

OTR Media Group, Inc. v City of New York
2007 NY Slip Op 33120(U)
September 25, 2007
Supreme Court, New York County
Docket Number: 0116293/2006
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EILEEN A. RAKOWER

PRESENT: _____
J.S.C.
Justice

PART Part 5

Index Number : 116293/2006
OTR MEDIA GROUP, INC.
VS.
LANCASTER, PATRICIA J.
SEQUENCE NUMBER : # 003
COMPEL

INDEX NO. 11629306
MOTION DATE _____
MOTION SEQ. NO. #003
MOTION CAL. NO. _____

re read on this motion to/for _____

PAPERS NUMBERED

1, 2
3
4, 5

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/25/07

EILEEN A. RAKOWER
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: PART 5

-----X
OTR Media Group, Inc.,

Plaintiff,

Index No.
116293/06

- against -

Decision and
Order

The City of New York; Michael R. Bloomberg, in his official capacity as the Mayor of the City of New York; Patricia J. Lancaster, in her official capacity as Commissioner of the New York City Department of Buildings; Iris Weinshall, in her official capacity as Commissioner of the New York City Department of Transportation; Cemusa, Inc.,

Defendants.

FILED
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-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action challenging the constitutionality of several local laws and rules which regulate the size and placement of outdoor advertising signs in proximity to the defendant New York City's ("City") arterial highways and larger public parks. Specifically, plaintiff alleges that these regulations violate its rights under the free speech and equal protection clauses of the New York State Constitution. Plaintiff now moves to compel disclosure by defendant Cemusa, Inc. ("Cemusa"), impose discovery sanctions, and assign deposition priority to plaintiff. Cemusa cross-moves to compel plaintiff to serve responses to its requests for production. Defendants the City of New York; Michael R. Bloomberg, in his official capacity as the Mayor of the City of New York; Patricia J. Lancaster, in her official capacity as Commissioner of the New York City Department of Buildings; Iris Weinshall, in her official capacity as Commissioner of the New York City Department of Transportation ("City") do not submit papers.

On March 23, 2007 this court issued an order and decision denying Cemusa's motion to dismiss plaintiff's claim for violation of the Donnelly Act (N.Y. Gen. Bus. Law §340). Following receipt of the decision, Cemusa requested that plaintiff consent to a stay of discovery on the Donnelly Act claim pending Cemusa's appeal. Plaintiff declined to so stipulate and on May 4, 2007 Cemusa served plaintiff with its answer; interrogatories, document requests, and notices of deposition for corporate officers of plaintiff, Ari Noe and Levi Echenstein. On May 15, 2007 plaintiff sent a letter to Cemusa objecting to its request for documents. On May 22, 2007 plaintiff served Cemusa with its interrogatories and requests for documents. Plaintiff served Cemusa with a response to Cemusa's interrogatories and document requests, dated June 11, 2007 .

Plaintiff did not produce its witnesses for the depositions that were scheduled for June 15 and June 18, 2007. Counsel for plaintiff claims that he thought the dates were just place holders and, in any case, he needed to reschedule due to an upcoming medical procedure he was having. During an email correspondence between the parties, plaintiff's counsel and Cemusa's counsel agreed that they would discuss the depositions at another time. On June 19, 2007 a preliminary conference was held and a Preliminary Conference Order was produced which set the date for production of documents and responses to demands to be completed by November 1, 2007. Deposition of all parties (fact witnesses) was to be completed by February 15, 2008.

Following the conference, plaintiff received a copy of Cemusa's response to its first set of interrogatories and request for documents, dated June 13, 2007. The response included, among other things, an objection based on "priority of disclosure" because plaintiff had not yet responded to Cemusa's demands or conducted the noticed depositions.

Specifically, plaintiff seeks an order compelling Cemusa to answer its first set of interrogatories and respond to its requests for the following: (1) all documents discussing, analyzing, evaluating and/or referencing: competition between and among outdoor advertising companies doing business in New York City, the effects of the Challenged Regulations upon competition, the impact of the Challenged Regulations on the advertising rates set by Cemusa and/or City for advertising space on street furniture, the impact of the Challenged Regulations on the economic value of the Cemusa Contract, the calculation and establishment of advertising rates, setting forth actual and/or projected advertising rates for commercial advertising space located on

