

Cason v Deutsche Bank Group
2013 NY Slip Op 33400(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 109377/2009
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 109377/2009
CASON, BEVERLY
vs.
DEUTSCHE BANK GROUP
SEQUENCE NUMBER : 007
RENEWAL

INDEX NO. 109377/09
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

DEC 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/4/13

Joan M. Kenney
JOAN M. KENNEY, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X
BEVERLY CASON, TASHA WILLIAMS and
EMMANUEL PATRICK ST. HILAIRE,

Index # 109377/2009

Plaintiffs,

-against-

DECISION & ORDER

DEUTSCHE BANK GROUP, NEIL SMITH, KONRAD
JOY, STEFAN PACHE, FRANK KUHNKE and
DAVID UH,

FILED

DEC 09 2013

Defendants.

-----X
KENNEY, JOAN, M., J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

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New York, NY 10279
(212) 553-9215

For Defendants:
Morgan Lewis & Bockius, LLP
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New York, NY 10178
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Papers considered in review of these motions seeking (1) an Order renewing and/or rearguing a prior decision of this Court and (2) an Order compelling additional discovery:

Papers	Numbered
Notice of Motion, Affidavits, Affirmation, Memorandum of Law and Exhibits	1-17
Affirmation in Opposition with Exhibits and Memorandum of Law	18-25
Reply Memorandum of Law	26
Notice of Motion, Affirmations with Exhibits and Memorandum of Law	27-50
Affirmation in Opposition with Exhibits and Memorandum of Law	51-54
Reply Memorandum of Law in Support	55

Motion sequences 007 and 008 are consolidated for decision. Motion sequence 007 seeks an Order pursuant to CPLR 2221 granting defendants' and non-party witness, Lisa K. Maloney (Maloney) combined application for renewal and reargument. Motion sequence 008 seeks an Order compelling defendants to comply with the prior Orders of this Court and plaintiffs' numerous discovery demands.

FACTUAL & PROCEDURAL BACKGROUND

In this racial discrimination case the parties have engaged in

a very acrimonious discovery process. The complaint alleges that defendants engaged in unlawful employment practices, including unlawful discrimination in violation of the New York State Human Rights Law, New York State Executive Law §290 et seq., and the New York City Human Rights Law, Administrative Code of the City of New York §8-101 et seq.

Motion sequence 007 is the seventh discovery motion brought before this Court. This does not include a couple of cross motions seeking additional relief, predominantly relating to the exchange of documents, depositions of witnesses and completion of discovery generally. The last Order of this Court, dated October 1, 2012 (the October 1st decision), could not have been more explicit:

"ORDERED that no later than October 31, 2012, plaintiffs shall provide defendants with a LIST of the outstanding discovery/documents and [defendants] shall produce or properly respond to said documentary/discovery demands no later than November 7, 2012."

The Court has reviewed defendant's responses to the enumerated "list" plaintiffs timely provided in the form of a letter, dated October 1, 2012 (the October 1st decision). Defendants' responses to items 1-4 are consistent with the prior rulings of this Court. Defendants' combined response to the balance of the list, items 5-34, does not comply with the prior Orders of this Court and states as follows:

"The remaining items on your list constitute either (1) the subject of Defendant's pending Combined Motion to Reconsider and to Reargue, or (2) documents sought in [prior demands],

which were not raised in [your] motion to compel and therefore were not ordered by the Court to be produced, and to which [we] objected as untimely and on numerous other proper grounds."

This response refers to motion sequence 007, which seeks to renew and/or reargue the October 1st decision. Defendants have clearly chosen to refuse to respond to the items 5-34, by interposing motion sequence 007.

A motion to reargue affords a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221 [d] [2]), and is a "procedural avenue ... available which allow[s] an ... attorney to correct an ... error without resort to an unnecessary appeal." *Kent v Kent*, 29 AD3d 123, 130 (1st Dept 2006). A motion to reargue is not designed to provide an opportunity for a party to advance arguments different from those originally tendered (see *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2nd Dept 2004]), argue a new theory of law, or raise new questions not previously advanced. *Frisenda v X Large Enters.*, 280 AD2d 514, 515 (2nd Dept 2001). Instead, a movant must demonstrate the matters of fact or law that it believes the court has misapprehended or overlooked. See *Hoffmann v Debello-Teheny*, 27 AD3d 743, 743 (2nd Dept 2006).

Defendants' motion seeks to renew and/or reargue. It is deemed an application for reargument, as the facts alleged in support of the motion were known to the moving party at the time the original

motion was made.¹ *State Farm v Barbera*, 161 AD2d 599 (2nd Dept 1990).

CPLR 2221(f) states in it's entirety as follows:

Motion affecting prior order

A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Defendants' motion to reargue is grounded solely on the fact that the October 1st decision referred to defendants' failure to annex a copy of the alleged retainer agreement between Maloney, and Morgan Lewis & Bockius, LLP (Morgan Lewis), counsel for the defendants herein. Defendants now contend that because the retainer agreement has been produced, Maloney should not be required to continue her deposition.

Mere production of the purported retainer agreement does not fully support defendants' argument that Maloney's testimony is privileged. Moreover, Maloney's prior deposition testimony raises additional questions regarding the admissibility of her testimony.

¹Motion sequence 007 is defective on its face because the prior moving papers are not annexed to and made a part of the instant motion (see *Phillips v Village*, 57 AD2d 110 [4th Dept 1977]).

Notably, Deutsche Bank's General Counsel, Janice Resnick, was present the entire time Maloney spoke to Ken Turnbull, Esq., a partner from Morgan Lewis.

The motion papers do not indicate whether Maloney intended to retain Morgan Lewis when she arrived at Deutsche Bank, and after she was served with the subpoena. The retainer agreement does not appear to be supported by consideration, and the document produced is unsigned.

The language of the retainer agreement suggests that Morgan Lewis may have had a concern about the possibility of it having a conflict of interest representing both Maloney and Deutsche Bank. Maloney's prior deposition testimony indicates that when she received the subpoena to testify at the deposition, she called Deutsche Bank, her former employer, and it was suggested to her that she speak to the attorneys representing the bank. It does not appear that Maloney, went to Deutsche Bank to seek the counsel of Morgan Lewis, but went to Deutsche Bank's offices, to talk with Janice Resnick, to find out whether or not she had to comply with the subpoena.

DISCUSSION

Generally, the circumstances of each case will determine whether a communication by a client to an attorney should be afforded the cloak of privilege (*Stroh v General Motors Corp.*, 213 AD2d 267 [1st Dept 1995]). The attorney-client privilege, "enables

one seeking legal advice to communicate with counsel for this purpose, secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes" (*People v Osorio*, 75 NY2d 80 [1989] [cit.om.]).

The privilege may be asserted only where, "an attorney-client relationship has been established." Such a relationship arises only when one contacts an attorney, in his capacity as such, for the purpose of obtaining legal advice or services (*Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]).

The attorney-client privilege, is codified in CPLR 4503(a). The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services. The burden of proving each element of the privilege rests upon the party asserting it and even if the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case where strong public policy requires disclosure (*Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 592 [1989]; *Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]; see also, *People v Mitchell*, *supra*, at 373). In this case the privilege has not clearly attached, particularly in light of the following analysis.

In *Anonymous v High School for Environmental Studies*, 32 AD3d 353 (1st Dept 2006) the First Department stated "[i]t is beyond cavil that New York has long favored open and far-reaching pretrial

discovery" (citations omitted). "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101(a); *Northway Eng., Inc. v Felix Indus., Inc.*, 77 NY2d 332, 335 [1991]). The words "material and necessary" as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial (*Anonymous v High School for Environmental Studies*, *infra*). "The test is one of usefulness and reason." (*Allen v Crowell, Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

In the instant case, there can be no dispute that the documents and information sought in the discovery demands at issue are material and necessary to the fair prosecution of this action. Plaintiffs' complaint contains allegations supporting each of plaintiffs' document requests and defendants' answer unequivocally denies these allegations. Notwithstanding the relevance and need for these documents, defendants have resorted to boilerplate responses that the requested documents were, *inter alia*, privileged.

CPLR 3101(a) embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (see, 3A Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶¶ 3101.01-3101.03). CPLR 3124 states:

Failure to disclose; motion to compel
disclosure

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

Unfortunately, plaintiffs have consistently moved under this section. This is a weak section. It does not penalize a party for failure to comply with any of the disclosure procedures specified therein. In the event plaintiffs applied for relief in the first instance under CPLR 3126, this Court could have fashioned an appropriate remedy by sanctions with or without conditions.

Consequently, plaintiff's motion is granted and defendants' motion is denied.

Accordingly it is,

ORDERED that defendants' motion is denied and defendants are to respond fully to plaintiff's demands numbered 5-34 forthwith; and it is further

ORDERED that Lisa K. Maloney's deposition is to be completed at the witness' earliest convenience and continue day-to-day until completed.

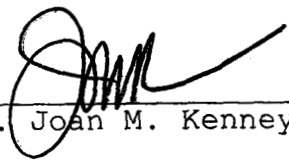
Dated: December 4, 2013

E N T E R:

FILED

DEC 09 2013

**COUNTY CLERK'S OFFICE
NEW YORK**



Hon. Joan M. Kenney