

Phillips Auctioneers LLC v Grosso

2023 NY Slip Op 31051(U)

April 3, 2023

Supreme Court, New York County

Docket Number: Index No. 651782/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

PHILLIPS AUCTIONEERS LLC,

Plaintiff,

INDEX NO. 651782/2020

- v -

MOTION DATE _____

PIER FRANCO GROSSO,

Defendant.

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 131 were read on this motion to/for DISCOVERY.

This motion arises from the deposition of David Baum (Deposition), the designated corporate witness of nonparty Cy Twombly Foundation (Foundation). Baum serves as the Foundation’s Secretary and General Counsel.

The court presumes familiarity with the action. Plaintiff Phillips Auctioneers LLC (Phillips), an auction house specializing in the sale of 20th century and contemporary art, timepieces, and jewelry (NYSCEF Doc. No. [NYSCEF 40], amended compl. ¶ 1), brought this breach of contract action against defendant Pier Franco Grosso to recover an advance, a withdrawal fee, and out-of-pocket expenses for the withdrawal of the alleged false artwork by late artist Cy Twombly (the Work). Grosso, consignee of the Work, counterclaimed for breach of duty, alleging Phillips failed to disclose relevant information to Grosso it received from the Foundation concerning the Work, which he contends led to the Work’s withdrawal from sale. (See NYSCEF 43, answer with counterclaims ¶ 1 at 8.)

The contract at issue is the consignment agreement between Phillips and Grosso (Consignment Agreement), which provided that Phillips may “withdraw any Lot at any time before sale without any liability in our sole judgment: (i) there is reasonable doubt as to its authenticity, authorship or attribution[]. . . .” (NYSCEF 41, exhibit A to amended complaint, Consignment Agreement at 6 [section 10 (a) (i)].¹) Phillips asserts that section 10(b) requires Grosso to pay out-of-pocket costs, a 25% withdrawal fee, and return the amount of the advance plus interest if Phillips withdraws the Work from sale pursuant to section 10(a)(i). (NYSCEF 40, amended compl. ¶ 31.)

There is a related tort action, initiated by Grosso, against the Foundation, Baum, Nicola Del Roscio² (Tort Action), index no. 155762/2022.

Grosso’s Request for Del Roscio’s Deposition and Additional Discovery

In this motion, Grosso moves, pursuant to CPLR 3124, to (i) compel the deposition of Del Roscio as the corporate witness for the Foundation; (ii) compel the Foundation to produce additional documents that have been withheld; (iii) declassify documents and testimony previously designated as confidential;³ and, pursuant to CPLR 3126 and 22 NYCRR 130-1.1, for (iv) sanctions against the Foundation in the form of reasonable attorneys’ fees and expenses incurred to prepare for and conduct the Deposition against the Foundation and filing this motion to compel.

As to (ii), Grosso specifically seeks (a) the “envelope file” of the Work, including the front and back of the envelope, any documents contained within, and documents

¹ Pages refer to NYSCEF generated pagination.

² Del Roscio is the President of the Foundation.

³ This part of the motion is moot. (NYSCEF 129, so ordered stipulation; NYSCEF 132, tr [mot. seq. no. 004] at 3:8-16.)

illustrating how these files are kept in the ordinary course of business, or confirmation that the entirety of such file has been produced; (b) all files concerning all alleged fake artworks maintained by the Foundation, (c) documents and communications concerning the Foundation's procurement of an alleged false Italian criminal conviction concerning Grosso, (d) all documents, communications, notes concerning the Work, (e) all database records concerning the Work, and (f) all other documents or communications responsive to the discovery requests submitted to the Foundation which have not previously been produced by the Phillips (the Additional Discovery).

A. Del Roscio's Deposition

"A corporate entity has the right to designate, in the first instance, the employee who shall be examined." (*Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2d Dept 2010] [citations and internal quotation marks omitted].) The party moving for an additional deposition must demonstrate that "(1) the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case." (*Id.* [citations omitted].)

Grosso claims Del Roscio's deposition is relevant to the prosecution of his counterclaim and also in his defense because Del Roscio has unique information on a number of matters. A brief review of Grosso's counterclaim and the amended complaint's allegations sheds light on this issue. Grosso counterclaimed that

"in or about July or August 2019, Phillips was contacted by the Foundation and was informed that the Foundation had been previously shown the Work, that there was a 'specific reason' that the Work was excluded from the Cy Twombly catalog raisonné that was published in 2013, and that the Foundation

had previously been in touch with the consignor who should not have consigned the Work for sale.”

(NYSCEF 43, answer with counterclaims at ¶ 6 at 9.)

Grosso claims that this was material information relevant to the subject of the consignment and sale of the Work and Phillips failed to disclose the material information it learned from the Foundation to Grosso. (*Id.* at ¶¶ 7-8 at 9.) Similarly, the amended complaint alleges that Phillips was contacted by the Foundation about the Work in July 2019 after sending a submission form about the Work to the Foundation. (NYSCEF 40, amended compl. ¶ 21.) Phillips claims that, after sending a submission form about the Work to the Foundation in July 2019, the Foundation contacted Phillips and relayed that there was a “specific reason” the Work was excluded from the catalogue raisonné, and that the individual who consigned the Work to Phillips should not have offered the Work for sale. (*Id.* ¶ 22.) The amended complaint also alleges several other reasons “to believe that the Work is not by Cy Twombly.” (*Id.* ¶ 29.)

According to Grosso, Phillips’ decision to withdraw the Work was principally informed by information the Foundation provided sometime in July or August 2019. In other words, Grosso’s contention is that the Foundation’s communications during this time formed the basis of Phillips’ “reasonable doubts” to withdraw the Work pursuant to section 10(a)(i). Thus, Grosso argues his defense of Phillips’ breach of contract claim, i.e., challenging or otherwise defending against Phillips’ allegations that it had reasonable doubts to withdraw the Work, entitles him to the Additional Discovery and to Del Roscio’s deposition. (See NYSCEF 132, tr [mot. seq. no. 004] at 4:13-19.)

During Baum’s deposition, Grosso’s counsel, John R. Cahill, Esq., inquired about a July 3, 2019 email sent from nonparty Annie Dolan, of Phillips, to nonparty Eleonora

Dierasmo,⁴ of the Foundation, (NYSCEF 131, Deposition tr at 232:5-12); Baum's subsequent phone call with Dolan sometime around July 8, 2019 (*id.* at 237:12-249:17); Dolan's email dated July 8, 2019 to nonparty Robert Manley, which reiterated Dolan and Baum's telephonic conversation (*id.* at 269:8-270:8); and about Baum's communications with Phillips' counsel, Martin Wilson, and Cheyenne Westphal, of Phillips, in December 2019 (*id.* at 271:2-273:24.) In sum, Cahill questioned Baum about what was communicated to Phillips during the relevant time period.

More importantly, Baum stated that he was the sole person who communicated with Phillips concerning the Work following Dolan's July 3, 2019 email. (*Id.* at 260:13-19 ["A. Subsequent to Ms. Dolan's email on July 3, 2019, I believe I was the sole person who communicated with Phillips. I believed it to be a legal matter at that point."]) Thus, the court now turns to what Baum communicated to Phillips to determine what additional discovery, if any, is allowable. For example, Baum communicated, among other things, to Dolan that "the Foundation doesn't authenticate works of art."

“Q: And what – what did you say to Ms. Dolan in that phone call and what did she say to you?”

A: I simply said that there was no authentication process, that the Foundation doesn't authenticate works of art. I confirmed that the work is not in the catalogue raisonné. I also conveyed that the work would not in the future be included/considered or included in the catalogue raisonné. And there was a reason for it which is it doesn't belong in the catalogue raisonné.

Q: And what – what, if anything, did Ms. Dolan say to you?”

⁴ Baum explained that Dierasmo, a Foundation employee based in Rome, Italy, has “responsibilities pertaining to the catalogue raisonne project” and “supervises materials that come in for submission.” (NYSCEF 131, Baum depo tr at 36:4-19.)

A: I don't recall her saying very much to me. I recall her mostly listening and she perhaps thanked me for my phone call.

Q: Did she ask you any questions?

A: I don't recall that she asked me any questions.

Q: Did she ask why the – why you said the – that the drawing does not belong in the catalogue raisonné?

A: She might have asked that question but I don't recall it.

Q: Did you – did you say why the drawing did not belong in the catalogue raisonné?

A: I simply said that –

* * *

A: - there was a reason that it was not included in the catalogue raisonné; that we were familiar with the work. And that it would not be included in the catalogue raisonné, and that it should not be sold as a work – you know, as a work that would be included in the catalogue raisonné. . . . So I said that it shouldn't be sold as a work that would be included in the catalogue raisonné.

* * *

A: As I just said, it is possible that the photograph came up in the conversation. If it did so, it would have been a clarification by me that there is no certificate of authenticity, and that photograph on the face of it, obviously, is not a certificate of authenticity....”

(NYSCEF 131, Deposition tr at 238:6-242:8.)

As Baum testified that he was the only person from the Foundation who communicated with Phillips beginning July 2019, Grosso fails to demonstrate the first element, that the representative deposed had insufficient knowledge. In fact, Baum had sufficient knowledge as he was the only person to communicate with Phillips during the relevant time period. Absent a contention that someone else from the Foundation communicated with Phillips during this time, the relevant communications are from

Baum beginning July 2019. Therefore, only what Baum communicated to Phillips is relevant to the prosecution of his counterclaim (breach of Phillips' duty to disclose relevant information to Grosso) and is information that Baum was able to, and did, testify to during the Deposition. (NYSCEF 131, Deposition tr at 234-249:17, 253:7-255:15, 269:8-273:22 [answering questions about his various communications with Dolan, Wilson, and Westphal during this time period].)

Grosso poses numerous reasons why Del Roscio possesses unique information relevant to his claims and defenses, but the court rejects his contentions. Grosso believes he should have an opportunity to prove the authenticity of the Work in this action and thus Del Roscio's deposition and/or additional discovery is material (for example, information about Twombly's relationship with Grosso's father). This argument is unavailing as this breach of contract action arises out of the terms of the Consignment Agreement. This is not an action to determine with certainty that the Work at issue is authentic. Grosso's motion to depose Del Roscio as a corporate witness for the Foundation is therefore denied.

B. Production of the Additional Discovery

Grosso contends that the Additional Discovery is material and necessary to the prosecution and defense of his counterclaim and these documents are unattainable from any other source. The Foundation maintains that it has produced all documents responsive to Grosso's request (a), (d)-(f), and argues requests (b) and (c) are irrelevant and constitutes an improper fishing expedition into the Tort Action where discovery is currently stayed pending a motion to dismiss all claims.

Under CPLR 3101, disclosure relevant to the prosecution or defense of an action must be provided by a nonparty to an action. (*Matter of Kapon v Koch*, 23 NY3d 32, 36 [2014].) The burden rests upon the subpoenaed person or entity to demonstrate that the information sought is “utterly irrelevant to any proper inquiry.” (*Id.* at 38, citing *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-32 [1988] [internal citations and quotation marks omitted].)

As detailed above, there is no basis to pursue any additional discovery in the prosecution of Grosso’s counterclaim as Baum disclosed what he told Phillips.

As to Grosso’s defense of this action, Grosso is entitled to discovery to explore the veracity of the information the Foundation actually provided to Phillips. “There should be full disclosure of all matter material and necessary in the prosecution or defense of an action . . . [.]” (CPLR 3103.) The additional discovery would allow Grosso to, in essence, refute Phillips’ reasonable doubt claim and is thus material and relevant on the issue of whether the Foundation’s doubts were reasonable, as alleged in the amended complaint. (NYSCEF 40, amended compl. ¶ 32.) While the court agrees with Grosso, the court finds that the Foundation has satisfied its burden in demonstrating that the information Grosso seeks is irrelevant because the discovery is not tethered to what the Foundation conveyed to Phillips during the relevant time period.

The Deposition did not establish that Baum shared with Dolan, or anyone at Phillips for that matter, Grosso’s purported criminal record. Accordingly, Grosso is not entitled to request (c), documents and communications concerning the Foundation’s procurement of an alleged false Italian criminal conviction concerning Grosso. The same reasoning applies to Grosso’s request (b), all files concerning all alleged fake

artworks maintained by the Foundation. Additionally, Grosso does not refute on reply that the Foundation has not produced (a), (d)-(f) and thus, Grosso's request as to (a), (d)-(f) is waived.

In Baum's conversation with Dolan, he told her that the Foundation does not authenticate works of art. (NYSCEF 131, Deposition tr at 238:6-18.) Thus, Grosso would be entitled to additional discovery on that subject, if any is available and has not already been provided, but that such discovery has not been sought by this motion. Thus, Grosso's motion to compel the Additional Discovery is denied.

