

Law Office of Gary R. Defilippo, PC v Jhong Uhk Kim
2023 NY Slip Op 35072(U)
August 22, 2023
Supreme Court, Richmond County
Docket Number: Index No. 152197/2020
Judge: Catherine M. DiDomenico
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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LAW OFFICE OF GARY R. DEFILIPPO, PC and
GARY R. DEFILIPPO, ESQ

Plaintiffs

Part- IAS 11

Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDER

JHONG UHK KIM, 933 RICHMOND LLC,
1719 HYLAN LLC, MORNINGSTAR FILMS, LLC

Defendants.
-----X

Index No. 152197/2020

Motion Sequence Nos.: 006 & 008

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion
Sequence Numbers 006 & 008

	<u>Numbered</u>
Order to Show Cause by Plaintiff (006)	1
Affirmation in Opposition by Defendants	2
Affirmation in Reply by Plaintiff	3
Order to Show Cause by Plaintiff (008)	4
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Upon the foregoing cited papers, the Decision and Order is as follows:

Procedural History

The present action was commenced with the filing of a Summons and Complaint in November 2020. This action is related to, but not consolidated with, an action filed by Plaintiff against Defendants' attorney Nicholas M. Moccia Esq. (See Index 150746/2021). In the present case Plaintiff asserts causes of action sounding in breach of contract and slander per se. By Order dated March 24, 2022, this Court granted Plaintiff summary judgment on his breach of contract action. In that same Order this Court denied Plaintiff's application for summary judgment on his slander cause of action with leave to renew at the completion of discovery. Discovery disputes between counsel has led to additional motion practice as addressed herein.

Plaintiffs' Motions

Plaintiff, a self-represented attorney, moves by Order to Show Cause (Seq. No. 006) for an Order pursuant to CPLR §3126 precluding Defendants from offering any evidence at trial for their alleged failure to provide discovery, or in the alternative, compelling discovery responses. Plaintiff further moves to disqualify Defendants' attorney Nicholas Moccia Esq. pursuant to Rules of Professional Conduct 1.7 (conflict of interest). Before opposition could be filed to motion sequence 006, Plaintiff filed another Order to Show Cause (Seq. No. 008) pursuant to CPLR §3103 seeking a Protective Order directing Defendants' counsel to remove, redact, or seal certain aspects of their discovery responses. Plaintiff's second Order to Show Cause reiterates his request for sanctions and disqualification. Defendants have filed written opposition to both motions in their entirety. Oral argument was held on March 9, 2023. Notably, before this Decision could issue, Plaintiff has filed yet another motion (Seq. No. 009) seeking an Order holding Defendants and Mr. Moccia in civil contempt for allegedly failing to comply with discovery. That motion, which is not yet briefed, is not addressed in this Decision.

Decision

a. Discovery Sanctions (Mot. Seq. 006)

Plaintiff moves for an Order precluding Defendants' from offering evidence at trial as a sanction for allegedly failing to provide discovery. Pursuant to CPLR §3126, a court may impose discovery sanctions, including the preclusion of evidence, only upon a showing that a party's failure to provide discovery is willful and contumacious. **See *HSBC Bank USA, N.A. v. Giannikakis*, 216 A.D.3d 622 (2d Dept. 2023)**. Plaintiff's Affirmation in support fails to make reference to the specific demands that were not responded to, but as Defendants' discovery responses were e-filed, it appears that counsel has exchanged an extensive response to the demands served (See e.g. NYSCEF #185). Under these circumstances it cannot be said that Defendants' alleged failure to comply with discovery has been willful and contumacious. **See *Prappas v. Papadatos*, 38 A.D.3d 871 (2d Dept. 2007)**. Moreover, during oral argument Plaintiff admitted that he had not provided a formal discovery response to Defendants' demands, other than to refer to documents attached to pleadings and motions. This Court will not consider sanctions for an alleged failure to provide discovery when the moving party has not exchanged his own discovery responses. Finally, Plaintiff has failed to establish that he has made a good faith effort to resolve the discovery issues raised. **See *Bronstein v. Charm City Hous., LLC*, 175 A.D.3d 454 (2d Dept. 2019)**. Accordingly, Plaintiff's application for discovery sanctions is denied at this time. **See *Smith v. County of Nassau*, 138 A.D.3d 726 (2d Dept. 2016)**; **see also *Rodriguez v. Big Ben Assoc. I*, 95 A.D.3d 1098 (2d Dept. 2012)**. However, this Court hereby orders *both* parties to provide a formal detailed response to each and every outstanding discovery demand within 30 days of this Order. If a specific demand is objected to, the objection shall clearly state the reason for the objection and

provide supporting law. If references are made to previously exchanged documents that have been e-filed, reference must be specifically made to the corresponding NYSCEF e-filing number.

b. Disqualification (Mot. Seq. 006)

Plaintiff further moves to disqualify Defendants' counsel, Nicholas Moccia Esq. pursuant to Rule 1.7 of the Rules of Professional Conduct. However, the litany of arguments raised in support of this application are confusing at best. Plaintiff argues that Defendants' counsel has somehow developed a conflict of interest with his own client because he has a financial interest in the outcome of the action, and the related action. Plaintiff further alleges that Defendant's counsel is improperly representing a client who suffers from vascular dementia and is unable to make his own decisions. Plaintiff implies that counsel is prolonging litigation, and preventing settlement, to obtain additional counsel fees at his client's expense. Plaintiff further argues that Defendant and his attorney of choice have become adverse to one another as counsel is a Defendant in the unconsolidated action. However, this argument was addressed at length when the consolidation motion was denied (See Order dated 3/25/22, Index No. 150746/2021).

At the onset, Plaintiff lacks standing to bring a motion to disqualify pursuant to Rule 1.7. Typically, motions to disqualify are brought by parties who have been represented by, or otherwise have exchanged confidential information with the attorney at issue. Since it is not alleged that Plaintiff and Defendants' counsel have ever had such a confidential relationship, he does not have standing to file a disqualification motion. See *HSBC Bank USA, N.A. v. Santos*, 185 A.D.3d 475 (1st Dept. 2020); see also *A.F.C. Enters, Inc. v. New York City School Constr. Auth.*, 33 A.D.3d 736 (2d Dept. 2006). Plaintiff further alleges that Defendant and his counsel have somehow become adverse to one another, but Plaintiff also lacks standing to make that argument on behalf of a party that he does not represent. See *Selim v. Castillo*, 2023 NYLJ LEXIS 2107 (Sup. Ct. Brx. Cty. 2023). Even if the Court were to consider the issue of conflict sua sponte (which it may), Rule 1.7 of the Rules of Professional Conduct provides two grounds for disqualification that have not been established here. Accordingly, Plaintiff's motion to disqualify counsel for Defendants is hereby denied. See *Koumantaros v. Haphaistos Developing, LLC*, 203 A.D.3d 907 (2d Dept. 2022).

c. Protective Order (Mot. Seq. 008)

Plaintiff moves for a Protective Order pursuant to CPLR §3103 striking certain documents from Defendants' discovery responses on the ground that the documents were exchanged for the sole purpose of harassing, embarrassing and annoying Plaintiff. The documents at issue are allegedly related to Plaintiff's professional history, reputation in the community, criminal history, and disbarment. Plaintiff also requests that this Court sanction Defendants' counsel for producing documents that are irrelevant to

this proceeding.

Generally, there shall be full disclosure of all documents material and necessary for the prosecution or defense of an action, regardless of the burden of proof held by a particular party. See *Gooden v. New York City Health & Hosps. Corp.*, 216 A.D.3d 1143(2d Dept. 2023). The benchmark for determining if a document should be exchanged is if it is relevant evidence. See *Rrengo v. New York City Tr. Auth.*, 204 A.D.3d 1049 (2d Dept. 2022). A party seeking a protective order under CPLR §3103 has the initial burden of establishing that the discovery is irrelevant or otherwise privileged. See *Liberty Petroleum Realty, LLC*, 164 A.D.3d 401 (1st Dept. 2018). The Court may also deny, limit, or preclude the exchange of “salacious gossip” to prevent annoyance, embarrassment, or prejudice to a party. See *Parimist Funding Corp. v. Rydzinski*, 215 A.D.2d 738 (2d Dept. 1995); see also *Faretta v. Heckler*, 2009 NY Slip Op 33404 (Sup. Ct. Suff. Cty. 2009).

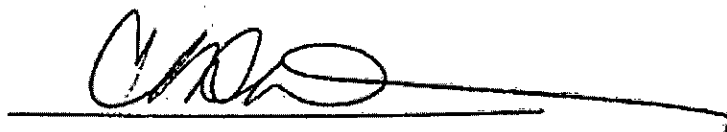
Here, Plaintiff alleges that certain documents produced by Defendants’ that they claim are related to his prior professional disciplinary history, conduct as an attorney, and reputation in the community, were actually exchanged for the sole purpose of harassment. The first set of documents at issue relate to a Federal lawsuit Plaintiff litigated on his own behalf, as a pro se attorney, against the Unified Court System and certain Court Officers. The documents contain various allegations regarding the conduct of Plaintiff while he was a Court Officer, the conduct of other litigants in the case, and end with a Decision granting summary judgment to the Defendants. The second set of documents produced relate to Plaintiff’s prior disbarment following a criminal conviction, and his subsequent reinstatement to the Bar.

As Plaintiff correctly asserts in his Amended Verified Complaint, the issue of his professional reputation is central to his cause of action for slander per se. Plaintiff has alleged that Defendant Kim made statements that “denigrated his character and professional reputation and competence” and Plaintiff further states that he “relies upon his reputation for honesty, integrity, professionalism and ethical conduct.” Damage to one’s professional reputation is compensable under a claim of slander per se. See *Nolan v. State of New York*, 158 A.D.3d 186 (1st Dept. 2018); see also *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32 (1st Dept. 2011). Thus, any documents that Defendant seeks to use to defend against the slander cause of action are relevant and should be exchanged if they purport to relate to Plaintiff’s conduct as an attorney or his reputation in the community. See *Rivera v. NYP Holdings Inc.*, 63 A.D.3d 469 (1st Dept. 2009); see also *Nellis v. Miller*, 101 A.D.2d 1002 (4th Dept. 1984); *Yamine v. DeVita*, 43 A.D.3d 520 (3rd Dept. 2007). The exchange of pre-trial discovery is intended to prevent ambush and surprise at trial. If Defendant plans on utilizing the documents produced in relation to his defense at trial, Plaintiff should be made aware of that fact through their production. See *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 78 N.Y.2d 371 (1991); see also *Siegel v. Snyder*, 202 A.D.3d 125 (2d Dept. 2021).

Regarding Plaintiff's alternative request to seal the documents, there is a "long-standing, sound public policy that all judicial proceedings, both civil and criminal, are presumptively open to the public." *Matter of Gliklad v. Deripaska*, 185 A.D.3d 512 (1st Dept. 2020); see also *People v. Reid*, 2023 NY Slip Op 02755 (2023). This includes not only the proceedings themselves, but the records related to the proceedings. See *Matter of James Q.*, 32 N.Y.3d 671 (2019). The sealing of a document should not be permitted except in compelling and unusual circumstances that are not present here. See e.g. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499 (2d Dept. 2007); see also *O'Reilly v. Klar*, 167 A.D.3d 919 (2d Dept. 2018). Notably, Plaintiff is the party that commenced this action alleging damage to his reputation, and he has made several derogatory statements in his filings regarding the professional reputation of Defendant's counsel.

Accordingly, for the detailed reasons set forth above, Motions 006 and 008 are hereby denied in their entirety. Any issue raised in either motion that was not specifically addressed herein is also denied. This matter, and the related unconsolidated matter, will both appear for an "in person" status conference which will be held on November 1, 2023, at 3:00 P.M.

Dated: August 22, 2023

A handwritten signature in black ink, appearing to read "C. DiDomenico", is written over a horizontal line. The signature is stylized and cursive.

Hon. Catherine M. DiDomenico