

**New York Merchants Protective Co., Inc. v
Rodriguez**

2007 NY Slip Op 33947(U)

December 3, 2007

Supreme Court, Nassau County

Docket Number: 7756-06/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**NEW YORK MERCHANTS PROTECTIVE CO.,
INC.,**

**TRIAL TERM
PART 50**

Plaintiff,

-against-

INDEX NO.: 007756/06

**MOTION DATE: 10-9-07
SUBMIT DATE: 10-25-07
SEQ. NUMBER - 007 &
008**

**AFRANIO RODRIGUEZ, ASTRID RODRIGUEZ,
MIGUEL RODRIGUEZ, A STAR SECURITY
TECHNOLOGY, LLC,**

**MOTION DATE: 11-8-07
SUBMIT DATE 11-19-07
SEQ. NUMBER - 009**

Defendants

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The following papers have been read on this motion:

Notice of Motion (Plaintiff), dated 9-21-07.....1
 Notice of Cross Motion (Defendant), dated 10-1-07.....2
 Affirmation in Opposition (to Plaintiff's Motion), dated 10-1-07.....3
 Affirmation in Opposition (to Defendants' Cross Motion, dated 10-3-07.....4
 Reply by Plaintiff, dated 10-3-07.....5
 Reply by Defendants, dated 10-23-07.....6
 Plaintiff's Affirmation of Good Faith, dated 9-21-07.....7
 Notice of Motion (Plaintiff), dated 10-26-07.....8
 Affirmation in Opposition, dated 11-6-07.....9
 Reply, dated 11-13-07.....10

Plaintiff's motion (Seq. 7) to compel discovery, pursuant to CPLR §3126, is granted to the limited extent set forth herein. Defendant's cross motion (Seq. 8) for a protective order pursuant to CPLR §3103, to compel compliance with its demand for particulars (CPLR §3042 (c) and (d), sanctions for failure to comply with defendants' discovery demands and preclusion CPLR §3126, is granted to the limited extent set forth herein. Plaintiff's further motion (Seq. 9), requesting a special referee to supervise disclosure, compelling defendants to enter into a confidentiality agreement and appointing an independent examiner, is denied as moot given the decision that follows. To the extent that plaintiff requests in its moving papers that this case be transferred to the commercial division of this Court, that request is denied because this Court lacks authority to make such an administrative decision, and because it is duplicative of a separate request made by plaintiff administratively for such a transfer which has been denied by the Administrative Judge of this Court.

Defendant Afranio sold his business to plaintiff's predecessor and in connection therewith executed an agreement (the Agreement) in which he agreed (i) never to solicit or accept business from any of the customers or accounts sold for the purpose of providing certain enumerated electronic systems and related services (defined as Services in the Agreement) and (ii) for a period of 5 years following an unspecified closing date not to compete as to the defined Services within a 100 mile radius of the "current" office of plaintiff's predecessor. The "current" office is not specified in the Agreement.

The complaint contains causes of action alleging that the defendants' have and continue systematically to solicit and service plaintiff's customers (First Cause of Action), that defendants' have induced plaintiff's customers to breach their contracts with plaintiff

(Second Cause of Action) and for injunction (Third Cause of Action).

This Court granted in part defendants' motion to dismiss under CPLR §3211(a)(7) however, on appeal, that decision was reversed and the complaint was reinstated.

The action centers on plaintiff's claim that defendants solicited customers of plaintiff that plaintiff purchased from defendant Afranio Rodriguez (Afranio). As part of the Agreement, Afranio, through his former corporation, Affarrow, transferred a subscriber list (the List) consisting of 1497 subscribers. Plaintiff contends that from the List 522 subscribers no longer have a business relationship with plaintiff although plaintiff fails to state in what manner the business relationships ceased to exist.

Plaintiff has made a demand for discovery and inspection, dated August 16, 2007, (Plaintiff's Demand) with which defendants have refused to comply and defendants have cross moved, with respect to compliance with defendants' particularization demands dated 24, 2007, and for a protective order with respect to Plaintiff's Demand. Defendant has refused to comply with any of Plaintiff's Demands and has not disputed plaintiff's claim that plaintiff has complied with all of defendant's demands with the exception of turning over the List which this court permitted to be held in abeyance pending this Decision.

Plaintiff has offered to abide by a confidentiality agreement applicable to all discovery from both sides but that offer has been rejected by defendants on the ground that defendant should not be required to comply with any of Plaintiff's Demands. Defendants have not offered to protect the confidentiality of any information which defendants obtain from plaintiff.

Except for items 13 (accounts payable) 14 (accounts paid) 16 (checks deposited) 17 (bank deposit statements) 18 and 19 (invoices) and 22 (invoices received) defendants shall

no later than 5:00 p.m., January 11, 2008, deliver to plaintiff's counsel, responses to the Plaintiff's Demands. All discovery from defendants shall be at the office of defendants' counsel and plaintiff shall pay for the cost of reproduction of any printed or electronic information.

Plaintiff shall no later than 5:00 p.m. January 11, 2008, deliver to the office of defendants' counsel responses to Items 2 and 4 of defendants First Supplemental Demand for Bill of Particulars, including the List. All discovery from plaintiff to defendants shall be at the office of plaintiff's counsel and defendants shall pay for the reproduction of any printed or electronic information. In the event that either party fails timely to comply with this Decision and Order within the aforesaid time period, that party shall, without further Order, be precluded from offering any evidence at trial, in a motion or in any other matter associated with this case.

A party seeking discovery must demonstrate that the discovery sought will lead to relevant evidence or is reasonably calculated to lead to discovery of information bearing on the claim. *Vyas v. Campbell*, 4 AD3d 417 (2d Dept. 2004). The plaintiff and defendants have met their burden.

Given the nature of this action, the allegations of both sides and the damages sought, the Court does not find the ordered information from both sides to be palpably improper, unduly burdensome or oppressive and as to defendants, their generalized and conclusory objections of irrelevancy are insufficient to establish otherwise. *Cf The Amherst Synagogue v. Schuele Paint Co., Inc.* 30 AD3d 1055 (4th Dept. 2006). The items demanded are reasonable and relevant to the allegations made by plaintiff and defendants have failed to cite

to this Court sufficient law or facts that would justify a protective order CPLR §3103 or a denial of the motions.

If a party from whom discovery is demanded, believes in good faith that any part thereof contains confidential proprietary or unique information not obtainable from any other source then such information may be designated as Confidential and any document or thing so designated shall be deemed a Confidential Item as to which the following shall apply:

(a) A party receiving a Confidential Item shall not use such item or any information therein for any purpose other than participation in this action, and shall not use or disclose such information to any person, except (i) as part of any Court proceeding, hearing, trial, motion or other Court related event; (ii) to in-house and outside counsel to the party receiving such Confidential Item (including paralegals, secretaries and other support staff); (iii) to in-house and outside counsel to the party receiving such Confidential Item (including paralegals, secretaries and other support staff); (iv) to potential witnesses, and (v) to experts, accountants, consultants and persons engaged by a party to assist in the prosecution or defense of any issue in this action. Any person to whom any Confidential Item or confidential information is disclosed shall be deemed bound by this Order.

(b) If a party to whom material designated Confidential is produced wishes to challenge the designation, the party making the challenge must do so promptly in writing to counsel for the designating party identifying the material being challenged and the grounds for the challenge. Within ten days of receiving that writing, the producing party shall respond in writing to the challenging party, setting forth the grounds for the designation. If the attorneys fail to resolve their disagreement as to the designation of materials, then the

challenging party may then move for an order vacating such designation. Until the court rules on such motion, the information, documents or portions of documents designated Confidential shall retain their designated status. If no such motion is filed, the information, documents or portions of documents subject to the challenge shall retain their designation.

(c) All materials produced by the parties and designated as Confidential shall be for use in the litigation of this action only.

(d) Nothing contained herein shall impose any restrictions on the use or disclosure by a party or witness of documents or information obtained lawfully by such party or witness independently of the discovery proceedings in this litigation, whether or not such documents or information are also obtained through discovery proceedings in this litigation.

(e) Within 30 days of the termination of this action (including any and all appeals that may be permitted by law therefrom), any party that has received information designated as Confidential will destroy or return to counsel all copies thereof except that parties may retain copies of any Confidential Item contained in any work product or court submissions including declarations or affidavits, exhibits thereto, and memoranda of law.


Except as set forth herein, all other requests for relief are denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 3, 2007

ENTERED


DANIEL PALMIERI
Acting Supreme Court Justice

DEC 05 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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