

**Whalen v Sammi**

2019 NY Slip Op 34649(U)

February 26, 2019

Supreme Court, Westchester County

Docket Number: Index No. 58852/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

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LINDSEY WHALEN,

Plaintiff,

-against-

**DECISION and ORDER**  
**Index No. 58852/2018**  
**Motion Date: Feb. 26, 2019**  
**Seq. Nos. 1 and 3**

PARAMJEET SAMMI and ROSENA SAMMI,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion (sequence number 1) by plaintiff seeking an order compelling defendant Paramjeet Sammi (“Sammi”) to: (1) produce the computer notes he reviewed in preparation for his deposition testimony; and (2) appear for a further examination before trial.

Order to Show Cause; Affirmation in Support; Exhibits A-H  
Affirmation in Opposition; Exhibit A  
NYSCEF File

The following papers were read on this motion (sequence number 3) by defendants seeking an order pursuant to CPLR 2304, CPLR 3101(4)(b), CPLR 4503(a)(1) and CPLR 3103 (a) quashing the subpoena served on non-party J. Bruce McGuirk, Esq. (“McGuirk”).

Order to Show Cause; Affirmation in Support; Exhibits A-D;  
Memorandum of Law in Support  
Affirmation in Opposition; Exhibits A-I

Upon the foregoing papers and the proceedings held on February 26, 2019, these motions are determined as follows:

Plaintiff commenced this action by the filing of a summons and verified complaint on June 5, 2018 seeking damages for injuries allegedly resulting from a slip and fall occurring on May 21, 2017 in defendants’ home located in Briarcliff Manor, New York 10510 (the “residence”). Plaintiff alleges, inter alia, that she slipped down steps leading to the mudroom in defendants’ residence while she was babysitting for defendants’ children. Among her allegations plaintiff contends that defendants were negligent in their failure to properly maintain the steps

and to install a handrail.

Motion Sequence Number 1

Both defendants attended and took notes during plaintiff's deposition on November 19, 2018. During Sammi's deposition on November 28, 2018 he stated that in preparation for his deposition he had reviewed the notes he took during plaintiff's deposition, including notes he took on his laptop computer. Sammi and his counsel refused plaintiff's counsel's request to see those notes during his deposition. Plaintiff's counsel now seeks those notes as well as a further deposition of Sammi on the grounds that defendants' attorney, Richard Salvato, Esq. ("Salvato") improperly directed Sammi not to answer certain questions during his deposition. During his deposition Sammi testified:

Q. When was the last time you took a look at the notes that you wrote on your laptop?

A. In -- this morning, in preparation.

\* \* \* \* \*

Q. So, your laptop, you have it here. Could you open up your laptop and show me what you looked at?

A. No.

Mr. SALVATO: No. I would also make an objection.  
(Plaintiff's Exhibit E, Tr. at page 38-39).

Immediately after this exchange, Sammi and his counsel took a short break. When the deposition resumed, Sammi asked to clarify this testimony, which request was denied by plaintiff's counsel. Also during his deposition Sammi was directed by Salvato not to answer certain questions concerning: whether getting plaintiff to Phelps Memorial Hospital would have involved moving her off of the ground (Plaintiff's Exhibit E, Tr. at page 140), whether Sammi owned or partially owns his home (Plaintiff's Exhibit E, Tr. at pages 186-188), and whether paragraph 28 of the verified complaint correctly states that plaintiff was lawfully at defendants' home to babysit their children when the incident occurred (Plaintiff's Exhibit E, Tr. at page 225).

Plaintiff contends that since Sammi testified that he reviewed the notes on his laptop in preparation for his deposition they are discoverable. Defendants argue that Sammi misspoke when he stated that he had reviewed his laptop notes prior to the deposition, which Sammi attempted to clarify but was prevented from doing so by plaintiff's counsel. Defendants further argue that Sammi answered all deposition questions and a further deposition of him is unnecessary.

Motion Sequence Number 3

By this motion, defendants seek an order quashing a subpoena duces tecum issued to non-

party McGuirk. McGuirk, an attorney with the firm of Skadden, Arps, Slate, Meagher & Flom, LLP (“Skadden”)<sup>1</sup> has been identified as the attorney who represented defendants in the purchase of their residence in 2010. In addition to McGuirk’s deposition, the subpoena sought the following documents with respect to the purchase of defendants’ residence: (1) all inspection reports, including a home inspection, architectural and/or engineer reports and photographs relative to defendants’ purchase of their residence; (2) documents containing the name of the person, company and/or entity that performed a home inspection relative to defendants’ purchase of their residence; (3) closing documents concerning defendants’ purchase of their residence, including the entire closing file and closing statement; (4) all photographs of the residence; and (5) all emails, including attachments, relating to the purchase of the residence.

Defendants state that they have provided the name of the company which performed the home inspection, “Mr. Inside Out,” as well as the name of the inspector Paul Coombes (“Coombes”). Defendants state that they do not have a copy of the inspection report itself. Defendants’ counsel provides a letter dated December 12, 2018 from Skadden to plaintiff’s counsel which states, inter alia, that McGuirk and Skadden have nothing to produce in response to the subpoena and that McGuirk would not be appearing for a deposition.<sup>2</sup>

Defendants argue that the subpoena is intended to harass defendants by seeking to conduct the deposition of one of Sammi’s partners at his place of business. Defendants also argue that the subpoena is overly broad, irrelevant, and seeks privileged attorney-client communications. In opposition plaintiff argues that McGuirk’s deposition and the documents sought by the subpoena are material and relevant to the issues of the allegedly unsafe condition of the steps and the absence of a handrail. Plaintiff further argues that since defendants have denied possessing the report plaintiff is seeking the report from the attorney who represented defendants in their purchase of the residence. Plaintiff notes that the December 12, 2018 letter from Skadden does not state that a search was made for the home inspection report, and is not signed or sworn to by McGuirk.<sup>3</sup> Plaintiff’s counsel annexes a subpoena duces tecum served on Coombes, but states that Coombes has indicated that he does not possess the home inspection report. The subpoena also directs Coombes to appear for his deposition on February 15, 2019.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

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<sup>1</sup> Mr. Sammi is a partner at Skadden.

<sup>2</sup> This letter is not signed by McGuirk.

<sup>3</sup> Neither Skadden nor McGuirk have submitted papers in support of the motion to quash the subpoena.

The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

To the extent that Sammi reviewed any notes in preparation for his testimony he is required to turn over those documents (*see Crawford v Lahiri*, 250 AD2d 722 [2d Dept 1998]). Sammi testified that he reviewed the notes on his laptop computer in preparation for his deposition. That he sought to “clarify” that statement only after conferring with his attorney outside of the room where the deposition was taking place strains credulity. Plaintiff is entitled to production of those notes, as well as an opportunity to question Sammi concerning those notes. After a review of the entire transcript from Sammi’s deposition, the court finds that he sufficiently responded to the remaining questions posed to him.

With respect to the motion to quash, in light of plaintiff’s allegations concerning the defective nature of the steps and the absence of a handrail, the home inspection report is highly relevant. It is noted that pursuant to the subpoena served upon Coombes, his deposition was scheduled to occur prior to the return date of this motion. Although Coombes would presumably be the person most likely to possess the home inspection report, he has indicated that he does not possess the report. In the event that remains unchanged at his deposition, then McGuirk would be the next likely possessor of the report and plaintiff should be able to obtain documents from McGuirk which reference the condition of the steps and the absence of a handrail, including all inspection reports (home inspection, architectural and/or engineer reports), any documents concerning those reports, and any additional documents in the closing file relative to the purchase of defendants’ residence which may be relevant to the condition of the steps and the absence of a handrail. Plaintiff would also be entitled to a further deposition of defendants concerning the home inspection report and any documents produced in response to the subpoena duces tecum served upon McGuirk.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that the branch of plaintiff’s motion sequence number 1 to compel is granted to the extent that defendant Paramjeet Sammi shall provide, so as to be received in hand by March 15, 2019, to plaintiff’s counsel the notes on his laptop computer which he reviewed in preparation for his deposition; and it is further

ORDERED that the branch of plaintiff’s motion sequence number 1 seeking the further deposition of defendant Paramjeet Sammi is granted to the extent that Paramjeet Sammi shall

appear for a further deposition on or before March 29, 2019 which shall be limited to the notes that Paramjeet Sammi took on his laptop computer during plaintiff's deposition, and any documents produced in response to the subpoena duces tecum which is the subject of motion sequence number 3; and it is further

ORDERED that defendants' motion sequence number 3 seeking to quash the subpoena duces tecum dated November 29, 2018 served on non-party J. Bruce McGuirk, Esq. is granted to the limited extent that non-party J. Bruce McGuirk, Esq. shall produce the closing file relative to the purchase of defendants' residence, and the home inspection report, so as to be received in hand by plaintiff's counsel by March 15, 2019 and shall appear for his deposition on or before April 5, 2019 which shall be limited to questions concerning documents produced in response to the subpoena duces tecum as they relate to the condition of the steps and the absence of a handrail. In the event that J. Bruce McGuirk, Esq. states that he is not in possession of these documents he shall provide a notarized affidavit stating same, describing in sufficient detail the search conducted for the documents that he claims not to have in his possession, including providing the particular area(s) searched, how much time was spent searching for the subject documents, whether the documents were destroyed and if so, by whom, when and for what purpose, and identifying any non-parties who may be in possession of such documents; and it is further

ORDERED that in the event that any of the documents directed to be produced herein contain information which defendants or J. Bruce McGuirk, Esq. believe is protected by the attorney-client privilege, a privilege log in accordance with CPLR 3122 (b) shall be included with the production to plaintiff and shall also be provided to the Compliance Part of the court along with two sets of Bates stamped documents, one unredacted and one set redacting allegedly privileged information, for in camera review on or before March 15, 2019; and it is further

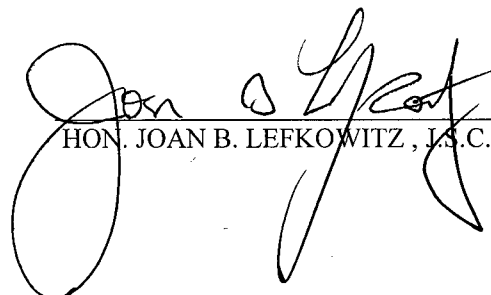
ORDERED that any applications not decided are herewith denied; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on April 8, 2019 at 9:30 A.M.; and it is further

ORDERED that within three (3) days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendants.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
February 26, 2019

  
HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF  
cc: Compliance Part Clerk