

<b>H. Roske &amp; Assoc. LLP v Burghart</b>
2022 NY Slip Op 34139(U)
December 5, 2022
Supreme Court, New York County
Docket Number: Index No. 657328/2017
Judge: Barry R. Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X

H. ROSKE & ASSOCIATES LLP,

Plaintiff,

-against-

CHRISTIAN BURGHART,

Defendant.

CHRISTIAN BURGHART and SCHUMANN  
BURGHART LLP,

Counterclaim Plaintiffs,

-against-

H. ROSKE & ASSOCIATES LLP and HENRY ROSKE,

Counterclaim Defendants.

-----X

HON. BARRY R. OSTRAGER

INDEX NO.	657328/2017
MOTION DATE	
MOTION SEQ. NO.	016, 017 & 018

**DECISION + ORDER ON MOTIONS**

The Court heard oral argument via Microsoft Teams on December 5, 2022 on three motions *in limine* in connection with the proposed jury trial in this matter. The motions are granted in part and denied in part in accordance with the December 5, 2022 transcript of proceedings and as follows.

In motion sequence 016, Christian Burghart and his law firm Schumann Burghart LLP (“the Burghart Parties”) move to admit certain evidence at trial and to exclude other evidence. First, the Burghart Parties seek to admit at trial evidence of the alleged repeated lies of Henry Roske, the sole owner of plaintiff H. Roske & Associates LLP (together, the “Roske Parties”), about the resignations of defendant Christian Burghart and his colleague, former defendant Moritz Schumann. The Roske Parties dispute the relevance of the evidence and argue that the

prejudicial value of any such evidence outweighs the probative value. The Court agrees with the Burghart Parties that the cited evidence may well be relevant to the claims at trial. Therefore, the Burghart Parties may proceed at trial to lay a proper foundation and to offer the cited evidence for admission, and the Court will hear any objections and render a determination at that time on each piece of evidence presented.

Second, the Burghart Defendants move to admit at trial purported business records documenting revenues Burghart allegedly generated for the Roske Firm that were allegedly the basis for the disputed October 2016 commission claimed by Burghart. Again, the Court agrees with the Burghart Parties that the cited evidence may well be relevant to the claims at trial. Therefore, the Burghart Parties may proceed at trial to lay a proper foundation and to offer the evidence, and the Court will hear any objections and render a determination at that time.

In the third prong of the motion, the Burghart Defendants move to exclude evidence of the revenues of the Schumann Burghart firm (“the SB Firm”), claiming the information is unrelated to the measure of damages that the Roske Firm may recover. The Court denies preclusion at this time. Even if the evidence of the revenues of the SB Firm is not directly relevant to the Roske Firm’s claimed damages, it may be some evidence of defendant Burghart’s alleged misconduct. Therefore, should plaintiff proffer the evidence at trial, the Court will hear the parties and determine the issues at that time.

In the fourth prong, the Burghart Parties move to exclude the testimony of plaintiff’s expert Jonathan Hochman; The Court denied the Burghart Parties’ request for similar relief by Decision and Order dated April 5, 2022 (mot. seq. 012). No basis has been stated for reargument. Burghart’s reliance on the recent decision *Red Hawk, LLC v. Colorforms Brand LLC*, 20-CV-9032 (VEC), 2022 WL 16570948, at \*6 (SDNY Nov. 1, 2022), does not change the result.

In the fifth prong, the Burghart Parties move to exclude evidence concerning the electronic records of the Roske Firm temporarily maintained by the Burghart Parties on the ground that the Roske Parties can show no damages. The Court denies preclusion at this time. The Court agrees with plaintiff that the evidence may well be relevant to defendant's alleged misconduct. Plaintiff may seek to lay a proper foundation at trial, and the Court will rule on any objections at that time.

In motion sequence 017, the Roske Parties move for an order precluding the Burghart Parties from introducing at trial, or commenting to the jury about, any evidence or allegations that: (a) Henry Roske allegedly made racist, sexist, or ethnic-related remarks, statements or slurs, including, but not limited to, purported speculation about the "brain size and intelligence of Africans and African-Americans"; (b) Roske allegedly used the term "'Pedro Lopez' as a stereotype for an uneducated Hispanic immigrant" at non-party German American Trade Association management seminars or at any other time; (c) Roske allegedly "ridiculed women in management positions and legal departments, especially women who used their maiden names"; and (d) Roske allegedly "bragged about his experience with prostitutes in Asia and other parts of the world". The Roske Parties also seek to preclude the Burghart Parties from introducing at trial, or commenting to the jury about, any evidence or allegations that Henry Roske or the Roske Firm allegedly engaged in "unethical business practices", including allegedly "permitting billing for electronic case law research when the Roske Firm had no access to an electronic research system like Westlaw or LexisNexis" or "splitting fees with a non-lawyer accountant who referred matters to the Roske Firm". Additionally, the Roske Parties seek to preclude the Burghart Parties from introducing at trial, or commenting to the jury about, any evidence or allegations that Henry Roske or the Roske Firm allegedly engaged in any violation of New York

lawyer ethics rules by deleting old files including, but not limited to, any reference to any alleged violation of NYSBA Commission on Professional Ethics Op. 1192 (2021). In the fourth prong of the motion, the Roske Parties seek to preclude the Burghart Parties from introducing at trial, or commenting to the jury about, any evidence or allegations that Henry Roske's sister, Harriet Roske, managed the day-to-day operations of non-party German American Trade Association under a pseudonym "Luisa Blumfeld". Lastly, the Roske Parties seek to preclude and bar the Burghart Parties from introducing at trial, or commenting to the jury about, any evidence or allegations that Roske allegedly "mocked [non- defendant Moritz Schumann] for having four children and a wife who worked full-time and for commuting from NJ".

The Court denies the motion to preclude without prejudice to renewal at trial. The Roske Parties argue that the cited evidence is not relevant to the claims at issue and that the prejudicial value outweighs the probative value. But the Burghart Parties in response have argued that the cited evidence has some relevance. The Court will determine at trial, in the context of the other evidence, whether any of the evidence should be precluded on the grounds of relevance or that the prejudicial value outweighs the probative effect.

To the extent counsel disagree as to whether the third counterclaim for tortious interference with business relations remains in the case, the Court directs counsel to the February 21, 2020 decision by Justice Scarpulla on motion sequence 008 where the Court denied plaintiff's motion to dismiss that counterclaim in light of the March 22, 2018 email sent by Roske (NYSCEF Doc. No. 171, p 9), and this Court's similar conclusion in its December 17, 2020 Decision and Order on motion sequence 009 (NYSCEF Doc. No. 208, p 3).

In motion sequence 018, the Roske Parties move to preclude the Burghart Parties from commenting or otherwise arguing to the jury that the Roske Firm had any contractual or other

binding obligation to pay (as distinguished from a *practice* of paying with Roske’s approval) any “attribution” or “commission” to defendant Burghart. The Court denies the motion without prejudice to renewal at trial. The Roske Parties have neither established law of the case based on an explicit ruling nor estoppel based on prior arguments made. The issue for the jury is whether Burghart was or was not entitled to take the commissions totaling approximately \$100,000.00. Counsel are free to offer relevant evidence at trial, and the Court will make appropriate rulings at that time.

Regarding the proposed jury trial, the Court adjourned the November 2, 2022 trial date *sine die* based on the parties’ failure to submit to the Court a satisfactory Proposed Verdict Sheet and Proposed Jury Charges. Counsel are directed to meet and confer to resolve their differences regarding those submissions and the various proposed Exhibits and deposition designations. Upon receipt of satisfactory pre-trial submissions, the Court will discuss a new trial date with counsel. A pretrial conference is scheduled for April 12, 2023 at 10:00 a.m. The parties shall efile a revised Joint Appearance Sheet on or before April 3, 2023.

Dated: December 5, 2022

  
 \_\_\_\_\_  
 BARRY R. OSTRAGER, J.S.C.

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