

<b>KH 48 LLC v Muniak</b>
2015 NY Slip Op 32330(U)
December 7, 2015
Supreme Court, New York County
Docket Number: 151606/2013
Judge: Joan A. Madden
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Under the lease, the Tenant agreed to pay a monthly based rent of \$57,000, subject to rent escalations. Muniak, who is the President of the Tenant, executed a “Good Guy Guaranty” which guaranteed the performance of the tenant under the lease. By decision and order dated April 24, 2014, this court denied KH’s motion for summary judgment finding, inter alia, that there were triable issues of fact as to whether a surrender of the premises occurred as a matter of law based on the conduct of the parties, including the Tenant’s leaving of valuable kitchen equipment at the restaurant and KH’s re-letting the restaurant for its benefit and taking over the Tenant’s subleases.

As articulated at oral argument, the central issue on this motion relates to plaintiff’s questions to defendant at his deposition with respect to Muniak’s involvement four ventures other than the restaurant: Mangia 57, Inc, Mangia 23, LLC, M48 Catering Corp, and MH Holding Company.

KH alleges that questions as to these ventures is appropriate as they are relevant to Muniak’s defense that the good guy guaranty was modified by an oral agreement that if the Tenant vacated the restaurant and left the kitchen equipment that he would be released from his obligations under the guaranty.

At oral argument, I directed the attorneys to delineate in writing the remaining discovery at issue. Plaintiff’s attorney, Gregory Calabro, Esq, detailed the questions which he alleges were not answered by Muniak at his deposition, and Muniak’s, attorney Sheldon Gopstein, Esq, responded. The questions and responses and Muniak’s position are as follows:

**1. Questions and Response:** “Mr. Muniak, would it be fair to say with respect to these three companies (referring to three of the four ventures identified above) that you run the show” Muniak responded “I work there and stuff but I don’t run the show” Mr. Calabro then asked, “who runs the show” and when Muniak responded that “other people are involved in it” [and that]“it’s irrelevant” Mr. Gopstein then objected to form based on phrase “running the show.” (Muniak Dep, at 11).

**Muniak’s Position:** A proper objection was made as to form based on phrase “running the show.”

**2. Questions and Response :** Were you the president [of MH Holding Company]? Muniak responded “no.” Mr. Calabro then asked, “Who was the President” and Muniak answered, “You know he’s no longer there it is not important any more” Mr. Calabro asked, “I’d like to know his name” and Muniak responded “I don’t remember” (id, at 14).

**Muniak’s Position:** Muniak appropriate answered that he does not remember

**3.Question and Response:** “Who was the person who negotiated the lease [for the

location where Mangia 57 operates]?” Objection by Mr. Gopstein “[w]e are now talking about different locations, different stores, separately owned entities” (id, at 15).

**Muniak’s Position:** The question is irrelevant.

4. **Questions and Response:** “Mr. Muniak, at some point last year you spent some time collecting documents that your lawyer directed you to prepare for us.” After Mr. Gopstein objected and Mr. Calabro rephrased the question, to ask if “at some point in 2014, did you put together documents to give to your lawyer to give us for this case,” Muniak answered that he did not remember but eventually responded “we did work on it. I don’t remember exactly the details of it.” (Id, 39, 40).

**Muniak’s Position:** The question was answered.

5. **Question and Response :** “You had a triple net lease for the [subject] building right?” Mr. Gopstein objected to form, and then Mr. Muniak answered yes when asked if he had an obligation to pay rent, real estate taxes and water and sewer (id, at 58-59).

**Muniak’s Position:** The question was answered.

6. **Question and Response:** Where is the storage company where the computer records were stored, and Muniak answered “somewhere in Queens.” A blank was left in the record for the address (id., at 100).

**Muniak’s position:** The question was answered.

### Discussion

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 (1<sup>st</sup> 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). At the same time, however, “a party is not entitled to unlimited, uncontrolled or unfettered disclosure.” Gutierrez v. Trillium, USA, 111 AD3d 669 (2d Dept 2013)(internal citation and quotations omitted).

“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,<sup>1</sup> unless a question is clearly violative of the witness's constitutional rights or

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<sup>1</sup>CPLR 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)

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 (1<sup>st</sup> 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).

Here, KH argues that counsel for Muniak improperly objected to questions during the deposition, and that the questions related to the four ventures are proper since they involve three restaurants and relate to Muniak’s defense and specifically his intent with respect to leaving the kitchen equipment. The court finds that while questions as to the four ventures are potentially within areas properly explored, that certain of the questions specified above were overly broad and intrusive. In particular, questions as to the ownership and control of the other ventures are irrelevant to the issues in this action, including Muniak’s defense regarding the oral agreement. However, the questions related to the negotiation of the lease for Mangia 57 may be relevant with respect to Muniak’s knowledge of the provisions in the lease and good guy guaranty. Other identified questions, specifically the question relating to the gathering of documents for this action and the one relating to the triple lease for the building were adequately answered after objections were made as to form. As for the KH’s question regarding the name and location of the storage facility, Muniak such information is relevant and should be provided.

Next, while certain questions objected to by Muniak’s counsel based on relevance arguably should have been answered since such questions were not “palpably irrelevant,” a review of the Muniak’s deposition transcript does not show any conduct by Muniak or his

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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).

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).

counsel that would warrant the imposition of discovery sanctions. However, the motion is granted to the extent of directing that a further deposition of Muniak be held for the limited purposes delineated below. As for the remainder of the discovery sought in the motion, the record shows that Muniak provided the discovery after the motion was made, and there is no basis for awarding discovery sanctions.

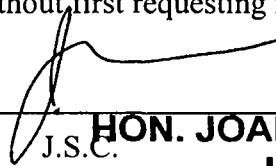
Finally, Muniak's request for sanctions in the form of attorneys' fees and costs expended in opposing KH's motion is denied, without prejudice to renewal in the event KH makes a further motion for discovery sanctions prior to requesting in writing that the court resolve the dispute at a conference.

In view of the above, it is

ORDERED that KH's motion is granted only to the extent that Muniak shall be deposed within 45 days of e-filing this decision and order with respect to issues regarding the negotiation of the lease and good guy guaranties for Mangia 57, and in connection with the name and address of the storage facility about which Muniak was previously questioned; and it is further

ORDERED that Muniak's request for sanctions is denied without prejudice to renewal in the event KH makes a further motion for discovery sanctions without first requesting in writing that the court resolve the dispute at a conference.

DATED: December 7, 2015

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

Check One: [ ] FINAL DISPOSITION

[ X ] NON-FINAL DISPOSITION