

Rewards Network Establishment Servs., Inc. v Pelagos Rest. Corp.
2007 NY Slip Op 30797(U)
April 11, 2007
Supreme Court, New York County
Docket Number: 0100199/2005
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 100199/2005
REWARD NETWORK ESTABLISHMENT
vs
PELAGOS RESTAURANT
Sequence Number : 008
STRIKE A PLEADING

INDEX NO. 100199/05
MOTION DATE _____
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Cross-motion and
Answering Affidavits — Exhibits _____
Opp. to Cross-motion and
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the attached decision
and order.

FILED
APR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 11, 2007

[Signature]
MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
REWARDS NETWORK ESTABLISHMENT SERVICES,
INC., fka IDINE RESTAURANT GROUP, INC.,

Plaintiff,

Index No.: 100199/05

-against-

DECISION/ORDER

PELAGOS RESTAURANT CORP., et al.,

Defendant

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

-----X
Plaintiff Rewards Network Establishment Services, Inc. fka IDine Restaurant Group, Inc. ("plaintiff" or "Rewards Network") moves pursuant to CPLR §3126 for an order granting judgment in plaintiff's favor against defendant Willie Haim Hirsh's ("defendant" or "Hirsh"), striking defendant's answer and counterclaims, prohibiting defendant from supporting or opposing claims and defenses for which discovery has not been provided and deeming issues as to which discovery is outstanding resolved in accordance with plaintiff's claims. Hirsh opposes the motion and cross-moves to compel Rewards Network to fully comply with Hirsh's discovery demands within ten days and upon failure to so comply, for relief pursuant to CPLR §3126 striking the complaint, precluding Rewards Network from supporting or opposing designated claims and defenses and precluding plaintiff from calling certain witnesses and introducing evidence of matters for which Rewards Network has not provided discovery.

Rewards Network's Motion

Plaintiff's motion contends that Hirsh failed to comply with plaintiff's notice for discovery and inspection (Exh. 1 to motion) in that Hirsh improperly served a response (Exh. 2 to motion) objecting to all but two of plaintiff's demands and failed to produce

documents responsive to the two demands to which no objections were made. In opposition to Rewards Network's motion, defendant claims: 1) he served a response to item 1 of plaintiff's demand simultaneously with his cross-motion; and 2) he provided plaintiff with copies of documents responsive to all remaining demands at a prior inquest against co-defendant Peter Spyropoulos ("Spyropoulos"). Plaintiff counters that Hirsh provided some but not all documents produced at the inquest and his discovery responses remain deficient.

Hirsh's Cross-Motion

Hirsh's cross-motion contends that: 1) Rewards Network has failed and refused to provide defendant with a copy of its bill of particulars served in response to co-defendant Peter Spyropoulos' demand; 2) plaintiff's response to interrogatory number 1 is improper; and 3) plaintiff's purported interrogatories are verified by counsel in violation of CPLR 3133(b). In reply, plaintiff does not dispute defendant's claims regarding service of the bill of particulars and improper verification of plaintiff's response to defendant's interrogatories. Further, Rewards Network supplements its prior response to interrogatory number 1 by alleging that "Plaintiff does not know of any witness who witnessed Hirsh execute the personal guarantee . . ." Rosenblum Aff. at ¶14.

CPLR §3126 provides in pertinent part as follows with respect to penalties for refusal to comply with orders to disclose:

If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

At this juncture, the harsh penalty of preclusion and/or dismissal is unwarranted and plaintiff's motion is denied. In this regard, the court notes that defendant has provided plaintiff with some of the requested discovery, albeit belatedly. Nonetheless, as Hirsh's responses are long overdue and its objections are conclusory, Hirsh is directed to fully respond to plaintiff's demands as more fully set forth below.

Turning to Hirsh's cross-motion, CPLR 2103(e) provides: "Each paper served on any party shall be served on every other party who has appeared . . ." As plaintiff does not refute defendant's claims regarding service of its bill of particulars, the cross-motion is granted to the extent that plaintiff is directed to serve a copy of its bill of particulars upon defendant as provided below. Further, Rewards Network is directed to serve properly verified interrogatories upon Hirsh in accordance with CPLR 3133(b).

Accordingly, it is hereby

ORDERED as follows: 1) Hirsh shall respond to items 1 through 7 of plaintiff's notice for discovery and inspection; 2) Hirsh shall provide plaintiff with copies of all documentation introduced into evidence at the prior inquest; 3) Rewards Network shall serve a copy of its bill of particulars responsive to Spyropoulos' demand upon Hirsh;

and 4) Rewards Network shall re-serve its responses to Hirsh's interrogatories properly verified by plaintiff.

All of the foregoing discovery is to be exchanged so as to be received on or before May 11, 2007. All other requested relief not specifically addressed herein is denied.

Counsel for the parties are directed to appear in IAS Part 1, Room 1127B, 111 Centre Street, New York County on May 22, 2007 at 9:30 a.m. for a status conference.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for plaintiff and defendant Hirsh. Plaintiff's counsel shall notify all other appearing parties of the foregoing conference date.

Dated: New York, New York
April 11, 2007

Hon. Martin Shulman, J.S.C.

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