

Conway v Marcum & Kliegman LLP

2016 NY Slip Op 32005(U)

October 19, 2016

Supreme Court, New York County

Docket Number: 652236/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SIMON CONWAY AND DAVID WALKER, in
their capacity as the Joint Official Liquidators of
AJW OFFSHORE LTD., AJW MASTER FUND
LTD., AJW OFFSHORE II, LTD., and AJW
MASTER FUND II, LTD.,

**DECISION AND
ORDER**

Plaintiffs,

Index No.: 652236/2014
Mot. Seq. 008

-against-

MARCUM & KLIEGMAN LLP, MARCUM &
KLIEGMAN (CAYMAN), and MARCUM LLP.

Defendants.

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HON. ANIL C. SINGH:

Plaintiffs, Simon Conway and David Walker (“Plaintiffs”), pursuant to CPLR 1021, move to substitute Jess Shakespeare (“Shakespeare”) as Plaintiff in his capacity as Joint Official Liquidator of the Offshore Funds in place of David Walker. Defendants, Marcum & Kliegman LLP, Marcum & Kliegman (Cayman), and Marcum LLP (“Defendants”), pursuant to CPLR 3124, cross-move for an Order compelling Plaintiff David Walker (“Walker”) to attend a continued deposition and provide testimony. Defendants oppose Plaintiffs’ motion to substitute a party to the extent that it should be contingent upon the granting of the cross-motion.

Motion to Substitute Party

CPLR 1021 provides that “a motion for substitution may be made by the successors or representatives of a party or by any party.” CPLR 1021. A motion to substitute is properly granted where the named plaintiff is replaced by a successor. See, Blue Mountain Homes, LLC v. Betancourt, 47 Misc. 3d 144(A) (2d Dept 2015). This Court has previously granted similar relief in this case when Plaintiff Simon Conway replaced Ian Stokoe (“Stokoe”) as other Joint Official Liquidator. See Decision and Order dated October 1, 2015. Therefore, Plaintiffs’ motion to substitute is granted.

Cross-Motion to Compel Deposition Testimony

CPLR 3124 provides that “if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article ... the party seeking disclosure may move to compel compliance or a response.” CPLR 3124. Courts have routinely held that a party must produce a non-party witness if the circumstances warrant their production. See Rugby Excavators, Inc. v. Juliano, 40 A.D.2d 1024, 338 N.Y.S.2d 983 (2d Dept 1972) (holding that a plaintiff was entitled to a deposition of non-party corporate officers after the corporation had ceased to exist). Plaintiffs contend that Walker has no relevant knowledge concerning the new allegations in the Amended Complaint and that Defendants have already questioned Walker exhaustively at his earlier deposition. However, pursuant to the decision and order dated July 5, 2016, where this court granted Plaintiffs’

previous motion to substitute, it was stipulated that if Plaintiffs' Motion to Amend the Complaint is granted, Plaintiffs must again produce Stokoe for an additional day of deposition testimony relating to Plaintiffs' Proposed Amended Complaint. In that previous decision, this Court recognized the importance of affording Defendants an opportunity to depose the former Joint Liquidators of the Offshore Funds regarding new claims set forth in the Proposed Amended Complaint. Consistently, Defendants' motion is granted and Plaintiffs shall be ordered to re-produce Walker for additional deposition testimony pursuant to the new claims in the Amended Complaint.

Accordingly, it is,

ORDERED that the Plaintiffs' motion to substitute Jess Shakespeare as plaintiff in his capacity as Joint Official Liquidator of the Offshore Funds in place of David Walker is granted upon the sworn affidavit of Jess Shakespeare; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice upon the County clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption; and it is further

ORDERED that the Defendants' cross-motion to compel Plaintiffs to re-produce David Walker for a second day of deposition testimony is granted. Defendants must limit their deposition questions to the new claims in the Amended Complaint.

Date: October 19 2016
New York, New York



Anil C. Singh