

**New York Univ. v International Brain Research
Found., Inc.**

2017 NY Slip Op 30291(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 652954/2013

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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NEW YORK UNIVERSITY and NEW YORK
UNIVERSITY SCHOOL OF MEDICINE,

Plaintiffs,

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-against-

Mtn Seq. No. 004

INTERNATIONAL BRAIN RESEARCH
FOUNDATION, INC.,

DECISION AND ORDER

Defendant.
-----x

JEFFREY K. OING, J.:

Plaintiffs commenced this action to recover payments allegedly due under a grant agreement. This action has been the subject of two prior motions to dismiss defendant's counterclaims (NYSCEF Doc. Nos. 32 and 47). As such, familiarity with the facts is presumed.

On May 13, 2016, this Court so ordered the parties' stipulation which provided that all EBTs be completed by July 15, 2016 (NYSCEF Doc. No. 51). Thereafter, a July 19, 2016 so ordered stipulation extended the time to complete the EBTs to September 16, 2016, and further provided that any EBTs that do not go forward by that date will be deemed waived (NYSCEF Doc. No. 52). Filing of the note of issue was extended to September 30, 2016 (Id.). On October 13, 2016, the parties submitted a stipulation to be so ordered, again extending the time for EBTs

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to be completed and the filing of the note of issue date to November 30, 2016 (NYSCEF Doc. No. 53).

At the earlier stages of this litigation in December 2013, defendant served a notice for discovery and inspection, seeking, among other things, budgets for the grant monies; records of payments made by plaintiffs as disbursements of the grant monies; and copies of payroll records (Adler Affirm., 12/13/16, Ex. C). Plaintiff served responses to defendant's requests in January 2014, setting forth objections to these particular requests (Id., Ex. D). The record does not indicate that defendant took any further steps at that time in response to plaintiffs' objections.

On November 22, 2016, defendant took the EBT of Anthony Carna ("Carna"), director of plaintiffs' Sponsored Programs Administration. Defendant contends that Carna was not able to provide testimony as to the disbursement of the grant monies. Thus, defendant requested production of the budgets for the grant disbursements and proof of compliance with the budgets at Carna's deposition (Adler Affirm., 12/13/16, ¶ 6). Plaintiffs filed the note of issue on November 30, 2016 (Adler Affirm., 12/13/16, Ex. A). A couple of days later, on December 1, 2016, plaintiffs produced the requested budgets (Adler Affirm., 12/13/16, ¶ 9).

Defendant claims that the budgets show "that of the direct costs approximately 87% were allocated to the salary and

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attendant fringe benefits of Professor Max Hilz, M.D. and 10% to his assistant's salary and fringe benefits" (Id., ¶ 10). The budgets, therefore, reflect that plaintiffs were aware of the grant requirements and restrictions. Thus, defendant contends that the issue of whether plaintiffs complied with the terms of the grant when making disbursements remains. Defendants seek documentation to substantiate that plaintiffs actually complied with the grants and followed the budgets they produced. In that regard, they seek "payroll checks and disbursements to two (2) individuals (Dr. Hilz and his assistant) and back up for payment of fringe benefits as well as some addition[al] expenditures on less than \$10,000 per year for travel, labs and miscellaneous expenses" (Id., ¶ 13). Defendant contends that plaintiffs have the burden to establish that they complied with all of the terms of the grant, specifically, "an unrestricted grant to support Dr. Max Hilz's traumatic brain injury research ... provided that such support was disbursed 90% to the direct costs thereof and 10% to the indirect costs" (Id., ¶ 14).

Relief

Defendant now moves for an order, pursuant to CPLR 3402 and 22 NYCRR § 202.21(c), striking the note of issue, and, pursuant to CPLR 3124, compelling plaintiffs to comply with discovery

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requests. In the alternative, defendant seeks an order, pursuant to CPLR 3126, for appropriate relief.

Defendant's motion is denied in its entirety. As an initial matter, defendant's motion is essentially one to compel plaintiffs to provide responsive documents to the December 2013 notice for discovery and inspection and it is therefore untimely. After resolution of plaintiffs' motion to dismiss the second amended counterclaims, continued discovery in this action was permitted for the sole purpose of allowing defendant an opportunity to conduct an EBT of a principal of plaintiff or, if not conducted, defendant would be deemed to have waived such EBT. During the time period leading to Carna's EBT, there was no indication from defendant that it was seeking documents from discovery demands made in December 2013.

In any event, production of Dr. Hiltz's payroll records and cancelled checks is not warranted. Here, all of defendant's counterclaims were dismissed, including counterclaims for breach of contract and for an accounting. The breach of contract counterclaim was dismissed because defendant "failed to state a valid cause of action ... because it [did] not allege that [plaintiffs] breached any specific provision of the Grant Agreement or Research Grants Policy" (NYSCEF Doc. No. 47, p. 6). The accounting counterclaim was dismissed because, in

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addition to there being no fiduciary relationship between the parties, it was duplicative of defendant's breach of contract counterclaim. Accordingly, defendant fails to demonstrate that it is now entitled to what amounts to an accounting in the form of payroll checks and disbursements to Dr. Hilz and his assistant.

Defendant argues that plaintiff must prove that it complied with all of the terms of the grant. That argument is unavailing. The terms of the grant demonstrate that it was unrestricted and specifically provided that there is no requirement for plaintiffs to report expenditures (Adler Affirm., 12/13/16, Ex. E). As such, defendant fails to show that it is entitled to the documentation it is seeking.

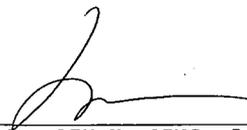
Accordingly, it is hereby

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that counsel are directed to telephone Part 48, at 646-386-3265, for a pre-trial conference or to set a trial date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/14/17



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.