

<b>Kasowitz Benson Torres LLP v Silverman</b>
2020 NY Slip Op 31746(U)
June 5, 2020
Supreme Court, New York County
Docket Number: 161918/2018
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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KASOWITZ BENSON TORRES LLP,  
Plaintiff,

- v -

HENRY SILVERMAN, KAREN SILVERMAN, SILVERBOYS,  
LLC

Defendant.

-----X

INDEX NO. 161918/2018  
MOTION DATE 03/13/2020  
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for DISCOVERY.

In this breach of contract action Kasowitz Benson Torres LLP, (“plaintiff”), seeks to recover legal fees from its former clients, Henry Silverman, Karen Silverman, and Silverboys, LLC, (“defendants”), who have asserted counterclaims in response to the amended complaint. In motion sequence number 002 defendants seek an order to vacate the note of issue and in motion sequence number 003 defendants seek to compel responses to outstanding discovery demands and to compel plaintiff to produce Marc Kasowitz to appear at a deposition and answer questions related to plaintiff’s representation of defendants. The motions are consolidated for disposition.

## BACKGROUND/CONTENTIONS

Plaintiff is seeking to recover \$1,270,353.37 pursuant to invoices it delivered to defendants in accordance with the terms of a written retention agreement dated June 13, 2018; defendants engaged plaintiff to replace their former counsel and to perform professional legal services related to defendants' claims in a lawsuit by Silverboys, LLC against Sojo Design, LLC ("the underlying lawsuit"), which had been pending in Florida since 2016. (NYSCEF Doc. No. 31, ¶ 12).

In seeking to compel the production of documents and the deposition of Marc Kasowitz, defendants maintain that a key issue in this case is what Marc Kasowitz discussed and agreed to with the Silvermans concerning the scope of representation, how the representation would be staffed, and what the priorities were in connection with the representation. In their counterclaims defendants allege that despite the requirement that plaintiff provide monthly invoices, defendants were billed months after the services were rendered, thereby depriving them of the ability to timely monitor the fees that were allegedly being incurred. (NYSCEF Doc. No. 36, ¶ 13). Additionally, defendants allege that they made clear to Marc Kasowitz that because extensive work had already been done on the underlying lawsuit by predecessor counsel, defendants wanted one attorney to be fully conversant in the facts related to the representation and they further allege that they "expected to be told in advance which and how many attorneys were staffed on its matter." (NYSCEF Doc. No. 36, ¶¶ 8-11).

Defendants allege that plaintiff overstaffed the representation contrary to the agreement of the parties, billed excessively, failed to undertake the services it agreed to perform and when the Silvermans questioned the billing entries, plaintiff summarily resigned from its representation. (NYSCEF Doc. No. 36). Defendants claim that Marc Kasowitz billed \$105,660

on the underlying lawsuit between the months of June 2018 and September 2018 and was the partner in charge of all aspects of plaintiff's representation, from billing and staffing, to making key decisions on litigation strategy and setting case priorities. Defendants note that Marc Kasowitz was the individual the Silvermans spoke with before retaining plaintiff, who discounted the billing invoices, and who sent a resignation letter to the Silvermans when they inquired as to the numerous billing entries. As such, defendants maintain that they are undoubtedly entitled to seek Marc Kasowitz' deposition in the discovery phase of this proceeding.

Plaintiff vehemently opposes producing Marc Kasowitz for a deposition, contending that his testimony is not relevant to the proceedings and is cumulative as the partners who had day-to-day involvement in the representation have already been deposed. Plaintiff also contends that defendants' request to depose Marc Kasowitz is intended to harass him and not to discover matters relevant to this dispute; finally, plaintiff raises the issue that Kasowitz' demanding schedule makes his availability to schedule and appear for deposition difficult to confirm.

The subject of Marc Kasowitz' deposition came up at the preliminary conference and at almost every other discovery conference held before the court in this matter. As the various conference orders make clear, defendants reserved their right to seek the deposition testimony of Marc Kasowitz and to compel further production of documents responsive to defendants' discovery demands. (NYSCEF Doc. Nos. 11, 16, 20, 35). While the court encouraged the parties to amicably resolve the discovery dispute concerning Marc Kasowitz' deposition and the further production of non-privileged documents, no ruling was issued by the court and as the January 28, 2020 status conference order indicates, the court granted defendants permission to make a discovery motion if the parties were unable to reach a compromise resolution. In that

status conference order the court again set the note of issue filing date at March 31, 2020, having extended the original filing date of March 6, 2020 at the status conference held on November 19, 2019, to allow the parties additional time to complete the outstanding discovery which at that time included the deposition of Karen Silverman and to potentially resolve the parties' dispute with respect to document discovery and producing Mr. Kasowitz for a deposition. (NYSCEF Doc. Nos. 22, 35).

Plaintiff also opposes producing Marc Kasowitz for deposition claiming his testimony is cumulative as the two partners who were involved in the day-to-day representation of defendants have already given extensive deposition testimony in this action. Defendants contend, conversely, that the deposition testimony of the witnesses produced by plaintiff demonstrate that they had no personal knowledge of the discussions Marc Kasowitz had with the defendants. Defendants assert that Marc Kasowitz' deposition is critical to defending against the claims plaintiff has made in seeking to collect legal fees defendants view as excessive, and in litigating their counterclaims alleging, inter alia, that plaintiff breached the contract by failing to adequately prepare the work product specifically promised, including preparation of an amended complaint.

#### **STANDARD OF REVIEW/ANALYSIS**

CPLR 3124 allows a party to "move to compel compliance or a response" with any discovery device or order. "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" CPLR 3101(a). "What is 'material and necessary' . . . includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" (*Andon v. 302-304 Mott St. Assocs.*, 94 NY2d 740, 746, 731 NE2d 589, 709 NYS2d 873 [2000] [quoting *Allen*

*v. Crowell-Collier Publ'g Co.*, 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]). "The test is one of usefulness and reason" and is left to the court's discretion. *Id.*

The right to disclosure, although broad, is not unlimited, and courts have consistently recognized that "litigants are not without protection against unnecessarily onerous application of the discovery statutes. Indeed, courts have broad discretion under our discovery statutes to balance the competing interests presented by the parties concerning the need for discovery. A party's demand for discovery "must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 705 NE2d 1197, 683 NYS2d 156 [1998] [citations and internal quotation marks omitted]; see CPLR 3103 [a]). When courts are called upon to resolve a dispute, the discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (see *Forman v Henkin*, 30 NY3d 656, 665, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018]). A party seeking to avoid disclosure bears the burden of showing that the disclosure sought is improper (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 258, 608 N.Y.S.2d 647 [1st Dept 1994], citing *Koump v Smith*, 25 NY2d 287, 294, 250 N.E.2d 857, 303 N.Y.S.2d 858 [1969]).

Here, there can be no doubt that the deposition testimony of Marc Kasowitz is relevant, useful and reasonable to determining the issues raised by the parties in this fee dispute. Issues relative to staffing, billing and decisions made with respect to filing the *lis pendens* and other strategic decisions made by plaintiff in directing the representation in the underlying lawsuit are obviously within the personal knowledge of Marc Kasowitz, who defendants have established played a key role in their decision to retain plaintiff in the first place.

Turning to plaintiff's contentions that the deposition testimony of Marc Kasowitz is cumulative, the court finds this argument unavailing. The testimony given by the witnesses already produced by plaintiff, indicating that neither witness had any first-hand knowledge of the conversations between Marc Kasowitz and the Silvermans, a key issue in this fee dispute, demonstrates the relevance of the testimony sought. (NYSCEF Doc. Nos. 40, 41). Plaintiff goes through great length to demonstrate that defendants' claims of Marc Kasowitz' involvement in their representation in the underlying lawsuit are greatly exaggerated, arguing instead that his involvement was *de minimis* in view of the overall work done, noting that he only billed 58 hours while the attorneys already produced billed significantly more hours.

Plaintiff points to testimony given by Karen Silverman that indicates she only met Marc Kasowitz on four occasions and Henry Silverman only had one conversation with Marc Kasowitz thus demonstrating that he has little relevant information to add to this proceeding. (NYSCEF Doc. Nos. 76, 77). The court again is not persuaded by this argument and finds that it bolsters defendants' contention that Marc Kasowitz is one of the key individuals at the firm with whom the Silvermans discussed the scope of representation, a critical issue in this fee dispute.

In balancing the competing interests of the parties, the court finds that notwithstanding the demands on Marc Kasowitz' schedule appearing for a deposition in this matter does not present an unreasonable burden to plaintiff, as compared to the defendants need to gather useful and relevant information in preparing their defense to plaintiff's claims and the litigation of their counterclaims. The court finds that defendants are entitled to this deposition as they have demonstrated that Marc Kasowitz possesses information that is material and necessary and which will assist preparation for trial by sharpening the issues concerning what Marc Kasowitz discussed and agreed to with the Silvermans, relative to, among other issues, the scope of

representation, how the representation would be staffed, and what the priorities were in connection with the representation.

Turning to the portion of defendants' motion that seeks to compel plaintiff's further production of documents, defendants contend that plaintiff cannot withhold the Silvermans' case file and related documents since these documents are necessary for the Silvermans to defend against this action for unpaid legal fees and to prosecute their counterclaims. Alternatively, defendants contend that plaintiff should be required to produce a privilege log of its internal communications and impressions concerning the Silvermans and the representation.

Not surprisingly, plaintiff maintains that it has already produced voluminous documents responsive to defendants' demands and that any further production of documents would amount to turning over its privileged work product, which it contends are appropriately withheld from disclosure, relying on *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn* (91 NY2d 30, 689 NE2d 879, 666 NYS2d 985 [1997] [where the Court found that at the termination of the attorney-client relationship, a client, presumptively, has full right of access, with narrow exceptions, to all of the documents in the attorneys' file, including work-product material, where no claim for unpaid legal fees is outstanding]). Plaintiff maintains that based on *Matter of Sage Realty Corp.*, it is not required to turn over "firm documents intended for internal law office review and use" and simultaneously asserts that its voluminous document production contains all work product related to the underlying representation, including the numerous drafts and filings that were sent to the defendants for review and comment, including drafts of interrogatories, draft responses and objections to interrogatories, draft requests for admission, draft subpoenas, and draft complaints. (NYSCEF Doc. No. 79, at p. 13).

Without identifying what aspect of plaintiff's production is deficient and what specific documents it contends plaintiff is withholding from production, defendants contend that plaintiff is reading the narrow exception articulated in *Matter of Sage Realty Corp* too broadly and that defendants are entitled to the firm's internal communications, including the attorneys' impressions of the Silvermans because plaintiff is directly blaming its former client for the overbilling and has already exposed at least one of its mental impressions by calling one of the defendants "crazy" during a deposition. Alternatively, defendants demand that plaintiff should be required to produce a privilege log of its internal communications and impressions concerning the Silvermans and the representation.<sup>1</sup>

In reviewing the documents submitted in support of defendants' motion to compel, the court finds that defendants have not identified with any specificity the documents it claims plaintiff is withholding from production and as such, the court is unable to determine whether plaintiff has fully complied with defendants' discovery demands or whether a privilege log is necessary. As such, this portion of defendants' motion to compel is denied and defendants are permitted to serve a further discovery demand, within 15 days of this decision, seeking production of the specific documents and/or general categories of documents it seeks to discover from plaintiff's files that have not already been produced, relative to its representation of defendants in the underlying lawsuit. Should defendants serve a further discovery demand, plaintiff will have 30 days to respond; any documents withheld from production by plaintiff shall be identified in a privilege log, duly served with said discovery responses and document production.

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<sup>1</sup> Plaintiff claims that it has turned over the entirety of its file and generally relies on the narrow exception articulated in *Matter of Sage Realty Corp*, without specifically asserting that it has in fact withheld any such privileged material.

Finally, defendants' motion to vacate the note of issue is granted. As noted, the court extended plaintiff's time to file the note of issue to March 31, 2020, from the previous deadline of March 6, 2020, because the parties had identified the outstanding deposition of Karen Silverman and the disputed pendency of defendants' document demands and the demand to depose Marc Kasowitz. (NYSCEF Doc. Nos. 22, 35). A note of issue should be vacated where, as here, it is based upon a certificate of readiness that incorrectly states that all discovery has been completed (see *Ortiz v Arias*, 285 AD2d 390, 390, 727 NYS2d 879 [1<sup>st</sup> Dept 2001]; *Savino v Lewittes*, 160 AD2d 176, 177-178, 553 NYS2d 146 [1<sup>st</sup> Dept 1990]).

Given the general policy to encourage "open and far-reaching pretrial discovery" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 705 NE2d 1197, 683 NYS2d 156 [1998] [internal quotation marks omitted]), the court finds that there is material discovery that remains outstanding, and that plaintiff prematurely filed the note of issue over a month prior to the deadline set by the court and within five days of plaintiff's filing its amended complaint. (NYSCEF Doc. Nos. 31, 32). Defendants have made an adequate showing that they are entitled to the deposition of Marc Kasowitz. The court is hopeful that the parties will work cooperatively and expeditiously to conclude any additional document discovery as directed herein, and to schedule the deposition of Marc Kasowitz "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Andon v. 302-304 Mott St. Assocs.*, 94 NY2d at 746).

## CONCLUSION

Accordingly, the motions are granted in part, in accordance with this decision and it is hereby,

ORDERED that defendants' motion sequence number 002, to vacate the note of issue is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)) ; and it is further

ORDERED that defendants motion sequence number 003, insofar as it seeks to compel plaintiff's further production of documents is denied in accordance with this decision; and it is further

ORDERED that defendants' motion sequence number 003, insofar as it seeks to compel the deposition of Marc Kasowitz, is granted and he shall appear for deposition, at the office of counsel for defendants or at a location or in a manner that the parties agree upon, on a date and at a time convenient for the parties; and it is further

ORDERED that the parties shall appear for a status conference in Room 307, 80 Centre Street, on September 22, 2020 at 9:30 AM, unless otherwise notified by the court

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

6/5/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE