

**Westport Hardness and Gaging, Corp. v All
Precision Needs, Ltd.**

2008 NY Slip Op 32690(U)

September 11, 2008

Supreme Court, New York County

Docket Number: 601574/07

Judge: Judith J. Gische

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

PRESENT: _____
Justice

PART 10

Westport Auditors

INDEX NO. 601574/07

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

all Accession needs

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 _____

Repeating Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

SEP 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*Trial certification / compliance
Conference scheduled for
12/11/08 @ 9:30 am &
NOT extended to 12/12/08*

Dated: Sept 11, 2008 _____ 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
COUNTY OF NEW YORK: PART 10**

-----X
Westport Hardness and Gaging, Corp.

Plaintiff,

-against-

All Precision Needs, Ltd., Richard
Steinbauer a/k/a Rick Mannix and
Ray Lamitola,

Defendants.
-----X

DECISION/ ORDER

Index No.: 601574/07

Seq. No.: 007

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

Defs' APN and RL OSC (compel) w/SS affirm	1
Pltf's opp w/RAR affirm, exhs	2
Defs' APN and RL reply w/SS affirm, exhs (no sep tab)	3
Various invoices (no back)	4
Stip re: exh "D" to pltf's opp	5
Transcript 10/30/07	6
Transcript 7/17/08	7

FILED numbered
 SEP. 15 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This action involves claims by plaintiff that the defendants have misappropriated their list of customers and vendors with is proprietary information. The case has been plagued with ongoing discovery disputes over the past year, some disputes were raised by motion, others at compliance conferences.

In October 2007, the parties brought motions for contempt against each other. Though the court denied both motions for reasons set forth on the record (see Transcript 10/30/07), the court addressed the discovery dispute holistically, ordering

that defendants All Precision Needs, Ltd. ("APN") and Ray Lamitola ("Lamitola") produce 120 invoices that plaintiff had identified as being for customers both sides had in common ("1st order to compel"). Thereafter, defendants produced some invoices, but not all 120 of them, and the invoices they produced were heavily redacted.

This prompted plaintiff to bring a motion to hold APN and Lamitola in contempt. In the alternative, plaintiff asked for the production of the invoices in their unredacted form and that if they failed to do so, APN and Lamitola's answer be stricken. Although the court denied plaintiff's motion for contempt, it granted the remaining branches of plaintiff's motion as follows:

"APN produce all 120 invoices, in their unredacted form within 30 days of the date of this order. The court further orders that within 30 days of the date of this order all invoices for the identified common customers be produced for the time period following the last date that the 120 invoices were issued up to the date of actual production."

"This is a final opportunity for APN to comply with court orders for production of invoices and the failure to produce documents pursuant to this order [will] result in [the] automatic striking of the answer of All Precision Needs, [Ltd.] and Ray Lamitola without the need for further motion."

Decision/Order, Gische J., 4/28/08 ("2nd order to compel")

It is undisputed that APN failed to provide plaintiff with any documents until June 2, 2008, a date more than thirty (30) days after the deadline imposed in the court's 2nd order to compel. APN and Lamitola, however, attribute the delay to the order not being known to them until May 1, 2008 when it was published online and entered. Defendants argue that it was unfair to impose such a deadline, without requiring plaintiff to serve a copy of the order. Defendants urge the court to excuse their non-compliance

and seek an order compelling plaintiff to accept the late production of documents.

Plaintiff admits it rejected the documents defendants produced on the basis that they were served late. However, plaintiff argues that even had they been served timely, the production is incomplete, and therefore, the defendants answer is stricken, as the 2nd order to compel provides it would be.

The parties' dispute turns on what had to be produced under the court's 2nd order to produce. Defendants rely upon correspondence that plaintiff sent to them dated September 13, 2007. They contend that the letter identifies the 120 invoices they have to provide, and is the basis for the court's 1st order to compel of October 30, 2007. The plaintiff has now (albeit late) provided most of the invoices referenced in that letter. The following invoices have not been provided: 43-45, 48, 49, 51, 53, 218-220, 227, 228, 229 and 284. As for the missing invoices, APN must provide a sworn statement by a person with knowledge explaining why those invoices cannot be produced. The issue of credibility is for the trier of fact to decide at trial.

It is undisputed that other documents which were previously supplied, but redacted (see exhibit "A" of Roth's affirmation), have not been reproduced in their unredacted form. Plaintiff contends that defendants produced other redacted documents after the court made its 1st order to compel but before the 2nd order to compel, and these documents, and that those documents have not been produced without redactions.

Discussion

The court recognizes that WebCivil Supreme and "SCROLL" provide online are primary sources of public information, including scanned decisions and orders. Since

the court's 2nd order to compel was not available to the parties until it was published online on May 1, 2008, the defendants' delay in complying with the court's order is viewed as a minor deviation. Moreover, while plaintiff complains of the slow discovery process in this case, the problems have not been unilateral. Plaintiffs have not shown any prejudice in the de minimus delay in the document production.

The more important issue is whether the defendants have complied with the 2nd order to compel by producing the invoices they were required to. After comparing what defendants produced to what plaintiff demanded in its letter to APN dated September 13, 2007, the court decides that the defendants have substantially complied with the court's April 28, 2008 order to compel.

The September 13, 2007 letter that itemizes the 120 invoices plaintiff wants the defendants to produce because they are for clients both sides have in common. The letter request ensued from a meeting that the attorneys for both attended and at which they reviewed some 174 invoices. With certain exceptions, defendants have complied with the April 28, 2008 order which enforced the 1st order to compel made in October 2007. There are, however, some missing invoices that Ms. Sobel, attorney for APN and Lamitola, states cannot be produced or recreated. Her explanation is inadequate, and should have been in her client's sworn affidavit. No sworn affidavit, however, was provided. Therefore, as to the missing invoices APN must provide a sworn affidavit by a person with knowledge explaining that those documents cannot be produced. This affidavit is to be served no later than Twenty (20) Days following service of this order with notice of entry. The issue of credibility is for the trier of fact to decide at trial.

While at the time plaintiff and defendant brought their prior motions for contempt

plaintiff may have attached as an exhibit samples of documents that defendants had provided in their redacted form, those documents were never expressly identified or referred to in the court's 2nd order to compel. The redacted documents consist not just of invoices, but also quotes, purchase orders, and at least one shipping notice. While plaintiff may be entitled to those documents in their unredacted form, these documents were not articulated, nor the subject of, the court's April 28, 2008 order which simply pertained to the 120 invoices. Apparently, defendants also produced other documents after the court's 1st order to compel, but before the court's 2nd order to compel was made. Those documents are also not part of the 2nd order to compel because those issues were not before the court in October 2007.

This is not to suggest that defendants do not have to provide those documents in their unredacted form. They must. This is consistent with the spirit of the court's April 28, 2008 order, that defendants cannot self-select the documents they want to provide, and then decide how much to reveal. Having already provided the documents (identified by plaintiff in exhibit "A" to their opposition and in paragraph 11 of Mr. Roth's affirmation), and since there is no claim of privilege or privilege log, defendants must provide these documents, without redactions, no later than Twenty (20) Days following service of this order with notice of entry.

The parties shall proceed with discovery, as set forth in the 2nd order to compel. Since the dates for depositions and completion of discovery have passed, however, they are extended as follows: plaintiff's deposition by APN shall take place on **October 27, 2008** at 10:00 a.m. and shall continue day by day until completed. Any other depositions that have already noticed shall be completed by November 25, 2008.

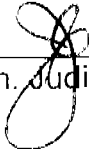
Plaintiff's time to file the note of issue is extended to December 12, 2008. The trial certification/compliance conference will be held on **December 11, 2008 at 9:30 a.m.** in Part 10.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 11, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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