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*Merrick (Long Island), New York*

June 25, 2019

*By Electronic filing*  
Hon Erin P. Gall  
Justice, Supreme Court  
Supreme Court, Oneida County  
200 Elizabeth Street  
Utica, New York

**Re: EFCA 2017-000904 [Palumbo v. Migliaccio]  
Plaintiffs' proposed Order to Show Cause (Docket 69)**

Dear Justice Gall:

We represent Defendants in the above matter. I respectfully write concerning Plaintiffs' proposed Order to Show Cause (Docket 69) submitted June 25, 2019, for signature. If the Court elects to sign the Order to Show Cause, then I respectfully request that the Court cross out the Second Ordering Paragraph therein, apparently directing specific weekday dates for Defendants deposition. The basis of my request is the following:

The core issue on the motion is whether the deposition of Dr. Migliaccio can be taken on a weekend day, to minimize the disruption to Dr. Migliaccio's ongoing, active medical practice. Unfortunately, Plaintiffs' counsel does not make that clear in his moving papers, and does not make clear my numerous confirmations that Dr. Migliaccio is ready, willing and able to be deposed, but seeks to sit for the deposition on a weekend day. In fact, Plaintiffs do not appear to give any legitimate basis why the deposition cannot go forward on a weekend. But that can be more fully addressed in opposition papers, as necessary.

Insofar as the Second Ordering Paragraph within the proposed Order to Show Cause is concerned, that paragraph certainly appears to mandate specific weekday dates for the deposition. The date of the deposition is the main contested issue on the motion, primarily regarding whether the deposition can be scheduled for a weekend date, instead of a weekday, as noted in my letter to the Court dated June 24, 2019 (Docket 68.) Essentially, in the Second Ordering paragraph, Plaintiffs' counsel is asking the Court to grant him interim relief setting weekdays for the deposition and short circuit the need for the underlying motion. That does not seem fair or appropriate – as noted in the Practice Commentary to CPLR 2214, which states:

McKinneys - PRACTICE COMMENTARIES  
by Professor Patrick M. Connors

C2214:27 Papers on Order to Show Cause.

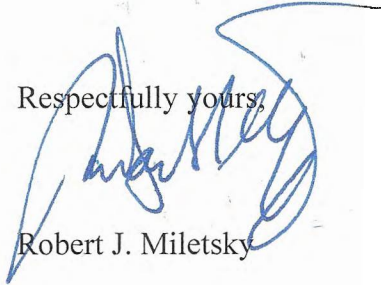
The key papers submitted on an order to show cause are the proposed order, affidavits and a memorandum of law. The order is sought by the applicant as a way to bring on a contested motion, and it will therefore contain, in show-cause terminology, a notice to the other side that it is required "to show cause why thus-and-so relief" should not be granted against it. The thus-and-so relief business has to do with the merits of the motion and the court does not determine those merits when deciding whether to sign an order to show cause. . . .

The usual case finds the court, on the show-cause application, looking not into the merits but into the factors that reflect on whether to allow the show cause procedure, i.e., time, method, etc. The applicant should thus see to it that the affidavit contains facts justifying the court's exercise of discretion as to those items, preferably with support from the memorandum of law. The supporting papers should contemplate and answer the question: why isn't an ordinary notice of motion adequate here? [Emphasis added]

I will refrain from addressing the merits of the motion being brought on by Order to Show Cause, although it does seem that Plaintiffs' counsel is attempting to reargue his earlier discovery motions already decided by the Court. It also does not seem clear why the motion had to be brought on by Order to Show Cause, since Plaintiffs could have set a return date for eight days after service of the motion. In any event, at this point, Defendants respectfully request that if the Court elects to sign the Order to Show Cause, then the Court cross out the second ordering paragraph that essentially determines (as interim relief) the motion before it can be heard.

Thank you.

Respectfully yours,



Robert J. Miletsky