Stark v Matchett
2016 NY Slip Op 31474(U)
August 1, 2016
Supreme Court, New York County
Docket Number: 651815/2014
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

----------X

JESSICA STARK,

Plaintiff,

-against-

REBECCA WINN MATCHETT, individually, CHRISTOPHER MATCHETT, individually, INSTYLE ESSENTIALS WITH TRIOFIT TECHNOLOGY, TRIOFIT, INC. REBECCA & DREW MANUFACTURING, LLC,

Defendants.

----------X

REBECCA & DREW MANUFACTURING, LLC,

Counterclaim-Plaintiff,

-against-

JESSICA STARK,

Counterclaim-Defendant.

----------X

DECISION AND ORDER

Index No. 651815/2014

Mot. Seq. No. 006

HON. ANIL C. SINGH, J.:

In this action, defendant TrioFit, Inc. ("TrioFit") and defendant/counterclaim-plaintiff Rebecca & Drew Manufacturing, LLC ("R&D") (together, "defendants") moves for, *inter alia*, an order, pursuant to CPLR §§ 3110(a) and 3124, to compel plaintiff/counterclaim-defendant Jessica Stark ("plaintiff") to produce documents, and, and order, pursuant to CPLR § 3126, awarding sanctions against plaintiff for

willful failure to comply with discovery requests, and awarding defendant's reasonable attorneys' fees and costs incurred in connection with this motion. Plaintiff opposes and cross-moves for an order imposing sanctions against defendants and awarding reasonable attorneys' fees to plaintiff.

FACTS

This case arises from the allegedly failed negotiations between plaintiff and R&D, and plaintiff's alleged tortious interference with the contract between R&D and InStyle, a Division of Time Inc. ("InStyle"). In late 2012, plaintiff and R&D started negotiating plaintiff's potential involvement in R&D. In July 2013, R&D and InStyle entered into a licensing agreement, while the negotiations between plaintiff and R&D allegedly faltered.

On or about June 13, 2014, plaintiff commenced this action for, *inter alia*, breach of contract. Defendants' counsel allegedly served their first and second request for production ("RFP") of documents to Stark's counsel on November 12, 2014 and February 18, 2015 respectively. On February 23, 2015, Defendants' counsel allegedly served the interrogatories, which required Stark to identify the people having information regarding the aforementioned negotiations. Defendants allege that plaintiff failed to respond or object to the discovery requests. On July 21, 2015, the Court ordered plaintiff to answer discovery request by August 8, 2015 and interrogatories by August 20, 2015. See Docket No. 37. Defendants and plaintiff

allegedly agreed on three occasions to extend plaintiff's time to respond to the discovery request, which was ultimately set to November 11, 2015. Defendants allege that plaintiff still failed to produce a single document or to provide any answer or objection.

DISCUSSION

Defendants' Motion to Compel Plaintiff to Produce Discovery

Defendants' motion to compel plaintiff to produce documents in response to defendants' first and second request for production is granted.

The standard for disclosure under New York law entails a "full disclosure of all matter material and necessary in the prosecution or defense of an action..." See CPLR § 3101. This provision has been liberally interpreted to require disclosure of any facts which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 406 (1968). Thus, discovery is restricted only by a test for materiality of usefulness and reason, measured by whether the information sought is sufficiently related to the issues in litigation. Id. "[A]ny party may demand disclosure of evidence, or information leading to evidence, relevant to the case." Northway Engineering, Inc. v. Felix Industries, Inc., 77 N.Y.2d 332, 335 (1991).

Defendants demanded plaintiff to produce documents, including but not limited to, with respect to plaintiff's or her husband's communications to third

parties about the case, and negotiations and agreements between plaintiff and defendants. See Defendant's Motion to Compel ("MTC") ¶¶ 24, 26; Exhibit A, B, C. These requested documents relate directly to the plaintiff's allegation that Christopher Matchett was centrally involved in negotiations concerning plaintiff's purported equity, in connection with the failed negotiations over Stark's potential participation in R&D. See Dockets Nos. 1-2; see, e.g., Pinter-Zwicker Elec. Co., Inc.v. Alliance Elec., Inc., 175 A.D.2d 737 (1st Dept 1991) (holding that in an action brought by electrical subcontractor for breach of agreement entered into with its parent company, discovery –including depositions of chairman of subcontractor and parent company- is "material and necessary" to the issue). Since these are the very documents and information on which plaintiff relied in commencing this action, "there is a[] possibility that the information sought [can be] use[d] ... in rebuttal or for cross-examination," and consequently defendants are entitled to answers to their interrogatories. Allen, 21 N.Y.2d at 452, citing In re Comstock's Will, 21 A.D.2d 843, 843 (4th Dept 1964).

This Court ordered plaintiff at the preliminary conference on July 21, 2015 to respond to interrogatories and discovery requests by August 8th, 2015. See Docket No. 37. This deadline was later extended three times in accordance with the communications between the parties, ultimately to November 11, 2015. See Exhibits G, H. However, plaintiff failed to respond by that time and served her objections to

the discovery requests on May 12, 2016. See Reply Affirmation of Aari Itzkowitz in Support of Defendants' Motion to Compel Discovery from Plaintiff and for Sanctions ("RA"), ¶ 6. Where a party fails to timely respond as requested to discovery requests pursuant to CPRL § 3120, "the party seeking disclosure may move to compel compliance or a response." CPLR § 3124. The party who chooses to ignore a notice for discovery or inspection does so at his peril. Coffey v. Orbachs, Inc., 22 A.D.2d 317, 319 (1st Dept 1964). "[T]he only permissible method for challenging a notice for discovery is to move for a protective order, within the time limitations." Id.

When the recipient of a demand for disclosure under CPLR § 3120 fails to respond within the time limitations in CPLR § 3122(a), that party significantly limits the grounds for objection. Objections pertaining to irrelevance under CPLR § 3101(a) or material prepared in anticipation of litigation under CPLR § 3101(d)(2) are no longer available. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994). The party who failed to serve any response to a disclosure demand may object only on the grounds that the material requested is privileged under CPLR § 3122(a) or is palpably improper. Lazan v. Bellin, 95 A.D.2d 751 (1st Dept 1983); see also Brian Parenteau, Inc. v. Dean Witter Reynolds, 267 A.D.2d 576, 577 (3d Dept 1999) (holding same), Aetna Ins. Co. v. Mirisola, 167 A.D.2d 270, 271 (1st Dept 1990), Titleserv, Inc. v. Zenobio, 210

A.D.2d 314, 315 (2nd Dept 1994). Since the documents sought here relate to the specific subject matter of this litigation, they are not palpably improper. See Zurich Ins. Co. v. State Farm Mut. Auto Ins. Co., 137 A.D.2d 401, 402 (1st Dept 1988).

None of the cases plaintiff cited support the proposition that "precluding Plaintiff from pleading her objections, is considered a 'drastic remedy' by the Court," instead the only measure these cases called drastic was striking the complaint pursuant to CPLR 3126(c). See Affirmation in Opposition to Defendants' Motion to Compel ("AIO") ¶ 14; see, e.g., Campbell v. NYC Transit Authority, 109 A.D.3d 455, 456 (2d Dept 2013), Rock City Sound, Inc. v. Bashian & Farber, LLP, 83 A.D.3d 685, 686 (2d Dept 2011). Plaintiff's argument suggests that precluding plaintiff from objecting to discovery requests and compelling her to produce such requested documents is a "more extreme measure" than the "drastic remedy" of striking plaintiff's cause of action all together. See AIO ¶ 14. The Court finds this argument unreasonable because striking a cause of action would, by definition, preclude plaintiff from objecting to discovery requests, as such requests are part of the cause of action.

Plaintiff also seeks for the Court not to preclude her from objecting to defendants' discovery requests on the grounds that such a measure "may only be imposed if there is a systematic failure to comply with discovery demands or orders that are clearly willful or contumacious." Id. However, "[a] trial court is vested with

broad discretion regarding discovery." 148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co., 62 A.D.3d 486, 487 (1st Dept 2009). In Mary Imogene Bassett Hosp. v. Cannon Design, Inc., 97 A.D.3d 1030 (3d Dept 2012), the Third Department held that the Supreme Court did not abuse its discretion in failing to preclude plaintiff from objecting to discovery request on the grounds that "plaintiff's late submission, which occurred less than seven days after the court-ordered deadline, was [not] a result of any bad faith or willful noncompliance." Id. at 1033. However, here distinguishably, plaintiff thrice asked the court-ordered deadline of August 20, 2015 to be extended but still failed to serve by November 11, 2014, the date both parties ultimately agreed. See MTC ¶¶ 33-39. Defendant alleges to be served with plaintiff's delayed submission on May 12, 2016. See RA ¶ 5. Courts may infer a willful and contumacious noncompliance from the party's "failure to comply with court orders, in the absence of adequate excuses." Henderson-Jones v. City of New York, 87 A.D.3d 498, 541 (1st Dept 2011); see also Johnson v. City of New York, 188 A.D.2d 302, 303 (1st Dept 1992).

