

Ellex v Rubinfeld

2007 NY Slip Op 32960(U)

September 17, 2007

Supreme Court, New York County

Docket Number: 0122193/2000

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

LISA ELLEX,
Plaintiff,

- v -

ILANA RUBENFELD d/b/a THE RUBENFELD
SYNERGY CENTER d/b/a THE GREENWICH
VILLAGE INN, d/b/a THE RUBENFELD
FOUNDATION, and THE NATIONAL
ASSOCIATION OF RUBENFELD SYNERGISTS,
INC.,
Defendants.

INDEX NO. 122193/00

MOTION DATE 7/26/07

MOTION SEQ. NO. 003

MOTION CAL. NO. 3

The following papers, numbered 1 to 5 were read on this motion to compel discovery

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits A-N; Exhibits A-B	<u>1-3</u>
Answering Affidavits — Exhibits A-F	<u>4</u>
Replying Affidavits	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers It is hereby ORDERED that the motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

J.S.C.

FILED
SEP 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/17/07
New York, New York

[Signature]
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
LISA ELLEX,

Plaintiff,

Index No. 122193/00

- against -

ILANA RUBENFELD d/b/a THE RUBENFELD SYNERGY
CENTER d/b/a THE GREENWICH VILLAGE INN, d/b/a THE
RUBENFELD FOUNDATION, and THE NATIONAL
ASSOCIATION OF RUBENFELD SYNERGISTS, INC.,

Decision and Order

Defendants.

FILED
SEP 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Lisa Ellex alleges that, in violation of the State and City Human Rights Laws, defendants terminated plaintiff's employment on July 8, 1999, based on a disability. Plaintiff allegedly sustained injuries as a result of a motor vehicle accident, and defendants were allegedly unwilling to accommodate plaintiff's schedule so as to allow her to attend doctor's appointments and physical therapy. Defendants assert that they do not fall under the definition of employer under the Human Rights Laws because they employed fewer than 4 employees during the relevant period.

Plaintiff served a third set of interrogatories dated September 16, 2006 and a third notice for discovery and inspection dated September 16, 2006. Plaintiff moves to compel defendants to respond to Interrogatory No. 1, and to document demands nos. 1-4, 8-14, and for a conditional order striking the answer in the event of non-compliance. Plaintiff believes that these documents are relevant as to whether defendants had the requisite number of employees, and would go to defendants' credibility as to the issue of whether defendants ceased business operations.

Having reviewed document demands nos. 3, 8, and 14 and the responses, the Court directs defendants to produce the following within 45 days:

- All payroll documents prepared by third parties for defendants from 1/1/99 through 7/31/99, as directed in the preliminary conference order dated March 2, 2006.
- Authorizations for payroll records prepared by or on behalf of defendants for 1999 and 2000;
- Dissolution records for the winding down of the bed and breakfast business in 1999;

Payroll records are relevant to the issue of the number of individuals that defendants employed. Dissolution records may contain information as to any employee-related liabilities, such as unpaid wages, and therefore such discovery is reasonably likely to lead to admissible information about the number of employees.

Defendants' request for a confidentiality order is denied, because defendants have not shown that disclosure of the items sought is likely to disclose proprietary information or trade secrets. Finch, Pruyn & Co. v Niagara Paper Co., 228 AD2d 834 (3d Dept 1996); New York State Elec. and Gas Corp. v. Lexington Ins. Co., 160 AD2d 261 (1st Dept 1990). To the extent that the parties are willing to enter into a confidentiality agreement, they are free to negotiate the terms of such agreement. However, discovery will proceed irrespective of whether a confidentiality agreement is in place.

Document demands nos. 1, 4, 12, and 13 seek:

- Authorizations for all quarterly tax returns filed with the State of New York and the IRS for 1999 and 2000;
- Authorizations to obtain all annual tax returns, W-2s, and 1099s, state and federal, for all defendants for 1999 and 2000;
- Authorization to obtain all records prepared on behalf of defendants by David Berdon, Inc. (phonetic) for 1999 and 2000;
- Authorization to obtain all records prepared on behalf of defendants by Barbara Litwinka and Richard Litwinka for 1999 and 2000;

As defendants indicate, “[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored ... [and a] party seeking disclosure must make a strong showing of necessity ... and demonstrate that the information contained in the returns is unavailable from other sources.” Gordon v Grossman, 183 AD2d 669, 670 (1st Dept 1992) (citations omitted). Here, plaintiff has met the strong showing of necessity for these documents, because the tax returns, payroll records, and financial records prepared by others on defendants’ behalf may be the only sole source of positive evidence of that defendants had more than three employees during the relevant period. See Rosenfeld v Kaplan, 245 AD2d 176 (1st Dept 1997).

Plaintiff has established the necessity to obtain Rubinfeld’s individual tax returns because Rubinfeld allegedly operated as a business a sole proprietorship, and plaintiff has shown that Rubinfeld apparently paid her from a personal bank account. See Pietrantonio Affirm., Ex J. Thus, the business deductions that defendants took, if any, might either provide direct evidence, or reasonably lead to admissible evidence, on the issue of the number of persons that defendants employed.

Defendants’ argument that plaintiff does not dispute the accuracy of a schedule of employees that defendants’ prepared is specious. Defendants have not provided the very discovery that plaintiff would need to verify or dispute the accuracy of defendants’ schedule.

To address defendants’ concerns about identity theft and confidentiality, the Court directs plaintiff to produce, within 90 days, for an in camera inspection, the documents for which authorizations were demanded.

At this time, the Court does not order production of the following documents:

- Documents relating to the sale of the premises of plaintiff’s place of employment,

including contract of sale, checks, and all documents exchanged at the closing thereof;

- Lease for Rubinfeld at 40 West 60th Street, New York, New York.

Plaintiff maintains that these records are sought on the issue of the continued viability of defendant's businesses as employers. However, nothing in the record, including the EBT excerpts of Rubinfeld, indicates that defendants have stated that they had ceased operations. Although evidence that defendants ceased operating could bear on the issue of the calculation of damages if plaintiff were awarded back pay, the relevance of the particular documents sought also could not be gleaned from the record. Nothing in the record indicates that plaintiff worked for defendant's bed and breakfast business. Because the parties do not state when defendants allegedly ceased operations, the relevance of the sale of plaintiff's workplace location, nor the lease for Rubinfeld's own residence, cannot be determined at this time.

At this time, the Court also does not order defendants to provide: (1) the name, address, and account numbers, all accounts maintained by any of the named defendants, and/or their behalf by Barbara Litwinka and/or Richard Litwinka; and (2) an authorization for copies of all checks and statements on checking accounts of defendants for 1999 and 2000. See Pietrantonio Affirm., Ex D (Interrogatory No. 1), Ex E. Plaintiff's ultimate aim is to obtain all canceled checks on the business accounts from the date that defendants hired plaintiff until the date she found new employment. Plaintiff's discovery request is overly broad. Plaintiff does not need to know the accounts which defendants did not use to pay any business expenses. The relevant period is the time at which plaintiff was terminated (see Brady v Helmsley, 246 AD2d 486, 487 [1st Dept 1998]; see also DeStefano v Kopelman, 265 AD2d 446, 447 [2d Dept 1999]), not the period from the date of plaintiff's hire until the date that plaintiff found another job.

. . . .

A conditional order striking defendants' answer is not warranted at this juncture, because plaintiff has not shown that defendants have wilfully or contumacious refused to comply with prior court orders.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the following extent:

1) Within 90 days, defendants must produce for an in camera inspection the following:

- Copies of quarterly tax returns filed with the State of New York and the IRS for 1999 and 2000;
- Copies of all annual tax returns, W-2s, and 1099s, state and federal, for all defendants for 1999 and 2000;
- Copies of all records prepared on behalf of defendants by David Berdon, Inc. (phonetic) for 1999 and 2000;
- Copies all records prepared on behalf of defendants by Barbara Litwinka and Richard Litwinka for 1999 and 2000; and it is further

2) Within 45 days, defendants are directed to plaintiff:


- All payroll documents prepared by third parties for defendants from 1/1/99 through 7/31/99, as directed in the preliminary conference order dated March 2, 2006.
- Authorizations for payroll records prepared by or on behalf of defendants for 1999 and 2000;
- Dissolution records for the winding down of the bed and breakfast business in 1999;

and in all other respects, plaintiff's motion is denied.

This opinion constitutes the decision and order of the Court.

Dated: 9/17/07
New York, New York

ENTER:


J.S.C.

FILED
SEP 21 2007
NEW YORK
COUNTY CLERK'S OFFICE