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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 112256/2007
REICHMANN, MARC
VS.
PRO PERFORMANCE SPORTS
SEQUENCE NUMBER : 002
EXTEND TIME

INDEX NO. _____
MOTION DATE 9/17/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
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 is decided in accordance with the annexed Memorandum Decision + Order,

FILED
DEC 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 14, 2009

J.S.C.

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

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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MARC REICHMANN

Index No. 112256/07

Plaintiff,

- against -

PRO PERFORMANCE SPORTS, LLC, MODELLS N.Y. II, MODELLS, INC., MODELL'S SPORTING GOODS, INC. and MODELL'S SPORTING GOODS #47,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff Marc Reichmann ("Reichmann") moves for an order striking the answer of defendants Modell's N.Y. II ("Modell's II"), Modell's Sporting Goods, Inc. ("Model Sporting Goods") and Modell's Sporting Goods #47 ("Modell's 47") and to compel Pro Performance Sports ("Pro Performance") to answer Plaintiff's First Set of Interrogatories and to respond to Plaintiff's Combined Demands and to extend the note of issue deadline. After the motion was made, the Modell defendants complied with the February 19, 2009 order so the motion to strike their answer is moot. Pro Performance opposes the motion to the extent that it pertains to it

Background

This action seeks to recover damages for personal injuries sustained by Reichmann on August 25, 2005, while he was using a Hit-A-Way product allegedly manufactured by Pro Performance and purchased from Modell's. Pursuant to an Interim Order dated September 17, 2009, the court resolved that part of the motion seeking to compel Pro Performance to respond to Rechmann's Combined Demands for discovery dated February 19, 2009 and extended Reichmann's time to file his note of issue to March 10, 2010. Accordingly, the only aspect of the

motion still at issue is that part seeking to compel Pro Performance to respond to Plaintiff's First Set of Interrogatories dated February 19, 2008. At a status conference held on February 19, 2009, this court directed that Pro Performance answer the interrogatories "within 30 days [and] upon Pro Performance's failure to timely comply the court will impose sanctions including preclusion pursuant to CPLR 3126." Pro Performance answered the interrogatories on March 23, 2009. However, Reichmann argues that Pro Performance has not complied with the February 19, 2009 status conference order since the interrogatories were not answered under oath as required under CPLR 3133(b). Reichmann also argues that since the interrogatories were not answered or objected to within twenty days after they were served as required under CPLR 3133 (a), Pro Performance has waived its right to object to the interrogatories. Kleinberg v. American Mayflower Life Insurance Company of New York, 106 A.D.2d 268 (1st Dept 1984). With respect to those objections based on attorney client or work-product privilege, Reichmann asserts that Pro Performance's objections are not sufficiently specific to meet its burden of demonstrating that either of these privileges applies.

In opposition, Pro Performance submits a statement under oath dated March 25, 2009, attesting to the truth of its answers to the interrogatories and also asserts that the interrogatories contain proper responses and objections and that the interrogatories objected to were unduly burdensome, overly broad and called for legal conclusions. Pro Performance also argues that it did not waive its right to object as it is not required to answer interrogatories that are palpably improper. Litemore Electric Co., Inc. v. City of New York, 96 A.D.2d 1022 (1st Dept 1983).

Discussion

CPLR 3133(a) provides that "[w]ithin twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity." When the party served with the interrogatories fails to object in the time and manner prescribed by 3133(a) "the court's inquiry is limited to whether the demands call for disclosure of privileged information or whether the demands are 'palpably improper.'" Aviles v. State of New York, 13 Misc.3d 1237(A), *1 (Ct. Claims 2006); see also Cooper v. Drobenko Bros. Realty, Inc., 200 A.D.2d 415 (1st Dept 1994)(defendants waived the right to cross move for a protective order by failing to timely challenge the interrogatories at issue); Kleinberg v. American Mayflower Life Insurance Company of New York, 106 A.D.2d 268 (failure to timely object to the interrogatories under CPLR 3133(a) forecloses party from challenging them).

Here, while Pro Performance initially failed to verify the interrogatories under oath, as it almost immediately remedied this defect and responded to the First Set of Interrogatories within thirty days, as required by the court's status conference order, no sanctions shall be imposed against it. However, while Pro Performance complied with the status conference order, it still failed to comply with the 20-day deadline provided under CPLR 3133(a) since it filed its objections and answers to the interrogatories on March 23, 2009, almost a year and a month after the interrogatories were served. Thus, Pro Performance is foreclosed from objecting to the interrogatories and is required to respond to them unless they are palpably improper or seek

privileged information. Here, a review of the interrogatories indicates that none of the interrogatories are "palpably improper." Moreover, to the extent certain interrogatories could be read as seeking legal conclusions as well as factual responses, Pro Performance needs only to respond with factual answers. In addition, while Pro Performance has objected to certain of the interrogatories based on privilege, in light of "the strong public policy favoring full disclosure," Pro Performance has the burden of proving each element of a privilege. Spectrum Systems Intern'l Corp. v. Chemical Bank 157 A.D.2d 444,447 (1st Dept 1990), aff'd as modified, 78 N.Y.2d 371 (1991). "In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that is was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v. Exchange Ins. Co., 240 A.D.2d 452,454 (2nd Dept), lv. dismissed 91 N.Y.2d 848 (1997). In addition, facts in a client 's possession are not insulated from discovery simply as a result of being reported to counsel. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 594 (1989). Likewise, facts learned by an attorney from independent sources and then reported are not privileged. Kenford Co. v. County of Erie, 55 A.D.2d 466 (4th Dept 1997).

An attorney's work product is entitled to absolute immunity (CPLR 3101[c]), while materials prepared in anticipation of litigation are subject to conditional privilege (CPLR 3101[d]). Corcoran v. Peat, Marwick, Mitchell and Co., 151 A.D.2d 443,445 (1st Dept 1989). "Lawyer's interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product." Id. However, the work product privilege has been construed narrowly. Zimmerman v. Nassau Hospital, 76 A.D.2d 921, 922 (2nd Dept

1980). Thus, to be shielded from discovery based on the work product privilege, it must be shown that the materials in issue are "uniquely the products of a lawyer's learning and professional skills." Aetna Cas and Surety Co. v. Certain Underwriters at Lloyd's, 263 A.D2d 367, 368 (1st Dept 1999), lv. dismissed, 94 N.Y.2d 875 (2000)(citations omitted).

Under the above-cited standards, Pro Performance has not met its burden of demonstrating that the attorney-client or work product privileges apply to the interrogatories at issue, including the documents sought in connection with certain interrogatories. Under these circumstances, the proper remedy is for Pro Performance to more particularly specify the basis for the privilege with respect to any answer which, if appropriate, the court may review in-camera and with respect to any documents withheld for Pro Performance to provide a privilege log in compliance with CPLR 3122(b) and produce any documents specified in such log to the court for in-camera inspection. Pro Performance's failure to provide information and/or a privilege log and documents to support claims of attorney client or work product privilege, in accordance with the direction of the court, will result in a waiver of the objections, and an order requiring Pro Performance to provide the response and/or documents at issue.

Conclusion

In view of the above, it is

ORDERED that to the extent it has not already done so, within 30 days of the date of this decision and order, Pro Performance is directed to answer Plaintiff's First Set of Interrogatories within 30 days of the date of this decision and order; and it is further

ORDERED that within thirty days of the date of this decision and order Pro Performance

is directed to specify the basis of any objection based on the attorney-client or work product privileges and to provide to the court a privilege log in compliance with CPLR 3122(b) and produce any documents specified in the log for in-camera inspection; and it is further

ORDERED that failure to timely comply with the immediately proceeding paragraph shall result in the waiver of any objection based on the attorney-client or work product privileges and Pro Performance will be required to respond to the questions and provide the documents at issue.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: December 4 2009

J.S.C.