

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten
Justice

PART 3

Natalie J. Maniscalco

INDEX NO. 115646/08

MOTION DATE 6/12/10

R. Couri Hay, and Creative Public Relations, Inc.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

~~IN~~ ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12-1-10

Eileen Bransten
J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X
NATALIE J. MANISCALCO,

Plaintiff,

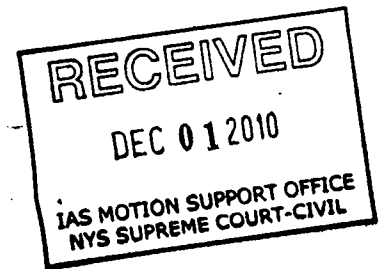
-against-

R. COURI HAY, and CREATIVE PUBLIC
RELATIONS, INC.,

Defendants.
-----X

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Index No.: 115646/08
Motion Date: 10/12/10
Motion Sequence No.: 002



Plaintiff Natalie J. Maniscalco (“Plaintiff”) moves, pursuant to CPLR § 3101 (d) (1) (iii) and CPLR 3116 (d), to compel R. Couri Hay and Creative Public Relations, Inc (“Defendants”) to pay Plaintiff’s expert witnesses’ professional fees incurred during deposition by Defendants. In the alternative, Plaintiff requests that the court limit Defendants’ time for taking depositions of Plaintiff’s expert witnesses to two hours for each expert. Defendants oppose Plaintiff’s motion.

BACKGROUND

On November 20, 2008, Plaintiff filed a complaint against Defendants. Plaintiff seeks to recover damages for, inter alia, intentional/tortious inference with prospective economic advantage, fraud in the inducement, conversion, breach of contract, violation of the Fair Labor Standards Act, violation of Article 6 of the New York Labor Law and defamation. Plaintiff further seeks to recover chattel and invalidate an anticompetitive employment covenant.

On November 25, 2009, the court entered a Preliminary Conference Order, requiring the parties to comply with an expedited discovery schedule ending May 12, 2010. The court stated specific discovery deadlines, including for the service and submission of expert reports and for the depositions of expert witnesses. Plaintiff was to serve any expert reports by April 1, 2010, and Defendants were to serve their expert reports by April 28, 2010. Defendants were to depose Plaintiff's expert witness by April 20, 2010; Plaintiffs were to depose Defendants' experts by May 12, 2010 (Affirmation of Gregory Zimmer, Esq. In Opposition to Plaintiff's Order to Show Cause Regarding Expert Witness Deposition Fees ["Zimmer Aff."], Ex. A, Preliminary Conference Order).

On January 6, 2010, the parties stipulated to extend the time for conducting written discovery by two weeks, primarily to account for the individual Defendant's travel time. On February 9, 2010, the court held a compliance conference hearing, at which time the parties' January 6, 2010 stipulation to extend was approved and entered as a compliance conference order. On April 12, 2010, the parties again stipulated to extend the discovery schedule set forth under the February 9, 2010 order, this time primarily to account for scheduling issues related to certain non-party witnesses. The court so-ordered the parties' stipulation on April 19, 2010. On June 18, 2010, the parties yet again stipulated to further extend the discovery deadline to August 23, 2010, due to the difficulty in obtaining the cooperation of two non-party fact witnesses for examination before trial. The parties' June 18, 2010, stipulation was so-ordered on June 21, 2010.

At a July 13, 2010, compliance conference, the court determined that the parties had not complied with the latest discovery schedule. Accordingly, the court entered a compliance conference order, requiring:

1. Plaintiff's expert witnesses to be deposed on or before August 6, 2010;
2. Defendants' expert report(s), if any, to be served on or before August 20, 2010;
3. Defendants' expert witness(es), if any, to be deposed before September 3, 2010;
4. Impleader to be completed on or before July 30, 2010;
5. All disclosure to be completed by September 7, 2010;
6. The Note of Issue to be filed by September 8, 2010; and
7. Dispositive motions to be filed thirty (30) days after the filing of the Note of Issue.

The July 13, 2010 Compliance Conference Order is the most recent discovery schedule entered in this matter. Discovery pertaining to expert witnesses is currently stayed pending resolution of the instant motion.

Throughout the course of this litigation, and prior to this motion, neither party had expressed objection to or reservation over the deposition of an expert witness by the opposing party. To the contrary, all stipulations entered into by the parties and all discovery schedules entered as orders of the court expressly provided for expert witness depositions. The parties therefore contemplated that any expert witnesses retained by either party would be ultimately available for deposition by opposing party.

