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Vasomedical, Inc. v Barron
2014 NY Slip Op 51015(U)
Decided on June 30, 2014
Supreme Court, Nassau County
Destefano, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 30, 2014

Supreme Court, Nassau County

**Vasomedical, Inc. and VASO DIAGNOSTICS, INC., d/b/a VASO
HEALTHCARE SALES PROFESSIONALS, Plaintiffs,**

against

**Brent Barron, MARGARET WALKER, and CHARLES HUGHES,
Defendants.**

000186-13

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Vito M. Destefano, J.

[*2]The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion1

Notice of Cross Motion2

Reply Affirmation3

Reply Affirmation4

In an action to recover damages for, *inter alia*, breach of fiduciary duty, the Defendants move for an order pursuant to CPLR 3108 and CPLR 3111 directing the issuance of an open commission

to take the depositions of five individual non-party witnesses. The Plaintiffs cross-move for: an order pursuant to CPLR 2221 granting them leave to reargue Defendants' prior motion which sought dismissal of the complaint; (2) an order pursuant to CPLR 3025 granting Plaintiffs leave to serve and file a second amended complaint; and (3) an order pursuant to CPLR 3108 and CPLR 3111 directing the issuance of an open commission to take the depositions of seven non-party witnesses.

Factual Background

On May 19, 2010, Plaintiff Vaso Diagnostics, Inc., d/b/a Vaso Healthcare Sales Professionals ("Vaso"), executed a three-year, commission-driven contract ("GE contract") with General Electric Healthcare ("GE"), pursuant to which Vaso was to serve as GE's exclusive representative "for the promotion and marketing of, and solicitation of orders for, the sale of" certain medical imaging products.

Apparently 18 months after the GE contract was executed, the Defendants allegedly began to perpetrate a scheme to misappropriate the GE contract for themselves. The "disintegration plan" allegedly called for the Defendants to generate a termination event under the GE contract by, *inter alia*, creating discord among Vaso's employees and by later encouraging core management personnel to resign *en masse* — after which they would then join the Defendants in a competing entity, expressly created to acquire and misappropriate the GE contract.

According to the Plaintiffs, in April of 2012, in furtherance of the disintegration plan, Defendant Brent Barron announced his immediate resignation (with no prior notice), and then informed GE that he had resigned from Vaso. Defendants Margaret Walker and Charles Hughes resigned approximately five weeks later.

Procedural History

The Plaintiffs commenced the instant action in 2013. The Defendants thereafter moved to dismiss the amended complaint arguing, *inter alia*, that the Plaintiffs' complaint failed to state a cause of action and/or was not pleaded with the requisite particularity within the meaning of CPLR 3016(b). [\[EN1\]](#)

In a decision and order dated January 2, 2014, this court denied the Defendants' motion except with respect to Plaintiffs' damages claim based upon the payment of employee retention bonuses and other benefits which, the Plaintiffs claim, allegedly represented the only way they could fortify

employee morale and prevent additional resignations.

The prior order, dated January 2, 2014 and entered January 10, 2014, was served with Notice of Entry on the Plaintiffs on January 16, 2014. The Order with Notice of Entry stated as follows: "Please take notice that the within is a true copy of the January 2, 2014 Decision and Order of the Honorable Vito M. DeStefano, a Justice of this Court, duly filed and entered by the Clerk of Nassau County on January 2, 2014" (Ex. "B" to Cross Motion). [\[FN2\]](#)

The Defendants now move for an order pursuant to CPLR 3108 and 3111 for an open commission of five non-party witnesses - all out-of-state employees of GE Healthcare.

The Plaintiffs cross-move for: 1) an order pursuant to CPLR §2221(d)(1) granting them "leave to reargue so much of the Court's Decision and Order dated January 2, 2014 which dismissed Plaintiffs' claim for damages relating to their retention incentive payments"; 2) an order pursuant to CPLR 3025 granting them leave to serve a second amended complaint which will include additional factual allegations pertaining to Plaintiffs' damages' claims; and 3) an order pursuant to CPLR 3108 and 3111 for an open commission of seven non-party witnesses.

For the reasons that follow, the Defendants' motion is granted in part and denied in part and the Plaintiffs' motion is denied.

*[*3] Defendants' Motion for an Open Commission*

Defendants seek an order pursuant to CPLR 3108 and 3111 for the issuance of an open commission for depositions of Sofiane Laoussadi, Anthony Rossa, Mark Delaney, Matthew Marsh and Marcelo Mosci, to appear for a deposition in the State of Wisconsin. Defendants contend that these individuals are "fact witnesses that have knowledge of matters and have in their possession or control documents and writings which are relevant to Defendants' defenses of these related matters" and that "without the subpoenas, the information and documents in the possession of [the witnesses] are not discoverable by Defendants" (Affirmation in Support of Motion at ¶¶ 5 & 7) .