Plaintiff's argument that the Court should not preclude plaintiff the right to object to defendants' discovery requests because public policy favors actions to be resolved on the merits whenever possible is misleading. A motion to compel the production of requested documents, unlike a motion to dismiss, does not prevent the action to be resolved on the merits. All the cases plaintiff cited discuss striking the

pleading, and not denying a party the right to object to the discovery request. See, e.g., Negro v. St. Charles Hosp. & Rehabilitation Ctr., 44 A.D.3d 727, 728 (2d Dept 2007), 1523 Real Estate, Inc. v. East Atl. Props. LLC, 41 A.D.3d 567, 568 (2d Dept 2007), A.F.C. Enters., Inc. v. NYC Schools Constr. Auth., 33 A.D.3d 737 (2d Dept 2006).

Plaintiff's reliance on CDR Créances S.A.S. v. Cohen, 23 N.Y.3d 307 (2014) is also misguided. The actions that are considered to constitute a "[f]raud on the court" and "involve willful conduct that is deceitful and obstructionist" and "injects misrepresentation and false information into the judicial process so serious that it undermines the integrity of the proceedings" are, as plaintiff indicated in her brief, "in addition" to the CPLR § 3126 sanctions. AIO ¶ 23; see id. at ¶ 24 citing CDR Créances S.A.S., 23 N.Y.3d at 318. Therefore, the standard of "fraud on the Court" discussed in AIO 23-27 is irrelevant to the defendant's motion to compel the production of certain documents.

Defendants claimed to have served their responses and objections to plaintiff's discovery requests in accordance with the court order and parties' consent on November 11, 2015. See MTC ¶ 38. However, plaintiff alleges that defendants failed to produce any discovery until April 2016. See AIO ¶ 18. However, this motion to compel is not about an allegation that defendants did not timely produce

the documents that they already produced but about the rest of the requested documents that defendants are yet to produce.

Plaintiff not only failed to move for a protective order, but she also made "no attempt ... to offer any valid excuse or show some good cause for not having applied for a protective order within the time limited by CPLR § 3122." See Coffey, 22 A.D.2d at 320. Hence, the Court denies her the right to object to defendants' discovery requests and grants defendants' motion to compel plaintiff to produce all documents requested by defendants.

Defendants' Motion to Award Sanctions Against Plaintiff for Willful Noncompliance to Discovery

Defendants' motion to compel plaintiff to award sanctions against plaintiff for willful noncompliance to discovery requests is denied.

Pursuant to CPLR § 3126, the party whose discovery request was ignored can proceed "under CPRL 3126 for the imposition of the penalties therein provided" where the recipient of discovery request "refuses to obey ... or wil[l]fully fails to disclose information which the court finds ought to have been disclosed." Aha Sales, Inc. v. Creative Bath Products, Inc., 110 A.D.3d 1019, 1019 (2d Dept 2013); Coffey, 22 A.D.2d at 318. "[T]he cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequences ... [when] a party has repeatedly failed to comply with discovery

orders..." Figdor v. City of New York, 33 A.D.3d 560, 561 (1st Dept 2006) (internal citation omitted). Even if the requesting party's motion to dismiss the noncompliant party's complaint was denied "for lack of clear showing that the noncompliance was willful or contumacious, plaintiffs inexcusable laxness should not escape adverse consequence." Advanced Fertility Servs., P.C. v. Yorkville Towers Assocs., 61 A.D.3d 472, 473 (1st Dept 2009) (internal citations omitted).

Plaintiff argues that defendants' demand for sanctions against plaintiff should be denied because defendants failed to make a good effort to resolve a discovery dispute. See AIO ¶¶ 41, 47. Pursuant to 22 NYCRR 202.7(c), "[t]he affirmation of good faith effort ... shall indicate the time, place, and nature of the consultation and the issues discussed and resolutions." 148 Magnolia, LLC, 62 A.D.3d at 487. Following the first request for production of discovery documents on November 12, 2014 until the preliminary conference held on July 21, 2015, defendants' counsel contacted plaintiff's counsel eleven times. See RA 33-37. However, despite these efforts, plaintiff allegedly failed to respond or object with respect to all documents requested. Id. at 38. Consequently, the Court is not convinced that defendants' counsel "did nothing for three months [after the last extension], and then just filed the instant motion." See AIO 46.

Courts enjoy "broad discretionary power in controlling discovery and disclosure, and only a clear abuse of discretion will prompt appellate action."

Hameroff & Sons, LLC v. Plank, LLC, 108 A.D.3d 908, 909 (3d Dept 2013). In Hameroff, the Third Department upheld the Supreme Court's use of discretion in finding that the recipient of the discovery request willfully failed to comply and in precluding that party from offering evidence concerning the stipulation of evidence. See id. The party in Hameroff who was requested to produce discovery failed to respond to numerous established deadlines and three court orders 15 months after demands were initially served. Id. However, plaintiff here did not show a pattern of disregard for multiple court orders and deadlines. Defendants and plaintiff agreed to extend the original court-ordered deadline of August 20, 2015 ultimately to November 11, 2015. See MTC 33-39. Therefore, the only time plaintiff officially failed to respond to discovery demands was when her response did not reach defendants by November 11, 2015.

For all the foregoing reasons, the Court denies defendant's motion to award sanctions against plaintiff for willful noncompliance with discovery order by the court-ordered deadline.

Defendants' Motion to Award Their Reasonable Attorneys' Fees and Costs Incurred in Connection with the Motion

Defendants' motion to award their reasonable attorneys' fees and costs incurred in connection with this motion is denied.

The general rule is that each party to a litigation bears their own costs of attorneys' fees for the action, except for a few narrow exceptions. Mighty Midgets, Inc. v. Centennial Ins., Co., 47 N.Y.2d 12, 21-22 (1979); see, e.g., Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 (1989) (agreement between the parties); A.G. Ship Maint. Corp. v. Lezak, 69 N.Y. 2d 1, 6 (1986) (court ruling as a sanction for frivolous filing); Buffalo v. J. W. Celement Co., 28 N.Y.2d 241, 263 (1971) (statute).

Defendants reason that "had [p]laintiff or her counsel bothered to respond to the [d]iscovery [r]equests prior to the [preliminary court order] ... or comply with [it] even after numerous extensions of time were granted, this motion may never have been made." See MTC ¶ 64. "Making colorable claims may constitute frivolous conduct if the primary purpose is to delay or prolong the resolution of the litigation, or to harass or maliciously injure the other party." Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P., 78 A.D.3d 1008, 1009 (2d Dept 2010). Such sanctions are "essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system." Gordon v. Marrone, 202 A.D.2d 104, 111 (2d Dept 1994). However, defendants failed to make a clear showing that plaintiff's primary purpose was to delay or prolong the cause of action, or to harass or maliciously injure them.

Furthermore, Anonymous v. High Sch. for Envtl. Studies, 32 A.D.3d 353 (1st Dept 2006), on which defendants rely is not applicable to this case. In Anonymous, the requested party's repeated failure to supply any timely substantive responses to court's numerous orders "warrant[ed] reimbursement of the time and expense incurred by plaintiff's attorney in pursuing discovery." Id. at 359-60. However, plaintiff in this case, failed to comply with only one court-ordered deadline.

For these reasons, the Court denies defendants' motion to award reasonable attorneys' fees to plaintiff.

Plaintiff's Cross-Motion to Award Her Reasonable Attorneys' Fees and Costs Incurred in Connection with the Motion

Plaintiff's cross-motion to award her reasonable attorneys' fees and costs incurred in connection with this motion is denied.

Plaintiff argues that not only should defendants' demand for attorneys' fees be denied but that attorneys' fees should in fact be awarded to herself on the grounds that "this [m]otion is entirely frivolous." See AIO ¶¶ 53, 54. Plaintiff's argument is based on their allegation that "[d]efendants' counsel failed to make any good faith attempt at resolving this dispute [prior to resorting to filing a motion]." See AIO ¶ 56. The Court already rejected this claim above in light of the efforts by defendants' counsel to cope with plaintiff's failure to respond to discovery request. See infra Defendants' Motion to Award Sanctions Against Plaintiff for Willful

Noncompliance to Discovery. ("following the first request ... defendants' counsel contacted plaintiff's counsel eleven times ... [c]onsequently, the Court is not convinced that defendants' counsel did nothing for three months ... and then filed the [] motion") (internal citations and quotations omitted). Thus, plaintiff failed to show that the motion is, pursuant to 22 NYCRR § 130-1.1, entirely frivolous.

Therefore, the Court denies plaintiff's demand for an order awarding her reasonable attorney fees.

Accordingly it is,

ORDERED that defendants' motion to compel plaintiff to produce all documents and information requested by defendant is granted; and it is further

ORDERED that plaintiff shall produce all documents and information within 30 days of this order; and it is further

ORDERED that defendants' motion to award sanctions against plaintiff for her alleged willful noncompliance with discovery requests is denied; and it is further

ORDERED that defendants' motion to award their reasonable attorneys' fees and costs incurred in connection with this motion is denied; and it is further

ORDERED that plaintiff's cross-motion to award her reasonable attorneys' fees and costs incurred in connection with this motion is denied.

Date: August 1, 2016
New York, New York

Anil C. Singh