

Huston v Perecman

2017 NY Slip Op 31236(U)

June 7, 2017

Supreme Court, New York County

Docket Number: 650604/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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BARRY S. HUSTON

Plaintiff,

-against-

DAVID H. PERECMAN, PERECMAN & FANNING,
P.L.L.C., THE PERECMAN FIRM, P.L.L.C.,

Defendants.
-----x

Index No.: 650604/2014

Mtn Seq. No. 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff, Barry S. Huston, Esq., moves, pursuant to CPLR 2308, to compel non-party witness Sharida Ishak ("Ishak") to comply with and respond to a subpoena compelling her to appear for a deposition. Ishak, a former office manager at defendant law firm, the Perecman Firm, PLLC, formerly known as Perecman & Fanning, LLC (the "Perecman Firm"), objects on the grounds that: 1) she has limited knowledge concerning the subject she will be testifying to; and 2) she has physical and emotional health concerns that prevent her from appearing and submitting to a deposition (Weinstein Affirm., ¶¶ 4-5).

Factual and Procedural Background

Plaintiff commenced this action to recover money damages allegedly owed to him pursuant to an agreement (the "Agreement") with defendant David H. Perecman, Esq. ("Perecman") and defendant Perecman Firm (both collectively referred to as "defendants" or the "Firm"). Under the Agreement, plaintiff contracted to

Index No. 650604/2014

Page 2 of 7

Mot. Seq. No. 002

receive a percentage of the legal fees earned by defendants on the personal injury cases that plaintiff referred to the Firm. Plaintiff contends that Ishak, as office manager of the Firm, performed the accounting of fees, and that she was directed by Perecman to create reports in which the amount of fees owed to plaintiff were decreased, in contravention of the Agreement (Hogan Affirm., ¶ 24).

This current motion is plaintiff's second motion to compel Ishak's compliance with the non-party subpoena (Mtn. Seq. 001) (NYSCEF Doc. No. 13). Ishak opposed the first motion to compel her deposition based on an alleged medical condition and submitted an affidavit from her treating physician, Dr. George H. Kowallis, who stated that Ishak's participation in a deposition would be "[d]etrimental to her health and well being" (NYSCEF Doc. No. 18, Kowallis Aff., ¶ 4). In lieu of stating her medical condition in her moving papers, Ishak requested an in camera review by this Court to assess her capacity to sit for a deposition.

The parties appeared for oral argument on November, 4, 2015. At that time, after considering Ishak's claim concerning her mental and physical capabilities, this Court directed that plaintiff first serve Ishak with written interrogatories (Moving Papers, Ex. 1, p. 6). Further, in the event plaintiff found Ishak's interrogatory responses to be insufficient, plaintiff was

Index No. 650604/2014

Page 3 of 7

Mot. Seq. No. 002

permitted to serve Ishak with a new subpoena seeking her deposition (Id., p. 6).

In accordance with this Court's Order, plaintiff served Ishak with Requests to Admit, Interrogatories and Production of Documents (Moving Papers, Ex. 2, pp. 24-36) and on February 18, 2016 Ishak responded to plaintiff's discovery demands. Plaintiff now moves to compel Ishak's deposition on the grounds that Ishak's answers to plaintiff's interrogatories were unresponsive, namely that they were "inadequate" and "demonstrably false."¹

Discussion

CPLR 3101(a)(4) allows parties to seek discovery from non-parties of all "material and necessary" information by service of a subpoena that sufficiently states, on its face or in an accompanying notice, the "circumstances or reasons" for the requested disclosure (Matter of Kapon v Koch, 23 NY3d 32, 36 [2014]). "The words 'material and necessary' as used in section 3101 must 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" (Id. at 38 [internal quotations and

¹Plaintiff's argument that Ishak's objection is untimely, and, as such, she waived her objections, presupposes that Ishak will seek to quash the subpoena pursuant to CPLR 2304. That is not the case. Instead, Ishak raises two arguments in opposition to the motion to compel compliance with the present subpoena -- that she cannot appear for a deposition because of her alleged medical condition, and that the information sought can be obtained from other sources.

Index No. 650604/2014
Mot. Seq. No. 002

Page 4 of 7

citations omitted)). "A trial court is vested with broad discretion in its supervision of disclosure" (MSCI Inc v Jacob, 120 AD3d 1072, 1075 [1st Dept 2014] [internal citations omitted]). There is no mandate for unlimited disclosure however, and the Court may, on its own initiative, deny, limit, condition or regulate the use of any disclosure devices so as to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (CPLR 3103(a); Hackshaw v Mercy Med. Ctr., 139 AD 3d 798 [2d Dept 2016]). Before precluding the use of a desired discovery device, however, the court should consider "[w]hether that device is of particular value under the circumstances" (Jones v Maples, 257 AD2d 53, 56 [1st Dept 1999]).

Here, Ishak once again asserts that her medical condition prevents her from being deposed, and continues to rely on her physician's, Dr. Kowallis, affirmation to support her assertion. She also contends that she does not possess knowledge of the relevant financial information that plaintiff seeks from her. For the reasons that follow, Ishak's medical condition is not relevant to the disposition of this motion. Her second contention, however, requires further consideration.

Ishak's Responses

Relevant Request for Admissions

Item No. 7: Admit that in 2014, David Perecman directed Ishak to prepare a report, audit or analysis

Index No. 650604/2014
Mot. Seq. No. 002

Page 5 of 7

of the amount, if any, of fees that the Perecman Firms owes Huston.

Ishak's Response: Denies, but admits that a direction was made by DAVID H. PERECMAN, Esq. to another employee, HAL BERMAN, the Controller [sic] of the firm, to prepare such a report and that said report was prepared by HAL BERMAN, Non-party, SHARIDA ISHAK a/k/a SHERRY ISHAK, is not in [possession] of report at this time and has no personal recollection of the contents of the report.

Item No. 9: Admit that Ishak completed a report reflecting the fees that the Perecman Firms owe Huston (the "Report").

Ishak's Response: Denies, but admits that HAL BERMAN, the controller [sic] of the firm, generated such a report.

Item No. 11: Admit that after Ishak provided the Report to Perecman, he requested changes to the Report.

Ishak's Response: Denied. Non-party witness, SHARIDA ISHAK a/k/a SHERRY ISHAK did not provide the report to DAVID H. PERECMAN, ESQ. and DAVID H. PERECMAN never requested any changes to the report.

Relevant Interrogatories

Question:

1. If ISHAK denies or makes a qualified admission to any of the foregoing Requests for admission, specify with itemized particularity the factual basis for each such denial or qualified admission.

Answer:

1. With respect to demand No. 7 in the Notice to Admit, it was not the non-party ISHAK who PERECMAN directed to prepare a report, audit or analysis of the amount, if any, of fees that the PERECMAN Firms owed HUSTON, it was HAL BERMAN, the Controller [sic] of The

Index No. 650604/2014

Page 6 of 7

Mot. Seq. No. 002

PERECMAN Firm who PERECMAN directed to prepare such report.

With respect to Demand No. 9 in the Notice to Admit, it was not Non-Party, ISHAK, who completed a report, audit or analysis of the amount, reflecting the fees that the PERECMAN Firms owe HUSTON, if any. It was HAL BERMAN who completed such a report.

With respect to Demand No. 11 in the Notice to Admit, ISHAK never provided the report to PERECMAN and PERECMAN never requested non-party, ISHAK, to make any changes to the Report prepared by HAL BERMAN.

(Moving Papers, Ex. 3).

With respect to these responses, plaintiff takes the position that they are "inadequate" and "demonstrably false"

(Huston Affirm., ¶¶ 6-24) by arguing the following:

Moreover, I am quite certain that Berman had no direct involvement with the Reports. To the best of my knowledge, Berman never had access to the Agreement, and thus, he would not have been able to calculate the fees owed to me, since the applicable percentages are set forth in the Agreement. In addition, upon information and belief, Berman solely wrote the checks for the Firm, and thus, would not be involved in the issue of calculating the fees owed to me.

(Huston Affirm., ¶ 25).

Plaintiff's dissatisfaction with these answers does not render them "inadequate" and "demonstrably false." Indeed, his argument to support these contentions demonstrates that it is based on mere speculation and conjecture. Contrary to plaintiff's unsubstantiated assertion, what is crystal clear from Ishak's responses is that Berman may possess the relevant and material information plaintiff is seeking from Ishak.

Index No. 650604/2014
Mot. Seq. No. 002

Page 7 of 7

Accordingly, it is

ORDERED that plaintiff's motion to compel non-party Sharida Ishak's deposition is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

6/7/17



HON. JEFFREY K. OING, J.S.C.