The branch of Defendants' motion for an open commission of Sofiane Laoussadi and Anthony Rossa is granted as unopposed. According to the Plaintiffs, they have "no opposition to Defendants' application as it relates to Sofiane Laoussadi and/or Anthony Rossa" as "[b]oth of these individuals were involved with Plaintiffs and, upon information and belief, have relevant information material

to Plaintiffs' cause of action and in turn to Defendants' defenses" (Affirmation in Support of Cross Motion at ¶ 6).

With respect to the remaining individuals (Mark Delaney, Matthew Marsh and Marcelo Mosci), however, Plaintiffs argue that depositions "are sought by Defendants solely to cause unnecessary hardship to these individuals, and in turn to Plaintiffs" (Affirmation in Support of Cross Motion at ¶ 6). Specifically, the Plaintiffs argue that Delaney "has no knowledge and/or information pertaining to any of the material issues contained in this action" and similarly, that Marsh has "no direct knowledge of any of the material issues in this case and his involvement will not further Defendants' efforts in any way" (Affirmation in Support of Cross Motion at ¶ 7). With respect to Marcelo Mosci, the U.S. and Canadian CEO of GE Healthcare, Plaintiffs contend that whatever information Mosci "may possess can be more easily and less intrusively obtained through the depositions of Sofiane Laoussadi and Anthony Rossa without involving GE Healthcare's top executive. At the very least, Defendants should be forced to depose these individuals first before seeking an Order from this Court allowing them to burden this high level executive and then, only upon a further showing to this Court that the information they seek was otherwise unavailable to them" (Affirmation in Support of Cross Motion at ¶¶ 7, 8).

An open commission may be issued by the trial court where necessary or convenient to conduct discovery outside the State and it is the party seeking the issuance of the commissions who bears the burden of demonstrating that they are "necessary or convenient" (see CPLR 3108; [Coventry Real Estate Advisors, L.L.C. v Developers Realty Corp., 85 AD3d 450, 451 \[1st Dept 2011\]](#)).

*Pursuant to CPLR 3108, a party may take an oral deposition outside the state under an open commission where it is demonstrated to be necessary or convenient. The reason for this procedural device is that service of a subpoena outside of New York State is ineffective to compel a non-party witness to appear at a deposition or produce documents. In order to justify the issuance of a [*4] commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate the information sought is material and necessary to the prosecution or defense of the claims. The moving party must establish that the witness possesses relevant evidence, or that an examination of the witness would be reasonably calculated to lead to the discovery of information bearing on the claims or defense at issue.*

Generally, however, the party seeking an open commission must demonstrate not only that the information sought is necessary to the investigation of the claim but also that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or the cooperation of the witness either in New York or the other state. Absent any showing that the "the proposed out-of state deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful when the [designee] seeks the assistance of the foreign court in compelling the witness to attend the examination, the moving party fails to demonstrate that a commission is necessary or convenient (In re Peltz, 39 Misc 3d 1225(A) [Sur Ct Nassau County 2013] citing 2000 Arthur Ave Corp v Hardy, NYLJ, Sept 17, 2009, at 28, col 3 [Sup Ct Westchester County] [internal citations and quotation marks omitted]; Cioffi v S.M. Foods, Inc., 2012 WL 9367500 [Sup Ct Westchester County 2012]).

*Here, irrespective of whether the Defendants have demonstrated that the testimony of the non-party witnesses and the information sought is relevant, the present application is devoid of any information concerning counsel's efforts, if any, to obtain the cooperation and voluntary appearance of the non-party witnesses ([see MBIA Insurance Corp. v Credit Suisse Securities \(USA\) LLC, 103 AD3d 486](#) [1st Dept 2013] [internal citations omitted] ["Denial is proper for the additional reason that plaintiff has failed to demonstrate that a commission is necessary or convenient", by neglecting to include allegations that the proposed out-of-state deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful"]; [Reyes v Riverside Park Community \(Stage I\), Inc., 59 AD3d 219](#) [1st Dept 2009] [internal citations omitted] [trial court properly denied motion for open commission since " absent allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful when the [designee] seeks the assistance of the foreign court in compelling the witness to attend the examination', the [movants have] failed to demonstrate that a commission is necessary or convenient"]; *Susan A. v Steven J. A.*, 141 AD2d 790 [2d Dept 1988] [same]; *Matter of Mittler*, 15 Misc 3d 1142(A) (Sur Ct Nassau County 2007) [application for open commission was denied where it was devoid of any information concerning efforts by counsel to obtain the voluntary cooperation of non-party witness]). The only basis for the open commission for these five non-party GE Healthcare employees is that they are "fact witnesses that have knowledge of matters and have in their possession or control documents and writings which are relevant to Defendants' defenses of these related matters"*

