defendant in his individual capacity, was deposed on four days – January 15-16, 2014, April 9, 2014, and June 18, 2014.¹ Plaintiffs’ counsel has not completed her questioning of Simbari with respect to the Rochester project, and estimates that she will require two to four hours to complete her examination. Defendants’ counsel refuses to produce him for additional questioning. UA moves for an order compelling Simbari to appear at the offices of their counsel for continuation of his deposition, and for legal fees. Defendants cross-move, pursuant to CPLR 3103(a), for a protective order precluding further deposition of Simbari or, alternatively, requiring plaintiffs to pay the expenses incurred by Simbari and his counsel in appearing for a fifth day of deposition.

“Pursuant to CPLR 3101 (a) (1), ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . . by . . . a party[] or . . . employee of a party’ That provision has been liberally construed to permit discovery ‘of any facts bearing on the controversy [that] will assist preparation for trial by sharpening the issues and reducing delay and prolixity’ (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see Montalvo v CVS Pharmacy, Inc., 81 AD3d 611 [2011]; Matter of Southampton Taxpayers Against Reassessment v Assessor of Vil. of Southampton, 176 AD2d 795, 796 [1991]). ‘The test is one of usefulness and reason, and CPLR 3101 (a) should be construed to permit discovery of testimony [that] is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable’ (Southampton Taxpayers Against Reassessment, 176 AD2d at 796 [internal quotation marks omitted]).”

Riordan v Cellino & Barnes, P.C., 84 AD3d 1737, 1738 (2011). In fact, “[i]f the disclosure sought is of relevant material and does not come under any of the immunities . . . of CPLR 3101, it will be the rare case in which CPLR 3103 is applied to deny disclosure altogether’ (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3103:1, at 357)” (Willis v Cassia, 255 AD2d 800, 801 [1998]).

Measured against that standard, questions about the Rochester project and Simbari’s work on that project are plainly material to the controversy pending between the parties. Defendants’ primary complaints are that Simbari’s deposition has taken four days, has not been completed in

¹ Although both actions are venued in Cortland County, all depositions have been conducted at the offices of plaintiffs’ counsel in Syracuse, where defendants’ counsel also maintains his office.

University Avenue, LLC v Simbari Design Architecture, PLLC
Cortland Apts, LLC v Simbari Design Architecture, PLLC

February 3, 2015

Page 3

a time deemed reasonable by defendants' counsel, and that Simbari will be inconvenienced if he is required to devote a fifth day to his deposition. Such complaints are an insufficient basis to warrant a protective order (see e.g. Willis, 255 AD2d 800; Hartheimer v Clipper, 288 AD2d 263 [2001]; State of New York v General Elec. Co., 215 AD2d 928 [1995] [expense of responding to appropriate discovery demands does not constitute unreasonable expense or burden]; cf. Button v Guerri, 298 AD2d 947 [2002] [protective order precluding deposition of party who suffered from PTSD, anxiety disorder and depression was appropriate in light of the uncontroverted affidavit of his treating psychiatrist that subjecting him to deposition would be dangerous to his emotional state]). Moreover, it bears noting that plaintiffs' counsel need not explain to the satisfaction of defendants' counsel "the critical questions that she may have missed during the four days of Mr. Simbari's testimony" (Affirmation of Matthew Gumaer, Esq. dated December 12, 2014, ¶ 24), or what "material subjects remain unexplored" (id., ¶ 28).

Accordingly, UA's motion is granted to the extent of ordering Simbari to appear for up to six hours of questioning at a continuation of his deposition to be held at the offices of plaintiffs' counsel at 9:00 a.m. on a date to be agreed upon by counsel, which date shall be on or before **April 3, 2015**. Plaintiffs' motion seeking attorneys' fees is denied. Defendants' motion for a protective order is denied, and UA is awarded motion costs in the maximum permitted amount of \$100 (see CPLR 8106, 8202).

In the Cortland Apts, LLC action, defendants move for an order compelling CA to disclose communications it had with its attorneys regarding issues pertaining to whether any zoning variances would be required to lawfully complete the proposed renovations at both Cortland properties. Both projects involved renovations to preexisting nonconforming uses. Initially, City officials opined that variances would be required because the proposed improvements constituted expansion of the nonconforming uses. They later changed course and issued building permits. After the work was partially completed, they again changed course, issuing stop work orders. Plaintiff then applied for variances, which were denied. Defendants note that CA was obtaining advice about variance issues from Simbari and from two attorneys – Frances Casullo and Kathy Bennett. Defendants contend that CA waived the attorney-client privilege with respect to communications related to the necessity for variances by commencing this action alleging that defendants, among other things, negligently provided advice regarding the need for variances.

CA asserts that it is not claiming that defendant gave incorrect advice about the need for variances; rather it characterizes its claim as being that defendants prepared design documents for projects that could not be lawfully constructed without first obtaining variances. Whether CA received advice from another professional regarding the necessity for variances is not relevant to

University Avenue, LLC v Simbari Design Architecture, PLLC
Cortland Apts, LLC v Simbari Design Architecture, PLLC

February 3, 2015

Page 4

the accuracy of the advice given, or to the designs prepared, by defendants. CA does not need to use any privileged material to prove its claim. The issue of whether such advice or plans were professionally reasonable when delivered may be addressed by testimony from professionals other than those who were contemporaneously providing advice to CA – evidence that is available to all parties. Accordingly, CA did not waive the privilege (see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust, 43 AD3d 56 [2007]; Lue v Finkelstein & Partners, LLP, 67 AD3d 1187 [2009]; Jakobleff v Cerrato, Sweeney & Cohn, 97 AD2d 834 [1983]; see also Ambac Assur. Corp. v DLJ Mtge. Capital Inc., 92 AD3d 451 [2012]; Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP, 52 AD3d 370 [2008]; Manufacturers & Traders Trust Co. v Servtronic, Inc., 132 AD2d 392 [1987]).

Accordingly, defendants' motion is denied.

This decision shall constitute the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry (see CPLR 5513).

Dated: February 3, 2015
 Cortland, New York

ENTER:

Phillip R. Rumsey
Digital signed by Phillip R. Rumsey
 DN: cn=Phillip R. Rumsey, o=Courts, ou=US, Date=2015.02.03 12:51:09-0500

HON. PHILLIP R. RUMSEY
 Supreme Court Justice

PRR:sh
 to Clerk for filing in both actions, Index Nos. 11-591 and 12-320