

Weiler v Leeds

2010 NY Slip Op 30125(U)

January 12, 2010

Supreme Court, Nassau County

Docket Number: 006848-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**MITCHELL WEILER, MD, RICHARD HONIGMAN
MD, ARM MANAGEMENT, INC., CBO ARM
REALTY INC., AND ARM OF PEDIATRICS LLP,**

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiffs,

**Index No: 006848-09
Motion Seq. No: 1
Submission Date: 11/24/09**

-against-

ANDREA LEEDS, MD,

Defendant.

-----X

The following papers having been read on this motion:

- Notice of Motion, Affidavit in Support,**
- Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Plaintiffs Mitchell Weiler, M.D., Richard Honigman, M.D., Arm Management, Inc., CBA Arm Realty Inc. and Arm of Pediatrics, LLP ("Plaintiffs") on October 20, 2009, which was submitted on November 24, 2009. For the reasons set forth below, the Court grants the motion in part and denies it in part. The Court denies Plaintiffs' motion to preclude Defendant from introducing certain evidence at trial, but directs Defendant to pay \$500 in counsel fees that Plaintiffs incurred as a result of Defendant's failure to respond to Plaintiffs' discovery requests in a timely manner. The Court also denies Plaintiffs' application in connection with Dr. Leeds' failure to supply certain personal financial information, without prejudice to renew upon on a more detailed

factual showing.

BACKGROUND

A. Relief Sought

Plaintiffs seek an Order 1) prohibiting Defendant Andrea Leeds, M.D. (“Leeds” or “Defendant”) from presenting any evidence at trial that would have been disclosed in response to Plaintiffs’ Notice for Discovery and Inspection; 2) directing Defendant immediately to provide Nassau Educators Federal Credit Union (“NEFCU) with certain financial documentation; and 3) awarding Plaintiffs counsel fees in the sum of \$2,500 that Plaintiffs have expended as a result of Defendant’s alleged failure to comply with the Court’s Orders.

B. The Parties’ History

In this action commenced on or about April 10, 2009, Plaintiffs have sued Defendant alleging three (3) causes of action sounding in breach of contract, fraud, and a tort based on Defendant’s allegedly improper manipulation of computer software in a manner that denied Plaintiffs access to the software needed to operate their medical practice. The allegations in the Complaint are as follows:

First Cause of Action

Plaintiffs allege that Leeds is a shareholder and partner in Plaintiffs Arm Management Inc. (“Arm Management”), CBO Arm Realty LLC (“Arm Realty”)¹ and Arm of Pediatrics LLP (“Arm Pediatrics”). On June 27, 2007, Arm Realty purchased real property located at 81 Sunrise Highway in Freeport, New York (“Property”). Leeds signed the mortgage and note for the purchase of the Property in her capacities as the Managing Member of Arm Realty and the President of Arm Management. Leeds also signed a personal guarantee of 100% of the mortgage amount.

On May 15, 2007, Arm Management obtained a line of credit in the amount of \$100,000 to be used to renovate the Property (“Line of Credit”). As of the date of the Complaint, April 6, 2009, Arm Management had borrowed \$95,000 against the Line of Credit. Leeds signed each advance request in her capacity as Vice President of Arm Management.

The parties agreed that each shareholder would pay one-third of the expenses associated

¹ The Complaint alleges that this entity is called “CBO Arm Realty LLC,” although the caption lists this entity as “CBO Arm Realty Inc.”

with the Property. Since February 8, 2008, Leeds has failed to make any contributions towards the Property's expenses, including the mortgage, Line of Credit and insurance, in violation of the parties' agreement.

Second Cause of Action

The parties billed for their professional services through Arm Pediatrics. On or about February 8, 2008, Leeds called insurance companies with which the parties conducted business and fraudulently advised them that she had mistakenly submitted bills with the incorrect tax identification number. Although Leeds had already been compensated for the services in question, she asked the insurance companies to reverse and reissue the payments due to Arm Pediatrics, and the insurance companies issued replacement checks to Leeds. Leeds has not repaid Plaintiffs for those sums. Moreover, as a result of Leeds' alleged misrepresentations, Plaintiffs incurred extensive time and expenses in notifying the insurance companies of Leeds' misrepresentations, and taking other necessary steps, to ensure that the parties' practice was not compromised by Leeds' conduct.