Accordingly, Defendants' motion for the open commissions is denied as to non-party

*[*5]witnesses Mark Delaney, Matthew Marsh and Marcelo Mosci.*

Plaintiffs' Cross Motion

The Plaintiffs cross-move for: an order pursuant to CPLR 2221 granting them leave to reargue Defendants' prior motion which sought dismissal of the amended complaint; (2) an order pursuant to CPLR 3025 granting Plaintiffs leave to serve and file a second amended complaint; (3) and an order pursuant to CPLR 3108 and CPLR 3111 directing the issuance of an open commission to take depositions of six non-party witnesses.

a. Motion to Reargue

The branch of the Plaintiffs' cross motion for leave to reargue certain branches of the Defendants' prior motion to dismiss is denied.

b. Motion to Amend

The branch of Plaintiff's cross-motion that seeks to further amend the complaint is denied inasmuch as Plaintiffs failed to clearly show "the changes or additions to be made to the pleading" in the second amended pleading submitted with the motion (see CPLR 3025[b]; Wynn v BNC Mortgage Corp., 2013 WL 6822860 [Sup Ct Bronx County 2013]). [\[FN3\]](#)

c. Motion for Open Commission

The Plaintiffs also move for an order pursuant to CPLR 3108 and CPLR 3111 directing the issuance of an open commission to take the depositions of seven non-party witnesses, namely, Manny Niebla, Mifhael Wendt, Aaron Hudy, Laurie Fisher, William Kelly, Sandra Barron and Robert Esleack.

Plaintiffs' argument in favor of the open commission is that these six non-party witnesses

*"have knowledge of matters and that some or all of them may have in their possession or control documents and writings which are relevant to Plaintiffs' causes of action" and that Plaintiffs' [*6]counsel "do[es] not believe that the information and documents sought from these non-party witnesses will be available to them absent the issuance of these subpoenas" (Affirmation in Support of Cross Motion at ¶¶ 50, 53)*

*The branch of the cross motion for an open commission to take the depositions of the above named non-parties set forth in Plaintiffs' moving papers is denied inasmuch as the Plaintiffs have failed to set forth any basis or information concerning their efforts to obtain the voluntary cooperation of the non-party witnesses [\[FN4\]](#) (see *MBIA Insurance Corp. v Credit Suisse Securities (USA) LLC*, 103 AD3d at 486, *supra*; *Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d at 219, *supra*; *Susan A. v Steven J. A.*, 141 AD2d 790 [2d Dept 1988]).*

Conclusion

Based on the foregoing, it is hereby

Ordered that the branch of Defendants' motion seeking the open commission of Sofiane Laoussadi and Anthony Rossa is granted in the form annexed to Defendants' Motion at Exhibits "F" & "G"; and it is further

Ordered that the branch of Defendants' motion seeking the open commission of Mark Delaney, Matthew Marsh and Marcello Mosci is hereby denied without prejudice to renewal within 30 days of the date hereof and upon submission of proof with respect to the unavailability of the witnesses and documents; and it is further

Ordered that the Plaintiffs' cross motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: June 30, 2014

Hon. Vito M. DeStefano, J.S.C.

Footnotes

Footnote 1: *The complaint was amended as of right pursuant to CPLR 3025(a).*

Footnote 2: *While the Defendants' Order with Notice of Entry indicated that the order was "entered" on January 2, 2014 the order was actually entered on January 10, 2014. The order annexed to Defendants' Order with Notice of Entry did not have the word "entered" stamped on it. On January 28, 2014, the Plaintiffs served and filed an Order with Counter Notice of Entry on the Defendants which contained a copy of the "entered" order. Plaintiffs argue that Defendants' Order with Notice of Entry was "defective" as it "erroneously states the Entry date as being January 2, 2014"; and "was not the Entered' copy stamped by the Court Clerk" and, because it was defective, it is the date of the Counter Notice which begins the time period in which to file a motion to reargue (Affirmation in Support of Cross Motion at ¶¶ 12-15). Conversely, the Defendants argue that the branch of Plaintiffs' motion seeking reargument is untimely as Defendants served the Order with Notice of Entry on January 16, 2014 and the motion to reargue was not made until February 26, 2014.*

Footnote 3: *Notwithstanding Plaintiffs' counsel's affirmation indicating certain modifications to be added to the amended complaint, Plaintiffs have nevertheless failed to comply with requirements set forth in CPLR 3025[b], to wit, that the proposed pleading clearly show the changes or additions to be made to the pleadings. The motion also does not contain a copy of the pleading sought to be amended.*

Footnote 4: *Inasmuch as the Plaintiffs have failed to satisfy their burden that the open commission is "necessary or convenient", the court does not address the merits of Plaintiffs' application for the open commissions.*