street furniture during the period of the Cemusa Contract, revenue projections for advertising space located on street furniture calculated by or on behalf of Cemusa after execution of the Contract, projections for advertising space located on street furniture calculated by or on behalf of the Contract; (2) All documents including correspondences, emails, memoranda, reports, analyses, and evaluations exchanged between Cemusa and the City discussing, analyzing, evaluating and/or referencing: advertising-related revenue to be paid to City under the contract; exchanged between City and Cemusa regarding competition between and/or among commercial outdoor advertising companies doing business in New York City, the effects on traffic safety in New York City or generally of commercial advertising signs(including signs that utilize scrolling visual content, moving images, and audio effects) affixed to street furniture structures, reports, studies, analyses, and calculations, relied upon or created by any expert retained by Cemusa in connection with the defense of this action, contracts, subcontracts, agreements, memoranda of understanding, and correspondences, discussing, referencing, identifying, and/or demonstrating relationships between Cemusa and any other commercial advertising entity established in order to satisfy Cemusa's obligations under the contract to lease commercial advertising space located on street furniture; (3) Rate cards for all advertising space located on street furniture maintained by Cemusa in every city, worldwide, in which Cemusa's street furniture is located, copies of the curriculum vitae for all experts retained by Cemusa in connection with the defense of this action, including a list of their publications; and (4) all documents relied upon by Cemusa in responding to plaintiff's interrogatories.

Plaintiff, by letter dated July 5, 2007, challenged Cemusa's response stating that "Cemusa has now had plaintiff's discovery response for approximately three weeks." Additionally, plaintiff states that it is forwarding Cemusa a copy of a "Confidentiality Stipulation" which, it claims, was so-ordered by the court and executed by plaintiff and City. In response to the letter, Cemusa sent a letter dated July 20, 2007 which states that it made changes to the Confidentiality Stipulation and that:

OTR has not produced a single document, has served interrogatory answers devoid of substantive responses, and has declined to make its deponents available for deposition. Once OTR has complied with Cemusa's statutory right to priority of discovery, Cemusa will promptly and properly provide appropriate discovery to OTR.

Cemusa's first set of requests for documents includes 46 items. Cemusa submits plaintiff's response which objects to requests numbered 2, 20, 39, 41, 42, 43, 44, 45 and 46. Cemusa does not specify which documents are outstanding but merely requests that the court compel plaintiff to produce "outstanding discovery responses." Many of plaintiff's objections are that it will produce the documents upon entry of an appropriate confidentiality order by the court. However, plaintiff has not yet responded to Cemusa's proposed changes to that order.

Cemusa makes the broad statement that plaintiff "responded and objected to Cemusa's request for answers to interrogatories." Upon examination of the response, it appears that some of plaintiff's responses are indeed in the form of objections but others are answered substantively.

CPLR 3106(a) states:

Normal priority. After an action is commenced, any party may take the testimony of any person by deposition upon oral or written questions. Leave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired.

As a general rule, in the absence of "special circumstances", priority of examination belongs to the defendant if notice of deposition is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination. (Bucci v. Lydon, 116 A.D.2d 520[1st Dept. 1986]).

Cemusa claims that it is entitled to withhold discovery from plaintiff based on the principle of "priority of discovery." Cemusa is entitled to *deposition* priority because it noticed plaintiff of the depositions of Ari Noe and Levi Echenstein within its time to answer. However, while CPLR 3106 generally gives the defendant priority of depositions (Rapillo v. Saint Barnabas Hospital, 93 A.D.2d 760[1st Dept. 1983]), it does not give a defendant the statutory right to withhold all documents until plaintiff's depositions are complete.

Wherefore it is hereby

ORDERED that plaintiff's motion to compel defendant Cemusa, Inc. to answer plaintiff's first set of interrogatories and to produce all documents in response to its first set of document requests is granted, and it is further

ORDERED that Cemusa shall answer plaintiff's first set of interrogatories and produce all aforementioned documents or objections, to the extent that it has not already done so, on or before NOVEMBER 1, 2007, and it is further


ORDERED that Cemusa's cross motion to compel is granted to the extent that plaintiff shall respond to Cemusa, Inc.'s proposed Confidentiality Stipulation and Order on or before the next scheduled compliance conference on OCTOBER 16, 2007, and it is further

ORDERED that plaintiff shall provide Cemusa, Inc., upon entry of a mutually agreed upon Confidentiality Agreement, with all documents requested, to the extent it has not already done so, on or before NOVEMBER 1, 2007, and it is further

ORDERED that plaintiff shall produce Ari Noe and Levi Echenstein for deposition on or before FEBRUARY 15, 2008.

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: SEPTEMBER 25, 2007



Eileen A. Rakower, J.S.C.

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