

Atassi v Philipp Plein Ams., Inc.

2023 NY Slip Op 32673(U)

August 1, 2023

Supreme Court, New York County

Docket Number: Index No. 653776/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. LOUIS L. NOCK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>TALAL ATASSI and ASAP STAFFING SERVICES LLC,</p> <p align="center">Plaintiffs,</p> <p align="center">- v -</p> <p>PHILIPP PLEIN AMERICAS, INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 38M</p> <p>INDEX NO. <u>653776/2019</u></p> <p>MOTION DATE <u>12/09/2022, 12/21/2022</u></p> <p>MOTION SEQ. NO. <u>002 003</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 43, 44, 45, 46, 47, 53, and 56 were read on this motion for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 49, 50, 54, 57, 58, 59, and 60 were read on this motion for DISCOVERY.

Upon the foregoing documents, defendant’s motion, made pursuant to CPLR 6301, but in effect, to quash the deposition subpoena issued to nonparty Amro Alsoleibi and to preclude his deposition, is granted; and plaintiffs’ motion to reopen the deposition of defendant’s witness, John-Alexander Raber, is denied, in accordance with the following memorandum. The court assumes familiarity with the facts and circumstances of this action as set forth in its decision and order dated April 6, 2022 (decision and order, NYSCEF Doc. No. 33).

Briefly, this action concerns whether a valid contract to provide recruiting services existed between plaintiffs and defendant. Alsoleibi, a former employee of defendant, signed the contract, and defendant has taken the position that Alsoleibi had no authority to bind defendant to such an agreement. In the court’s prior decision, in which it denied plaintiff’s motion for summary judgment, the court noted that issues of fact existed as to Alsoleibi’s authority to bind the defendant, concluding that there was doubt as to any such authority on the then-present

record (decision and order, NYSCEF Doc. No. 33 at 5). As discovery continued, and indeed since the commencement of this action in 2019, plaintiffs made no attempt to take Alsoleibi's deposition.

On October 19, 2022, a compliance conference was held in this matter. Following the conference, the court entered an order providing that Raber's deposition, which had begun on July 19, 2022, should continue and conclude by December 9, 2022 (conference order, NYSCEF Doc. No. 42 at 1). Other than fixing a note of issue date for December 31, 2022, no other discovery was discussed (*id.* at 2). The order specifically provided that, "[a]bsent good cause shown, any discovery issues not raised herein will be deemed waived" (*id.*). Approximately one month later, and for the first time during the duration of this action, plaintiff served a subpoena ad testificandum on Alsoleibi (subpoena, NYSCEF Doc. No. 46).

"A motion to quash is limited in scope, challenging only the validity of the subpoena or the jurisdiction of the issuing authority" (*Santangelo v People*, 38 NY2d 536, 539 [1976]). Here, defendant successfully establishes the invalidity of the subpoena on Alsoleibi. As an initial matter, plaintiffs have waived Alsoleibi's deposition by failing to raise it at the last conference by the terms of the ensuing conference order. Moreover, while plaintiff has yet to file the note of issue, discovery has effectively closed following issuance of the last conference order. Where a party has not diligently sought an item of discovery pursuant to court discovery orders, that party waives the right to reopen discovery and obtain the item not diligently pursued (*see Colon v Yen Ru Jin*, 45 AD3d 359, 360 [1st Dept 2007] ["The record discloses that defendant failed to avail himself of several opportunities to conduct plaintiff's deposition and medical examination prior to the deadline set forth in the court's compliance conference order, thereby waiving any right he had to additional discovery"]). Plaintiffs have known of the

potential importance of Alsoleibi's testimony since the commencement of this action but have failed for approximately three years to timely obtain his testimony (*see Tavaréz v Ronad Holding Corp.*, 202 AD3d 423, 424 [1st Dept 2022] ["Here, defendant has not demonstrated good cause as to why it waited so long to investigate the witness information and to exchange it after many years of discovery"]). Given the court's references to Alsoleibi in its prior order, such lack of diligence is particularly pronounced, and warrants the court quashing the subpoena.

Turning to Raber's deposition, and plaintiffs' motion to reopen it, the parties continued the deposition on November 29, 2022 (Raber 11/29/22 EBT tr, NYSCEF Doc. No. 60). As set forth in the moving affirmation of David Abrams, plaintiffs' counsel on several occasions took exception to the manner in which defendant's counsel, Mr. Englander, made objections to his questioning of the witness (Abrams affirmation, NYSCEF Doc. No. 50 at 5-9). The court has the greatest respect for both advocates on this case, and makes no judgments as to the conduct of either counsel during the deposition except as specifically stated herein.

Having reviewed the deposition transcript, the court finds nothing objectionable about the manner in which Mr. Englander made his objections; nor does it agree with Mr. Abrams that Mr. Englander was attempting to, or did in fact, coach the witness as to his answers to Mr. Abrams' questioning. The court also notes that at the time when Mr. Abrams refused to continue the deposition, and following questioning by Mr. Englander, the witness was prepared to continue, despite it being 10:00 PM in Germany where he was located (Raber 11/29/22 EBT tr, NYSCEF Doc. No. 60 at 62). Mr. Abrams had ample time to preserve his objections and continue with his examination (*Dabrowski v Abax Inc.*, 216 AD3d 546, 546-47 [1st Dept 2023] ["Defendants already had been given ample time to conduct the necessary discovery"]). Further, Mr. Abrams delayed seeking a ruling on Mr. Englander's purportedly objectionable conduct until

approximately a month after the deposition concluded. Under the circumstances, and in accord with the court’s broad discretion over the conduct of discovery (*Strout v CF E 88 LLC*, 213 AD3d 589, 590 [1st Dept 2023]), the court denies the motion to reopen Raber’s deposition.

Accordingly, it is hereby

ORDERED that the motion to quash the subpoena to nonparty Amro Alsoleibi and preclude his deposition (Mot. Seq. No. 002) is granted, and plaintiffs are precluded from deposing Amro Alsoleibi; and it is further

ORDERED that the motion to reopen the deposition of John-Alexander Raber is denied; and it is further

ORDERED that plaintiffs are directed to file the note of issue within 14 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.



<u>8/1/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>				<input type="checkbox"/>	
	<input type="checkbox"/>				<input type="checkbox"/>	