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| Horizon Media v Leible |
| 2007 NY Slip Op 30760(U) |
| March 28, 2007 |
| Supreme Court, New York County |
| Docket Number: 0602728/2005 |
| Judge: Charles E. Ramos |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos PART 53

Index Number : 602728/2005

HORIZON MEDIA

vs

LEIBLE, MATTHEW P.

Sequence Number : 001

COMPEL

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

*In decided in accordance with
accompanying memorandum decision. See Order.*

Dated: 3/28/07

C
CHARLES E. RAMOS /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
HORIZON MEDIA,

Plaintiff,

-against-

Index No. 602728/05

MATTHEW P. LEIBLE, SPOT AND COMPANY OF
MANHATTAN, INC., and GENERATION OUTDOOR,
INC.,

Defendants.
-----X

FILED
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Charles Edward Ramos, J.S.C.:

In motion sequence 001, plaintiff, Horizon Media, Inc. ("Horizon") moves pursuant to CPLR 3124 for an order: (1) compelling all defendants to produce documents for inspection and copying as requested in plaintiff's several discovery notices; and (2) compelling defendants Matthew P. Leible and Spot and Company of Manhattan, Inc. ("Spotco") by its principal, James Edwards to appear for deposition in response to plaintiff's notices.

Defendants cross move (1) to compel plaintiff to respond to defendants' March 6, 2006 interrogatories and to produce documents; and (2) to compel plaintiff and Ruby Gottlieb to appear for deposition and produce documents in response to defendants' March 6, 2006 notices of deposition.

Background

This action was commenced around July 2005. Horizon is a media service company organized under the laws of the State of New York which is in the business of planning and organizing advertising campaigns for its clients and finding, negotiating

and booking contracts with various media outlets. Spotco is a New York advertising agency and a former client of Horizon. Defendant Spotco contracted with plaintiff to provide it, and its end user clients, with media planning, research, marketing consultation, negotiation and placement for advertisements with various "out-of-home" media providers. Defendant Generation Outdoor ("GO") is a start up media services company which competes with plaintiff in the media services market. Plaintiff alleges that Leible breached the non-compete clause of his employment contract with Horizon, that Spotco breached its contract and that GO interfered with plaintiff's business relationships.

On October 18, 2005, plaintiff served notices to take depositions and document demands on all three defendants. Defendant Leible was deposed on January 26, 2006 from 9:05 a.m. until 3:05 p.m. During the deposition, plaintiff identified documents which had already been requested in plaintiff's original document demand. Defendants argue that they produced all responsive documents.

On November 13, 2006, this Court ordered the parties to (1) serve additional specific document demands; (2) respond to the additional demands; and (3) amend the parties' document requests.

On March 2, 2006 plaintiff sent a copy of Leible's deposition transcript to defendants with a letter asking that the transcript be reviewed, signed and returned. The transcript contained a request that defendants provide the missing documents

and included an index of all requests for documents. Defendants' counsel asserts that many requested documents are confidential, irrelevant and/or non-probative, but nevertheless forwarded the index to the clients.

On March 6, 2006, defendants served discovery requests upon plaintiff. These included defendants' interrogatories and document demand as well as two notices of deposition addressed to plaintiff's CEO and Leible's former colleague. Defendants also served a subpoena *duces tecum* for service upon Peter V. Wall, Esq. who had been plaintiff's counsel when Leible was in plaintiff's employ.

In April 2006, S. Pitkin Marshall, plaintiff's counsel, states that he made further attempts to resolve the matter but to no avail; thus, he informed his adversary that he would make a motion should he not be given the outstanding documents. According to Marshall, F. Lloyd Garten, defendants' counsel, gave vague assurances and asked him to wait a while before making the motion. Garten counters that he had heard nothing regarding the motion.

Marshall further argues that after March 2 and prior to June 2006, he repeatedly asked for the missing documents. This included (1) a written request dated April 17 in which he advised plaintiff that he would be representing the non-party attorney Wall and that he would be responding to defendants' subpoena "after all party depositions and document discovery has been completed" and (2) a June 21, 2006 letter which enclosed a copy

of the March 2, 2006 list of all outstanding documents requests.

On June 27, 2006, in response to the June 21st letter, Garten sent a letter promising that his clients were "assembling responsive documents and that [he] expect[ed] to have them by the end of [that] week." Garten also specified that he would forward the documents to which he believed plaintiff was entitled. He also pointed out that plaintiff's own discovery responses were overdue as well.

In August, 2006, Garten sent Marshall some documents along with objections to plaintiff's requests. Plaintiff alleges that his opponent did not identify the particular items that were being objected to and ignored his itemized requests. Garten alleges that he sent all documents which his client had transmitted to him that he deemed discoverable.

Marshall argues that he has attempted in good faith to resolve these matters with his adversary through phone conversations and messages but to no avail. According to plaintiff, defendant Spotco has never produced any documents of any kind in response to plaintiff's November 16, 2006 demand nor in response to plaintiff's original demand served on October 18, 2005. Additionally, counsel asserts that even prior to the original discovery motions being argued, counsel had served responses and produced documents responsive to defendants' requests. Plaintiff contends that several of defendants' interrogatories are overly broad and vague and thus, unanswerable and that plaintiff has produced all requested documents that

relate in any reasonable way to this litigation.

Defendants argue that this action was commenced for the sole purpose of harassing defendants and that defendants have complied with their discovery obligations. Defendants allege that neither of the two noticed depositions have been completed.

Discussion

CPLR 3124 states that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order [...], the party seeking disclosure may move to compel compliance or a response."

The underlying action turns on whether Leible, Spotco and GO breached their respective contracts and interfered with Horizon's business relationships when Leible left Horizon and established GO, a competing business. Plaintiff alleges that a large part of GO's advertising purported to have been generated the year after Leible left Horizon was actually pre-sold by Leible while in plaintiff's employ or rolled over.¹ Horizon further alleges that Spotco wrongfully terminated its contract with Horizon which, by its terms, had been renewed for a one year period to end in July 2005 and that Spotco further refused to pay plaintiff's fees for pre-existing media placements.

Plaintiff seeks to compel defendants to produce all documents relating to any business plan for the company that

¹ "Rolled over" advertising occurs when renewal contracts are left opened to be signed at a later time. Plaintiff's claim is that rolled over advertising allowed Leible to intervene with plaintiff's business as he renewed Spotco's contract after he left Horizon.

became GO. Defendants object that the business plan is irrelevant. A party is entitled to disclosure of relevant evidence if it is "material and necessary." CPLR 3101(a). In other words the evidence is relevant, if "any facts [bear] on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 (1968). The Court finds that the new competing company's business is not only relevant to when Leible worked for both companies, it will also show when GO was created.

Plaintiff's document demand to Leible and GO, items 2-12, are overly broad and unduly burdensome. See *Harrison v Bayley Seton Hosp.*, 219 AD2d 584 (2nd Dep't 1995) (When plaintiffs' demands tend to confuse rather than sharpen the central issue, the demand is overly broad and vexatious and does not assist in the preparation of trial within the meaning of CPLR 3101(a).) Plaintiff requests the following documents: a variety of GO's financial records concerning GO's capitalization including cash receipts and deposit slips; checks and financial statements; phone bills for a cell phone, the owner of which is unspecified; correspondence, contracts and other business documents concerning the business relationship between Spotco and GO; e-mail communications and other commercial or corporate documents relating to the relationship between GO and Leible. On January 16, 2007 this Court ordered discovery to proceed on the issue of liability; that is, to determine which vendors should have rolled

over under Horizon's prior contracts which later became GO's clients. To that end, defendants are ordered to give all items listed in plaintiff's document request 1 through 12 (except for item 4, 6, and 10) from June 2000 until December 2004 during which time Leible worked at Horizon. Defendants are directed to prepare a privilege log in compliance with CPLR 3122(b) for items 4 and 6.

Plaintiff asks, in item 10, that Spotco produce all documents, including correspondence, contracts, e-mail communications, bills, invoices and checks concerning the business relationship from inception between GO and Spotco through 2006, as well as Spotco advertising vendors. Plaintiff provides no document which warrants discovery of these documents.

Plaintiff also seeks to compel defendant Spotco by its principal, James Edwards, to appear for deposition in response to plaintiff's notices. Spotco, as a party to this action as well as the intermediary party in terms of advertising between clients and advertising agencies (whether Horizon or GO), must comply with the October 18, 2005 notice of deposition. The documents requested with the notice of deposition must also be produced. However, plaintiff's request is limited to the period during which Leible was employed at Horizon i.e., from June 2000 until December 2004.

Leible has already been deposed for a period of six hours. Plaintiff does not provide any reasons for an additional deposition of Leible. Accordingly, plaintiff's motion to compel

Leible to appear for a deposition is denied.

In their cross motion, defendants seek to compel plaintiff to respond to defendants March 6, 2006 interrogatories and produce the documents demanded. For Item 1 and 2 of defendants' interrogatories, defendants must provide some specificity to identify which communications pertaining to Leible's employment are demanded, including a reasonable range of dates. Plaintiff must now identify documents upon which it intends to rely at trial that are within plaintiff's knowledge. Although defendants may not invade plaintiff's attorney's strategy which constitutes privileged work product and is not discoverable [see *ACWOO Intl. Steel Corp. V Frenkel & Co.*, 165 AD2d 752 (First Dep't 1990)], the plaintiff will not be permitted to offer exhibits at trial that it has not turned over in discovery.

In the absence of opposition, defendants' request to compel Rudy Gottlieb of Horizon to appear for deposition in response to defendants' March 31, 2005 notice is granted.

This is a 2005 case. This Court will no longer tolerate delays in this case. Counsel are directed to check in with the Court once a week by telephone until discovery is complete. The end date of all disclosure is hereby set as July 13, 2007. Plaintiff shall file a note of issue on or before July 31, 2007. Accordingly, it is

ORDERED that defendants give all items listed in plaintiff's document request 1 through 12 (except for item 4, 6, and 10) from June 2000 until December 2004 during which time

Leible worked at Horizon by April 27, 2007. Defendants are directed to prepare a privilege log in compliance with CPLR 3122(b) for items 4 and 6 by April 27, 2007; and it is further

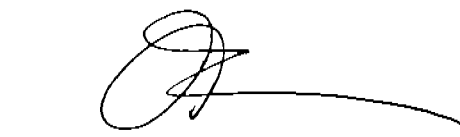
ORDERED that defendants' motion to compel plaintiff's document request is granted as provided above; and it is further

ORDERED that plaintiff's motion to compel defendant Leible to appear for deposition is denied; and it is further

ORDERED defendants' request to compel Rudy Gottlieb to appear for deposition is granted and shall be completed by May 11, 2007; and it is further

ORDERED that defendants' interrogatories items 1 through 3 is hereby limited to documents produced from June 2000 until December 2004 during which time Leible worked at Horizon and sent to plaintiff by April 16, 2007.

Dated: March 28, 2007



CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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