

ATM Servs. NY, Inc. v Zone One N.Y., Inc.

2007 NY Slip Op 31985(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0100674/2006

Judge: Shirley W. Kornreich

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

PRESENT **HON. SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 100674/2006

ATM SERVICES NY

vs

ZONE ONE NEW YORK

Sequence Number : 001

COMPEL DISCLOSURE

DEX NO. 100674/06

OTION DATE 6/7/07

OTION SEQ. NO. 001

OTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3,4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

JUL 09 2007

NEW YORK COUNTY CLERK'S OFFICE

HON. SHIRLEY WERNER KORNREICH

Dated: 7/5/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
ATM SERVICES NY, INC.,

Plaintiff,

Index No.:100674/2006

-against-

**DECISION and
ORDER**

ZONE ONE NEW YORK, INC., LEE CHEN,
MICHAEL CHEN, VILLAGE BAZAAR, "XYZ
CORP." d/b/a VILLAGE BAZAAR, BODRAL
HEM SIDDIAM, AAK CONVENIENCE, "XYZ CORP."
d/b/a AAK CONVENIENCE and ABDUL QUAYYLIM,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

FILED
JUL 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Pursuant to CPLR 3124, Defendants Zone One New York, Inc., Lee Chen and Michael Chen ("defendants") move to compel plaintiff, ATM Services NY, Inc. ("plaintiff"), to provide further responses to their Second Notice to Produce and Permit Discovery and Inspection, dated March 29, 2007 ("Notice"), along with costs, disbursements and attorneys' fees. Plaintiff avers that defendants' demands were over-broad and irrelevant to any of plaintiff's claims and counterclaims. Plaintiff also contends that it previously provided defendants with all relevant and responsive documents as required by CPLR 3122 and, thus, opposes defendants' motion.

I. Factual Background

Plaintiff commenced this action seeking monetary damages for breach of contract and interference with contractual relationships. It contends that it entered into ATM Site Location Agreements with retail stores known as M A Grocery, Pak Punjab Deli & Grocery, Village Bazaar and AAK Convenience ("Stores"), which granted plaintiff exclusive rights to place and

process ATM transactions on the Stores' premises. Sometime thereafter, plaintiff sub-contracted with defendants to perform work on the ATM machines in exchange for a fee. However, plaintiff claims that defendants re-programmed and switched the codes in the ATM machines, without plaintiff's consent, in order to receive a higher fee or "kick-backs" from a different company. Plaintiff contends that it lost profits and incurred reputational harm when defendants wrongfully induced the Stores to breach their agreements and evicted plaintiff from the Stores.

In their counterclaims, defendants aver that plaintiff breached its contract with them and tortiously interfered with their business relationships with M A Grocery and Pak Punjab Deli & Grocery by using threats and extortion and inducing the stores to breach their relationship with defendants. They, however, do not mention Village Bazaar or AAK Convenience in their counterclaims.

II. Conclusions of Law

CPLR 3101 (a) states: "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The words "material and necessary" are to 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 Publishing Co.*, 21 N.Y.2d 403, 406 (1968). Litigants, however, do not have carte blanche to demand production of whatever documents they speculate might contain something helpful. *Vyas v. Campbell*, 4 A.D.3d 417, 417 (2nd Dept. 2004). Therefore, demands that are unduly burdensome, lack specificity, seek privileged matter or irrelevant information, or are otherwise improper must be denied. *Scalone v. Phelps Memorial Hosp. Center*, 184 A.D.2d 65, 70 (2nd Dept. 1992). Moreover, trial courts have

broad discretion in supervising pre-trial discovery, as CPLR 3103 (a) states:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Here, the majority of defendants' demands are overly broad and irrelevant to the issues in this case. *See 40 Rector Holdings, LLC v. Travelers Indemnity Co.*, 2007 NY Slip Op 4422 (1st Dept. 2007). For example, items ten through twenty-seven of the Notice require plaintiff to provide copies of pleadings related to *other* actions in which plaintiff is involved and to produce contracts, agreements, correspondence, etc. relating to different stores *not* mentioned in the pleadings in this action. There are no claims in this action relating to these other stores, and defendants have not shown that the issues in the actions relating to the other stores are related to the issues here. Also, defendants request copies of documents showing phone numbers and correspondence under the control of plaintiff's president, Mr. Kim, a list of all of the ATM machines operated by plaintiff, copies of plaintiff's sales agents' tax forms, and a print-out of plaintiff's highest and average bank balance for 2006. Defendants fail to explain how these documents are relevant to this case or might lead to the discovery of material facts. *See Scofield v. Trustees of Union College*, 267 A.D.2d 651, 652 (3rd Dept. 1999). Additionally, defendants did not provide the Court with a copy of Mr. Kim's deposition, which they repeatedly refer to in order to explain why their requests are needed to prepare for trial.

Discovery should not be ordered where, as here, there has been a failure to demonstrate that it is anything more than a "fishing expedition." *Greenberg v. McLaughlin*, 242 A.D.2d 603, 604 (2nd Dept. 1997). Virtually all of defendants' interrogatories are improper, overly broad or

seek conditionally privileged information, such as tax information and bank accounts. *See EIFS, Inc. v. Morie Co., Inc.*, 298 A.D.2d 548, 549 (2nd Dept. 2002). Document requests two through twenty-seven and interrogatories (demonstrated as “information questions”) one through three should be stricken rather than pruned, as they are patently burdensome, unduly vague and oppressive. *Barouh Eaton Allen Corp. v. IBM Corp.*, 76 A.D.2d 873, 874 (2nd Dept. 1980); *see also EIFS, Inc. v. Morie Co., Inc.*, 298 A.D.2d 548, 549 (2nd Dept. 2002).

On the other hand, defendants’ first request for documents makes a legitimate request for police records regarding an investigation of plaintiff and Mr. Kim, who is a police officer, as well as plaintiff’s president. Defendants requested disclosure of Mr. Kim’s police department records and agreements concerning his operation of plaintiff’s business while serving as a police officer. This information relates to defendants’ counter-claims, as Mr. Kim allegedly told defendants that he was removing himself from plaintiff’s business by order of the police department, and that he was turning over plaintiff’s locations to defendants. Thus, plaintiff and Mr. Kim shall produce any documents relating to the police investigation and agreement that are in their possession, custody or control, and which they are permitted by law to disclose. However, plaintiff and Mr. Kim may not be compelled to produce information that does not exist, that they are legally bound to keep confidential, or over which they do not exercise possession, custody or control. *Lauro v. Top of the Class Caterers, Inc.*, 169 A.D.2d 708, 708 (2nd Dept. 1991). In the event that plaintiff and Mr. Kim do not have possession, custody or control of documents responsive to this request, they shall provide defendants with an affidavit so stating. Accordingly, it is

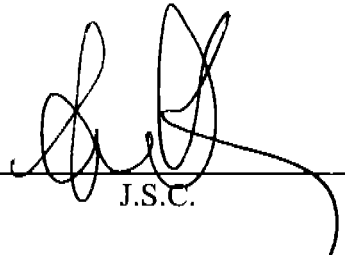
ORDERED that plaintiff is directed to produce the documents demanded by defendants in item number one of the Notice within seven (7) days of service upon plaintiff of a copy of this

order with notice of entry; and it is further

ORDERED that defendants' document requests two through twenty-seven and information questions one through three are hereby stricken; and it is further

ORDERED that defendants' request for costs, disbursements and attorneys' fees is denied.

Dated: July 5, 2007
New York, New York



J.S.C.

FILED
JUL 09 2007
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