SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

----------X

MADONNA CICCONE,

Plaintiff,

- v -

ONE WEST 64TH STREET,

Defendant.

----------X

INDEX NO. 651748/2016

MOTION DATE N/A

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion for PROTECTIVE ORDER.

Shaw & Binder, P.C., New York City (Stuart F. Shaw and Robert Ehrenfeld of counsel), for plaintiff.
Holland & Knight LLP, Philadelphia, Pa. (Benjamin R. Wilson and Manuel Ayarra of counsel), for defendant.

Gerald Lebovits, J.:

This motion concerns the appropriate scope of discovery related to an attorney-fee hearing.

Background

In an order issued in this case in July 2019, this court granted defendant's motion for attorney fees and referred the matter to a special referee to hear and report on the amount of fees to be awarded. (*See Ciccone v One W. 64th St., Inc.*, Index No. 651748, 2019 WL 3429393 [Sup Ct, NY County July 26, 2019].) The Special Referee Clerk initially set the matter down for a fee hearing on October 10, 2019. The parties stipulated in late September to adjourn the hearing from October 10 to October 28, 2019. (NYSCEF No. 137.)

Defendant is represented in this action by the law firm Holland & Knight LLP. At the beginning of October, plaintiff served subpoenas on every Holland & Knight attorney who had worked on this action, seeking not only their testimony at the fee hearing but also the production of all their "notes, time records, emails, and other correspondence or documents regarding this action," including "unredacted time records" and "unredacted intra-office communications" with other Holland & Knight attorneys. (*See* NYSCEF No. 162 [attaching subpoenas.)

Over the first two weeks of October 2019, the parties disputed whether Patrick Sweeney, Esq., a former Holland & Knight partner responsible for the case while at the firm but who no longer lives in New York State, should be compelled to appear at a deposition to provide testimony regarding defendant's attorney-fee claims. (*See generally* NYSCEF No. 138-148.)

Plaintiff's motion seeking an open commission to obtain Sweeney's deposition testimony was argued before this court on October 11. The court granted the motion, but only to the extent that plaintiffs were given permission to apply to the court for an order to secure Sweeney's deposition testimony in Connecticut if Sweeney did not voluntarily appear—as long as the time and place for the voluntary appearance were convenient to Sweeney and plaintiff paid Sweeney for his time and travel expenses involved in appearing for deposition. (*See* NYSCEF No. 152.) Sweeney later agreed to testify at the scheduled fee hearing on these terms. (*See* NYSCEF No. 155.)

On October 21, 2019, Holland & Knight served objections to plaintiff's testimonial and documentary subpoenas. (*See* NYSCEF No. 162, at 25-29.) Also on October 21, plaintiff served a testimonial and documentary subpoena on defendant, seeking both testimony and documents relating to any insurance policy held by defendant "regarding reimbursement, recovery or payment thereof to Defendant for attorneys' fees." (NYSCEF No. 162, at 31-32.)

On October 25, the parties wrote to the court to inform it that in light of this court's October 11 ruling, the parties had entered into settlement negotiations. The parties requested that, because of these negotiations, the fee hearing be adjourned further, to December 6, 2019. (*See* NYSCEF No. 157.) This court so-ordered the parties' adjournment stipulation. (*See* NYSCEF No. 159.)

Unfortunately, the parties' settlement negotiations were unsuccessful. On November 26, 2019, following the breakdown of settlement negotiations, defendant moved by order to show cause for a protective order precluding plaintiff's testimonial and documentary subpoenas to all current and former Holland & Knight attorneys other than Benjamin R. Wilson, Esq. (the firm partner now responsible for the case), precluding plaintiff's document subpoena to Wilson, and precluding plaintiff's insurance-related document subpoena to defendant itself.

The court received defendant's order to show cause on December 2. On that date, an attorney for plaintiff appeared and sought permission to present argument on why this court should decline to sign the order to show cause altogether. This court, in its discretion, granted him permission to argue, and the court also heard argument from defendant in favor of signing the order. After hearing from both sides, the court signed the order to show cause.

Because of the rapidly impending fee hearing, the court set down defendant's motion for oral argument on Wednesday, December 4 (Wednesday being the court's motions day), and directed plaintiff to submit opposition papers onto the court's NYSCEF system by 4:00 p.m. on December 3. (*See* NYSCEF No. 164 [signed order].) Having heard oral argument on the motion today, the court concludes that defendant's motion for a protective order should be granted in full.

Discussion

As an initial matter, plaintiff contends that this court should hold any decision on defendant's motion in abeyance pending fuller briefing on a longer briefing schedule. But the underlying fee hearing in this case—directed by order issued more than four months ago—has already been adjourned twice at the parties' request. This court concludes that it would be inappropriate to adjourn the hearing a third time to permit plaintiff to submit additional briefing in opposition to defendant's motion.

Plaintiff also argues that defendant waived any request for protective order by waiting more than seven weeks after service of most of plaintiff's subpoenas (and more than a month after service of plaintiff's last subpoena). This court disagrees. Holland & Knight objected to plaintiff's subpoenas 20 days after receiving them; and much of the intervening period between objection and motion were occupied by good-faith settlement negotiations between the parties. That those negotiations ultimately proved unsuccessful does not mean that defendant should be penalized until waiting until negotiations had broken down before moving for a protective order.

On the merits, this court does not agree with plaintiffs that defendant should be required to produce at the hearing *all* Holland & Knight attorneys who logged any time on this action. Defendant intends on producing the two partners who supervised the litigation (Sweeney and Wilson), and has turned over billing records for the remaining attorneys. The testimony these partners will provide about their actions on the case and the work done by the non-testifying attorneys, supported by contemporaneous billing records, is permissible at a fee hearing, and will be sufficient to enable plaintiff meaningfully to contest the fees defendant claims.[1] (*See e.g. Xanboo, Inc. v Ring*, 40 AD3d 1081, 1082 [2d Dept 2007] [holding that a party sufficiently supports its fee claim through billing records and testimony from the supervising partner, and need not also call multiple attorney "witnesses who would have merely offered cumulative testimony at best"]; *see also e.g. 407 E. 81 Realty LLC v Creighton*, 2012 NY Slip Op 51405 [U], at *4 [Civ Ct, NY County May 15, 2012] [noting that it "would only serve to increase the amount of legal fees due if every person who worked on a case were required to testify in support of the claim for fees"].)

Although plaintiff argues that it needs further discovery lest defendant seek to establish its case merely by proffering billing records and a "few perfunctory remarks about office practices and the positions of the various attorneys whose time sheets are presented" (NYSCEF No. 166, at 3), this court concludes that this argument is better left for the referee to consider based on the evidence actually presented at the hearing. Should the referee conclude that other witnesses are necessary for the court to evaluate the parties' arguments, or to give the parties a fair opportunity to prove its case or to disprove the other side's case, the referee may direct that such witnesses be called (whether on application or sua sponte); but this court declines to do so in advance.

---

[1] This court notes that plaintiff has acknowledged that it is not aware of any precedent barring the introduction of hearsay evidence (such as nonprivileged conversations among law-firm attorneys regarding time-allocation, billing, and so on) at a fee hearing. (*See* NYSCEF No. 167, at 2.)

This court further agrees with defendant that the document subpoenas served both on the non-testifying attorneys and of Wilson are substantially overbroad—the subpoenas plainly seek large quantities of documents that have no relevance to the issue of attorney fees, are privileged on one or more grounds, or both. Although this court does not *necessarily* foreclose the possibility that a more narrowly framed documentary subpoena could be enforceable, the court declines to blue-pencil plaintiff's subpoenas for her.

Plaintiff also seeks unredacted billing records. Defendant opposes producing these records on grounds of the attorney-client and work-product privileges. Here, too, the court concludes that this dispute should be for the referee to address case-by-case in the first instance—including through in camera review of particular unredacted records, should the referee conclude in his or her discretion that such a review is warranted.

Finally, plaintiff seeks documents relating to defendant's insurance policies that (plaintiff asserts) covered nearly half the attorney fees to which defendant now seeks entitlement. But the Appellate Division, First Department, has made clear that a plaintiff that owes attorney fees under the terms of a co-op lease may not offset her "counsel fee obligation in the amount of the payment made to the cooperative by its insurer." (*Isaacs v Jefferson Tenants Corp.*, 270 AD2d 95, 96 [1st Dept 2000]; *accord O'Neill v 225 E. 73rd Owners Corp.*, 298 AD2d 239, 239 [1st Dept 2002].) The insurance policies thus are not relevant to the issues to be heard by the referee at the fee hearing.

Plaintiff contends that the party owed fees is not always allowed to recover attorney fees that have already been paid by an insurer and that "the answer as to whether or not it may be allowed is provided by the contents of the insurance policy providing such coverage." (NYSCEF No. 166, at 3.)

But plaintiff provides no basis—either in precedent or in examples of insurance policies containing such a limitation—for this assertion. To the contrary, the First Department's analysis in *Isaacs* and *O'Neill* does not focus on the defendant at all; rather, it seeks to prevent a *plaintiff* from "benefit[ting] from the circumstance that the cooperative had an insurance policy to cover its legal costs." (*Isaacs*, 270 AD2d at 96; *accord O'Neill*, 298 AD2d at 239 [holding that "plaintiffs were not effectively relieved of their counsel fee obligation by reason of the payment of those fees by defendant's insurance carrier"]; *see also U.S. Bank Nat'l Assn v Dexia Real Estate Capital Markets*, Dkt. No. 12-9412, 2016 WL 6996176, at *7 [SDNY, Nov. 30, 2016] [discussing this aspect of *Isaacs* and *O'Neill*].)

Accordingly, for the foregoing reasons it is hereby

ORDERED that defendant's motion for a protective order is granted.

12/4/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE