

Balestriere PLLC v BanxCorp
2014 NY Slip Op 31500(U)
June 6, 2014
Sup Ct NY County
Docket Number: 650919/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BALESTRIERE PLLC,

Plaintiff,

-against-

Index No. 650919/10

BANXCORP and NORBERT MEHL,

Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiff Balestriere PLLC (hereafter “the plaintiff” or “the Firm”) moves, by order to show cause, to compel defendants to produce the transcript of defendant Norbert Mehl’s (“Mehl”) deposition testimony in a related action pending in the District Court of New Jersey entitled *BanxCorp v. Bankrate Inc.* (hereinafter “the New Jersey action”). Defendants oppose the motion and cross move for discovery sanctions against plaintiff.

The Firm was retained by defendants in or about 2007, in connection with the New Jersey action, an antitrust suit arising out of Bankrate’s alleged misconduct, including price fixing and profit sharing agreements with competitors. This action arises out of the alleged refusal of defendants BanxCorp and Norbert Mehl (“Mehl”) to pay for legal services provided by plaintiff on their behalf in the New Jersey action.

Plaintiff seeks to compel defendants to comply with a supplemental document request dated November 20, 2013, which seeks Mehl’s deposition transcript in the New Jersey action. In its response dated December 10, 2013, defendants object stating that the transcript is subject to a confidentiality order in the New Jersey action which prevents them from turning it over. Plaintiff

responds that it would be willing enter into a limited confidentiality order to address the issue but defendants do not agree, and take the position that plaintiff must seek relief from Judge Falk, the judge presiding over the New Jersey action. However, according to plaintiff, in a March 14, 2014 conference call, Judge Falk informed counsel for the parties that he could do nothing with respect to New Jersey protective order until he received an order from this court compelling the production of the transcript.

Plaintiff now moves to compel the production of Mehl's deposition transcript, asserting that it is relevant to its quantum meruit claim for legal services performed on defendants' behalf in the New Jersey action. Plaintiff maintains its work for defendants in the New Jersey action involved successfully defending against two motion to dismiss, issuing discovery demands, reviewing thousands of pages of documents, investigating the claims, and drafting a brief opposing a third motion to dismiss. Plaintiff argues that Mehl's testimony in the New Jersey action is relevant to the issue of the value of the services the Firm provided to defendants in the New Jersey action and whether it was terminated without cause. Plaintiff further argues that Mehl's testimony is relevant to defendants' defense that the Firm was terminated for cause, and that the work performed by the Firm necessitated the filing of seven amended complaints.¹

Defendants oppose the motion, asserting that transcript has no relevance to the instant action, and seeks "to pierce the protective order" issued by the District Court in New Jersey. Defendants also cross move pursuant to CPLR 3126, for discovery sanctions against plaintiff including striking a 43-page bill for plaintiff's services totaling \$625,619, provided by plaintiff in

¹Plaintiff maintains that the seven amended complaints were filed after it ceased representing BanxCorp in the New Jersey action and note the complaints drafted by the Firm withstood three motions to dismiss.

discovery, and striking plaintiff's claim for quantum meruit. Defendants argue that such discovery sanctions are warranted based on plaintiff's failure to provide documents or testimony to support its quantum meruit claim. Defendants also argue that plaintiff's witness, Marc Natale, who was responsible for preparing and handling the Firm's billing, was unable to provide detailed testimony required for the quantum meruit claim, and that the Firm failed to file the note of issue by the April 4, 2014 deadline provided in the last status conference order. Alternatively, defendants argue that they should be permitted to reinstate their defense of termination for cause.

Plaintiff oppose the cross motion, asserting that they have complied with discovery and that Natale was produced for deposition in accordance with the court orders, and that any failure to elicit information from Natale was due to the nature of Mehl's questioning. In addition, plaintiff asserts that the court informed plaintiff that the note of issue deadline could be extended on the argument date for the motion. As for the affirmative defense of termination for cause, plaintiff asserts that while the question of whether the Firm was terminated for cause is at issue in this action, there is no basis for reasserting the affirmative defense, which was found, in the court's decision and order dated October 14, 2011, to be inadequately pleaded.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." Allen v. Crowell-Collier Publishing

Co., 21 NY2d 403, 408 (1968).

Under this liberal standard, the court finds that Mehl's deposition testimony is potentially relevant to the issue of the value of plaintiff's services, and as to whether plaintiff was terminated for cause. For example, questions could have been asked of Mehl as to allegations made in the pleadings by the Firm, or as to factual underpinnings of legal positions taken by the Firm on Banxcorp's behalf. Defendants' argument that this motion constitutes an attempt to circumvent the confidentiality order issued in the New Jersey action is addressed by ensuring the confidentiality of the transcript in this action. Accordingly, the transcript shall be produced by defendants subject to the relevant provisions of the confidentiality order issued in the New Jersey action and annexed as Exhibit 4 to the defendants' cross motion. In reaching this conclusion, it is noted that while the court finds that the transcript is discoverable, it makes no determination as to admissibility at trial of any testimony from the transcript.

Defendants' cross motion for sanctions is denied. A review of the record shows that plaintiff is in compliance with discovery and that the expiration of the note of issue deadline is not a basis for sanctions under the circumstances here, particularly as the plaintiff was informed by the court that the deadline could be extended in light of the instant motion to compel. As for defendants' request to reassert its defense of termination for cause, such request is denied without prejudice to renewal within 30 days of the date of this order upon a proposed amended pleading containing such defense.

Accordingly, it is

ORDERED that the motion to compel the production of the transcript of Mehl's deposition testimony in the New Jersey action is granted, subject to the relevant provisions of the

confidentiality order in the New Jersey action with respect to the transcript; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the note of issue deadline is extended to September 12, 2014; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street on August 28, 2014 at 9:30 am.

DATED: June 6, 2014



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