Third Cause of Action

Arm Pediatrics used particular computer software for which Plaintiff Mitchell Weiler ("Weiler") had a license ("Software"). After Leeds left Arm Pediatrics on February 8, 2008, she manipulated the computer in a way that denied Plaintiffs access to that Software, thereby preventing them from gaining access to their billing and medical records. Plaintiffs were forced to hire someone to reprogram the software so that Plaintiffs could obtain access to the Software.

In her Verified Answer dated May 27, 2009, Leeds advances the following affirmative defenses: 1) Plaintiffs have failed to state a claim upon which relief can be granted, 2) Plaintiffs' causes of action are barred by the doctrine of unclean hands, 3) Weiler and Richard Honigman ("Honigman") breached their fiduciary duties to Leeds; 4) Weiler and Honigman unlawfully locked Leeds out of the business on February 8, 2008, thereby relieving her of her obligations; 5) any debts or liabilities that Plaintiffs incurred after Leeds' ouster were incurred without her knowledge, authorization or consent; 6) Weiler and Honigman breached their agreement with Leeds by failing to bring in a physician to share the overhead expenses of the Plaintiffs' professional practice; 7) any damages that Plaintiffs suffered were caused by their own misconduct; 8) Plaintiffs have mitigated their damages by leasing the Property to a third party

and converting monies to which Defendant is entitled; and 9) Plaintiffs' causes of action, which are derivative in nature, must be dismissed because Plaintiffs failed to name the professional entities as defendants.

In support of this motion, Plaintiffs provide an Affidavit in Support of Honigman dated October 13, 2009. Honigman affirms as follows:

Nassau Educators Federal Credit Union ("NEFCU") holds the mortgage and note on the Property. The Mortgage, Assignment of Rents and Security Agreement ("Mortgage Agreement") (Ex. C to Honigman Affidavit) provides as follows, in pertinent part, at Paragraph 2(a):

Borrower hereby authorizes Lender to prepare and file financing statements, continuation statements and financing statement amendments in such form as Lender may require to perfect or continue the perfection of this security interest and Borrower agrees, if Lender so requests, to execute and deliver to Lender such financing statements, continuation statements and amendments.

On August 25, 2009, NEFCU advised Plaintiffs that it needed financial information from both the corporate entities and the individuals. In support thereof, Honigman provides e-mails dated August 25 and September 14, 2009 from Ashley Marth ("Marth"), a Portfolio Management Associate at CU Business Capital, LLC ("CU Business Capital") (Ex. F to Honigman Affidavit).

In the August 25, 2009 e-mail, Marth advised Honigman that she needed the following financial information 1) Honigman's 2007 and 2008 personal tax returns, 2) Honigman's signed and dated Personal Financial Statement, 3) Leeds' 2007 and 2008 personal tax returns, and 4) Leeds' Personal Financial Statement. Marth also advised Honigman, in this e-mail, that she spoke with Leeds who advised her that she was no longer associated with Arm Management. In the September 14, 2009 e-mail, Marth advised Honigman that she had received certain items, but still did not have Leeds' documentation. Marth also asked Honigman to confirm that Leeds was still a party of Arm Management.

On August 28, 2009, Plaintiffs' counsel sent a letter to Defendant's counsel (Ex. G to Honigman Affidavit) which stated that 1) NEFCU requested financial documents from all shareholders of Arm Management, including Leeds' 2007 and 2008 personal tax returns and Personal Financial Statement; and 2) Leeds refused to produce this documentation and advised

Marth that Leeds was no longer associated with Arm Management.

This letter from Plaintiff's counsel included an enclosure, consisting of a letter from NEFCU to Arm Management dated October 6, 2009. That October 6, 2009 letter was addressed to Leeds and read as follows:

Dear Ms. Leeds:

Our records indicate that certain financial information in your loan file(s) is missing, or now in excess of one (1) year of age, and is considered to be non-current by policy guidelines. Therefore, in accordance with your loan documents we hereby request that you forward the information detailed below to the attention of [CU Business Capital].

