

DiMauro v United LLC
2014 NY Slip Op 33333(U)
April 28, 2014
Supreme Court, Westchester County
Docket Number: 58165/12
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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JOSEPH DIMAURO and JOSEPH DIMAURO,
AS TRUSTEE OF THE DIMAURO TRUST
UNDER AGREEMENT DATED SEPTEMBER
28, 1984, AS AMENDED BY AMENDED
AGREEMENT OF TRUST, DATED JUNE 11, 1987,

DECISION & ORDER

Index No. 58165/12
Motion Date: April 28, 2014

Plaintiffs,

Seq. No. 6

-against-

UNITED LLC, AGNES NANCY VARSAMES,
PAUL A. VARSAMES, LOUIS VARSAMES,
JOHN VARSAMES, JEAN VARSAMES,
INDIVIDUALLY AND AS BENEFICIARY OF THE
JEAN VARSAMES IRREVOCABLE TRUST,
PAUL VARSAMES DEVELOPMENT, LLC and
ANV ESTATES, LLC,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order compelling defendant Agnes Nancy Varsames to appear for a deposition.

Order to Show Cause - Affirmation in Support - Exhibits
Affirmation in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on April 28, 2014, this motion is determined as follows:

Plaintiffs allege on December 7, 2011 DiMauro obtained a judgment against United LLC confirming an arbitration award in favor of the plaintiffs. It is alleged the judgment in the amount of \$1,119,223 has not been satisfied. Plaintiffs allege on or about November 18, 2004 DiMauro issued a notice to United informing it of its claim for negligent design and construction of a home. Defendant Paul Varsames owns and controls United and Paul Varsames Development LLC. Plaintiffs allege Paul Varsames rendered United judgment proof by transferring millions of dollars from United to Paul Varsames Development LLC, his relatives, and ANV Estates, LLC. It is alleged that in July 2005 United conveyed money from an account

at Provident Bank to defendants Louis Varsames, Paul Varsames, and ANV Estates, LLC. It is alleged in May 2006 United conveyed money from an account at Provident Bank to defendants Louis Varsames and Agnes Nancy Varsames, the brother and mother of Paul Varsames. Plaintiffs allege that in August 2006 United conveyed money from an account at Provident Bank to defendants John Varsames, Paul Varsames' brother, and the Jean Varsames Irrevocable Trust. It is alleged United transferred all of its interest in the accounts, causing it to become insolvent and perpetrating a fraud on the creditors of United. Plaintiffs allege in 2006 United transferred its assets, business premises, telephone numbers, employees, customer lists, and accounts receivable to Paul Varsames doing business as Paul Varsames Development.

Plaintiffs seek to depose defendant Agnes Nancy Varsames in her individual capacity, her capacity as trustee for the Jean Varsames Irrevocable Trust, as well as in her capacity as sole member of the defendant Anv Estates, LLC. Mrs. Varsames allegedly is a trustee of the Jean Varsames Irrevocable Trust, which has a 25% interest in United, and she played a role in the \$3,000,000 of challenged transfers at issue in this litigation. Plaintiffs assert Mrs. Varsames' testimony regarding the transactions at issue and her knowledge of United is material and necessary to the prosecution of this matter. Plaintiffs argue her credibility is at issue and the best method to evaluate a witness's credibility is by conducting a deposition. Plaintiffs assert that Mrs. Varsames age is not relevant to this motion, as it does not affect her ability to act as a trustee and owner of the defendant companies. Plaintiffs argue Mrs. Varsames' medical illness is not permanent and should not preclude plaintiff from conducting her deposition. Plaintiffs have no objection to placing time restrictions on each day of the deposition. Plaintiffs argue defendants provided a letter from Mrs. Varsames' treating physician, which is conclusory and lacks detail regarding how the witness' medical condition would prevent her from testifying.

In opposition, defendants argue Mrs. Varsames is elderly and chronically ill. She has agreed to complete her deposition by answering all questions posed by plaintiffs' counsel through the use of written questions and interrogatories, pursuant to CPLR 3109 and 3130. Defendants argue this request was made based solely on Mrs. Varsames' serious medical condition and the written advice of her physician. Defendants submit a February 10, 2014 letter to plaintiffs' counsel from Donald Cohen, M.D., Mrs. Varsames' internist. Dr. Cohen states Mrs. Varsames has an acute medical illness, varicella zoster virus, which is exacerbated by stress, and could impact her well being, including postherpetic neuralgia. Dr. Cohen opines Mrs. Varsames is not medically fit to attend a deposition in person. She would, however, be able to review questions and provide written, verified responses. Dr. Cohen states he does not anticipate that Agnes Varsames' medical condition will permit her to appear for a deposition at any time in the foreseeable future (Defendants' Exhibit B). Defendants submit an undated affirmation by Dr. Cohen reiterating his opinion. Dr. Cohen also states Agnes Varsames is being treated by an ophthalmologist for nerve damage and blurriness as an effect of the debilitating disease.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is

one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

An October 31, 2013 compliance conference order states depositions of the plaintiff and defendant Varsames shall be completed on or before December 6, 2013. A December 10, 2013 compliance conference order provides the depositions of the remaining defendants shall be completed on or before January 31, 2014. At a conference on February 28, 2014, defense counsel took the position that Mrs. Varsames has shingles. Defendants argue Mrs. Varsames is willing to complete her deposition by answering written questions pursuant to CPLR 3109. Pursuant to CPLR 3108, a deposition may be taken on written questions when the examining party and the deponent stipulate or when the testimony is to be taken outside the state. Here, plaintiff's counsel seeks to depose a defendant in the action and the examining party objects to taking the deposition on written questions.

The purpose of a deposition is to elicit testimony which is material and necessary (*Zenna v St. Vincent's Hospital*, 13 AD2d 824 [2d Dept 1961]). However, there are other purposes to conducting the deposition of a witness in person, including obtaining more detailed answers, assessing the strength of the witness, evaluating her credibility, and impeaching the witness at trial. In opposition to the motion, defendant Agnes Nancy Varsames fails to provide an adequate excuse as to why she cannot appear in person for a deposition. Defendants submit a February 10, 2014 letter and an affirmation signed by Donald Cohen, M.D. stating Mrs. Varsames has varicella zoster virus, which is exacerbated by stress, and she is not medically fit to attend a deposition. Dr. Cohen states he does not anticipate Mrs. Varsames' medical condition will permit her to appear for a deposition in the foreseeable future. However, the physician affirmation is undated, the language indicating Mrs. Varsames cannot appear for a deposition in the foreseeable future is vague, and there is no indication in the record that her condition is permanent. Dr. Cohen states Mrs. Varsames is treating with an ophthalmologist for nerve damage and blurriness as a result of the illness, but there is no indication this condition would affect her ability to appear for a deposition.

In view of the foregoing, it is

ORDERED that Agnes Nancy Varsames shall appear for a deposition on or before May 19, 2014 at a location selected by defense counsel; and it is further

ORDERED that at the election of defense counsel or the witness the deposition may be conducted day to day with a time restriction of three hours per day; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on all parties within ten days of entry; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on May 29, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York

April 28, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.

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