STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BAYSIDE MICHIGAN, INC. and
BAYSIDE PROPERTY, LLC,
Plaintiffs,

Case No. 2015-146663-CZ
Hon. Wendy Potts

v

BLUE MARLIN, LLC d/b/a
BAY SIDE SPORTS GRILLE,
KEY LARGO, LLC, JOHNI SEMMA,
BARRY A. STEINWAY, and STEINWAY
LAW OFFICES, PC,

Defendants,

_____/

OPINION AND ORDER RE: PLAINTIFFS' MOTION TO LIMIT TESTIMONY, EXHIBITS, AND WITNESSES FROM DEFENDANTS' WITNESS AND EXHIBIT LIST AND TO COMPEL PRODUCTION OF DOCUMENTS

At a session of Court
Held in Pontiac, Michigan On
JUL 25 2016

This matter is before the Court on Plaintiffs' Motion to Limit Testimony, Exhibits, and Witnesses from Defendants' Witness and Exhibit List and to Compel Production of Documents. The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, the Court entered a Default against Defendants on January 27, 2016 and dismissed their counterclaims as a sanction for their failure to cooperate with discovery and their noncompliance with the Court's orders. On May 18, 2016, the Court granted Defendants' motion to set aside the Default as to Blue Marlin, LLC d/b/a Bayside Sports Grille, Key Largo, LLC, and Johni Semma in consideration of Defendants' representations that Attorney Barry

Steinway intentionally withheld discovery requests and orders to conceal his conversion or embezzlement of Plaintiff's $200,000.00 earnest money deposit that was being held in Mr. Steinway's IOLTA trust account.

Plaintiffs subsequently filed a motion for reconsideration to contest the Court's decision to set aside the Default. Thereafter, the Court issued the June 21, 2016 Opinion and Order Re: Plaintiffs' Motion for Reconsideration, which provides in pertinent part: "[t]he Court finds that the contradictory Affidavit of Barry Steinway and the supporting emails [attached to Plaintiffs' motion for reconsideration] have called into question the representations that Defendants made in their motion and during the May 18, 2016 motion hearing regarding Barry Steinway's intentional withholding of discovery requests and orders as well as Defendant Semma's claim that the $55,000.00 was not withdrawn from the Bayside deposit. For this reason, an evidentiary hearing is necessary to determine the veracity of Defendants' representations, which were the basis for relief from the Default as provided in the May 18, 2016 Order Regarding Motion."

In their motion, Plaintiffs maintain that the issues for the August 12, 2016 evidentiary hearing are limited to Defendant Johni Semma's Affidavit with regard to the discovery requests and Defendants' claim that the $55,000.00 was not withdrawn from the Bayside deposit. However, the Court agrees with Defendants' position that the evidentiary hearing is not limited only to Defendant Johni Semma's Affidavit. The Court ordered an evidentiary hearing for the reason that Plaintiffs presented the contradictory Affidavit of Barry Steinway as well as supporting documentation to refute the representations Defendants made regarding the discovery requests and the subject withdrawal. The Court finds that the hearing must encompass testimony and/or documentary evidence related to the representations made by Defendant Johni Semma and Barry Steinway regarding the discovery requests for this Court to make a determination as to the credibility of Defendant Johni Semma's representations, which led to the setting aside of the Default. In addition,

the hearing should include evidence regarding Barry Steinway's IOLTA account for this Court to determine whether or not the subject $55,000.00 was withdrawn from the Bayside deposit, the Coliseum proceeds, or other funds. Defendants' expert witness may provide relevant testimony related to the subject $55,000.00 withdrawal. Accordingly, Plaintiffs' Motion is denied in terms of their request to limit relevant testimony, exhibits, and expert witnesses.

Next, Plaintiffs object to Defendants' inclusion of Mark Dikow, Plaintiffs' counsel, as a witness. The Court observes that on July 11, 2016, an Order was entered to quash Defendants' deposition of Mark Dikow. Under the Michigan Rules of Professional Conduct Rule 3.7(a), "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness," with certain exceptions. The Court finds that Mark Dikow is not a necessary witness as the information sought by Defendants can be obtained directly through Barry Steinway's testimony. Therefore, Mark Dikow shall not be compelled to testify at the August 12, 2016 hearing.

Finally, Plaintiffs are seeking the production of closing documents and emails related to the sale of the business known as the Coliseum. Defendants indicate in their Response that they are willing to produce the Coliseum transaction documents that they received from Barry Steinway, subject to privilege and other considerations. Therefore, the Court grants Plaintiffs' document request and hereby orders Defendants to produce those documents, subject to privilege and other considerations, to Plaintiffs by August 1, 2016.

IT IS SO ORDERED.

Dated: JUL 25 2016

Hon. Wendy Potts
Circuit Court Judge