

Barrison v D'Amato & Lynch LLP
2017 NY Slip Op 30078(U)
January 11, 2017
Supreme Court, New York County
Docket Number: 653530/2011
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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HARVEY BARRISON,

Plaintiff,

Index No.: 653530/2011

-against-

Mtn Seq. Nos. 009 & 010

D'AMATO AND LYNCH LLP, LUKE D.
LYNCH, JR., and HECHT AND COMPANY,
CERTIFIED PUBLIC ACCOUNTANTS, P.C.,

DECISION AND ORDER

Defendants.

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JEFFREY K. OING, J.:

Mtn Seq. No. 009

Defendants, D'Amato and Lynch LLP ("D&L"), Luke D. Lynch, Jr., and Hecht and Company, Certified Public Accountants, P.C. ("Hecht"), make an in limine motion, pursuant to CPLR 4011, to preclude the expert testimony of Thomas Fitzgerald ("Fitzgerald"). Defendants contend that plaintiff seeks to have Fitzgerald testify on the computation of statutory interest and that his expert testimony should be precluded because statutory interest is neither a jury issue nor a matter that requires expert professional expertise.

Plaintiff argues that the loss of the money he had to pay in taxes as a result of defendants' alleged treatment of him as a partner rather than an employee, is an important part of plaintiff's damages. Further, the issue of whether Fitzgerald's testimony is relevant should be decided by the trial judge.

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Defendants' motion in limine is premature, and is denied without prejudice to renew at the time of trial.

Mtn Seq. No. 010

Defendants move, pursuant to CPLR 2304, to quash plaintiff's notice of deposition and non-party witness subpoena served upon non-party witness Shannon Ulmer ("Ulmer"), senior vice president and chief technology officer at Thomson Reuters Tax and Accounting Business ("Thomas Reuters"). At issue in this action is the meaning of the number inserted below the "Percent Owned" column of the partnership directory in D&L's New Jersey state tax return. Thomas Reuters is the company that created a tax software program used by Hecht to prepare D&L's tax returns.

Plaintiff cross-moves for a commission to take Ulmer's deposition based on the argument that he "should not be deprived of the right to depose a knowledgeable witness from the company which produced the software to determine how it actually worked; what needed to be input; what was done with the input; and how the percent ownership numbers were calculated" (Schwarz Affirm., 8/1/16, ¶ 25).

The Court notes that discovery in this action has been a protracted process. The parties were to have finally moved beyond fact discovery and be fully engaged in expert witness discovery at this juncture. As such, plaintiff's application to

take a non-party deposition seeking further fact discovery is untimely. The Court also notes that plaintiff's prior discovery application dealt with essentially the same issue in seeking production of all schedules given by D&L to Hecht from 2008 to 2011, which was denied. In that regard, "the excerpts of the depositions of James Mahon, a representative of defendant Hecht & Company, and Keith Clarkson, D'Amato & Lynch's Controller, annexed to defendants' letter brief ... demonstrate that plaintiff had ample opportunity to question defendants' witnesses as to the meaning of the 'Percent Owned' column" (NYSCEF Doc. No. 208). Plaintiff raises this issue again by seeking Ulmer's deposition.

In any event, contrary to plaintiff's claim "that the central issue in this case is whether the plaintiff was a partner with an ownership interest in the defendant law firm, D'Amato and Lynch, or an employee of the firm," plaintiff's remaining claims concerning this issue are for fraud (third cause of action) and negligent misrepresentation (fourth cause of action). As such, plaintiff is required to demonstrate that defendants made certain representations to plaintiff upon which he relied in order to prove his claims. Plaintiff admitted at his deposition that he had not seen the partnership directories at issue while he was at D'Amato and Lynch (Ree Affirm., 6/10/16, Ex. F). As such,

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defendants correctly point out that plaintiff cannot allege that he relied on representations made in documents that he had not seen prior to this action. Given that questioning Ulmer about documents that plaintiff cannot rely upon in proving the fraud and negligent misrepresentation claims would be of no evidentiary value in proving plaintiff's claims, defendants' motion to quash the subpoena is granted and the cross-motion is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to preclude (mtn seq. no. 009) is denied; and it is further

ORDERED that defendants' motion to quash (mtn seq. no. 010) is granted, and plaintiff's cross-motion is denied; and it is further

ORDERED that counsel are directed to complete all discovery on or before February 28, 2017, and appear for a status conference in Part 48, Room 242, on March 7, 2017 at 10:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/11/17


HON. JEFFREY K. OING, J.S.C.

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J.S.C.