

30-32 W. 31st LLC v Heena Hotel LLC

2019 NY Slip Op 32016(U)

July 11, 2019

Supreme Court, New York County

Docket Number: 651918/2012

Judge: Joel M. Cohen

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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: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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30-32 WEST 31ST LLC, ANDREW IMPAGLIAZZO,

Plaintiff,

INDEX NO. 651918/2012

MOTION DATE 03/26/2019

- v -

MOTION SEQ. NO. 006

HEENA HOTEL LLC, TERRA NOVA TITLE &
SETTLEMENT SERVICES, INC., AND, XYZ CORP.,
KHANDUBHAI PATEL, NAYAN PATEL, B.L. PATEL,
CHAMP PATEL, HAMENT PATEL, NCBL NY, LLC., HY
POINT PROJECT & DEVELOPMENT LLC
(COUNTERCLAIM), RENOTAL CONSTRUCITON INC
A/K/A RENOTAL CONSTRUCTION CORP
(COUNTERCLAIM),

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 231, 232, 233, 234, 235, 236, 239, 240, 241, 242, 243, 244, 245, 246

were read on this motion to STRIKE EXPERT REPORT.

This action involves the development and sale of a Manhattan hotel located at 30-32 West 31st Street ("Hotel") as a joint venture between Plaintiff 30-32 West 31 Street, LLC and Defendant Heena Hotel, LLC. At issue is the proper distribution of proceeds from the sale of the Hotel. In short, this action is over an accounting.

In this motion, Defendants seek to strike Plaintiffs' expert disclosure of Stephen C. Chait, CPA/ABV/CFF, DABFA, dated April 16, 2018, claiming it is insufficient and inadmissible for either use with a summary judgment motion or for trial. ("Chait Report", NYSCEF 233). Plaintiffs oppose. For the following reasons, Defendants motion to strike the expert report and trial testimony relying on the report of Mr. Chait is granted.

Defendants seek to strike the report on the grounds that: 1) The report is unsigned and inadmissible as a matter of law; 2) the report fails to comply with Commercial Division Rule 13; and 3) Plaintiffs failed to comply with controlling discovery orders. The Court will address each argument in turn.

First, Defendants are correct that the Chait Report is inadmissible because it is not signed or sworn. *See, e.g., Diaz v. Almodovar*, 147 A.D.3d 654, 654 (1st Dep't 2017) ("unsigned [expert] report ... was inadmissible"); *Accardo v. Metro North R.R.*, 103 A.D.3d 589, 589 (1st Dep't 2013) ("The expert's report, submitted in support of defendant's [summary judgment] motion, was unsworn, and thus, not in admissible form."); *Shah v. 20 East 64th Street LLC*, 2017 N.Y. Slip Op. 32028(U) (Sup Ct, New York County 2017) (same).

In addition, the Chait Report does not comply with Commercial Division Rule 13 and the Court's prior discovery order, which mandate that all expert reports contain, among other things: "(A) a complete statement of all opinions the witness will express and the basis and the reasons for them; [and] (B) the data or other information considered by the witness in forming the opinion(s)" (NYSCEF 234, pp. 19-20; Rule 13). Neither the Rule nor the Order sets a different standard for rebuttal reports, such as the Chait Report.

Mr. Chait's report states that he disagrees with the report offered by Defendants expert, James Ashe, CPA, but does not offer a basis or reason for that conclusion. For instance, Mr. Chait writes, "At this time and on a preliminary basis I find that I do not concur with the conclusion reached by James Ashe, CPA ("Ashe") of the Marcus firm. Additional forensic accounting work is required, and I reserve the right to amend and

supplement this initial draft.” No supplemental report was provided and there is no indication that the “required” additional forensic accounting work was ever performed, let alone disclosed to Defendants. Mr. Chait also states summarily that the Ashe Report “presumes information as factual that is in dispute,” but then fails to identify those purportedly disputed factual assertions.

In page 2 of his 2-page report, Mr. Chait also states that there are “significant intercompany transactions that require a detailed forensic accounting review,” but does not identify any specific transactions at issue or provide opinions as to whether the intercompany transactions were proper. While he complains about Defendants’ general accounting practices – a central issue in this matter - Mr. Chait again states “additional forensic work is required to determine if the accounting records [of Defendants] were actually maintained on an accrual basis.” Again, such a disclosure (which was never amended) provides insufficient notice of any opinions Mr. Chait proposes to offer or the bases for those opinions. Finally, and in further violation of Rule 13 and the Court’s Order, the Chait Report fails to identify which documents he relied on in forming his opinion and generating the report.

The fact that Mr. Chait is being called as a rebuttal witness does not change the standard of specificity applicable to his report. See *Singh v. PGA Tour, Inc.*, 2017 NY Slip Op 31078 (Sup Ct, NY County 2017) (“[t]he expert discovery rules are promulgated so no party will be “sandbagged” or surprised by another expert’s opinion”). In these circumstances, the Court concludes that it is appropriate to strike Mr. Chait’s report and proposed testimony. See, e.g., *Carter v. Isabella Geriatric Center, Inc.*, 71 A.D.3d 443 (1st Dept 2010) (dismissing complaint because expert’s disclosure contained a “sea of

generalities" that failed to disclose in reasonable detail the substance of the expert's facts and opinions); *Galaz v. Sobel & Krausm Inc.*, 280 A.D.2d 427 (1st Dept 2001) (finding trial court properly precluded plaintiff's expert from testifying where plaintiff's disclosure was inadequate).

Therefore, it is:

ORDERED that Defendants motion to strike the expert report and trial testimony of Stephen C. Chait, CPA/ABV/CFF, DABFA is Granted; and it is further

ORDERED that Defendants are to serve this Order with Notice of Entry within 5 days of the date of this Order.

This constitutes the decision and order of the Court.

7/11/2019
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: