| **American Franchise Specialist Agency, Inc. v Henry** |
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| 2009 NY Slip Op 32758(U) |
| November 12, 2009 |
| Supreme Court, Suffolk County |
| Docket Number: 13335/2007 |
| Judge: Ralph T. Gazzillo |
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SHORT FORM ORDER

Index No: 13335/2007

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 05/14/2009
ADJ. DATE: 07/16/2009
MOT. SEQ: 003 MD; 004 MD
005 Mot D

***PRESENT:***
Hon. RALPH T. GAZZILLO
A.J.S.C.

-------------------------------------------------------------X

AMERICAN FRANCHISE SPECIALIST AGENCY, INC., CHERYL GRAHAM and JANICE CAVENAUGH-TETI,

Plaintiff(s),

- against -

BRENDAN C. HENRY, KAH INSURANCE, BROKERAGE, INC., HUDSON INSURANCE GROUP, HUDSON INSURANCE COMPANY, CLEARWATER INSURANCE COMPANY, CLEARWATER SELECT INSURANCE COMPANY.

Defendant(s).

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Upon the following papers numbered 1 to 49 read on this motion pursuant to 3126 ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14-31; 32-41; 46-47, 48-49 ; Answering Affidavits and supporting papers 42 - 45 ; Replying Affidavits and supporting papers ___ ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that plaintiffs' motion (seq 003) for an order striking the answer or precluding the defendants from introducing certain evidence at trial; or compelling compliance with the demands is denied; and it is further

***ORDERED*** that the cross-motion (seq 004) by defendants, Brendan C. Henry and Kah Insurance Brokerage, Inc., for an order striking plaintiff's complaint and for sanctions against plaintiffs is decided herewith; and it is further

***ORDERED*** that the cross-motion (seq 005) by defendants, Hudson Insurance Group, Hudson Insurance Co., Hudson Specialty Insurance Company, Clearwater Insurance Co., and Clearwater Select Insurance Co. (hereafter Hudson), for an order striking plaintiffs' complaint or compelling compliance with the discovery requests is decided herewith; and it is further

***ORDERED*** that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for the named defendants, pursuant to CPLR 2103(b)( 1), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this action, plaintiff seek to recover damages against defendants Henry and Kah for a breach of a Memorandum Agreement dated June 15, 2005. That agreement provided for plaintiffs to provide start-up costs to defendants Henry and Kah. It also provided for a sharing of commissions between those parties as the generated through the procurement of insurance policies for various McDonald's Restaurant franchises. They also claim that the Hudson defendants violated plaintiffs' rights by paying brokerage commissions solely to defendants Henry and Kah.

Plaintiffs now move for an order pursuant to CPLR 3126 striking the defendants' answers based upon their alleged willful failure to respond to plaintiffs' demands for discovery.

The plaintiffs' motion relating to defendants Henry and Kah is denied. Plaintiffs contend that they served these defendants with their Notice for Discovery and Inspection which was dated December 14, 2007. On or about January 17, 2008, the defendants served their responses which plaintiffs now allege were incomplete. On January 14, 2009, plaintiffs served a Supplemental Request for Documents. The following day, they sent defendants a letter regarding their earlier discovery requests dated December 14, 2007. Plaintiffs contend that they have not received complete responses from these defendants.

In opposition and in support of their cross-motion, defendants, Henry and Kah, contend that plaintiffs have not complied with the Preliminary Conference Order of July 23, 2008. Defendants attach a copy of that Order to their cross-motion and note plaintiffs' failure to attach it to theirs. Defendants argue that the Order required plaintiffs' depositions to be held on October 15, 2008. Henry and Kah appeared ready to proceed on that date but plaintiffs did not. Similarly, plaintiffs did not appear on October 21, 2008 for the depositions of Henry and Kah as required by the Order. Further, these defendants note that the Preliminary Conference Order required any requesting party to serve their discovery demands by September 15, 2008. However, on January 14, 2009, plaintiffs served a supplemental demand for documents after the deadline set by the Order. Henry and Kah continue that on January 28, 2009, plaintiffs sent objections to defendants' responses to the January 2008 demands.

Plaintiffs served the same discovery demands on the Hudson defendants on or about December 14, 2007. Hudson's response was served on January 28, 2008. Ten months later on October 2008, plaintiffs sent a letter noting Hudson's incomplete responses to their demands.

Plaintiff then served a supplemental demand on January 14, 2009. This was followed by plaintiff's letter dated January 15, 2009 noting defendants' incomplete responses to their 2007 demands.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406). "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 Publ. Co.***, *supra*, at 407, 288 NYS2d 449, *quoting* CPLR 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Beckles v Kingsbrook Jewish Med. Ctr.***, 36 AD3d 733; ***Smith v Moore***, 31 AD3d 628; ***Vyas v Campbell***, 4 AD3d 417). Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g.* ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469; ***Bettan v Geico Gen. Ins. Co.***, 296 AD2d 469, *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420).

Although actions should be resolved on the merits whenever possible (*see* ***Ingoglia v Barnes & Noble College Booksellers, Inc.***, 48 AD3d 636; ***Pascarelli v City of New York***, 16 AD3d 472; ***Cruzatti v St. Mary's Hosp.***, 193 AD2d 579), a court may strike a pleading or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; *see* ***Nicolia Ready Mix, Inc. v Fernandes***, 37 AD3d 568; ***Mendez v City of New York***, 7 AD3d 766, 778 NYS2d 501 [2d Dept 2004]). The penalties authorized by CPLR 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (***Oak Beach Inn Corp. v Babylon Beacon***, 62 NY2d 158, 166). A party seeking the drastic sanctions of striking a pleading or preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v Port Auth. of N.Y. & N.J.***, 46 AD3d 501; ***Shapiro v Kurtzman***, 32 AD3d 508). Willful and contumacious conduct may be inferred from a party's repeated failure to adequately respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (*see* ***McArthur v New York City Hous. Auth.***, 48 AD3d 431; ***Bomzer v Parke-Davis, Div. of Warner Lambert Co.***, 41 AD3d 522; ***Devito v J & J Towing, Inc.***, 17 AD3d 624).

Here, plaintiffs have fallen far short of meeting their burden. Plaintiffs demand consists of 53 separate paragraphs. Their supplemental demand contains 64 document requests. The Hudson defendants argue that their preliminary estimates indicate that the production of the documents would exceed 200,000 pages of documents which are located across 25 states. They estimate the cost of reproducing these documents to be between $50,000 and $100,000. Further, they argue that the various demands are overly broad and improper.

It appears that plaintiffs' demands are in fact overly broad and unduly burdensome. Plaintiffs do not dispute the Hudson defendants' claim that 200,000 pages of documents would have to be retrieved from across 25 states. Further, they merely contend that all the defendants' responses were incomplete without demonstrating that the documents are otherwise material, relevant, necessary or designed to obtain evidence. There is no statement by them identifying the claimed inadequacies in the defendants' responses. In that regard, it is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (***Allen v Crowell-Collier Pub. Co.,*** 21 NY2d 303; ***Crazytown Furniture v Brooklyn Union Gas Co.,*** 150 AD2d 420).

Initially, the Court notes that plaintiffs have not demonstrated a good faith effort to resolve their dispute. In this regard, cursory telephone conversations or letters are insufficient. In order to be in compliance, a good faith effort requires significant and intelligent contact, and any negotiations must be sufficiently detailed in counsel's affirmation.

In any event it is apparent to the Court that many of the requests by plaintiffs do not even relate to the subject matter of this action. Clearly, plaintiffs have failed to meet their burden of establishing that the documents they seek are material and necessary in the prosecution of the action. Where, as here, discovery demands are palpably improper in that they are overbroad, lack specificity, burdensome, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it. Plaintiffs bear the burden of making a proper demand for disclosure. It is not the court's responsibility to correct a palpably bad demand, or to parse an overly broad demand (*see* ***Bell v Cobble Hill Health Ctr., Inc.,*** 22 AD3d 620). Accordingly, the demands by plaintiffs are vacated (see CPLR 3103).

Finally, the drastic remedy of striking a pleading must be supported by a clear showing that there was both a failure to comply with discovery demands and that such failure was willful and contumacious (*see*, ***Step-Murphy, LLC v B & B Bros. Real Estate Corp.***, 60 AD3d 841). Again, plaintiffs have wholly failed in this regard.

The Henry and Hudson defendants have also separately cross-moved for a dismissal of the complaint pursuant to CPLR 3126. Suffice it to note that plaintiffs have been dilatory in their compliance with the Preliminary Conference Order by responding to discovery demands and appearing for depositions. They have also delayed the matter by failing to promptly claim, as they do now, that the defendants' responses to demands were inadequate. The cross-motion (seq 004) by the Hudson defendants pursuant to CPLR 3126 is denied. Plaintiffs have attached responses to these demands in their affirmation in opposition. However, Hudson does not specifically advise the Court how or whether those responses are inadequate. The cross-motion (seq 005) by defendants Henry and Kah is decided to the extent that plaintiffs shall appear for a deposition in compliance with the Preliminary Conference Order within thirty days of the date of this Order.

Lastly, the Court advises the parties and their counsel that dilatory tactics, evasive conduct

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and or a pattern of non-compliance with discovery and disclosure obligations may give rise to an inference of willful and contumacious conduct, and may result in severe adverse consequences and sanctions. Further, prior to the date of the next compliance conference respective counsel are directed to communicate with each other and resolve any outstanding discovery requests or issues without further recourse to this court.

Dated: 11/12/09
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION______ NON-FINAL DISPOSITION______