

**Augustus Butera Photography, Inc. v MCA Creative  
Serv., Inc.**

2013 NY Slip Op 31825(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 651984/2011

Judge: Saliann Scarpulla

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA

PART 19

Index Number : 651984/2011  
AUGUSTUS BUTERA PHOTOGRAPHY,  
vs  
MCA CREATIVE SERVICES, INC.  
Sequence Number : 003  
MODIFY ORDER/JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 8/2/13  
which disposes of motion sequence(s) no. 003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 8/2/13

SALIANN SCARPULLA, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
AUGUSTUS BUTERA PHOTOGRAPHY, INC.

Plaintiff,

- against-

Index No.: 651984/2011  
Submission Date: 5/29/13

MCA CREATIVE SERVICES, INC., a/k/a MARGE  
CASEY & ASSOCIATES, INC.

**DECISION AND ORDER**

Defendants.

----- X  
MCA CREATIVE SERVICES, INC.,

Third-Party Plaintiff,

-against-

AUGUSTUS BUTERA, an individual

Third-Party Defendant.

----- X

For Plaintiff/Third-Party Defendant:  
Edward C. Greenberg, LLC  
570 Lexington Avenue, 19th Floor  
New York, NY 10022

For Defendant/Third Party Plaintiff:  
Cowan, DeBaets, Abrahams & Sheppard LLP  
41 Madison Avenue, 34th Floor  
New York, NY 10010

Papers considered in review of this motion for protective order and cross-motion to compel (motion seq. no. 003):

Notice of Motion/Affirm. of Counsel/Exhibits.....	1
Memo. of Law in Opp. to Motion/Affirm. of Counsel/Exhibits.....	2
Reply Memo.....	3
Notice of Cross Motion/Memo of Law .....	4
Memo. of Law in Opp. to Cross Motion.....	5
Reply in Supp. of Cross-Motion.....	6

**HON. SALIANN SCARPULLA, J.:**

This action involves a dispute between professional photographer Augustus Butera (“Mr. Butera”) and the artist representation agency MCA Creative Services, Inc. a/k/a Marge Casey & Associates, Inc. (“MCA”).<sup>1</sup> Defendant MCA moves: (a) for a protective order modifying the Court’s November 14, 2012 order; (b) to compel Augustus Butera Photography, Inc. and Mr. Butera to enter into a confidentiality agreement<sup>2</sup>; and (c) for an extension of discovery deadlines.

Plaintiff Augustus Butera Photography, Inc. (“Plaintiff”) and third-party defendant Mr. Butera cross move for an order: (a) compelling MCA to complete document production pursuant to the November 14, 2012 order within twenty days; (b) compelling MCA to produce Patrick Casey for a deposition within forty days; (c) conditionally precluding MCA from entering any documents into evidence or testifying at trial and/or dismissing MCA’s claims against Plaintiff and Mr. Butera, if MCA fails to complete its document production or to produce Patrick Casey; and (d) awarding them attorney’s fees.

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<sup>1</sup> Mr. Butera is a professional photographer who conducts business as a corporation, Augustus Butera Photography, Inc.

<sup>2</sup> Specifically, MCA seeks permission to designate confidential documents as “attorneys’ eyes only” according to the following categories: (a) all internal accounting documents generated by MCA; (b) internal communications by and amongst employees of MCA; (c) documents regarding MCA’s finances; and (d) invoices, bills, statements, or correspondence between MCA and third parties, to the extent that these documents only implicate third parties and not plaintiff.

In the complaint, Plaintiff alleges that it entered into a business relationship with Marge Casey, an experienced agent, in 1998. Plaintiff claims that it was “induced to be represented by MCA due solely to the presence of Marge Casey.” Plaintiff alleges that a representation agreement may exist between Mr. Butera and MCA that was entered into on August 31, 1998 (“the representation agreement”). Plaintiff further alleges that in or around 1998, Patrick Casey, son of Marge Casey, became MCA’s majority or sole shareholder.

Plaintiff further alleges that a chaotic atmosphere existed at MCA, such that Marge Casey left MCA in or around 2011 and formed a new business known as “New Wave Reps” that is now in direct competition with MCA. On June 1, 2011, Plaintiff terminated its business relationship with MCA.

Plaintiff asserts six causes of action against MCA for conversion, accounting, breach of fiduciary duty, unjust enrichment, negligence, and a declaratory judgment concerning the rights and obligations of the parties under the representation agreement.<sup>3</sup> Plaintiff alleges that MCA failed to pay for services rendered by Mr. Butera and for licenses that it granted to Mr. Butera’s work, and that MCA failed to properly account for photography work and licensing fees owed to Plaintiff or Mr. Butera.

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<sup>3</sup> In the declaratory judgment cause of action, Plaintiff seeks a determination that the representation agreement is invalid, or alternatively, that it is unenforceable due to MCA’s material breach of the agreement. Plaintiff also seeks a declaratory judgment concerning the parties’ rights and obligations under a separate contributor agreement.

MCA asserts a counterclaim against Plaintiff for tortious interference with business relations. MCA also commenced a third-party action against Mr. Butera for breach of the representation agreement based on Mr. Butera's failure to pay a severance fee upon his termination of the relationship and his failure to pay commissions to MCA. MCA also asserted a claim against Mr. Butera for tortious interference with business relations.<sup>4</sup>

On November 14, 2012, I so-ordered a stipulation between the parties, in which they agreed to produce documents created during the time period that a business relationship existed between the parties. The so-ordered stipulation stated that “[d]ocuments created during the period of the parties or one or more of them (approx 13 years) are subject to production.”

In the current motion, MCA states that it has already produced thousands of documents in compliance with the November 14 order. However, MCA now seeks a protective order limiting the scope of discovery. MCA argues that Plaintiff's requests for documents covering the period of the parties' thirteen year business relationship is overbroad and burdensome. MCA argues that discovery should be limited according to Plaintiff's claims of unpaid sums for the period May to November 2011, and to the six-

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<sup>4</sup> Butera, as third-party defendant, asserted counterclaims against MCA for conversion, accounting, breach of fiduciary duty, unjust enrichment, negligence, and a declaratory judgment concerning the rights and obligations of the parties under any existing written agreement.

year statute of limitations period for Plaintiff's breach of contract claim. MCA also argues that Plaintiff has not alleged a fraud claim to support its request for documents.

In opposition, Plaintiff claims that its document requests are material and necessary to determining the validity and terms of the representation agreement, and as to "a pattern of behavior of deceit and fraud as it relates to the claims for breaches of the fiduciary duty of loyalty." Plaintiff also argues that its document requests are necessary because there may be instances in which MCA collected a licensing fee or failed to reveal the final amounts charged, of which Plaintiff and Mr. Butera are unaware.

### **Discussion**

CPLR §3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. "Material and necessary" has been interpreted to mean 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 Publishing Co.*, 21 N.Y.2d 403, 406 (1968); *Friel v. Papa*, 87 A.D.3d 1108, 1110 (2d Dep't 2011). Unlimited disclosure, however, is not permitted. *Spohn-Konen v Town of Brookhaven*, 74 A.D.3d 1049, 1049 (2d Dep't 2010); *Ackerman v. Landes*, 125 A.D.2d 620 (2d Dep't 1986). 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 Dep't 2009).

At the outset, I note here that MCA's motion seeks a modification of a so-ordered stipulation that was previously agreed to and signed by both parties. Notwithstanding the foregoing, I grant MCA's motion for a protective order to the extent that Plaintiff's First Request for Production of Documents No. 6, 7, 8, 12 - 15, and 18 - 21 are limited in scope to the six-year period prior to the end of the business relationship in June 2011, with the exception that MCA must produce any responsive documents created during the thirteen-year period of the business relationship that concern whether the parties entered into the representation agreement, and whether the representation agreement provided for a severance commission.

In this action, Plaintiff seeks a declaratory judgment concerning whether a valid representation agreement exists, and it is therefore entitled to documents created during the business relationship that are relevant and material to that issue. However, Plaintiff's document requests concerning whether MCA failed to pay for Mr. Butera's photography work, including licensing fees, must be limited in scope to amounts that Plaintiff can recover under the applicable statute of limitations period.

As to the issue of confidentiality, I grant defendant MCA's motion to designate documents as "attorneys' eyes only" for the following specified categories of documents: (a) all internal accounting documents generated by MCA; (b) internal communications by and amongst employees of MCA; (c) documents regarding MCA's finances; and (d) invoices, bills, statements, or correspondence between MCA and third parties, to the



extent that these documents only implicate third parties and not plaintiff. I find that these documents may be designated “attorneys’ eyes only” in light of MCA’s claim that Plaintiff now works for a direct competitor of MCA.

I also grant MCA’s request for an extension of time to complete discovery. I direct MCA to complete document production within forty-five days, and to produce Patrick Casey for a deposition within sixty days of the date of this order.

## **2. Plaintiff and Butera’s Cross-Motion**

In accordance with my decision above, I grant Plaintiff and Mr. Butera’s cross-motion to the extent that MCA is directed to complete document production within forty-five days, and to produce Patrick Casey for a deposition within sixty days of this order. I otherwise deny Plaintiff and Mr. Butera’s cross-motion for a conditional preclusion order, dismissal of MCA’s claims, and attorney’s fees. There is no evidence that MCA filed this motion in bad faith simply to delay discovery in this action.

In accordance with the foregoing, it is

ORDERED that defendant MCA Creative Services, Inc. a/k/a Marge Casey & Associates, Inc.’s motion is granted to the extent that: (1) Plaintiff’s First Request for Production of Documents No. 6, 7, 8, 12 - 15, and 18 - 21 are limited in scope to the six-year period prior to the end of the business relationship in June 2011 as described above; (2) I grant MCA’s request to designate confidential documents as “attorneys’ eyes only” for the above specified categories of documents; and (3) I grant MCA’s request for an

extension of time to complete document production within forty-five days and to produce Patrick Casey for a deposition within sixty days of the date of this order, and otherwise denied; and it is further

ORDERED that plaintiff Augustus Butera Photography, Inc. and third-party defendant Augustus Butera's motion is granted to the extent that MCA is directed to complete document production within forty-five days and to produce Patrick Casey for a deposition within sixty days of the date of this order, and otherwise denied; and it is further

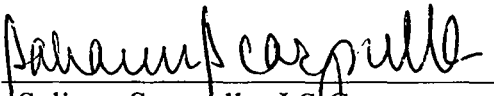
ORDERED that the Court's prior decision dated November 14, 2012 is vacated and substituted with this order; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 19, 60 Centre Street, Room 335, on October 9, 2013, at 2:15 P.M.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
August 2, 2013

ENTER:

  
Saliann Scarpulla, J.S.C.