- * Personal Financial Statements for Andrea J. Leeds, MD
- * Personal Tax Returns for Andrea J. Leeds, MD

In the August 28, 2009 letter, Plaintiffs' counsel also advised Defendant's counsel that, in light of the fact that Leeds was still associated with Arm Management, she was required to provide this documentation. Plaintiffs' counsel asked that Leeds provide this documentation by September 8, 2009.

In her Affirmation in Support, Plaintiffs' counsel affirms that she drafted correspondence and this motion, and attended a conference, in connection with Plaintiffs' efforts to obtain this documentation from Defendant. Plaintiffs' counsel requests an Order directing Defendant to pay Plaintiffs the sum of \$1,875 for legal fees they expended in connection with Defendant's alleged failure to comply with this Court's orders. Plaintiff's counsel also affirms that she anticipates preparing reply papers and requests counsel fees of \$2,500.

In his Affirmation in Opposition, counsel for Defendants disputes Plaintiffs' claim that Defendant has refused to comply with the Court's directives. With respect to the allegations of Plaintiffs' counsel regarding a related District Court action, Defendant's counsel affirms that Defendant complied with all the District Court's directives, and that Plaintiffs withdrew that action after making what Defendant's counsel characterizes as a frivolous motion to disqualify Defendant's counsel.

Defendant's counsel also objects to Honigman's affirmations regarding court conferences, on the grounds that Honigman does not have personal knowledge regarding these conferences because he did not attend them. Moreover, Defendant's counsel affirms that the

Court never issued an Order or other directive requiring Defendant to provide the documentation at issue. Rather, the Court granted Plaintiffs permission to make a motion in the event that the Defendant did not provide the requested documents by a designated date. Finally, Defendant's counsel disputes the claim of Plaintiffs' counsel that Defendant's Verified Answer was untimely. Moreover, contrary to Plaintiffs' counsel's claim that she has tried to be courteous, Plaintiffs' counsel expressed her intention to file a motion for a default judgment based on her receipt of Defendant's Verified Answer merely one (1) day after it was due.

Defendant's counsel submits that the Court should deny Plaintiffs' motion to preclude as moot, as Defendant has served her Responses and Objections to Plaintiffs' Notice for Discovery and Inspection, a copy of which is annexed as Exhibit A to the Affirmation in Opposition. Defendant's counsel submits, moreover, that Plaintiffs' initial demand was improper in that it sought information more properly requested by an interrogatory or request for bill of particulars. Defendant's counsel concedes that Defendant's response to Plaintiffs' demand was untimely, but attributes its lateness to 1) Defendant's counsel's misreading of the deadlines in the Preliminary Conference Order, and 2) Defendant's counsel's subsequent involvement in a complicated trial in Queens County.

Defendant's counsel also opposes Plaintiffs' motion to compel Defendant to provide NEFCU with the financial information discussed *supra*. First, Defendant's counsel submits that Plaintiffs have failed to demonstrate why NEFCU requires this personal financial information of Leeds, speculating that Marth may be a financial advisor and Plaintiffs may be interested in refinancing, or increasing their line of credit.

Defendant's counsel also submits, as alleged in Defendant's Verified Answer, that Weiler and Honigman have denied Leeds access to the parties' business, and have refused Leeds' request that they provide her with access to the business' books, as well as an accounting. Finally, Defendant's counsel submits that Plaintiffs' counsel's request for counsel fees for 7.5 hours is excessive, contending that the Court should not award counsel fees relating to the NEFCU issue, which Defendant's counsel characterizes as a legitimate dispute between the parties.

In her Reply Affirmation, Plaintiffs' counsel disputes many of the assertions in the Affirmation in Opposition. With respect to the claim of Defendant's counsel that he was

engaged on an unrelated trial, Plaintiffs' counsel submits that, in light of the fact that there are eleven (11) attorneys listed on the letterhead of Defendant's counsel's law firm, there were other employees of that firm who could have drafted Defendant's responses to Plaintiffs' discovery requests. Plaintiffs' counsel also submits that, even if Defendant's counsel's trial engagement provided some explanation for Defendant's failure to respond, that engagement occurred after the date when Defendant's responses were due and does not satisfactorily explain Defendant's failure to comply with her discovery obligations.

With respect to Defendant's counsel's objection to Plaintiff's counsel billing for her attendance at a compliance conference, Plaintiffs' counsel affirms that she had submitted a letter to the Court requesting a conference regarding the late discovery responses and requested financial information. As there was already a conference scheduled in the near future, the issues in Plaintiff's counsel's letter were addressed at that scheduled conference. Plaintiffs' counsel affirms that these were the only matters discussed at the scheduled conference.

Plaintiffs' counsel also refutes the claim of Defendant's counsel that there is no apparent relationship between NEFCU and CU Business Capital. Plaintiffs' counsel provides copies of Monthly Payment Statements and a letter dated November 2, 2009 from NEFCU (Ex. B to Reply Affirmation) that, Plaintiffs' counsel submits, demonstrate the connection between those two entities.² Thus, Plaintiffs' counsel submits, there is no support for Defendant's claim that Plaintiffs are attempting to refinance the Property, or secure additional credit. Rather, the Mortgage Agreement requires Defendant to provide the requested documentation.

C. The Parties' Positions

Plaintiffs seek an Order 1) prohibiting Leeds from presenting any evidence at trial that would have been disclosed in response to Plaintiffs' Notice for Discovery and Inspection; 2) directing Leeds immediately to provide NEFCU with certain financial documentation, as required by the Mortgage Agreement executed in connection with the Property; and 3) awarding Plaintiffs counsel fees in the sum of \$2,500, that Plaintiffs have expended as a result of Defendant's alleged failure to respond to Plaintiffs' discovery request in a timely manner.

Defendant opposes Plaintiffs' application, submitting that 1) Defendant has responded to

² The Court notes that the October 6, 2009 correspondence from NEFCU, discussed *supra*, also makes specific reference to CU Business Capital but does not explain the relationship between those entities.

Plaintiffs' discovery request, which was improper; 2) Plaintiffs have not demonstrated their need for the documentation that NEFCU requested; and 3) as Defendant's conceded lateness in providing its discovery response was minimal and understandable, the Court should deny Plaintiffs' request for a counsel fee award.

RULING OF THE COURT

A. The Court Denies Plaintiffs' Motion for Sanctions

CPLR § 3126, titled "Penalties for refusal to comply with order or to disclose," provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In light of the fact that Leeds has responded to the Plaintiffs' Notice for Discovery and Inspection, the Court denies Plaintiffs' application for preclusion as moot. The Court, however, awards Plaintiffs counsel fees in the sum of \$500.00 that Plaintiffs incurred as a result of Leeds' failure timely to respond to Plaintiffs' discovery request. In making this award, which is less than the sum sought by Plaintiffs, the Court considers the facts that Defendant has offered some explanation for her lateness in responding, and has now responded to those discovery requests. The Court directs Defendant to forward that sum to Plaintiffs' counsel within thirty (30) days of the date of this Order.

B. The Court Denies Plaintiffs' Motion to Compel with Leave to Renew

With respect to Leeds' failure to supply NEFCU with updated personal financial information, the Court denies Plaintiffs' application to compel Defendant to provide that information, without prejudice to renew the application upon a more detailed factual basis. Plaintiffs have failed to establish the reason that NEFCU requires that information. The e-mails and correspondence on which Plaintiffs rely do not establish the nature of Marth's relationship to NEFCU, or the reason that NEFCU and Marth requested that information. Thus, the Court cannot conclude, based on the record before it, whether it is appropriate to compel Defendant to provide this information.

All matters not decided herein are hereby denied.

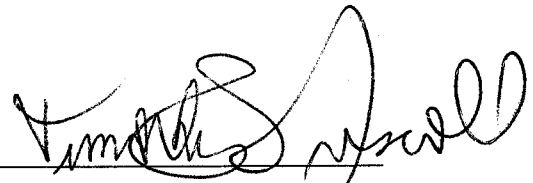
This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Certification Conference on February 25, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

January 12, 2010


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE