

Johnson v IAC/Interactivecorp
2016 NY Slip Op 31520(U)
August 12, 2016
Supreme Court, New York County
Docket Number: 155837/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
TIFFANI JOHNSON,

Plaintiff,

- against -

Index No. 155837/14

Motion seq. nos. 002, 003

DECISION AND ORDER

IAC/INTERACTIVECORP and CONNECTED
VENTURES, LLC,

Defendants.

-----X

BARBARA JAFFE, J.:

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By respective notices of motion, the parties move pursuant to CPLR 3124 to compel responses to outstanding discovery demands, and pursuant to CPLR 3126 for sanctions and/or the preclusion of evidence. Each side opposes. (Motion seq. nos. 002 and 003). The motions are consolidated for decision.

I. BACKGROUND

The pertinent factual background is set forth in my decision and order dated June 9, 2015. Briefly, the action is based on defendants' alleged discriminatory employment practices, which culminated in the termination of plaintiff's position as a video editor in June 2011. Plaintiff had been employed by defendants for approximately 10 months.

Following the summary dismissal of a federal action based on similar allegations, defendants moved for an order dismissing this action, arguing that plaintiff is collaterally estopped and barred by the federal action from proceeding here. I denied defendants' motion, finding that plaintiff's claims based on the New York City Human Rights Law (NYC HRL) § 8-107 *et seq.* are subject to a more liberal standard than their federal and state counterparts, and thus issues unique to plaintiff's NYC HRL claims had not been resolved by the federal court. Additionally, absent any indication that the federal court dismissed on the merits plaintiff's pendant NYC HRL claims, she is neither estopped nor barred here from bringing those claims. (2015 WL 3657251 [Sup Ct, New York County 2015]; NYSCEF 21).

After issue was joined, on September 16, 2015, plaintiff served discovery demands comprising 26 interrogatories and 33 document requests concerning, as pertinent here, defendants' organization and personnel makeup, and the race, gender, qualifications, and/or performance evaluations of video editors employed by defendants commencing in January 2008 and continuing to the present. (NYSCEF 72).

On the same day, defendants served document requests, including as pertinent here:

3. Any and all documents, including documents produced by either party in the Federal Action, that support your gender discrimination or gender-based hostile or harassing work environment claims or upon which your gender discrimination or gender-based hostile or harassing work environment claims are based[.]

and interrogatories, including as pertinent here:

3. Identify each document, including documents produced by Defendants in the Federal Action, that support your gender discrimination and/or gender hostile or harassing work environment claims or upon which your gender discrimination and/or gender hostile or harassing work environment claims are based.

....

56. Identify the amount of damages you seek to recover from Defendants, including, but not limited to: (a) damages for your “mental anguish, humiliation, lasting embarrassment, loss of reputation, emotional distress and loss of enjoyment of life,” as set forth in . . . the Complaint; (b) damages for your “loss of employment opportunities and other employment benefits,” as set forth in . . . the Complaint; (c) punitive damages; and (d) “reasonable attorney’s fees.”
57. Identify each person with knowledge of or information concerning the economic and/or non-economic damages you claim you suffered or will continue to suffer as a result of any of Defendants’ alleged conduct.
58. Identify each document you believe pertain to your claims for damages.

(NYSCEF 53, 54).

On November 12, 2015, plaintiff responded to defendants’ document requests, noting her general objections, attaching her employment contract, and asserting that any additional responsive documents would only be provided upon a confidentiality agreement stipulation.

Plaintiff responded to defendants’ interrogatories as follows:

3. See General Objections 3, 5, 6, 8, 9 and 10.
.....
56. See General Objections 5, 6, 7, 8, 9, 10 and 11. Subject to and without waiver of said objections no less than \$300,000.00, the full amount to be determined at trial.
57. See General Objections 3, 5, 6, 7, 8, 9, 10 and 11. Subject to and without waiver of said objections Plaintiff and the Defendants, including upon information and belief Katie McGregor.
58. See General Objections 3, 4, 5, 6, 7, 8, 9, 10 and 11. Subject to and without waiver of said objections see response to Interrogatory No. 57.

(NYSCEF 55-56).