On July 9, 2010, Plaintiff served two expert reports on Defendants. The first, a report from the Tinari Group, signed by economists Frank D. Tinari, Ph.D. and Kristin Kucsma, M.A., opined on Plaintiff's economic damages. The second, a report from a public relations expert, Shari Sadowski, M.A., opined on standard practices of business within the public relations industry (Attorney's Statement of Karen L. Zdanis ["Zdanis Statement"], Ex. E, An Appraisal of Economic Loss to Natalie Maniscalco; Ex. F, Expert Report of Shari Sadowski, M.A.).

After receiving Plaintiff's expert reports, Defendants notified Plaintiff that they wished to depose Plaintiff's expert witnesses. Plaintiff's counsel initially facilitated the scheduling of these depositions without objection.

During the scheduling of the expert witness depositions, the parties exchanged frequent correspondence concerning the timing and availability of Plaintiff's expert witnesses. On July 19, 2010, Plaintiff's counsel sent an email to counsel for Defendants, explaining that Plaintiff counsel's office would be a preferable location to conduct the deposition of expert witness Shari Sadowski, M.A. ("Ms. Sadowski"), stating that it would be "less expensive since [Ms. Sadowski's] time and travel for a deposition requested by [D]efendants are the [D]efendants' expense" (Zimmer Aff., Ex. C, p. 2). Defendants' counsel did not object to Plaintiff's counsel's statement at that time (*see id.*, p. 1).

On July 23, 2010, Plaintiff's counsel received two letters from the Tinari Group, one on behalf of Plaintiff's expert witness, Kristin Kucsma, M.A. ("Ms. Kucsma") and the other on behalf of Plaintiff's expert witness Frank D. Tinari, Ph.D. ("Dr. Tinari") (Zimmer Aff., Ex. D). The letters requested Plaintiff to provide an advance payment of the professional fees for each expert's time and travel in association with their respective depositions, to be received at least three days prior to the scheduled deposition date. The letters noted that Plaintiff should arrange to seek and obtain reimbursement from the relevant parties, "[i]f [D]efendant[s] are obligated to pay for the deposition time" (*id.*). Plaintiff's counsel forwarded the letters to counsel for Defendants (*id.*).

On July 26, 2010, Plaintiff attached forwarded to counsel for Defendants correspondence from Plaintiff's other expert, Ms. Sadowski, regarding Ms. Sadowski's fee requirements. Counsel for Defendants responded the same day, and contended that Plaintiff's position that Defendants' were to bear responsibility for Plaintiff's experts' fees as "ridiculous" (Zimmer Aff., Ex. E). Counsel for Defendants informed Plaintiff that he would contact the court if Plaintiff continued their position on Plaintiff's expert witnesses fees (*id.*).

On July 27, 2010, Defendants did send a letter to the court, requesting that the court address the dispute over expert witness fees for depositions (Zimmer Aff., Ex. F). Plaintiff responded and requested that the court intervene to resolve the matter (Attorney Affirmation of Karen L. Zdanis ["Zdanis Aff."], Ex. B). On July 28, 2010 and July 29,

2010, the court held telephone conferences with the parties. The issue was not resolved by those conferences.

ANALYSIS

A. CPLR § 3101

Plaintiff relies primarily on CPLR § 3101 (d) (1) (iii) to advance her position that Defendants are responsible to pay Plaintiff's expert witness fees incurred relating to depositions. Plaintiff's reliance is fundamentally misplaced in light of the facts and circumstances of this particular case, the nature of the expert testimony at issue and the legislative intent of the section.

CPLR § 3101 (d) (1) (iii) states that “[f]urther disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.” This section contemplates a factual scenario wherein one party objects to the deposition of his or her expert witness by opposing party for reasons related to the substantive content of the expert's testimony. Plaintiff argues that Defendants have not made the proper showing of “special circumstances” to warrant deposition of Plaintiff's expert witnesses. Plaintiff's argument is without real merit.

First, the instant motion is the first time Plaintiff has objected to expert depositions and the first time Plaintiff has raised the need for “special circumstances” argument. Plaintiff has contemplated expert depositions in numerous stipulations and orders, and has never objected to Defendants’ requests for deposition. The parties presumed and agreed throughout this matter that they would have the opportunity to depose each other’s expert witnesses. The parties consistently outlined provisions for the timing and submission of expert reports and depositions throughout the discovery period. Prior to this dispute, neither party objected to the deposition of expert witnesses by the opposing party. Plaintiff’s argument then, appears to be advanced more as an objection to the payment of expert witness fees during deposition than as a legitimate reluctance to avail Defendant of the opportunity to depose Plaintiff’s expert witnesses. Even now, where Plaintiff argues the “special circumstances” requirement, Plaintiff makes no real objection to the subject matter of potential questioning.

Second, the “special circumstances” exception under CPLR § 3101 (d) (1) (iii) is based largely on a distinction between factual and expert testimony. Neither party has drawn this distinction in the context of the nature and capacity for which Plaintiff’s expert witnesses were retained here.

New York case law prescribes that “special circumstances” warranting deposition of an expert witness will arise where an expert witness is the only person who can testify as to the factual nature of physical evidence that has since been lost or destroyed. In

Coella v Progressive Ins., Co., an insurance dispute involving a recovered vehicle, the court granted a deposition as to the plaintiff's expert witness. The court found that the expert appeared to be the only person that examined the automobile at issue after its recovery and, thus, the only witness with personal knowledge of its condition at the relevant time (6 AD3d 282, 283 [1st Dept 2004]).

Other "special circumstances" warranting deposition of an expert witness may arise where "one expert did not have the same opportunity for investigation as did his adversary's expert" (*Essa Realty Corp. v J. Thomas Realty Corp.*, 2010 NY Slip Op 31598, *8 [Sup Ct NY Co June 23, 2010]). Thus, even when a deposition of an expert witness is conducted pursuant to the "special circumstances" exception under CPLR § 3101 (d) (1) (iii), the scope of questioning must be limited to the witness' observations of fact, rather than to the witness' opinion or qualifications of expertise (*see, e.g., Rosario v General Motors Corp.*, 148 AD2d 108 [1st Dept 1989] [holding that a scientific expert who inspected a vehicle before the vehicle was destroyed could be deposed on his factual observations in inspecting the vehicle only]). Here, Plaintiff's expert witnesses are purely "expert" in nature. The experts will not testify as to any direct factual knowledge or observations of the circumstances surrounding the litigation.

In *Taft Partners Dev. Group v Drizin*, the First Department upheld Justice Cahn's (New York State Supreme Court, Commercial Division) ruling to permit expert witness deposition by opposing party, pursuant to the "special circumstances" exception under

CPLR § 3101 (d) (1) (iii). The First Department found that the claims in the matter were not based on facts personally known to the claimant, but on an expert accountant's review of documents and on a construction industry executive's opinion as to what renovations should have cost (277 AD 2d 163 [1st Dept 2000]). The facts in *Taft Partners* suggest that the claimant's allegations were based solely on opinions rendered by claimant's experts. Here, Plaintiff's allegations against Defendants were made long before she retained the expert witnesses and appear to be based on personal factual knowledge.

Because of the CPLR's general reluctance to permit expert witness depositions, the rules do not provide specific guidance for the payment of expert witness fees during deposition. CPLR § 3101 (d) (1) (iii) states that a deposition of an expert witness ordered by the court, based on a showing of "special circumstances," is "subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate." Here, where no showing of special circumstances has been made, and thus the inapplicability of this statute to the current dispute has been determined, the court declines to assign fees and expenses as per CPLR § 3101 (d) (1) (iii). To do so would be to ignore the statutory relevance and legislative intent of the rule itself.

B. CPLR 3116

Plaintiff's alternate reliance upon CPLR 3116 (d) is also inapplicable to the present dispute over expert witness fees during deposition. CPLR 3116 (d) states that "[u]nless the court orders otherwise, the party taking the deposition shall bear the expense thereof."

The section intends to govern the administrative fees of a deposition rather than the professional fees associated with an expert witness' time during deposition. This is the only logical interpretation of the statute given the context within which it is written and the prior and subsequent subdivisions of the statute which provide direction as to the signing, sealing, certification, filing and transcribing of the deposition. The Advisory Committee Notes to CPLR 3116 confirm such an interpretation and note that “[w]here a case is complex and the parties cannot agree, the court will have to decide how the expenses of taking depositions should be allocated. The court may order that the expense of the transportation or of reproducing copies be paid by one or more of the parties, or that it be apportioned among them or that it be assessed as costs in the action.”

New York case law provides further confirmation that CPLR 3116 pertains to administrative costs. In *Swiskey v Lamotta*, the court held that “[t]he condition that plaintiff Gordon pay for the transcript is appropriate, since the party who takes a deposition is expected to bear the cost thereof (CPLR 3116(d))” (224 AD2d 274, 274-275 [1st Dept 1996]). In addition, in *Kamp v Miller*, the court held that “[i]n interpreting CPLR 3116(d), it has been held that . . . the party taking the deposition shall bear ‘the expense of having the original transcript reproduced and copies made available to opposing counsel’” (175 Misc 2d 516, 517-518 [NY App Term 1997] [citations omitted]). CPLR 3116 (d) is therefore inapplicable to the current dispute over expert witness fees.

The general presumption in this matter by all parties to permit expert witness depositions comports with the general standards of practice in the Commercial Division of the New York State Supreme Court. In *Jamaica Public Service Co., Ltd., v La Interamericana Compania de Seguros Generales*, the First Department upheld Justice Ramos's (New York State Supreme Court, Commercial Division) order finding that there was no "merit to plaintiff's challenge to the court's order, orally rendered at a conference, directing the depositions of experts, in view of the letter one of the defendants addressed to the court and circulated to all parties reiterating the court's directives given at the conference, plaintiff's responsive letter expressly consenting to such letter, and plaintiff's participation in the deposition of experts. Unless public policy is affronted, not the case here, parties are afforded great latitude in charting their own procedural course" (293 AD2d 336, 336 [1st Dept 2002]). Where both Plaintiff and Defendants agreed to a particular procedural approach as to expert witness depositions, the court will not here change that agreement absent a clear infringement on the pertinent law.

The Commercial Division also looks for guidance on this issue to the Federal Rules of Civil Procedure, where parties are granted unhindered access to depose an expert witness once the mandated disclosure of the expert report has been made. Under the Federal Rules, "a party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26 (a) (2) (B) requires a report from the

expert, the deposition may be conducted only after the report is provided” (Fed R Civ P 26 [b] [4] [A]). In addition, the Federal Rules do not limit an expert witness’s discovery to factual observation; rather, the Federal Rules anticipate discovery as to an expert witness’s opinion and qualifications and place few restrictions on the extent or scope of discovery of an expert witness. Thus, under the Federal Rules, Defendants would be entitled to take the depositions of Plaintiff’s expert witnesses without a showing of “special circumstances.”

The Federal Rules place the burden of paying for an expert witness’s fees for time spent during deposition on the party seeking to take the deposition: “[U]nless manifest injustice would result, the court must require that the party seeking discovery ... pay the expert a reasonable fee for time spent in responding to discovery under Rule 26 (b) (4) (A)” (Fed R Civ P 26 [b] [4] [C]). In this case, under the Federal Rules, because Defendants are seeking to take the deposition of Plaintiff’s expert witness, Defendants would bear the responsibility of paying any reasonable professional fees incurred by Plaintiff’s expert witnesses during said depositions. However, the Federal Rules are not controlling upon this court.

C. Conclusion

The court notes, and agrees, with the Federal system requiring the party seeking discovery to pay the reasonable cost of the expert in responding to the deposition and taking part therein. The court further notes that neither party has put forward dispositive

law supporting their respective positions on payment. Should Defendants find the deposition of Plaintiff's expert witnesses necessary, the court sees no controlling authority requiring Plaintiff to pay for those witnesses' deposition fees. Neither does controlling authority mandate that Defendants must bear the cost of the experts fees; however, strong persuasive authority suggests that the Defendants bear responsibility, and the court prefers this manner of proceeding. Nonetheless, in the absence of dispositive controlling authority, the court must decline to exert its own authority to order either party to pay for the professional fees incurred by Plaintiff's expert witnesses during deposition by Defendants, and Plaintiff's motion to compel is denied. The court accordingly further declines to limit the duration of Plaintiff's expert witnesses' depositions.

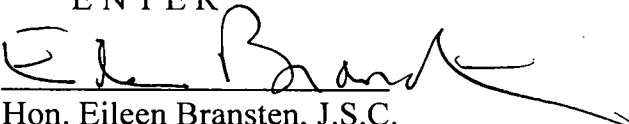
Accordingly, it is

ORDERED that Plaintiff's Motion to Compel is DENIED; and it is further.

ORDERED that Plaintiff's Motion to Limit Time for Expert Depositions is DENIED.

This constitutes the Decision and Order of the court.

Dated: New York, New York
December 1, 2010

ENTER

Hon. Eileen Bransten, J.S.C.