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

HON. EILEEN BRANSTEN

PART 3

Index Number : 601917/2005

GARBER, HAROLD E.

vs.

STEVENS, TROY D., JR.

SEQUENCE NUMBER : 004

DISMISS ACTION

INDEX NO. 601917/05

MOTION DATE 5/28/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

NYS SUPREME COURT RECEIVED OCT 15 2009 IAS MOTION SUPPORT OFFICE

FILED Oct 16 2009 NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-14-09

Eileen Branst J.S.C.

HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MDAJ

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

----------X

HAROLD E. GARBER, RONALD SEIDEN, SEYMOUR C. NASH, ROBERT C. MAGOON, GORDON MILLER, STEPHEN M. KULVIN, STEVEN ZARON and LEE DUFNER, as limited partners of and in the right of KINPIT ASSOCIATES, a New York limited partnership,

Plaintiffs,

-against-

TROY D. STEVENS, JR., Individually and d/b/a DEVELOPMENT CO., KINPIT REALTY CORP., KINPIT REALTY, INC., KINPIT REALTY CO., KINPIT MANAGEMENT and DAWMICH INDUSTRIES, INC.,

Defendants.

----------X

Index No. 601917/2005
Motions Date: 5/28/09
Motion Seq. Nos.: 004, 005
006, 007, 008

BRANSTEN, J:

Motion sequence numbers 004, 005, 006, 007 and 008 are consolidated for disposition.

In motion sequence number 004, plaintiffs Harold E. Garber, Ronald Seiden, Seymour C. Nash, Robert C. Magoon, Gordon Miller, Stephan M. Kulvin, Steven Zaron and Lee Dufner, as limited partners of and in the right of Kinpit Associates, L.P. (the "Partnership")(collectively, "Plaintiffs") move, pursuant to CPLR 3211(a) (5) and (7), to dismiss the fourth counterclaim and cross-claim in defendants' amended answer and for sanctions.

Defendants Troy D. Stevens, Jr., individually and d/b/a Development Co., Kinpit Realty Corp., Kinpit Realty, Inc., Kinpit Realty Co., Kinpit Management and Dawmich Industries, Inc. (collectively, "Defendants") cross-move, pursuant to CPLR 2005, 3012(d) and 5015, for an order (a) waiving their default in answering Plaintiffs' October 20, 2008 notice to admit and allowing them to answer the notice; (b) waiving Defendants' default in timely providing Plaintiffs with the names of the individual plaintiffs they desire to depose and permitting them to choose plaintiffs for depositions and (c) sealing the file in this matter.

In motion sequence number 005, Plaintiffs move, pursuant to CPLR 3103, for a protective order striking Defendants' February 25, 2009 notices to admit.

In motion sequence numbers 006, 007 and 008, Defendants move, pursuant to CPLR 3126 for an order dismissing the action based on Plaintiffs' alleged failure to answer certain interrogatories or, alternatively, for an order pursuant to CPLR 3124, compelling Plaintiffs to answer those interrogatories and for attorneys' fees.

Background

The facts of this case have been discussed at length in prior decisions and will not be repeated here. Briefly stated, the Partnership owns and manages a 90-unit apartment complex in Brooklyn, NY (the "Property"). Plaintiffs, limited partners, made financial investments in the Property but never received any distributions. Plaintiffs allege that,

contrary to the requirements of the partnership agreement (the "Agreement"), defendant Stevens, the general partner, altered that Agreement and refinanced the Property without Plaintiffs' consent and that he never accounted to them for either the proceeds of the refinancing or the operation of the Property. In addition, they allege that Stevens took more than $1,000,000 for repayment of loans he claims to have made to the Partnership without the knowledge or consent of Plaintiffs and without documentation. As a result of Stevens's alleged actions, Plaintiffs commenced this lawsuit seeking an accounting and reformation of the Agreement, as well as damages for breach of the Agreement, breach of fiduciary duties, misuse of partnership assets and mismanagement.

Defendants answered and asserted a number of counterclaims and cross-claims. In particular, in the fourth counterclaim and cross-claim, Defendants allege that the allegations in the complaint impugn Stevens's integrity, are injurious to his reputation and constitute libel.

Analysis

Motion Sequence Number 004

Plaintiffs correctly argue that the fourth counterclaim and cross-claim must be dismissed because it is the well-settled rule in this state, "that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation" (*Lacher*

v Engel, 33 AD3d 10, 13 [1st Dept 2006] citing *Youmans v Smith,* 153 NY 214, 219 [1897]). "An absolute privilege affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made" (*Sexter & Warmflash, P.C. v Margrabe,* 38 AD3d 163, 170 [1st Dept 2007]). Absolute privilege is recognized in judicial proceedings based on the principle "that the proper administration of justice depends on freedom of conduct on the part of counsel and parties to litigation, which freedom tends to promote an intelligent administration of justice" (*Sexter & Warmflash, P.C. v Margrabe,* 38 AD3d at 171[internal quotation marks and citations omitted]) . "It is only when the language used goes beyond the bounds of reason and is so clearly impertinent and needlessly defamatory as not to admit of discussion that the privilege is lost" (*People ex rel. Bensky v Warden of City Prison,* 258 NY 55, 59 [1932]). However, where an offending statement is pertinent to the proceeding, it is absolutely privileged, even if it is made with malice, recklessness, bad faith or lack of due care (*see Andrews v Gardner,* 224 NY 440, 446 [1918][the "statements may have been false, but they were not impertinent"]; *Grasso v Mathew,* 164 AD2d 476, 480 [3d Dept], *lv dismissed* 77 NY2d 940, *lv. denied* 78 NY2d 855 [1991][whether true or not, the challenged statement was absolutely privileged, as a matter of law, and a libel claim could not be supported]).

The question of whether a statement is pertinent to the litigation is determined by a very liberal test. Indeed, a statement made in the course of litigation will be privileged "if, by any view or under any circumstances, it may be considered pertinent to the litigation" (*Martirano v Frost,* 25 NY2d 505, 507 [1969]). "To be actionable, a statement made in the course of judicial proceedings must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame" (*Sexter & Warmflash, P.C. v Margrabe,* 38 AD3d at 173, citing *Martirano v Frost,* 25 NY2d at 508 [internal quotation omitted]).

In this case, the complaint, which states causes of action for an accounting, breach of contract, breach of fiduciary duty and the return of unauthorized management fees, alleges, among other things, that Stevens took kickbacks and looted the Partnership; hired sham employees; made up bogus expenses; engaged in unauthorized refinancing; charged the Partnership for phony construction, repair and maintenance costs and filed false instruments with a federally regulated lending institution. These allegations are pertinent to causes of action that have been pled in the complaint and it cannot be said that the statements were "motivated by no other desire but to defame." Accordingly, that branch of the motion that seeks dismissal of the fourth counterclaim and cross-claim sounding in libel is granted.

The branch of the motion that seeks sanctions, pursuant to 22 NYCRR 130-1.1, for frivolously asserting the libel counterclaim is denied. It cannot be said that the counterclaim

was completely without merit since there are circumstances where a court may find a pleading to be "impertinent." Moreover, it does not appear that defendant maintained the claim to delay or prolong the litigation or to harass or maliciously injure another (*see Sakow v Columbia Bagel, Inc.*, 32 AD3d 689 [1st Dept 2006]). This is not the kind of extreme behavior that courts have traditionally found to merit sanctions (*Dunn v Khan,* 19 Misc 3d 1121[A], 2008 NY Slip Op 50797[U][Sup Ct, Nassau County 2008]).

That branch of the cross motion that seeks to seal the file in this matter on the ground that it is injurious to Stevens' reputation is denied. 22 NYCRR 216.1(a) states, "a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties."

Generally the courts have been reluctant to allow the sealing of court records (*Gryphon Domestic VI, LLC v APP International Finance Company, B.V.*, 28 AD3d 322, 324 [1st Dept 2006]). The right of access to proceedings as well as to court records is of constitutional dimension and it is also firmly grounded in common-law principles (*Danco Labs., Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Dept 2000]). Consequently, a court is always required to make an independent determination of good cause before it grants a request for sealing (*Matter of Hoffman,* 284 AD2d 92, 94 [1st Dept

2001][embarrassing allegations against fiduciaries, even if ultimately found to be without merit, not a sufficient basis for a sealing order]; *see also Liapakis v Sullivan,* 290 AD2d 393, 394 [1st Dept 2002][prejudice to reputation caused by allegations of unethical and criminal conduct did not outweigh the clear public interest in such allegations]).

In this case, Stevens has failed to demonstrate that the alleged harm to his reputation is a compelling reason for sealing the file. Here, as in *Matter of Hoffman* and *Liapakis,* the allegations of unethical and embarrassing, improper and fraudulent conduct, even if ultimately found to be without merit, fall short of establishing "a compelling interest" that would support issuance of a sealing order.

The branch of the cross motion that requests that the court issue an order waiving Defendants' default in responding to Plaintiffs' October 20, 2008 notice to admit is granted. CPLR 3123(a) contemplates extensions of time to respond to notices to admit within the court's discretion, stating, "[e]ach of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof *or within such further time as the court may allow*, the party to whom the request is directed serves . . . a sworn statement . . . ." (emphasis added). In *Vurdak v Eagle Ins. Co.,* (200 AD2d 518 [1st Dept 1994]) the Appellate Division, First Department affirmed the lower court's decision excusing a default in responding to the notice to admit due to law office failure because there was no

prejudice shown (*see also, Alford v Progressive Equity Funding Corp.,* 144 AD2d 756 [3d Dept 1988]).

Here, new counsel was unaware that Defendants' former attorney had not responded to the notice to admit and, upon learning about the outstanding notice, requested an extension of time to answer. Plaintiffs' counsel refused the request. On this motion, Plaintiffs have failed to demonstrate that they would be prejudiced by permitting Defendants to serve a late response to the October 20, 2008 notice. Thus, Defendants shall serve a response to the notice within 20 days of service of a copy of this order with notice of entry.

Finally, the branch of the cross-motion that seeks an order waiving Defendants' default in timely complying with the court's July 10, 2008 compliance conference order is granted. That order states in pertinent part, "[w]ithout waiving Defendants' right to depositions of all Plaintiffs, counsel for defendant will select one or two plaintiffs for deposition as representatives . . . by December 15, 2008" (Kramer Aff., Ex. E). Thereafter, in a memo dated January 6, 2009, from Eric Gruber, Defendants' former counsel, Mr. Gruber told Defendants' incoming counsel:

> "Eric Gruber has had further conversations with counsel for plaintiffs regarding identifying the two Plaintiffs Defendants would depose pursuant to the July 10, 2008 Compliance Order. Pursuant to the order, the Plaintiffs were supposed to have been identified prior to December 15th. Plaintiffs counsel agreed to extend that time without specification of date, subject to the court's determination of the application to be relieved"

(Kramer Aff., Ex. F).

Here, Defendants' delay was not deliberate. It appears that Defendants' new counsel relied on former counsel's representation regarding Plaintiffs' agreement to extend the time for the identification of individual plaintiffs for depositions. In addition, Plaintiffs have not demonstrated that Defendants intended to abandon the depositions or that they will be unduly prejudiced by the delay in identifying one or two plaintiffs to be deposed (*see Vanek v Mercy Hosp.*, 162 AD2d 680, 681 [2d Dept 1990]). Accordingly, Defendants are directed to serve Plaintiffs with the names of one or two plaintiffs no later than ten days after service of a copy of this order with notice of entry. Depositions of those plaintiffs must be completed within thirty days thereafter.

Motion Sequence Number 005

Plaintiffs move for a protective order striking Defendants' notice to admit, which requires the limited partners to admit that their signatures, as they appear on the disputed version of the limited partnership agreement, are genuine.

Among the issues in this lawsuit is the question of whether Defendants violated the Agreement by refinancing the Property without the consent of the limited partners. Plaintiffs allege that Stevens altered the Agreement to remove paragraph 14 (c) (7), which states:

> "The General Partners shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a Partnership without Limited Partners, except

that the General Partners have no authority to:

* * * *

7) Sell, refinance or otherwise dispose of the Limited Partnership Project or real estate without the approval of Fifty-One Percent (51%) of the Limited Partners"

(Compare Safran Aff., Exs. A & B) and that he submitted the altered Agreement to North Fork Bank as part of the refinancing application package in order to obtain the refinancing without informing and obtaining the consent of the limited partners. It is Plaintiffs' position that by admitting that their signatures are genuine on the allegedly altered document, Plaintiffs would also be admitting the authenticity and genuineness of that disputed document and that therefore they cannot respond to the notices to admit (Safran Aff., Ex. A).

In *The Hawthorne Group, LLC v. RRE Ventures,* (7 AD3d 320, 324 [1st Dept 2004]), the Appellate Division, First Department stated that, "[a] notice to admit, pursuant to CPLR 3123(a), is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues of ultimate facts that can only be resolved after a full trial" (*see also Sagiv v Gamache,* 26 AD3d 368, 369 [2d Dept 2006][protective order appropriate where notice to admit improperly addressed ultimate issues in the litigation]).

Here, Plaintiffs' motion for a protective order is granted. The question of the authenticity of the allegedly altered Agreement is fundamental to Plaintiffs' breach of

contract and breach of fiduciary duty claims and Defendants' demand that Plaintiffs authenticate their signatures on an allegedly altered Agreement addresses ultimate issues at the very core of the dispute. Defendants' use of the notice to admit to demand admission of a fundamental and disputed fact is palpably improper (*see Meadowbrook-Richman, Inc. v Cicchiello,* 273 AD2d 6 [1st Dept 2000]).

Motion Sequence Number 006

Defendants move to compel plaintiffs Magoon, Deufner, Zaron, Seiden, Kulvin and Miller to provide answers to interrogatories 7, 8, 8.1, 8.8, 8.9, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 9.91, 9.92, 9.93, 9.94, 9.97, 9.98, 9.99, 9.991, 11, 11.1, 11.2, 11.21, 11.3, 11.4, 11.5, 11.6, 11.7 and 11.8 in Defendants' second set of interrogatories. Defendants' position is that plaintiffs' answers were boiler plate statements that provided no information. Plaintiffs object to the motion on the ground that the interrogatories are overbroad, irrelevant, palpably improper and/or ask Plaintiffs to disclose privileged attorney-client communications.

"The supervision of discovery, and the setting of reasonable terms and conditions for disclosure are within the sound discretion of the Supreme Court. Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Downing v Moskovits,* 58 AD3d 671, 671 [2d Dept 2009][citations and quotation marks omitted]).

Here, the court has reviewed Plaintiffs' answers to each of the disputed interrogatories and, accordingly, the motion is granted to the extent that Plaintiffs are directed to provide answers to interrogatories 8.8, 9.5, 9.6, 9.7, 9.94 and 9.991 because those questions are relevant to the litigation. As to the remainder of the disputed interrogatories, Defendants have failed to demonstrate that Plaintiffs' answers to 7, 8, 8.1, 9.3, 9.4, 9.8, 9.97, 9.98, 9.99, 11.21, 11.3, 11.4, 11.5, 11.6, 11.7 and 11.8 were not responsive (*see* CPLR 3133[b]; *Shenouda v Cohen*, 1 AD3d 428 [2d Dept 2003]; *Grosso Moving & Packing Co., Inc. v Damens*, 261 AD2d 339 [1st Dept 1999]). Finally, the remaining disputed interrogatories are either overly broad, palpably improper or ask Plaintiffs to disclose confidential attorney-client information.

Motion Sequence Number 007

Defendants seek to compel plaintiff Nash to answer interrogatories 8, 9, 10 and 11 in their second set of interrogatories. The motion is denied. As to interrogatories 8, 9 and 10, Defendants have failed to demonstrate that Nash's answers to those interrogatories were not responsive. Interrogatory 11 asks for a conclusion of law and is palpably improper.

Motion Sequence Number 008

Defendants seeks to compel plaintiff Garber to answer interrogatories 7, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 9.9, 9.92, 9.93, 9.94, 9.97, 9.98, 9.99, 9.991, 11, 11.1, 11.2, 11.4, 11.5, 11.6, 11.7 and 11.8.

As in motion sequence number 006, the motion is granted to the extent that Garber is directed to answer questions 9.5, 9.6, 9.7, 9.94 and 9.991 because those questions are relevant to the litigation. As to the remainder of the disputed interrogatories, Defendants have failed to demonstrate that the answers to 7, 9.3, 9.4, 9.8, 9.97, 9.98, 9.99, 11.3, 11.4, 11.5, 11.6, 11.7 and 11.8 were not responsive (*see* CPLR 3133[b]; *Shenouda v. Cohen*, 1 AD3d 428; *Grosso Moving & Packing Co., Inc. v Damens*, 261 AD2d 339). Finally, the remaining disputed interrogatories are either overly broad, palpably improper or ask Plaintiffs to disclose confidential attorney-client information.

Defendants' requests for attorneys' fees related to motion sequence numbers 006, 007 and 008 are denied.

Accordingly, it is

ORDERED that, as to motion sequence number 004, the motion to strike the fourth counterclaim and cross-claim is granted; and it is further

ORDERED that the request for sanctions is denied; and it is further

ORDERED that the cross-motion is granted to the extent that Defendants may serve a late response to the notice to admit within 20 days of service of a copy of this order with notice of entry and they may name up to two plaintiffs for depositions no later than ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the cross-motion seeking a sealing order is denied; and it is further

ORDERED, as to motion sequence number 005, that Plaintiffs' motion for a protective order striking the notices to admit certain signatures is granted; and it is further

ORDERED, as to motion sequence number 006, the motion is granted to the extent that Plaintiffs are directed to answer questions 9.5, 9.6, 9.7, 9.94 and 9.991 and the motion is otherwise denied; and it is further

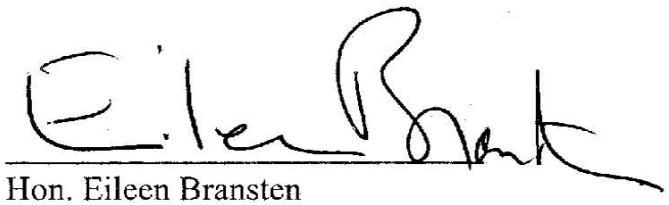
ORDERED that motion sequence number 007 is denied; and it is further

ORDERED , as to motion sequence number 008, the motion is granted to the extent that plaintiff Garber is directed to answer questions 9.5, 9.6, 9.7, 9.94 and 9.991 and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 14, 2009

ENTER



Hon. Eileen Bransten