On the same day, defendants served their responses to plaintiff’s interrogatories, objecting to their vagueness, and asserting that they sought irrelevant or privileged information, or exceeded the permissible scope of discovery, as they sought documents related to individuals

not similarly situated to plaintiff, and given the brevity of plaintiff's tenure at the company, the proposed eight-year time frame was unreasonable and not likely to produce admissible evidence. They also asserted that her requests were redundant insofar as the information was either already provided to her in the federal action, was already in her possession, or would be unduly burdensome to produce, especially if stored electronically. (NYSCEF 73).

By so-ordered stipulation dated November 24, 2015, the parties agreed that certain material obtained in discovery would be designated confidential. (NYSCEF 31).

By letter dated December 1, 2015, defendants objected to plaintiff's use of extensive blanket objections in her responses absent any further explanation, and accused her of gamesmanship and attempting to obstruct her upcoming deposition. They also accused her of providing insufficient or incomplete detail in her other responses, which they claimed was disingenuous given that 7,000 documents were exchanged and seven witnesses produced in the federal action. (NYSCEF 57).

By letter dated December 4, 2015, defendants requested the documents plaintiff had previously withheld pending their confidentiality agreement stipulation. (NYSCEF 58). Plaintiff's counsel responded on December 7, attributing her delays to a "personal crisis," and on December 9, provided supplemental responses to defendants' requests, attaching five printouts from defendants' website purportedly evidencing race- and gender-based animus in plaintiff's workplace, and a W2 form and earnings statement from her subsequent employer. (NYSCEF 59-60).

By letters dated December 11 and 15, the latter directed to the court, defendants renewed their objections to plaintiff's original and supplemental responses, warning that plaintiff's

deposition could not go forward absent her meaningful participation in discovery. (NYSCEF 61-62). The next day, plaintiff wrote to the court, disputing defendants' objections and objecting to the time frame defendants employed in tailoring their responses. (NYSCEF 82).

Following plaintiff's deposition on February 3, 2016, by letter dated February 26, plaintiff assured respondent she would continue to search for responsive documents, and threatened motion practice if defendants did not "fully comply" with her outstanding demands. (NYSCEF 84, 88). By letter dated March 11, 2016, defendants sought plaintiff's clarification of the alleged deficiencies in their supplemental responses, observing that since their last conversation on December 11, 2014, plaintiff had identified no new deficiencies. (NYSCEF 85). Plaintiff's deposition resumed on the same day. (NYSCEF 65).

II. APPLICABLE LAW

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

(CPLR 3124). Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matters material and necessary in the prosecution or defense of an action," which should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015], *affd* 27 NY3d 985 [2016]).

Pre-trial discovery need not be limited to admissible proof, but may include "testimony or documents which may lead to the disclosure of admissible proof." (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 [1st Dept 2007], quoting *Fell v Presbyt. Hosp. in City of N.Y. at*

Columbia-Presbyt. Med. Ctr., 98 AD2d 624, 625 [1st Dept 1983]). However, a request for an entire category of documents absent reference to the nature of the documents or a claim at issue is impermissibly overbroad. (Eg, *Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 278 AD2d 157, 157 [1st Dept 2000]).

In employment discrimination cases, the court has discretion in tailoring an appropriate time frame during which the plaintiff may seek relevant information regarding her employment or the employment of others. (Eg, *Abbott v Mem. Sloan-Kettering Cancer Ctr.*, 276 AD2d 432, 433 [1st Dept 2000]).

III. DEFENDANTS' MOTION

A. General contentions

In support of their motion, defendants assert that plaintiff's responses to document request 3 and interrogatories 3, 56, 57, and 58 are insufficient, alleging that instead of identifying documents produced in the federal action by Bates number, plaintiff refers "generally" to over 7,000 disclosed documents. Defendants also claim that at her deposition, plaintiff admitted that the facts on which her gender discrimination claim is based became known to her during discovery in the federal action, but she was unable to identify any relevant document or testimony, nor any relevant material pertaining to damages. Moreover, as seven months have elapsed since their demands were served, defendants contend, plaintiff should be sanctioned for her willful delay. Defendants assert that their attempts to resolve these issues prior to this motion were unsuccessful. (NYSCEF 49-50).

In response, plaintiff maintains that defendants' complaints to the court before her deposition were disingenuous, as evidenced by defendants' willingness to proceed, and that the

following week, defendants raised none of their issues at a compliance conference. (NYSCEF 104).

In reply, defendants argue that plaintiff's repeated frivolous objections to their proper discovery requests warrant sanctions. (NYSCEF 105).

B. Document request 3 and interrogatory 3

1. Contentions

Plaintiff claims that her objections to document request and interrogatory 3 are proper, as they are overly broad, unduly burdensome, vague, oppressive, and seek privileged work product. She also alleges that during her deposition, defendants improperly sought conclusions of fact and/or law, and observes that they possess all requested materials that were disclosed in the federal action. (NYSCEF 104).

In reply, defendants argue that they will be prejudiced if plaintiff fails to either identify or confirm the nonexistence of any documents related to her gender discrimination claims, and claim that they have been unable to locate relevant documents independently, including those supporting plaintiff's allegation that she was replaced by a man, that her coworkers did not want to work with her because of her gender, that her supervisor was aware of her negative treatment, and that defendants retaliated against her. They argue that plaintiff's vague references to emails among defendants' employees and past deposition testimony allegedly supporting her claims are insufficient and make it impossible for them to identify relevant material. They also contend that plaintiff's assertion of privilege to avoid identifying documents by Bates number is frivolous, and that such identification does not imply legal or factual conclusions. (NYSCEF 105).

2. Analysis

With document request 3, defendants seek evidence relevant to plaintiff's claim that while she was employed by defendants, she was discriminated against based on her gender. The request is not overly broad and seeks evidence material and necessary to defend the action. Thus defendants' motion for an order compelling production of these documents, to the extent that they exist and absent a claim of privilege, is granted. (*Cf. Steadfast Ins. Co.*, 278 AD2d at 157 [document request improper where it sought "all documents maintained in plaintiff's database or files, without reference to the nature of the documents or the particular claim at issue"]; *see also generally Sgro v Drake Pubs., Inc.*, 221 AD2d 295, 295 [1st Dept 1995] ["A discovery dispute is not the appropriate forum to evaluate and narrow plaintiffs' claims."]). To the extent plaintiff claims that certain material is privileged, she must provide for *in camera* review a privilege log and the affected documents.

Defendants' motion to compel a response to interrogatory 3 is denied as duplicative of document request 3. However, to the extent that defendants already possess documents disclosed in the federal action relevant to plaintiff's claim of gender discrimination, plaintiff shall identify such documents by Bates number, which shall be deemed responsive to document request 3.

C. Interrogatories 56, 57, and 58

1. Contentions

Plaintiff denies that defendants notified her before filing this motion that they deemed interrogatory 56 deficient, and argues that allegations in the amended complaint placed defendants on notice as to her damages, and that in any event, she provided defendants with all of the information she possesses. Plaintiff also contends that in response to interrogatory 57, she

sufficiently identified individuals having knowledge of her damages, namely, an HR employee, and contends that interrogatory 58 is overly broad, vague, and seeks privileged information, and complains that defendants are unwilling to compromise on these items. (NYSCEF 104).

In reply, notwithstanding their notice of potential damages, defendants argue that it does not relieve plaintiff of her obligation to respond to interrogatories 56, 57, and 58. As plaintiff now identifies additional categories of damages not alleged in her complaint, they are entitled to disclosure of supporting evidence, and the single HR employee plaintiff identified would have no knowledge of her alleged personal debts or other noneconomic damages. (NYSCEF 105).

2. Analysis

Defendants' motion to compel plaintiff's response to interrogatory 56 is granted to the extent that plaintiff shall specify the amount she seeks for each enumerated category of damages as set forth in her pleadings, or otherwise state with particularity the basis for her objection beyond the generalized objections appearing in her November 12, 2015 response.

Defendants' motion to compel plaintiff's responses to interrogatories 56 and 57 is granted to the extent that plaintiff shall specify documents and/or persons with knowledge supporting her claim of damages to the extent not already identified, and to the extent that no pertinent documents or persons with knowledge exist, provide an affirmation or affidavit in support.

D. Additional deposition of plaintiff

Defendants seek to continue plaintiff's deposition in order to question her about newly identified information, and because they deem her previously answers insufficient. (NYSCEF 49). In response, plaintiff contends that defendants wish to depose her a third time in order to harass and intimidate her, and claims that they are not entitled to any further discovery given her

valid objections and their unwillingness to compromise. (NYSCEF 104).

As defendants proceeded to depose plaintiff without being provided complete responses to the above discovery demands, an additional deposition of plaintiff is appropriate (*see Tai Tran v New Rochelle Hosp. Med. Ctr.*, 291 AD2d 121, 125 [1st Dept 2002], *revd on other grounds* 99 NY2d 383 [2003] [additional deposition warranted as it served “important truth-finding function in view of the newly-discovery facts, and meets the concern of possibly tailored testimony when (deposition) conducted prior to disclosure”]), with the proviso that the additional deposition be limited to the issues addressed in document request 3 and interrogatories 56, 57, and 58.

IV. PLAINTIFF’S MOTION

A. Contentions

Plaintiff moves for an order compelling responses to her interrogatories 2-5, 7-13, 15-17, 22, and 23 and her document requests 2-6, 9, 10, 15, 32, and 33, covering the period from 2008 until the present. In support of her motion, she contends that she first learned of defendants’ allegedly deceptive discovery practices during an April 15, 2016 deposition of her former supervisor, who she alleges contradicted defendants’ characterization of the position that was filled in her stead. She also alleges that defendants provided incomplete and misleading responses to her interrogatories, such as those related to the identities, hiring, transfer, and/or promotion of video editors at the company, or pertinent personnel documents, and have failed to identify and produce documentation concerning four of their video editors. Additionally, she argues that defendants refuse in bad faith to disclose information about their hiring practices at the time of her termination and immediately afterwards, and maintains that the outstanding information sought is material and necessary to her claims. (NYSCEF 69, 74).

Plaintiff also alleges that defendants have cherry-picked the information disclosed as they have unilaterally and arbitrarily limited disclosure to information related to the post-production unit in which plaintiff worked, yet identified witnesses outside of the unit. She contends that defendants ignored the relevant time-frame, imposed its own time frame, and then selectively disclosed that they hired a black female employee after the her termination, but would not provide her identity or any documents related to her employment. Defendants also refused to disclose information related to the plaintiff's hiring and alleged poor performance, and have failed to provide a "working disc" which she has repeatedly requested. (*Id.*).

In opposition, defendants assert that they have produced 12 witnesses for depositions and more than 7,000 documents during both this and the federal action, and that much of the material sought here was previously disclosed in the federal action. In this context, they claim that plaintiff did not attempt in good faith to resolve the dispute before making this motion, particularly as she never objected to their discovery responses, except as to the time period, and claim that they have since supplemented their responses with more detail. They thus maintain that plaintiff's February 26 letter is vague and unexpected, and that when they asked her to clarify her new objections, this motion ensued. (NYSCEF 75-76).

Defendants contend that inquiries into departments other than the post-production department, or into employees with different job titles, are impermissibly broad and seek information related to persons not similarly situated to plaintiff. They argue that the relevant time period requested by plaintiff is also too broad, as plaintiff's claims relate to alleged conduct that occurred during her employment, and dispute the remaining alleged deficiencies as follows: (1) for interrogatory 2, they provided names and contact information for two current and nine

former employees with knowledge of plaintiff's allegations; (2) for interrogatory 4, they described recent organizational changes at the company; (3) for interrogatory 10, they referred plaintiff to her personnel file and other documents related to her hiring; (4) for interrogatories 15, 16, and 17, they again referred plaintiff to her personnel file and identified three employees involved in her probation and termination; (5) for interrogatory 22, they referred plaintiff to their answer to interrogatory 14, which was identical; (6) for interrogatory 23 and document requests 32 and 33, they located no responsive documents for the relevant time period and again referred plaintiff to her personnel file; (7) for document request 4, they located no performance reviews for similarly situated employees during the period of plaintiff's employment; (8) for document request 5, they referred plaintiff to her personnel file; (9) for document request 9, they alleged that their objection, that the request was vague, over broad, and sought information better gleaned through deposition, was proper; (10) for document requests 15 and 20, they provided their harassment policy and plaintiff's acknowledgment and agreement form; and (11) for document request 25, they provided documents plaintiff removed from the company prior to her termination. In any event, defendants argue, plaintiff articulates no basis for asserting their responses were deficient, and thus they urge sanctions. (*Id.*).

In reply, plaintiff maintains that she attempted to resolve all discovery disputes at a compliance conference and in correspondence where she complained about defendants' deficient responses, particularly the time frame, and alleges that she made a good faith effort to resolve any outstanding issues. She denies that she did not alert defendants of her intention to seek relief here and claims that defendants, not her, failed to raise discovery issues at their February 2016 compliance conference. Plaintiff reiterates her previous contentions. (NYSCEF 90).

B. Analysis

In *Abbott v Memorial Sloan-Kettering Cancer Center*, information related to an employer's termination of other employees was held discoverable for a period of five years prior to the plaintiff's termination. (276 AD2d 432, 433 [1st Dept 2000]). Similarly, a request for "documents relating to complaints of sexual harassment and/or retaliation, as well as any complainants' identities" for a period of eight years has been deemed reasonably calculated to reveal pertinent information. (*See Pecile v Titan Capital Group, LLC*, 119 AD3d 446, 446 [1st Dept 2014]).

Here, plaintiff's request seeking information from January 2008, approximately three and a half years before her termination, to now, approximately five years after, is reasonably calculated to reveal admissible evidence. However, the material must relate only to plaintiff's termination and to the terminations of other similarly situated employees (*see generally Schwartz v Morgan Stanley SW, Inc.*, 2009 WL 1834669, *1 [SD NY 2009] ["(Plaintiff) has failed to demonstrate which other employees are similarly situated to her such that discovery concerning those individuals would be relevant, but has sought broad discovery of other employees."]), or to race- and/or gender-based harassing or discriminatory conduct by defendants or complaints based on such conduct lodged against them (*see Pecile*, 119 AD3d at 446 [request for documents pertaining to complaints or complainants' identities appropriate]).

On the other hand, to the extent that plaintiff alleges deficiencies in defendants' other responses that are not related to the relevant time frame, her claims are specious, and to the extent that she alleges that certain responses are deceptive or misleading, she fails to explain how the information she seeks are relevant to her claims. Moreover, counsel provides no detail as to

the alleged good faith effort made to resolve these issues (*see generally* 22 NYCRR 202.7[c] [affirmation of good faith “shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions”]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057 [4th Dept 2006] [defendants’ rejection of plaintiff’s responses absent attempt to modify or simplify their demands evinced lack of “diligent effort” to resolve dispute]). Correspondence between counsel and to the court, wherein plaintiff complains of the alleged deficiencies, reflects no attempt at resolution.

Thus, plaintiff’s motion to compel is granted to the extent that defendants must supplement or amend all responses consistently with the expanded time frame and otherwise comply with the directives herein.

V. SANCTIONS

A party who disobeys “an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed,” the court may, within its discretion, impose an appropriate penalty, including but not limited to, “an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, [or] from producing in evidence designated things or items of testimony” (CPLR 3126[2]; *see also Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). In order to invoke “the drastic remedy of preclusion,” the court must be convinced that the “offending party’s lack of cooperation with disclosure was willful, deliberate, and contumacious.” (*Richards v RP Stellar Riverton, LLC*, 136 AD3d 1011, 1011 [2d Dept 2016]; *Sanchez v City of New York*, 266 AD2d 127, 127 [1st Dept 1999]). Such willful and contumacious conduct may be inferred from repeated failures to comply with discovery demands and orders without excuse. (*Henry v Datson*, 140 AD3d 1120,

1122 [2d Dept 2016]).

Here, neither party has failed to respond to the other's discovery demands. Rather, they have provided incomplete or unsatisfactory responses or objections. Absent clear indicia of willful, deliberate, and contumacious conduct, sanctions are unwarranted.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to compel is granted in part to the extent that plaintiff, within 20 days of the date of this decision, shall produce documents and/or provide responses consistent with this decision, and to the extent plaintiff asserts a privilege, provide to the court the affected documents and privilege log for an *in camera* inspection; it is further

ORDERED, that plaintiff's motion to compel is granted in part to the extent that defendants, within 20 days of the date of this decision, shall produce documents and/or provide responses consistent with this decision; and it is further

ORDERED, that if either party fails to timely comply with this order, they shall be precluded from introducing any evidence at trial with respect to the items sought in the document requests and interrogatories referenced herein.

ENTER:



Barbara Jaffe, JSC

DATED: August 12, 2016
New York, New York