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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

BRUCE BROOKS,

Plaintiff,

-against-

METROPOLITAN WHO'S WHO, INC., and
CAMBRIDGE WHO'S WHO PUBLISHING, INC.,

Defendants.

Motion Sequence #3, #4
Submitted February 24, 2009

INDEX NO: 10374/08

The following papers were read on this petition:

Plaintiff's Notice of Motion To Compel.....1
Defendants' Notice of Cross-Motion.....2
Plaintiff's Reply Affirmation in Support of Motion To Compel.....3

Requested Relief

Counsel for plaintiff, BRUCE BROOKS (hereinafter referred to as "BROOKS"), moves for an order, pursuant to CPLR § 3124, for an order directing the defendants, METROPOLITAN WHO'S WHO, INC. (hereinafter referred to as "METROPOLITAN") and CAMBRIDGE WHO'S WHO PUBLISHING, INC., (hereinafter referred to as "CAMBRIDGE"), to provide full and complete responses to plaintiff's first set of interrogatories, document demands, and first request for admissions to defendants. Defendants cross-move for an order, pursuant to CPLR § 2004, extending the time for

them to comply with the discovery demands, including compliance with the "cut-offs" provided in the Preliminary Conference Stipulation and Order, dated December 3, 2008. The motion and cross-motion are determined as follows:

Background

METROPOLITAN, a subsidiary of CAMBRIDGE, is in the promotional products business that publishes a biography for executives and professionals, either as a hard cover book or online, which provide its members with a source for networking and marketing. The members who pay a renewable membership fee and receive a wall plaque memorializing their membership in METROPOLITAN.

This action arises from the manufacturing of the wall plaques that had previously been outsourced. Plaintiff alleges that, on February 28, 2008, he entered into a Consulting Agreement with METROPOLITAN in which he agreed to create an "Award and Plaque Production Department", which consisted of assisting METROPOLITAN in setting up laser engraving machinery, instructing employees in the proper laser engraving procedure and managing the department in exchange for remuneration. Plaintiff claims that the agreement was for a three (3) year period, from February 28, 2008 through February 27, 2011, with compensation at the rate of $1,250.00 per month, with a per annum discretionary bonus of up to $35,000.00. It is plaintiff's position, that after 2 ½ months of service to METROPOLITAN, he was discharged without cause.

Plaintiff commenced the action, on June 2, 2008, by filing a motion for summary judgment in lieu of complaint, pursuant to CPLR § 3213, and alleged that the Consulting Agreement was an instrument for the payment of money only and that METROPOLITAN breached the agreement by failing to remit the remaining mandatory payments in

contravention of the terms and conditions of the agreement. In opposition to the motion and in support of its cross-motion for summary judgment, counsel for METROPOLITAN pointed out that it never signed the Consulting Agreement because it quickly became apparent that plaintiff had lied about his qualifications, that he had no idea how to operate the machinery and software that the company had purchased, and because he was abrasive to vendors and employees. By Short Form Order, dated October 2, 2008, the Court held that there existed numerous questions of fact with respect to each parties' performance under the contract that precluded the granting of summary judgment to either party on the breach of contract action, however, the Court dismissed plaintiff's causes of action for quantum meruit recovery and for fraud and directed that discovery proceed.

On or about October 24, 2008, plaintiff served its first combined set of discovery demands which sought documents, admissions and a first set of interrogatories. Thereafter, when a Preliminary Conference (PC) was held, on December 3, 2008, plaintiff claims that the Court Clerk was advised that plaintiff had already served his demands for discovery and, therefore, no provision was included in the PC order with respect to plaintiff's service of demands or defendants' responses to said demands. It is plaintiff's position that defendants should have responded to plaintiff's discovery demands within twenty (20) days of the PC Conference (by December 23, 2008), and by letter dated December 29, 2008, informed counsel for defendants that he had exceeded the twenty (20) day time period in which to respond or object to discovery demands under CPLR Article 31 and, therefore, plaintiff had waived any objections to plaintiff's discovery demands and had admitted each numbered admission within plaintiff's request for admissions. Counsel for plaintiff advised that unless complete responses to the document

demands were received by January 5, 2009, Court intervention would follow.

Counsel for defendants responded to plaintiff's December 29, 2008 letter, and rejected plaintiff's position that defendants had waived any objections to plaintiff's discovery demands or that they admitted anything with respect to plaintiff's first requests for admissions, based upon their reliance on the discovery dates provided in the PC order of the Court. Plaintiff rejected this position and pointed out that the PC order was silent with respect to the discovery demands served by plaintiff as well as the time frame for defendants' responses. In early January, when counsel for defendants requested an extension of time to provide responses to plaintiff's demands, said request was rejected as untimely.

In support of the cross-motion to extend defendant's time to comply with the discovery cut-off dates provided in the PC order, as well as to respond to plaintiff's first set of discovery demands, defendants' counsel contends that his prior requests for additional time to serve discovery demands upon plaintiff have been denied by plaintiff's counsel and, moreover, that defendants have served responses to plaintiff's first set of document demands, interrogatories and request for admissions (See defendant's Exhibits "C", "D", and "E"). Defendants' counsel asserts that the original delay was due to a variety of factors, including: difficulties locating responsive documents, scheduling conflicts with different principals and employees of the defendants, the complexities surroundings the relationship between defendants METROPOLITAN and CAMBRIDGE in order to corroborate the defense that CAMBRIDGE has no place in this litigation, and counsel's engagement on trial in a different matter. Counsel for defendants' argues that the Court has the discretion to extend defendants' time, as provided by CPLR §2004, which directs

that "the Court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown..." Defendants' counsel alleges that such good cause has been shown based on the infancy of the action, the good faith request for an extension from plaintiff's counsel, and the lack of prejudice to plaintiff. Counsel for defendants argues that no prejudice can be shown because depositions have not been held or scheduled and the Preliminary Conference order does not provide a cut-off date for service of defendants' responsive documents.

In reply, counsel for plaintiff rejects defendants' excuses, and contends that defendants' discovery responses were grossly deficient and that plaintiff informed defendants of same. Counsel for plaintiff states that he outlined the deficiencies in a letter, dated February 12, 2009 (see plaintiff's "Reply Affirmation" Exhibit "B"), to which defendants have still not responded.

The Law

CPLR § 3124 mandates that, "...if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response." Moreover, CPLR §3101(a) requires the "full disclosure of all information that is material and necessary to the defense or prosecution of an action". The "material and necessary" requirement directed in CPLR §3101(a) is to be liberally construed to require disclosure where the material sought will assist in trial preparation by sharpening the issues and reducing delay. *Andon v 302-304 Mott Street Associates,* 94 NY2d 746, 709 NYS2d 873, 731 NE2d 589 (C.A. 2000), citing *Allen* v *Crowell-Collier Publishing Co.,* 21 NY2d 403. "If there is any possibility

that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense". (*Allen v Crowell-Collier Pub. Co., supra*, [citations omitted]). Furthermore, the Courts have held that the failure of a party to challenge a Notice for Discovery and Inspection within the time prescribed by CPLR §3122 "forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR §3101 or requests that are palpably improper". *Garcia v Jomber Realty Inc.*, 264 AD2d 809,695 NYS2d 607 (2nd Dept. 1999); see also, *McMahon v Aviette Agency, Inc.*, 301 AD2d 820, 753 NYS2d 605 (3rd Dept. 2003). Additionally, the nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the Court. *Kingsley v Kantor*, 265 AD2d 529, 697 NYS2d (2nd Dept. 1999).

When determining if "good cause" exists pursuant to CPLR §2004, the Court may consider factors such as "the length of delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence of or absence of an affidavit of merit." See *Tewari v Tsoutsouras*, 75 NY2d 1, 550 NYS2d 572, 549 NE2d 1143 (C.A.1989).

Discussion

After a careful reading of the submissions herein, the Court acknowledges counsel for plaintiff's frustration in timely obtaining duly demanded discovery, but notes that the length of the delays have not been extensive and the extent of the discovery provided by

counsel for defendants at the end of January 2009, notwithstanding the boiler plate objections, appears to be adequate. It is the experience of the Court that granting requests for an extension of time to comply with required discovery are part of the routine courtesies that litigating attorneys provide to one another, and the Court frowns on highly technical objections which, is essence, delays the regular course of routine discovery and frustrates each parties ability to properly prepare the matter for trial. Counsel for defendants has provided the relevant documents, has answered the interrogatories in accordance with their theory of defendant's case, and has provided admissions where appropriate. CPLR §3123 does not mandate responses to issues upon which there are factual disputes. The Court finds that the discovery focuses on material issues of fact in dispute for which both sides have already been denied summary judgment.

Moreover, it is the Court's view that counsel for plaintiff has failed to demonstrate how plaintiff has been prejudiced by the few days delay in service of defendants' discovery demands upon plaintiff. The Court favors disposition of the litigation on the merits, after each party has exchanged all necessary discovery to their adversary, to assist in trial preparation by sharpening the issues and reducing delay. *Cf. Andon v 302-304 Mott Street Associates, supra.*

Conclusion

Based on the foregoing, it is hereby

ORDERED, that plaintiff's motion to compel defendants to respond, without objection, to plaintiff's first set of interrogatories, document demands, and first request for admissions, is denied and the Court finds that defendants have provided adequate

responses; and it is further

ORDERED, that defendants' cross-motion for an order denying plaintiff's motion to compel and for an order providing additional time to serve discovery demands upon plaintiff is granted, and counsel for plaintiff is directly to provide responses to defendants' demands within twenty (20) days after receipt of a copy of the instant order with notice of entry. Counsel for both parties are directed to efficiently proceed with discovery without further delay; and it is further

ORDERED, that, all counsel shall appear for a previously scheduled Certification Conference before the undersigned on June 1, 2009 at 9:30 A.M. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 15, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

MAY 28 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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