Winitch v 150 TT RGG LLC
2010 NY Slip Op 33853(U)
December 20, 2010
Supreme Court, New York County
Docket Number: 109056/2007
Judge: Martin Shulman
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SCANNED ON 12/22/2010

[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 109056/2007
WINITCH,CHARLES
VS
150 TT RGG
Sequence Number : 004
COMPEL

INDEX NO. 109056/07
MOTION DATE
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 ... A-E	1
Answering Affidavits — Exhibits A-E	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

NEW YORK
COUNTY CLERK'S OFFICE

Dated: DEC 20 2010

MARTIN SHULMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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CHARLES WINITCH,

Plaintiff,

-against-

150 TT RGG LLC, HIRO REAL ESTATE ASSOCIATES, L.L.C., HIRO REAL ESTATE, L.L.C., PLAZA CONSTRUCTION CORP. and HENRY BROS. ELECTRONICS, INC.

Defendant.

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PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

HENRY BROS. ELECTRONICS, INC.,

Third-Party Defendant.

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Index No.109056/2007

DECISION/ORDER

TP Index No: 590601/2008

FILED

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Henry Bros. Electronics, Inc. ("HBE") moves pursuant to CPLR 3124 and §3126 for an order compelling Plaintiff Charles Winitch ("Plaintiff") (1) "to respond to questions at an Examination Before Trial ("EBT") regarding prior immoral, vicious or criminal acts" and (2) "to produce HIPPA complaint authorizations responsive to Defendant's Omnibus Demand #4" (the "Demand"). Specifically, HBE first seeks to have Plaintiff respond to questions regarding New York Stock Exchange Board Decision 08-7 ("NYSE 08-7") in which Winitch was found guilty of improper trading and making misleading statements to the NYSE.[1] Second, HBE seeks to compel Plaintiff to provide

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[1] In New York Stock Exchange Board Decision 08-7 Plaintiff was found guilty of the following charges:

I. "Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, he effected unauthorized trades in one or more customer accounts.

II. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just

the co-defendants access to all medical records related to Plaintiff's lower back for the five years prior to the alleged accident at issue in this case. Plaintiff opposes both prongs of this motion.

Plaintiff commenced this action alleging causes of action sounding in negligence against the above named defendants. Plaintiff's complaint alleges that he was injured when the glass doors of a security turnstile at 150 East 42nd Street closed on his leg and caused him to fall. At an EBT on April 7, 2009, counsel for the defendants attempted to question Plaintiff about NYSE 08-7. Plaintiff's counsel objected to the question and Plaintiff refused to answer.

The first prong of HBE's motion requests the court to order Plaintiff to submit to a further EBT so that HBE can question him regarding NYSE 08-7. The Uniform Rules for the Conduct of Depositions, 22 NYCRR Part 221, limit a witness's right to refuse to answer questions at a deposition. Specifically, 22 NYCRR §221.2, states in relevant part that: "A deponent shall answer all questions at a deposition, except . . . (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person." It is settled law that a witness's credibility can be impeached through cross-examination regarding "prior immoral, vicious and criminal acts which have a bearing on his credibility as a witness." *People v. Schwartzman*, 24 N.Y.2d 241, 244

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and equitable principles of trade in that, on one or more occasions, he effected trades in one or more customer accounts, that were unsuitable given the customer's age, circumstances, investment objectives, and investment experiences.
III. Violated NYSE Rule 504(a) In that he exercised discretionary authority over a customer's accounts without written authorization.
IV. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that he made a material misstatement to the NYSE."

(1969); *see also, McNeill v. LaSalle Partners*, 52 A.D.3d 407, 409-410 (1st Dept. 2008). The prevailing rationale is that a prior bad act "demonstrates an untruthful bent or 'significantly reveal[s] a willingness or disposition . . . voluntarily to place the advancement of his individual self interest ahead of principle or of the interests of society' [citations omitted]." *People v. Walker,* 83 N.Y.2d 455 (1994).

There are two limits to this general principle. First, the questioning must be based in good faith and with a reasonable basis in fact. *People v. Kass,* 25 N.Y.2d 123, 125-126 (1969). Second, the questioning must not violate the collateral evidence rule, which provides that extrinsic documentary evidence cannot be used to contradict a witness on collateral matters. *See, e.g., Badr v. Hogan*, 75 N.Y.2d 629, 635 (1990).

Here, the acts at issue in NYSE 08-7 speak to Plaintiff's truthfulness and veracity as three counts involve improper and unauthorized trading of stocks and the fourth count involves making misleading statements to the sanctioning body. Nothing in the record indicates that HBE questioned Plaintiff about NYSE 08-7 in bad faith. Further, the collateral evidence rule only prevents HBE from offering a copy of NYSE 08-7 into evidence at trial. Thus, it is proper for HBE to question Plaintiff about NYSE 08-7 at his deposition and, under 22 NYCRR §221.2, Plaintiff's refusal to answer was improper.

On a final note, Plaintiff states that, if forced to appear for a further deposition and answer questions about NYSE 08-7 he will refuse to answer by asserting his right against self incrimination. A witness asserting the right against self incrimination in a civil case cannot refuse altogether to be deposed. See *Hughes v. Farrey*, 11 Misc.3d 1067(A), 816 N.Y.S.2d 696, at *2 (Sup. Ct., NY County, 2006)(Beeler, J.), citing *Steinbrecher v. Wapnick,* 24 N.Y.2d 354 (1969). Rather, the privilege must be asserted

in response to specific questions and blanket refusals to answer all questions are not permitted. *Id.* Furthermore, the right against self-incrimination does not relieve the witness of explaining its invocation. *Id.*

On this record, the court is not in a position to assess the viability of such a claim, as this privilege "may not be asserted or claimed in advance of questions actually propounded." *People v. Laino*, 10 N.Y.2d 161, 174 (1961), *cert. den.* 374 U.S. 104 (1963). Nor does Plaintiff offer any explanation as to the basis for any potential prosecution.

The second prong of HBE's motion is to compel Plaintiff to provide authorizations for the medical records requested in the Demand. The Demand reads, in part, "if the plaintiff is claiming loss of enjoyment of life, we demand . . . authorizations allowing [the defendants] to obtain and photocopy all hospital records, diagnostic films and reports and all health care providers' records for a period of five (5) years pre-dating the accident at issue in this litigation" (Def. Omnibus Disc. Demand ¶ 4, at Exh. C to HBE's Aff. of Good Faith). In its reply, HBE limits this request to records related to Plaintiff's lower-back (HBE's Reply Aff. at ¶ 24).

"A party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (citations omitted)." *Weber v. Ryder TRS, Inc.*, 49 A.D.3d 865, 866 (2d Dept. 2008); *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983). When asked at his EBT whether he had ever had "medical treatment" on his back Plaintiff answered with an unequivocal "no" but when asked if he had ever had an "MRI or x-ray or CAT

scan" of his lower back Plaintiff claimed he did not remember (Exh. E to HBE's Aff. of Good Faith).

Plaintiff denies that his deposition testimony placed his entire medical history for the five years preceding the accident at issue. The court agrees. However, as limited in HBE's reply, the request is proper because Plaintiff affirmatively placed the physical condition of his lower back in issue.

For the foregoing reasons, it is hereby

ORDERED that within 30 days of service of a copy of this Decision and Order with notice of entry Plaintiff shall submit to a further EBT for the sole purpose of questioning Plaintiff with regard to NYSE 08-7 and shall provide the authorizations requested by the Demand, limited to treatment of Plaintiff's lower back.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for Plaintiff and HBE.

Dated: New York, New York
December 20, 2010

Hon. Martin Shulman, J.S.C.

FILED

NEW YORK
COUNTY CLERK'S OFFICE