

**Carlton Group, Ltd. v Property Mkts. Group, Inc.**

2018 NY Slip Op 31725(U)

July 23, 2018

Supreme Court, New York County

Docket Number: 450044/2016

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

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THE CARLTON GROUP, LTD.,

Plaintiff,

Index No.: 450044/2016

- v -

PROPERTY MARKETS GROUP, INC.,  
DYNAMIC WORLDWIDE GROUP, LLC, DYNAMIC  
HAKIM, LLC, QPS 23-10 DEVELOPMENT, LLC,  
PMG AVENTURA HOLDINGS, LLC, PMG AVENTURA,  
LLC, PMG AVENTURA MEZZANINE, LLC, PMG  
BRICKELL, LLC, PMG BRICKELL DEVELOPMENT  
GROUP, LLC, PMG BRICKELL HOLDINGS, LLC,

**DECISION AND ORDER**

Defendants.

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**Saliann Scarpulla, J.**

In this action, *inter alia*, to recover damages for breach of contract, defendants Property Markets Group, Inc., QPS 23-10 Development LLC, PMG Aventura Holdings, LLC, PMG Aventura LLC, PMG Aventura Mezzanine, LLC, PMG Brickell, LLC, PMG Brickell Development Group, LLC, and PMG Brickell Holdings, LLC (“PMG defendants”) move to reopen the examination before trial of Brad Zackson (“Zackson”), and to vacate the stipulation dated January 24, 2018 insofar as it permitted defendants Dynamic Worldwide Group, LLC and Dynamic Hakim LLC (“Dynamic defendants”) to continue the examination before trial of Kevin Maloney (“Maloney”) for an additional

hour for a limited purpose. Dynamic defendants cross move to compel the examination before trial of Frank Kaiman, Esq (“Kaiman”).<sup>1</sup>

In a decision/order dated May 23, 2018, the PMG defendants’ motion to dismiss the Dynamic defendants’ second, third and fourth cross claims was granted. The parties admit that the continued questioning of Zackson and Maloney would only be relevant to those now dismissed cross claims. Therefore, as of now, the sought-after testimony of Zackson and Maloney is not relevant or necessary. The parties have informed the court that new cross claims will be asserted, and a motion to dismiss those cross claims will be made. As such, the PMG defendants’ request to reopen Zackson’s examination before trial is denied without prejudice to renew if the newly contemplated cross claims are sustained. Further, the issue of whether Maloney’s examination before trial should continue for one hour can be addressed if the newly contemplated cross claims are sustained.

As to the cross motion, the Dynamic defendants and plaintiff explain that one of the central issues in this case is whether the PMG defendants had possession of the Carlton contract at issue before the closing. According to Zackson, he brought the Carlton contract to Kaiman and Maloney prior to the closing. The Dynamic defendants argue that Kaiman’s testimony is material and necessary because (1) Zackson testified that Kaiman and Maloney told Zackson not to email them the Carlton agreement prior to the closing, which Zackson believed was said so that Kaiman and Maloney could avoid

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<sup>1</sup> Plaintiff The Carlton Group, Ltd joins in the cross motion by affirmation of plaintiff’s counsel.

having a record of having received the document in case of future litigation; and (2) Zackson testified that Maloney, with Kaiman in the room, advised him that the Dynamic defendants' interest in the property was going to be left temporarily undocumented "so [the Dynamic defendants] could fight the Carlton case. Otherwise, we would be liable, and they would make us pay everything."

Generally, an attorney should only be compelled to testify at an examination before trial when it is shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *See Dufresne-Simmons v Wingate, Russotti & Shapiro, LLP*, 53 Misc. 3d 598, 606-607 (Sup. Ct. Bronx Co., 2016). Cross movants have failed to make a showing that no other means exist to obtain the information other than to depose opposing counsel, as they have Zackson's testimony on this issue. No evidence has been submitted on the cross motion to refute Zackson's testimony at this time. In their moving or opposition papers, none of the parties refer to Maloney's testimony on this issue, if any such testimony exists.

Cross movants also contend that Kaiman's testimony is material and necessary because he wrote and sent many relevant emails and received responses, he drafted most of the organizational documents for the subject real estate project, caused the formation of corporate entities for the project, and negotiated and closed the acquisition of the real estate at issue. "Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony necessary." *Talvy v. American Red Cross*, 205 A.D.2d 143, 152 (1<sup>st</sup> Dept. 1994)(internal quotations omitted).

At this point, cross movants have failed to make an adequate showing that Kaiman's testimony is crucial or that the relevant information may not be obtained from other sources.

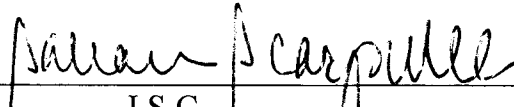
In accordance with the foregoing, it is hereby

ORDERED that defendants Property Markets Group, Inc., QPS 23-10 Development LLC, PMG Aventura Holdings, LLC, PMG Aventura LLC, PMG Aventura Mezzanine, LLC, PMG Brickell, LLC, PMG Brickell Development Group, LLC, and PMG Brickell Holdings, LLC's motion to reopen the examination before trial of Brad Zackson and to vacate the stipulation dated January 24, 2018 insofar as it permitted defendants Dynamic Worldwide Group, LLC and Dynamic Hakim LLC to continue the examination before trial of Kevin Maloney for an additional hour for a limited purpose is denied without prejudice to renew; and it is further

ORDERED that defendants Dynamic Worldwide Group, LLC and Dynamic Hakim LLC's cross motion to compel the examination before trial of Frank Kaiman, Esq. is denied without prejudice to renew.

This constitutes the decision and order of the court.

Dated: July 23, 2018  
New York, New York

  
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J.S.C.  
HON. SALJANN SCARPULLA