

High Value Trading LLC v Shaoul
2014 NY Slip Op 33132(U)
November 25, 2014
Sup Ct, New York County
Docket Number: 651788/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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HIGH VALUE TRADING LLC and
ALSKOM REALTY, LLC,

Index No. 651788/11

Plaintiffs,

-against-

JACK SHAOUL and UNIVERSE ANTIQUES, INC.,
Defendants.

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Joan A. Madden, J.:

Plaintiff Alskom Realty, LLC (“Alskom”) moves, by order to show cause, for an order (1) compelling non-party Nicholas Milani to appear and testify at a continuation of his deposition within 14 days, (2) precluding Mr. Milani and his counsel from refusing to respond to, or instructing the witness not to respond to, questions on the basis of attorney-client privilege as to matters and communications prior to November 2011, or on the basis of the Fifth Amendment privilege against self-incrimination, and or on any other unarticulated basis, (3) precluding Mr. Milani’s counsel from interposing objections in a manner precluded by the Uniform Rules of Trial Courts; and (4) holding Mr. Milani in contempt for his conduct at his September 17, 2014 deposition (“the September 17 deposition”) and ordering him to pay the costs of transcription services for that deposition and, if ordered, his continued deposition.

Mr. Milani opposes the motion and cross moves for an order pursuant to 22 NYCRR 130 directing plaintiffs to pay Mr. Milani’s costs and legal fees in connection with the September 17 deposition and Mr. Milani’s response to this application for a continued deposition and/or for contempt. Defendants also oppose the motion.

Background

This action arises out of allegations that defendants sold Alskom a fake painting

purportedly created by Renoir, for \$1,100,000 in March 2010. Defendant Jack Shaoul is the owner of defendant Universe Antiques, Inc. ("Universe"), which is in the business of selling artwork. Non-party Alexander Komolov is an art dealer and the owner of Alskom and plaintiff High Value Trading, LLC ("High Value"). Mr. Milani as a former associate of Mr. Komolov, who was introduced to Mr. Komolov through Mr. Shaoul.

At issue on this motion and cross motion is the September 17 deposition of Mr. Milani. Mr. Milani was initially questioned by counsel for defendants at defendants' counsel's office in February 2013, without notice to plaintiffs. The questioning was videotaped without a court reporter although a transcript was prepared from the videotape.¹ Plaintiffs objected to the deposition as improper, and defendants thereafter subpoenaed Mr. Milani's deposition in accordance with the CPLR. Mr. Milani appeared for the subpoenaed deposition on October 15, 2013, at the office of defendants' counsel. Mr. Milani responded to defendants' questions, but left the deposition shortly after counsel for Alskom began to question him.

Alskom then moved, by order to show cause, to hold Mr. Milani in contempt for failing to complete his deposition, and/or to compel Mr. Milani to appear and testify at the continuation of his deposition. By order dated July 14, 2014, this court granted Alskom's motion to the extent of requiring Mr. Milani to appear and testify for a continued deposition, and permitting Alskom to renew its motion for contempt in the event Mr. Milani failed to comply with the order.

In accordance with the July 14, 2014 order, Mr. Milani appeared for the September 17, deposition. A review of the transcript from that deposition indicates that Mr. Milani's counsel,

¹Defendants maintain that contrary to plaintiffs' characterization, Mr. Milani's February 2013 testimony was not a "secret deposition," but, rather, a "statement under oath" taken as part of defendants' pre-litigation investigation before they interposed their answer.

Jeffrey Millman, Esq, (“Millman”) objected to certain questions and directed his client not to answer on the grounds of (1) attorney-client privilege based on an alleged attorney client relationship that existed between Mr. Milani and High Value’s attorney, Roman Popkin, Esq.(“Popkin”), (2) the Fifth Amendment privilege that was later retracted and replaced with an objection on unspecified grounds, and (3) relevance. In certain instances, Mr. Milani used foul language to describe Alskom’s attorney, and Popkin, and he answered other questions by stating that he was not “at liberty to say.” In addition, the transcript reflects that Millman provided long explanations on the record with respect to various objections and his direction to his client not to answer.

Plaintiffs now move for various relief in connection with the September 17 deposition, including an order compelling Mr. Milani to appear for a further deposition, precluding Mr. Milani from objecting based on the privileges and objections asserted at the deposition, and/ or holding Mr. Milani in contempt, and awarding sanctions, costs and attorneys’ fees. Mr. Milani opposes the motion and cross moves for sanctions, costs and attorneys’ fees.

Discussion

“The proper procedure during the course of an examination before trial is to permit the witness to answer all questions posed, subject to objections pursuant to subdivisions (b), (c) and (d) of CPLR 3115,² unless a question is clearly violative of the witness's constitutional rights or

²CPLR 3115(b) concerns instantly avoidable errors that must be objected to; subdivision (c) concerns disqualification of the officer before whom the deposition is taken; subdivision (d) involves objections to competency of witness or admissibility of evidence. The objections under (b) and (c) are waived if not raised a deposition, while those under (d) are not waived by failure to make them during the deposition, unless it is an instantly curable matter falling within subdivision (b).

of some privilege recognized in law, or is palpably irrelevant.” Mora v. Saint Vincent’s Catholic Medical Center of New York, 8 Misc3d 868, 869 (Sup Ct NY Co. 2005); see also Orner v. Mount Sinai Hospital, 305 AD2d 307 (1st Dept 2003). “The reason for this maxim is simple: only objections to form and the technical aspects of the deposition are waived if not timely raised at the deposition.” Mora, supra, at 870 (internal citations and quotations omitted).

Section 221.1(a) (“uniform rules”), “Objections at Depositions,” provides in pertinent part:

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b)(c) or (d) of [CPLR] 3115. . . , would be waived if not interposed. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR (emphasis added).

Section 221.1(b), “Speaking objections restricted,” provides in pertinent part:

Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Section 221.2 requires a deponent to answer all questions except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person. That section further states:

An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore.

In light of these standards, the majority of objections posed by Millman on behalf of Mr. Milani were improper. While the Fifth Amendment privilege is a legitimate basis for objecting,

in this instance, the privilege was asserted but then retracted, and no proper grounds for objecting were asserted in its place. Moreover, Millman's long explanations for his client's refusal to answer are contrary to Section 221.1(b) which requires that an objection be stated "succinctly" and in a manner that does not "interfere with questioning." As for the objections based on relevance, after such objections were made, Mr. Milani should have been permitted to answer. See Orner v. Mount Sinai Hospital, 305 AD2d at 606; White v. Martins, 100 AD2d 805 (1st Dept 1984). Objections based on unspecified assertions of confidentiality were also improper, and notably, neither defendants nor Mr. Milani has moved for a protective order. Compare, In re Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch, 37 Misc3d 1121(a) (Sup Ct NY Co. 2012)(granting petitioners' application for protective order with respect to non-party depositions, to the extent of permitting petitioner to object and for witnesses to decline to answer any question at the deposition on the ground that the answer would divulge confidential information or trade secrets of petitioner, and marking each objection for a ruling). However, with respect to certain audio recordings that were the subject of Milani's September 17 testimony, such records shall be produced for in-camera review by the court in accordance with this decision and order.

As for the objections based on attorney-client privilege, the court notes that "a party's unilateral belief does not confer upon him the status of client...Rather, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task." See Volpe v. Canfield, 237 AD2d 282 (2d Dept) lv denied 90 NY2d 802 (1997); Jane St. Co. v. Rosenberg & Estis, 192 AD2d 451 (1st Dept 1993), lv denied 82 NY2d 654 (1993). Moreover, "[i]n order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney

and the client in the context of legal advice or services.” Bertalo’s Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91 NY2d 848 (1997) .

Here, the record shows that there was no attorney-client relationship between Popkin and Mr. Milani until in or around November 2011, when Mr. Milani requested Popkin to undertake specific tasks on his behalf in connection with Segal v. Komolov; Index No. 108814/11³, in which Mr. Milani and Mr. Komolov were named as defendants. In addition, this relationship ended in August 2014, when Popkin was permitted to withdraw as counsel for Mr. Milani in this matter.

Furthermore, that Mr. Milani, at the request of Mr. Komolov, attended meetings with Mr. Komolov in Popkin’s office regarding two actions in which Popkin represented Komolov (Komolov v. Segal et al.; Index Nos. 652042/10 and 651626/11), is insufficient to establish an attorney-client relationship between Mr. Milani and Popkin. According to Popkin, Mr. Milani’s role from 2010 until late 2011 was limited “to relying and representing Komolov’s requests.. and arranging the meetings, on behalf of Komolov.” Popkin’s view is supported by various emails during this period between himself and Mr. Milani, which show that Popkin was not undertaking any tasks on behalf Mr. Milani. Likewise, even assuming, as stated by Mr. Milani, that Popkin regularly met with Mr. Milani regarding personal matters, including Mr. Milani’s impending marriage and the issue of a prenuptial agreement, and real estate deals, such meetings do not give rise to an attorney-client relationship in the absence of evidence that Popkin was retained by Milani to undertake a specific task. Accordingly, the court finds that the assertion of the

³The action was commenced by summons and notice on August 1, 2011, and the summons and complaint was filed on December 7, 2011. Popkin interposed an answer on behalf of both defendants on December 7, 2011.

attorney-client privilege on behalf of Mr. Milani is not a valid objection, except insofar as any question relates to Popkin's representation of Mr. Milani Segal v. Komolov; Index No. 108814/11, or any confidences or information Mr. Milani provided to Popkin during the period of this representation, which began in November 2011, and ended in August 2012.

While Mr. Milani did not answer the deposition questions in keeping with the requirements of the CPLR and the Uniform Rules, such failure at this point is an insufficient basis for sanctions or for holding him in contempt. That being said, however, if the further deposition ordered below is not in keeping with these rules and/or this decision and order, plaintiffs may renew their motion for sanctions and/or contempt.

In view of the above, it is

ORDERED that on or before December 19, 2014, non-party witness Nicholas Milani shall provide to the court for in-camera inspection a duplicate of the audio recording that was subject of Mr. Milani's testimony at the September 17 deposition together with a certification as to the authenticity of the recording and a certified translation; and it is further

ORDERED that if Mr. Milani fails to comply with the immediately proceeding paragraph than testimony as to such recordings or the contents thereof shall be precluded at trial; and it is further

ORDERED that if the recording is produced for in-camera inspection the parties shall appear in Part 11, room 351, 60 Centre Street on January 8, 2015 at 3:30 pm, for a decision with respect to such inspection; and it is further

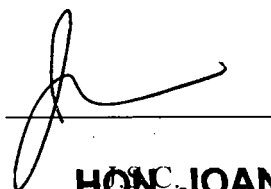
ORDERED that the motion is granted to the extent that Mr. Milani shall appear for a deposition in the courthouse to be presided over by a Special Referee appointed by this court and

such deposition shall take place at the courthouse on or before January 22, 2015; and it is further

ORDERED that any objection raised to the questioning of Mr. Milani shall be consistent with this decision and order; and it is further

ORDERED that motion for contempt and sanctions is denied without prejudice to renewal.

DATED: November 25, 2014

A handwritten signature in black ink, appearing to be 'Joan A. Madden', is written over a horizontal line.

**HON. JOAN A. MADDEN
J.S.C.**