Sanctions Against the Foundation

Grosso moves pursuant to Section 130-1.1 of the Rules of the Chief Administrative Judge (22 NYCRR § 130-1.1) and CPLR 3126 to impose sanctions and award deposition and subsequent motion costs against the Foundation for Baum's frivolous conduct. Grosso contends that, during the Deposition, Baum accused him and Cahill with wrongdoing without foundation, repeatedly referred to them in a disparaging manner, and avoided answering Cahill's questions, in an effort to run out the clock on the Deposition. In the alternative, Grosso seeks an adverse inference that the Foundation lacked a legitimate basis to question the authenticity of the Work.

Legal Standard

22 NYCRR § 130-1.1(a) provides that the "court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Frivolous conduct is defined as conduct "undertaken primarily to delay or

prolong the resolution of the litigation, or to harass or maliciously injury another; or . . . asserts material factual statements that are false.” (22 NYCRR § 130-1.1 [c] [2]-[3].) CPLR 3126 provides for penalties against a party who refused disclose information which the court finds ought to have been disclosed.

Discussion

A. Deposition Objections and Refusals to Answer Questions

Here, Baum’s improper refusals to answer questions, prolonging the Deposition, began almost immediately.

“Q: Okay. Mr. Baum, I think you can assume that I may be asking questions that I or my client know the answer to, but – but this is a deposition so it’s – we’re making a record here. And I apologize if I’m – I seem like I’m burdening you, but I’m asking for purposes of the record.

A: Your apology is accepted. This is a profound waste of my time so I’m just wishing to speed things up.

* * *

THE WITNESS: Can you explain the relevance? If you do, I’ll be happy to answer the question.

MR. CAHILL: Yes I can. But that’s not my obligation in a deposition here.

THE WITNESS: Fair enough. If you don’t want to explain—if you don’t want to explain the relevance, I won’t answer the question. If you explain the relevance and it is a reasonable explanation, I would be very happy to answer the question.”

(NYSCEF 131, tr at 11:13-22, 13:13-25.)

Baum repeated this behavior throughout the Deposition. (See, e.g., *id.* at 86:8-89:23 [refusing to testify]; *id.* at 59:25-60:9 [“Q. My question to you is: What do you think this document is, Exhibit 2? A. I withhold judgment until I hear confirmation from you

that your client was convicted of fraud in Italy. That's why I keep asking you the question. I'm trying to be cautious. It's a very easy question to answer. Surely your client knows whether or not he was convicted of fraud in Italy."]; *id.* at 104:23-105:3 [refusing to answer unless document was shown and marked for identification].)

Objections at depositions are governed by CPLR 3115 and 22 NYCRR 221.2, the Uniform Rules for the Conduct of Depositions in the NY State Trial Courts. Generally, under 22 NYCRR 221.1, a witness may not refuse to answer a question posed at deposition and neither may counsel for the witness instruct the witness not to answer. (*Rubin v Sabharwal*, 76 Misc 3d 1211 [A], *9 [Sup Ct, NY County 2022].) There are three limitations, in addition to the objections allowed under CPLR 3115(b)-(d), when counsel can instruct the witness not to answer:

"A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."

(22 NYCRR 212.2.)

"Ordinarily, therefore, it would not be proper to object to a question on the ground that the question seeks irrelevant information, or that the question has previously been asked and answered." (*Brightman v Corizon, Inc.*, 72 Misc 3d 1213 [A], *1 [Sup Ct, NY County 2021].) "This is not to say that attorneys defending depositions are powerless to intervene against questioning that is badgering, harassing, or otherwise improper and

prejudicial.” (*Id.*) “Rather, the Uniform Rules make clear that such interventions must be the exception, rather than the norm—and that a given intervention must be (i) uncommon, (ii) made only when plainly necessary, and (iii) no more than extensive than required to protect the witness against the improper line of questioning.” (*Id.*)

Nothing in 22 NYCRR 212.2 allows Baum, as witness, to object to Cahill’s questions. Such behavior was patently improper and the court need not belabor the point. What is even more shocking is that Baum is a New York licensed attorney,⁵ and should know better. In addition to prolonging the Deposition due to his inappropriate objections/refusals to answer, Baum demonstrated his flagrant disregard for the New York State Standards of Civility (Standards of Civility) when, for example, he responded to Cahill with “none of your business” four times throughout the deposition. (NYSCEF 131, Deposition tr at 39:8, 39:13-14, 76:4, 291:21-22.) While the Standards of Civility were not intended as “rules to be enforced by sanction or disciplinary action,” they are nevertheless an aspirational set of guidelines “to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.” (Standards of Civility, <https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Jan%202020%20%20civility%20standards%20CLEAN.pdf> [last accessed March 21, 2023].)

Kim Kalmanson, counsel for Baum as witness, made several attorney-client privilege objections. However, the bulk of the objections asserted by Kalmanson were unrelated to attorney-client privilege and were about form. Although objections to the

⁵ The court takes judicial notice of its own records. (<https://iapps.courts.state.ny.us/attorneyservices/search?4>.)
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form of the question are permitted under CPLR 3115(b), Kalmanson's form objections were excessive. In fact, she asserted over 100 form objections, which is an independent basis for sanctions alone.⁶

B. Insults and Disparaging Remarks against Cahill and Grosso

Additionally, Baum repeatedly insulted Cahill's competence. (See, e.g., NYSCEF 131, tr at 209:13-14 ["A. This lawsuit is an embarrassment to you. It's a new low."]; id. at 202:4-7 ["A. I really – I have no idea what you're getting at. I don't know what kind of Perry Mason moment you think you're achieving here."].) Baum's condescension toward Cahill's questioning is neither appropriate nor consistent with a lawyer's professional duties.

"[A.] And I would appreciate it if you would be careful with your questions to avoid conflating the question of whether we authenticate works with the question of whether we include works in the catalogue raisonne. They are two separate issues, as you well know from your time practicing art law and your brief tenure at Sotheby's. You know this. I ask you to be clear. This deposition is already a woeful embarrassment to you and your client. Let's just get through this."

(See, e.g., id. at 95:11-22.)

Baum repeatedly accused Grosso of selling fake works or some variation. (See, e.g., NYSCEF 131, Deposition tr at 210:21-23 ["At some point, you got to realize the gig is up. He's caught. He's a fraud. He's selling fake works."].) In another instance, Cahill asked Baum a question, which he refused to answer and instead criticized Cahill's question and launched into an off-topic ad hominem attack on Grosso. (Id. at 257:8-12, 258:10-260:3.) Therefore, the court finds that Baum's insults were not only

⁶ Searching the Deposition transcript for "Objection to form" yields 100 results. Searching "Form objection" yields 4 results. Searching "Objection; form" yields 1 result.
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intended to prevent Grosso from obtaining discovery, but also to harass, and perhaps even intimidate, Cahill and Grosso. (*Id.* at 89:8-23; see *Cadlerock Joint Venture, L.P. v Sol Greenberg & Sons Intern., Inc.*, 94 AD3d 580, 582 [1st Dept 2012].)

C. Sanctions Against Baum, Kalmanson, and the Foundation are Warranted

Pursuant to 22 NYCRR 130-1.1(a), “the court may impose financial sanctions upon a party or an attorney who engages in frivolous conduct.” (*Jones v Camar Realty Corp.*, 167 AD2d 285, 286 [1st Dept 1990].) The authority to impose sanctions and costs is within the court’s sound discretion. (22 NYCRR 130-1.1.) “The court’s power to impose sanctions serves the dual purpose of vindicating judicial authority and making the prevailing party whole for expenses caused by his opponent’s obstinacy.” (*Sakow, suing derivatively on behalf of Columbia Bagel v Columbia Bagel, Inc.*, 6 Misc 3d 939, 943 [Sup Ct, NY County 2004].) Thus, the court declines to award an adverse inference and instead orders sanctions against Baum and Kalmanson for their conduct at the Deposition in the amount of \$1,000 each and orders the Foundation to bear one-half of the cost of reasonable attorneys’ fees and expenses incurred in the making of this motion. The Foundation shall also reimburse the party who paid for the court reporter’s services for the Deposition. In this case, it was mostly Baum’s behavior and conduct that dragged out the Deposition and cluttered the record making it extremely difficult to follow. However, as described below, Kalmanson effectively sanctioned Baum’s behavior by failing to advise her client to simply answer the questions without insulting commentary.

Kalmanson failed, throughout the entire Deposition, to curtail Baum's excessive comments, insults, or refusals to answer. For example, after Baum added that "You must have more important questions than this," the following colloquy occurred:

“MS. KALMANSON: Mr. Cahill, he has answered your question. And I'm unclear on what you're marking for a ruling.

MR. CAHILL: Well, I'm marking for a ruling his ad hominem.

MS. KALMANSON: Okay.

MR. CAHILL: And I'd ask you to instruct – I'd ask you to instruct your witness not to make ad hominem remarks about my questions or speculate about what – what is important or not.

MS. KALMANSON: Mr. Cahill, I'll instruct my witness as I deem necessary and appropriate. I ask that you ask the questions and he'll continue to answer.”

(NYSCEF 131, Deposition tr at 41: 8-9, 42:8-22.)

Sanctions have been imposed on the client's attorney despite the severe and repeated nature of the client's misconduct where the attorney persistently failed to intercede and correct client's abusive, obstructive, and evasive behavior. (*GMAC Bank v HTFC Corp.*, 248 FRD 182, 195, 198 [ED Pa 2008].) Because

“[t]he nature of [the client's] misconduct was so severe and pervasive, . . . any reasonable attorney representing [the client] would have intervened in an effort to curb [the client's] misconduct. [The attorney's] failure to address, then and there, [the client's] misconduct could have no other effect but to empower [the client] to persist in his behavior. Under these circumstances, the Court equates [the attorney's] silence with endorsement and ratification of [the client's] misconduct.”

(*Id.* at 197-98.)

Cahill requested that Kalmanson step in and advise Baum to cooperate on multiple occasions, apparently, without success. (See, e.g., NYSCEF 131, Deposition tr

at 209:2-210:23.) When Cahill sought clarification from Kalmanson whether she was instructing Baum not to answer, she responded in some form “Witness has testified that he’s not answering.” (*Id.* at 12:13-25, 102:7-9; 87:13-14.) Since Kalmanson failed to stop Baum from his inappropriate refusals to answers and other obstructive behavior, Kalmanson is equally responsible for the protracted Deposition, and she is also fined \$1,000.

Moreover, the court has considered the Foundation’s arguments against sanctions and finds them entirely unavailing. For one, the Foundation argues that Grosso’s deposition of the Foundation was not aimed at obtaining relevant information but rather the intention was to harass the Foundation and obtain information for the Tort Action. If so, the Foundation could have moved to limit the subpoena under CPLR 3103(a). Using the deposition as an opportunity to attack either the merits of the Deposition or the parties and counsel to parties is impermissible and constitutes sanctionable conduct. The Foundation also raises an argument that Baum’s conduct did not rise to a level warranting sanctions but that contention is meritless based on a review of the Deposition.

To ensure that this conduct is never repeated, Baum is also directed to attend a CLE on civility and Kalmanson is to attend a CLE on how to take and defend a deposition and order and submit to the court an affirmation attesting to their attendance by May 31, 2023.

Accordingly, it is

ORDERED that defendant’s motion to compel the deposition of Nicola Del Roscio and production of the Additional Discovery is denied; and it is further

ORDERED that defendant's motion to sanction the Foundation is granted; and it is further

ORDERED that the Foundation shall reimburse the cost of the court reporter's services during the deposition to defendant; and it is further

ORDERED that the Foundation shall reimburse defendant for reasonable one-half of the attorneys' fees and expenses incurred in filing this motion for sanctions within 10 days of receipt of defendant's affirmation of services; and it is further

ORDERED that Baum and Kalmanson shall conduct themselves in this case and in the related action in a civil manner; and it is further

ORDERED that Baum shall pay the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York, 11210, \$1,000 within 10 days of the date of this order; and it is further

ORDERED that Kalmanson shall pay the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York, 11210, \$1,000 within 10 days of the date of this order; and it is further

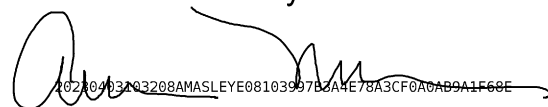
ORDERED that written proof of the payment of this sanction shall be provided to the court by email (SFC-Part48@nycourts.gov) and opposing counsel within 30 days of the date of this order; and it is further

ORDERED that, in accordance with 22 NYCRR 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection; and it is further

ORDERED that Baum is also directed to attend a CLE on civility and submit to the court an affirmation attesting to his attendance by May 31, 2023; and it is further

ORDERED that Kalmanson is to attend a CLE on how to take and defend a deposition and order and submit to the court an affirmation attesting to their attendance by May 31, 2023; and it is further

ORDERED that as the part of the motion to file under seal the deposition transcript and memos is moot or otherwise withdrawn (mot. seq. no. 005), the temporary seal restricting NYSCEF 82, 87, 88, and 106 from public access shall be lifted immediately upon service of this order upon the New York County Clerk.



4/3/2023
DATE

ANDREA MASLEY, J.S.C.

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