

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

CAROL EDMEAD J.S.C.

PRESENT: _____
Justice

PART 35

LADOCAP VALUE

INDEX NO. 600973/07

MOTION DATE 10/11/07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Lowenstein Sandler

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 05 2007

NEW YORK COUNTY CLERK'S OFFICE

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Michelle Rice pursuant to CPLR 3104 for a Court-appointed referee to supervise further depositions in this case and for an order directing that further depositions be held at the courthouse is granted and the parties shall proceed with depositions under the supervision of a special referee at the courthouse forthwith. And it is further

ORDERED that the movant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 12/5/07

CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 35

-----X
LADDCAP VALUE PARTNERS, LP,

Plaintiff,

Index No. 600973-2007

-against-

DECISION/ORDER

LOWENSTEIN SANDLER PC,

Defendant.

-----X
LOWENSTEIN SANDLER PC,

Counterclaim and
Third-Party
Defendant,

-against-

LADDCAP VALUE PARTNERS, LP,

Counterclaim
Defendant

-and-

ROBERT B. LADD and LADDCAP VALUE
ASSOCIATES LLC,

Third-Party Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

I am “not aware of any rule or law which requires
civility between counsel” (Thomas B. Decea, Esq.).

The genesis of this application is a claim of contumacious, abusive, and strident conduct
by counsel during a deposition.

Michelle Rice, Esq. (“Rice”), moves pursuant to CPLR 3104 for a Court-appointed
referee to supervise further depositions in this case and for an order directing that further

depositions be held at the courthouse. Rice represents the defendant/third-party plaintiff, Lowenstein Sandler PC (“Lowenstein LP”), against claims of legal malpractice by plaintiff Laddcap Value Partners, LP (“Laddcap Partners”).

On October 1, 3 and 4, 2007, Rice took the deposition of plaintiff’s representative, Robert B. Ladd (the “witness”), who, along with Laddcap Value Associates (“Laddcap Associates”), are third-party defendants in this action. The witness is the sole employee of both plaintiff Laddcap Partners and Laddcap Associates. The witness was represented by Mr. Thomas B. Decea (“Decea”).

Rice’s motion is precipitated by the behavior of Decea during the three days of depositions of the witness. Rice points out that during the course of the witness’s deposition, Decea repeatedly directed the witness not to answer certain questions posed to him, which were, on many occasions, followed by inappropriate, insulting, and derogatory remarks against Rice concerning her gender, marital status, and competence. Although both counsel agreed that all objections, except those as to form, were preserved, Decea made numerous speaking objections, and threatened to leave the deposition in response to such “leading” questions. Rice also contends that Decea asked her several times, off the record, whether she was married.

In light of the above, Rice argues that Decea’s conduct was intended to intimidate her and interfere with her ability to zealously defend and conduct further depositions, in violation of New York’s Code of Professional Responsibility, EC 7-37, DR 1-102 [A][6], New York Executive Law §296((1)(d), Rules of the Chief Judge of New York §25.16, and Uniform Rules for the Conduct of Depositions. Because of Decea’s tactics and his demonstrated inability or unwillingness to comply with rules governing professional conduct, the Court should exercise its

discretion under CPLR 3104(a) and appoint a special referee to ensure that the depositions are completed in a timely and cost-effective manner.

In opposition, Decea maintains that while he “aspires to be civil” to other counsel, he is “not aware of any rule or law which requires civility between counsel.” According to Decea, that Rice was intimidated by him was “unfortunate” and does not substantiate any improper actions on his part. Decea complains that Rice was antagonistic toward him and the witness, was sarcastic with her questions, and harassing with her facial expressions. When Rice threatened to file a complaint against him with the Court, Decea asked to speak with her privately, whereupon both parties shook hands in agreement that if she refrained from asking leading and compound questions and badgering the witness, he would try not to interrupt her and limit his objections. According to Decea, “There was never another word about it for the rest of the week.” When Rice threatened to contact the Court during the first day of depositions, Decea offered to arrange a conference call. However, Rice then declined, and continued the deposition. Now, on the eve of producing her client for a deposition, Rice “plays the gender card.” Decea claims he instructed the witness not to answer approximately four times, and on each occasion, stated the basis for his objection and proffered a proper question. Decea contends that his references to “hun” and “girl” were not malicious, and if Rice would have advised him that she was offended, he would have stopped. If Rice was truly offended, she would not have completed three days of depositions. Rice’s motion is a delay tactic to permit her client to assess the plaintiff’s testimony and justify the fact that Rice is unavailable to for the deposition of her client scheduled for the following week. Decea intends to move for costs and sanctions against Rice and her firm.

Analysis

There is no question that the Court has discretion to oversee the discovery of cases brought to the Court's attention (*Estate of Ungar ex rel. Strachman v Palestinian*, 44 AD3d 176, 841 NYS2d 61 [1st Dept 2007]; *In re Steven B.*, 24 AD3d 384, 385, 807 NYS2d 29 [2005] ["given the crushing caseloads ... judges face ... they are vested with broad discretion to advance cases fairly and cautiously, but also expeditiously"], *affd.* 6 NY3d 888, 817 NYS2d 599, 850 NE2d 646 [2006]). This discretion includes the power, pursuant to CPLR 3104, to appoint a referee to likewise oversee the discovery process and direct that the discovery, such as a deposition, be held in the courthouse (*Kogan v Royal Indem. Co.*, 179 AD2d 399, 577 NYS2d 849 [1st Dept 1992] [stating that the decision to appoint a referee pursuant to CPLR 3104 "is a matter within the discretion of the trial court and is especially appropriate where, as here, a party appearing *pro se* is hostile or otherwise frustrates discovery])). At issue is whether the circumstances surrounding the depositions thus far warrant the appointment of a referee to oversee further depositions at the courthouse.

The following are some examples of the colloquy between Rice and Decea:

MR. DECEA: What I want to do is get you mad enough so I can try this case.

THE WITNESS: She won't be at trial.

MR. DECEA: Promise you'll let me try this case.

MS. RICE: You should look me up, man.

A. I did.

Q. Obviously not well enough

A. I didn't look into whether you're married or not.

MR. DECEA: We're interested as to why you don't wear your wedding ring.

MS. RICE: Is that right? You can be interested all you want.

MR. DECEA: I'm very interested.

(EBT., Vol. 2, page 192)

MS. RICE: Attacking everyone at the table accomplishes absolutely nothing.

MR. DECEA: What accomplishes nothing is your inability to conduct a deposition. This is not an interview which apparently you're more accustomed to doing than taking

depositions.

THE WITNESS: I agree.

MS. RICE: That's wonderful. This line is --

MR. DECEA: This is not a white collar interview that you're sitting here interviewing something with your cute little thing going on.

MS. RICE: My cute little thing?

MR. DECEA: This is a deposition that has rules about what kinds of questions you can ask and how to ask them. You've led him the entire morning. You led him all day Monday when there's no reason to lead him. If you want to lead him to get into a subject area I can understand that and I'll let that go, but when you get to the subject area ask him nonleading questions.

MS. RICE: Mr. Decea, you conduct the type of deposition you wish to conduct, I conduct the type of deposition I wish to conduct.

MR. DECEA: And I respect that. I'm just saying respect my defense, respect my defense of the litigation, that's all. Nothing personal, dear.

MS. RICE: Nothing personal, dear, let's see. I can't tell you the number of things that you have said were more than personal and certainly offensive and probably --

MR. DECEA: You told me you're not offended.

MS. RICE: Listen, listen.

THE WITNESS: Now she's offended.

MR. DECEA: Now you're offended.

MS. RICE: I'd like to complete a sentence.

MR. DECEA: Your skin is getting thin now.

MS. RICE: There are rules of conduct as you well know that you have to observe. Whether or not you like being opposite a table from a woman, you have to observe them.

(EBT., Vol. 2., page 85-89).

MR. DECEA: Let me just say, if you ask another leading question I am directing him not to answer.

MS. RICE: I am well-entitled to ask leading questions, as you know, and indeed he has proven himself to be quite a hostile witness --

A Me?

MS. RICE: -- so I would be entitled to ask him leading questions at any point.

A I am not hostile.

MS. RICE: So, in any event --

MR. DECEA: But this is not the trial.

MS. RICE: It doesn't matter.

MR. DECEA: It does, hon.

MS. RICE: It does, hon?

MR. DECEA: Yes, it does.

A As an Attila. As an Attila. Don't get --it's not -- it was not personal.

Q As an Attila? I don't even understand that.

A Attila the Hun.

Q Attila the Hun.

(EBT., Vol. 2, pages 28-29).

MR. DECEA: This is the first deposition you ever took?

MS. RICE: Right.

MR. DECEA: I mean, come on, you got to be kidding me. You're not trying this case, are you?

MS. RICE: Are you done?

MR. DECEA: You better get somebody else here to try this case, otherwise you're gonna be one sorry girl.

MS. RICE: A sorry girl?

MR. DECEA: Yes.

(EBT., Vol. 3, pages 31-32).

Q. At the time was there any item that is listed in those three paragraphs that you did not intend to do?

THE WITNESS: [REDACTED]

Q. If you want to tell me that, but using the list in those paragraphs, tell me what you intended to do.

THE WITNESS: [REDACTED]

MR. DECEA: At the time.

MS. RICE: At the time.

MR. DECEA: I mean it may have been overinclusive --

MS. RICE: You can stop testifying, Mr. Decea.

MR. DECEA: So that there were options going forward.

MS. RICE: That's fine. Mr. Decea, you're doing a great job testifying for your client.

MR. DECEA: So you don't want to be -- it's like when you have the purpose for a corporation, it's any lawful purpose so you can do anything and not limit yourself.

MS. RICE: I would ask you to stop that.

MR. DECEA: That's a very misleading line of questioning. The way you're asking it is so convoluted.

MS. RICE: Apparently you're misled a lot.

Q. You can answer the question.

(EBT., Vol. 1 pages 111-112)

Q. So is it your belief as you sit here today that Lowenstein would know the five to ten directors you were interviewing at that time or potential directors for the Delcath board?

MR. DECEA: I object to the form of the question. That's not what he testified to.

A. I can't answer that question.

Q. So you can't know if Lowenstein would know who the five to ten are but you can know that talking to Lowenstein would refresh your recollection as to who the five to ten are?

MR. DECEA: Objection to the question.

MS. RICE: Could you please read the question about what he would do to refresh his recollection.

MR. DECEA: It's a mischaracterization of the testimony. It's his testimony that they had questionnaires. He didn't know -- how could he know what they know? He's saying that there's documents that are in their possession that may refresh his recollection regarding the prior question.

MS. RICE: Your testimony again is exceptional. I'd prefer you not to.

MR. DECEA: I'd make a good witness, wouldn't I?

MS. RICE: You would make a good witness. I still prefer you not to then.
(EBT., Vol. 1, pages 123-124)

MR. DECEA: If this letter was sent four days before maybe those emails wouldn't have gone missing.

MS. RICE: Mr. Decea.

MR. DECEA: You're admitting they sent a letter too late.

MS. RICE: I'm not admitting anything. Your obvious sensitivity to this is remarkable. I would imagine this is when you would keep your mouth shut.

MR. DECEA: I want to make sure the adjuster knows what's going on, that's all.

MS. RICE: It's stunning.

MR. DECEA: What I want to do is get you mad enough so I can try this case.

THE WITNESS: She won't be at trial.

(EBT., Vol. 2, pages 191-192).

Violation of Rule Against Speaking Objections

The uniform rules for the conduct of depositions became effective on October 1, 2006.

Section 221.1(a) ("uniform rules"), "Objections at depositions," provides in pertinent part:

(a) . . . All objections made at a deposition shall be noted by the officer before whom the deposition is taken, *and the answer shall be given* and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR (emphasis added).

Section 221.1(b), "Speaking objections restricted," provides in pertinent part:

Every objection raised during a deposition shall be stated *succinctly* and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall

include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning (emphasis added).

Section 221.2 requires a deponent to answer all questions except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person. That section specifically states:

An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor.

It appears that Decea's principal objection throughout the deposition was to the form of Rice's questions, which Decea considered "leading" and thus, inappropriate. A leading question objection speaks to the form rather than to the substance of the question, and thus, the only obligation of Decea under the circumstances was to object as to form and permit the witness to answer the question. It was improper for Decea to direct the witness not to answer where none of the grounds in 221.2 were stated. Indeed, upon a review of the transcript, none of the grounds in 221.2 existed. Furthermore, Decea's objections to form were accompanied by speeches which clearly exceeded what was necessary to preserve the objection (*see* CPLR 3115, Patrick M. Connors, *McKinney's Supplementary Practice Commentaries*, Electronic Update [2007]). Notwithstanding Rice's expressed objection to Decea's conduct, Decea persisted in making speaking objections, in violation of the uniform rules.

Violation of Duty of Civility and Gender-Neutral Conduct

One of the goals of the CPLR is to promote "efficiency, civility, and professional decorum at the deposition session and to create an environment in which objections do not cause

constant interruption and delay (*see* CPLR 3115, Patrick M. Connors, *McKinney's Supplementary Practice Commentaries*, Electronic Update [2007]).

In a case squarely on all fours, *Principe v Assay Partners* (154 Misc 2d 702 [Supreme Court, New York County]), counsel Lawrence Clarke, in front of numerous attorneys and the witness being deposed, made several remarks toward counsel, Beth Rex, including: "What do you know, young girl"; "Be quiet little girl"; "Go away, little girl" while dismissively flicking his fingers and waiving a back hand at Ms. Rex. In opposition to a motion for sanctions based on such conduct, Mr. Clarke attempted to justify his comments, characterizing them as "name-calling." In a well-reasoned and researched opinion, the court characterized such comments as gender bias remarks. The Court pointed out that

New York State Judges have been publicly disciplined for virtually identical comments. Twice addressing a female attorney as "little girl" was the basis for public admonition, with such words described as "an epithet calculated to demean the lawyer" and "objectionable no matter what its origin"; calling female attorneys "girls" was described as "demeaning and undignified" and of an "offensive nature" (*see*, 8 Determinations of NY St Commn on Judicial Conduct, at 192 [1982-1983]; 1988 Ann Report of NY St Commn on Judicial Conduct, at 28; . . . in Federal District Court, an attorney who, among other things, disparagingly called a Judge's law clerk "young lady" was found to have "engaged in abusive and discourteous" conduct and publicly censured (Matter of Werner, NYLJ, Jan. 28, 1991, at 6, col 3 [EDNY 1991]).
Principe v Assay Partners, supra at 704-5.

Thus, the Court declared that:

"discriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. The principles involved are so basic that they are set forth in the Preamble to the Code of Professional Responsibility as follows: "The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual ... Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection".
Principe v Assay Partners, supra at 705-6.

* * *

Given the rules applicable to professional conduct, any reasonable attorney must be held to be well aware of the need for civility, to avoid abusive and discriminatory conduct, to conduct proper depositions, to eschew obstructionist tactics, and to generally abide by the norms of accepted practice.

Principe v Assay Partners, supra at 708.

Offensive and abusive language by attorneys in the guise of zealous advocacy is plainly improper, unprofessional, and unacceptable (*see*, Annotation, Attorney's Verbal Abuse of Another Attorney as Basis for Disciplinary Action, 87 ALR3d 351 [1978]). An attorney who demonstrates a lack of civility, good manners and common courtesy taint the image of the legal profession and, consequently, the legal system, which was created and designed to resolve differences and disputes in a civil manner (*see Matter of McAlevy*, 69 NJ 349, 354 A2d 289, 291 [1976]), and an attorney's "conduct ... that projects offensive and invidious discriminatory distinctions ... based on race ... [or] gender ... is especially offensive" (*Matter of Vincenti*, 114 NJ 275, 283, 554 A2d 470, 474 [1989]; *see also People v Fagan*, 104 AD2d 252, 483 NYS2d 489 [4th Dept 1984][noting that "while the correct resolution of civil disputes is indeed an important goal of our legal system, it may fairly be said that society's primary interest in the resolution of civil disputes is that they be settled in a peaceful, orderly, and impartial manner]).

If such objectionable conduct has merited sanctions, which Rice does not even seek in this instance, surely guarding against future objectionable conduct by appointing a referee to essentially monitor Decea would not constitute improvident exercise of this Court's discretion. That Decea claims that he knows of no rule requiring attorneys to be civil is baffling and the Court is not swayed by Decea's pledge to behave at future depositions. In order to ensure that Decea does not fall into the pit of unprofessionalism he once found himself in during the week of


October 5th, the Court determines to appoint a special referee to oversee further depositions, and that such depositions shall be held at the courthouse.¹

Based on the foregoing, it is hereby

ORDERED that the motion by Michelle Rice pursuant to CPLR 3104 for a Court-appointed referee to supervise further depositions in this case and for an order directing that further depositions be held at the courthouse is granted and the parties shall proceed with depositions under the supervision of a special referee at the courthouse forthwith.

This constitutes the decision and order of the Court.

Dated: December 5, 2007



Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED

DEC 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

¹ The Code of Professional Responsibility, as recently amended, explicitly forbids an attorney to "[u]nlawfully discriminate in the practice of law" and provides that a final determination "finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding" (Code of Professional Responsibility DR 1-102 [A] [6] [22 NYCRR 1200.3 (a)(6)]).