

TSFV Holdings, LLC v Mulberry Dev., LLC
2019 NY Slip Op 31485(U)
May 28, 2019
Supreme Court, New York County
Docket Number: 652865/2016
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

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TSFV HOLDINGS, LLC,

Plaintiff,

INDEX NO. 652865/2016

MOTION DATE 01/31/2019

MOTION SEQ. NO. 006

- v -

MULBERRY DEVELOPMENT, LLC, ROBERT LAVECCHIA

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208

were read on this motion to STRIKE PLEADINGS.

Upon the foregoing documents, it is ordered that this motion is denied.

Plaintiff moves for an order: (a) striking the answer filed by Mulberry Development LLC (“Mulberry”) and Robert Lavecchia (“Lavecchia”) in the first action, and dismissing the complaint filed by Mulberry in the second action, pursuant to CPLR 3126(3); (b) awarding plaintiffs’ attorneys’ fees pursuant to 22 NYCRR 130-1.1(a); (c) further sanctioning defendants and their counsel for violations of Court Rule 221 during the course of depositions; and (d) compelling a deposition witness to answer questions that were improperly objected to at his deposition.

Plaintiff contends that Lavecchia’s extreme incivility towards plaintiff’s counsel during the deposition warrants dismissal of defendants’ claims. Plaintiff further argues that defendants’ attorney, Michelle Cheng, made multiple improper speaking objections, as well as other inappropriate statements, during the depositions of Michael Bruno (“Bruno”), in violation of Uniform Rule 221 (NYSCEF Doc. No. 187).

Lavecchia was noticed to appear for a deposition on November 20, 2018 at 10:30 a.m.

Lavecchia arrived nearly 30 minutes later. Plaintiff's counsel, Latisha V. Thompson, asserts that Lavecchia made a number of inappropriate comments during the deposition. The following represents conduct and comments that occurred during the deposition that plaintiff's counsel deems objectionable:

Q. Is there anything that could help you remember the date?

A. Maybe if you jumped on the table and dance around a little bit.

Q. I am unwilling to do that since I am a lawyer.

A. Okay. Maybe your partner can.

Q. Is there anything else other than one of us women in here dancing on the table that would help you recall when you sued 17th Street Corporation?

A. No....

(NYSCEF No. 189, 7:22-8:18)

Q. Do you know if you served as a consultant for New York Renaissance Group for more than three years?

A. I don't recall.

Q. Is there anything that could help you recall?

A. Do you want to dance?

(NYSCEF No. 189, 33:15-21)

Q. Sure. What are you looking at on your phone?

A. Naked pictures.

Q. It is inappropriate to look at naked pictures during a deposition.

A. Inappropriate to who?

Q. I ask that you refrain. To all of the people sitting in this room, and it is disrespectful, so I would ask that you stop that and answer the questions.

(NYSCEF No. 189, 102:2-11)

Q. And then you see at the bottom there is Edward J. Irwin, U.S. Probation Officer.

A. Yes. That guy was such a dick. I see that.

(NYSCEF No. 189, 55:7-10)

Q. So you were paid on that requisition within a day of submission, correct?

A. Correct. Prior to Frank La Ruffa's e-mail though. Isn't that funny? I'm not asking you to laugh. I think it is funny though. I remember Frank La Ruffa's e-mail that you stated he said under no circumstances will we be paid before that date, and miraculously we were. I wonder how that happened? Maybe there was some verbal agreement. I don't know.

The guy was such a dick. Who knows?

Q. And what does late in your terms mean?

A. I don't know. The guy was a dick.

(NYSCEF No. 189, 164:12-165:2, 195:10-12)

Q. What did you discuss with your partner?

A. My partner discussed how much jerk-offs you guys were, and he fucking hated it.

Q. Did your partner say anything else?

A. He said there is a bunch of clowns. Who gives a shit about them.

(NYSEF Doc. No 189, 14:23-15:7)

The court retains broad discretion in supervising discovery (*see Crooke v Bonofacio*, 147 AD3d 510 [1st Dept 2017]), and any CPLR 3126 sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]). While the court does not condone Levecchia's boorish conduct, striking the defendants' answer is too a harsh remedy for this relatively isolated set of transgressions. On the record before this court, moreover, plaintiff fails to demonstrate that Levecchia did not answer all of questions asked at the deposition. Movant does not establish that its counsel was ultimately unable to complete the deposition of Levecchia.

Plaintiff argues that defendants' counsel violated Uniform Rule 221 by making the following improper speaking objections:

Q. How many current projects does New York Renaissance Group, LLC currently have?

MS. CHENG: Only if you remember.

A. I'm not sure.

Q. How much were you paid as a consultant?

MS. CHENG: Objection to form. You don't have to answer that.

Q. You can answer that.

A. I don't remember.

Q. You don't remember how much you were paid?

A. Uh-uh.

Q. How much are you paid now as a CEO?

MS. CHENG: Objection to form. You don't have to answer that.

Q. You can answer that.

MS. SIROTA: No speaking objections. We are going to take a break.

Q. So what is Mulberry doing exactly on that project for the gut renovation?

THE WITNESS: Is this relevant?

MS. CHENG: If you know the answer, you can answer.

A. We are providing millwork, electrical, plumbing, sprinkler and mechanical.

Q. And Peak had already paid for some of the sauna and steam accessories, right or equipment?

A. No, they did not pay for any of that actually if you look at it. If you look at that line item, 52,000, there is nothing that was req'd for during that time period.

MS. THOMPSON: What are you showing the witness?

MS. CHENG: A calendar of November 2015. That was a Sunday.

A. Yeah, so she makes a good point.

Q. Is it possible that this fourth requisition that you speak of demanded \$800,000?

MS. CHENG: Objection to form. You may answer if you know.

A. I don't know.

MS. CHENG: Just for the record, the contract Mulberry –

MS. THOMPSON: Not for the record. Not for the record. There is no talking on the record. You can redirect if you would like to.

MS. CHENG: All parties -

MS. THOMPSON: You can redirect if you'd like. You cannot break up my direct. You can do it on redirect when I'm finished. The witness is all yours. Have at it.

MS. CHENG: I just wanted to say -

MS. THOMPSON: For the record, when it is your turn to speak, you can do it. Are you making an objection?

MS. CHENG: No.

MS. THOMPSON: Okay. Then you cannot speak now.

MS. CHENG: I'm just saying the contract speaks for itself.

MS. THOMPSON: You cannot speak now.

MS. CHENG: I am making a statement that the contract speaks for itself. That's it. End of story.

MS. THOMPSON: That is not a proper objection, and you know it. So stop speaking. You know there are no speaking objections in New York.

MS. CHENG: I am allowed to make a statement.

MS. THOMPSON: No, you are not.

MS. CHENG: Yes.

MS. THOMPSON: You are allowed to make a statement on the record?

MS. CHENG: On the record the contract speaks for itself.

MS. THOMPSON: You're allowed to make a statement on the record? That's your position? At a deposition, whenever you would like, you can make a statement on the record? That's your position?

MS. CHENG: Yes.

(NYCEF Doc. No. 190 Thompson Aff. Ex. C, 16:4-7; 25:16-26:6; 44:2-8; 217:15-218:2; 277:22-278:2)

CPLR 3115(b), (c), and (d) provide certain limited bases for making objections during depositions, including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or admissibility of testimony (*see*


CPLR 3115[b]-[d]). However, despite its inclusion in Uniform Rule 221.2, CPLR 3115 does not provide any separate basis for refusing to answer questions or for an attorney to direct a deponent to not answer questions (*see* CPLR 3115; 22 NYCRR 221.2). Furthermore, Uniform Rule 221.1(a) provides that objections made at a deposition “shall be noted by the officer before whom the deposition is taken, and the answer shall be given, and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.” 22 NYCRR 221.1(a). Attorneys may not instruct a deponent not to answer unless CPLR 3115 or 22 NYCRR 221.2 provides a basis for doing so.

The court has reviewed the portions of Bruno’s deposition transcript, as highlighted by plaintiff’s counsel, and finds that, indeed, the objections made by defendants’ counsel were improper. Defendants’ counsel on several occasions directs Bruno not to answer. Nevertheless, despite counsel’s improper objections, it appears on the record before this court that Bruno ultimately provided responses to the questions that he was directed not to answer. As such, ordering additional deposition questioning appears, based on the papers presented on this motion, to be unnecessary.

Accordingly, it is hereby

ORDERED that plaintiff’s motion, for an order: (a) striking the answer filed by Mulberry Development LLC (“Mulberry”) and Robert Lavecchia (“Lavecchia”) in the first action, and dismissing the complaint filed by Mulberry in the second action, pursuant to CPLR 3126(3); (b) awarding plaintiffs’ attorneys’ fee pursuant to 22 NYCRR 130-1.1(a); (c) further sanctioning defendants and their counsel for violations of Court Rule 221 during the course of depositions; and (d) compelling a deposition witness to answer questions that were improperly objected to at his deposition, is denied, and it is further

ORDERED that the parties are directed to appear for a Status Conference in Part 43
(Room 412, 60 Centre Street, New York, NY 10007) on Thursday, July 18, 2019 at 11:00 a.m.

<u>5/28/2019</u>				
DATE			ROBERT R. REED, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE