H2 Architect, P.C. v Stevenson
2006 NY Slip Op 30802(U)
October 30, 2006
Supreme Court, New York County
Docket Number: 114731-2005
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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H2 ARCHITECT, P.C.,

Index No. 114731-2005

Plaintiff,

-against-

DECISION/ORDER

EDWARD STEVENSON, LORIN STEVENSON, BOARD OF MANAGERS of the TRUMP WORLD CONDOMINIUM, and NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants move pursuant to CPLR 3103(a) for a protective order directing that plaintiff depose defendants Edward Stevenson and Lorin Stevenson (the "Stevensons") in Las Vegas, Nevada where they reside and work, on the ground that to compel that their appearance in New York for depositions would impose an undue burden on them personally and professionally.

Plaintiff, an architectural firm, commenced this action for moneys allegedly due for services performed to the Stevensons' condominium unit in Manhattan, New York, pursuant to an agreement between plaintiff and the Stevensons. The Stevensons maintain that they purchased this unit in Manhattan strictly for investment purposes, and otherwise have no other connections to New York. They have hired a broker in New York to sell the unit, and do not intend to travel to take part in any sale of the unit. Mr. Stevenson contends that his two businesses, located in California and Nevada, require that he remain in the West Coast to conduct business deals and negotiations, and that he has no plans to travel to New York. Mrs. Stevenson maintains that she is in school in Nevada and that any commute to New York will result in her

missing her classes. Further, if forced to commute to New York, no one could take care of her cats. The Stevensons propose video conferencing *in lieu* of their appearance in New York for depositions.

In opposition, plaintiff argues that the claim that the condominium unit was purchased for investment purposes is questionable in light of a letter dated June 14, 2005, in which Mr. Stevenson stated that he wanted to "develop a design scheme for the apartment that is a reflection of us-one that we feel comfortable with and will enjoy for many years to come." Additionally, the Stevensons expressed having a large kitchen built to accommodate celebrity chefs, a wine cooler for a specific number of bottles, custom closets in their bedroom for their respective wardrobes and guest accommodations for Mrs. Stevenson's mother to take care of her cats. Furthermore, the Stevensons met with plaintiff in New York on several occasions to discuss the design of their condominium unit, and stayed at a facility that required a minimum 30-day stay. Nor would their deposition in New York pose a financial hardship, since Mr. Stevenson recently sold his interest in Solar Integrated Technologies for over $66 million. Plaintiff also points out that the Stevensons have interposed counterclaims in this action.

In reply, the Stevensons essentially argue that plaintiff failed to demonstrate that it would be prejudiced if directed to take their deposition in Las Vegas. Further, that the Stevensons have filed counterclaims in New York is no reason to deny the protective order.

Analysis

Generally, when a party to the action is to be deposed, the deposition should take place "within the county . . . where the action is pending" (CPLR 3110[1]). The exception to this general rule is where the party to be examined demonstrates that examination in such county

would result in "hardship" to him or her (*Levine v St. Luke's Hosp. Ctr.*, 109 AD2d 694, 695, 486 NYS2d 737 [1st Dept 1985]; *cf. Hoffman v Kraus*, 260 AD2d 435, 688 NYS2d 575 [2d Dept 1999][traveling to New York for a deposition would result in hardship to defendant, where defendant was a resident of Hungary, and, is more than 70 years old and in failing health] *citing Bristol-Myers Squibb Co. v Yen-Shang B. Chen*, 186 AD2d 999, 588 NYS2d 672 [4th Dept 1992]; *Ferrante by Ferrante v Ferrante*, 127 Misc 2d 352, 485 NYS2d 960 [Supreme Court Queens County 1985] [where plaintiff commenced action in New York, justice was best served by permitting plaintiff, who was 92 years old, in poor physical condition, and permanently confined to nursing home in Florida, to testify by means of video tape and simultaneous transcription of telephone conference call]). Where, as here, defendants reside outside of New York, the convenience of such parties will be considered by the Court and the Court can utilize CPLR § 3110 to adjust the venue of the deposition (*Kozak v Marshall*, 9 Misc 3d 1114, 808 NYS2d 918 [Supreme Court Nassau County 2005] citing *New York Practice § 355,* David D. Siegel).

CPLR 3101(a) provides:

> The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

As movants for a protective order, the Stevensons bear the burden of establishing that they will suffer a "substantial hardship" if directed to appear for depositions in New York. The Court determines that the submissions and arguments posed by the parties belie the claim that the Stevensons would suffer a "substantial hardship" if directed to appear for depositions in New

York (*Rogovin v Rogovin*, 3 AD3d 352, 770 NYS2d 342 [1st Dept 2004] [deposition in county where action was pending would result in hardship, entitling defendant to be deposed via live video conferencing where defendant was the sole caregiver for her ailing nonagenarian grandmother, who required around-the-clock care, and also had sole responsibility for a 10-year-old daughter with special needs]; *Kahn v Rodman*, 91 AD2d 910, 911, 457 NYS2d 480, 481 [1st Dept 1983] [stating that the non-resident status of party to an action does not preclude examination in the county where the action is pending where there is insufficient showing of any hardship which would result from holding the deposition in New York]; *Oneto v Hotel Waldorf-Astoria Corp.*, 65 AD2d 520, 409 NYS2d 221 [1st Dept 1978] [although airplane trip from Argentina to New York and a stay of some days at a hotel here far from plaintiff's home would be both inconvenient and expensive, where no other hardship is indicated in connection with such a journey, plaintiff to be deposed in New York]; *Cooper v Met Merchandising*, 54 AD2d 859, 388 NYS2d 306 [1st Dept 1976] [denying application for protective order (1) to permit deposition to be held just prior to the trial, (b) that written interrogatories be used, or (c) that an open commission to Florida be utilize where president argued that defendant was a small organization and could not be spared for both business and personal reasons to come to New York; a trip from Florida to New York in this day of modern transportation is not such a hardship as to warrant the protective order sought]).

Mr. Stevenson claims that it would be impossible for him to attend all of his business meetings in Las Vegas if forced to travel to New York. However, Mr. Stevenson could not expect to attend these same meetings if deposed in the West Coast any more than if his deposition occurred in the East Coast. In other words, it is not location of the deposition that

prevents Mr. Stevenson's attendance at his business meetings, but his presence during the deposition that causes such a result, whether on the West Coast on in New York. Thus, Mr. Stevenson's contention in this regard is unpersuasive. Furthermore, Mr. Stevenson's contention that he has only the slimmest connection to New York is of no moment. "Substantial hardship" is the test, and the absence of any connection to New York, though doubtful to the Court, has no bearing on the Court's analysis. And, that Mr. Stevenson has no plans to visit New York is of no consequence. Further, Mr. Stevenson cannot seriously argue that any meetings to be held in the future cannot be scheduled around the dates of his deposition, especially when his deposition can be scheduled well in advance.

Similarly, Mrs. Stevenson fails to recognize that any days missed from her class in order to appear for a deposition in New York would occur whether such depositions were held in the West Coast or the East Coast. Mrs. Stevenson's claim that her attendance in New York would pose a personal hardship because no one would be able to take care of her cats, who are like children to her, is incredible, to say the least.

The Stevensons also failed to demonstrate that they would suffer financial hardship if required to appear in New York.

Defendants' reliance on *Oppenheimer by Oppenheimer v Shubitowski* (92 AD2d 1021, 461 NYS2d 444 [3d Dept 1983]) and *Bolognino v Anheuser-Busch Inc.* (279 AD 819, 109 NYS2d 111 [3d Dept 1952]) is misplaced ([*Oppenheimer*, *supra* [Michigan defendants to submit interrogatories instead of appearing for deposition in New York permitted where expense and inconvenience in appear in New York]; *Bolognino, supra* [permitting interrogatories or open commission in Missouri where defendant Anheuser-Busch company resides, with the expenses

thereof, except as to counsel fees, to be borne by defendant on ground that deposition in New York would pose a considerable hardship]). Such cases do not reflect the level of hardship required to be shown under more recent First Department caselaw. While distance alone is sufficient to warrant the relief requested in the Third Department, Appellate Division, such factor, in and of itself, does not rise to the level of "substantial hardship" acceptable in the First Department. Nor does *Kozak v Marshall* (9 Misc 3d 1114, *supra*) on which defendants rely, warrant a different result. In *Kozak*, it was undisputed that the defendant had limited financial resources and that he did not have significant financial resources derived from recent employment to permit his travel to New York for a deposition. Here, there is absolutely no showing that defendants' appearance in New York would present a financial burden to the defendants.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Edward Stevenson and Lorin Stevenson for a protective order is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 30, 2006

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD