

United Tit. Agency, LLC v Surfside-3 Mar., Inc.

2010 NY Slip Op 32390(U)

August 26, 2010

Supreme Court, Nassau County

Docket Number: 001283-07

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
UNITED TITLE AGENCY, LLC.,

Plaintiff,

-against-

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

**Index No: 001283-07
Motion Seq. No. 5
Submission Date: 7/8/10**

**SURFSIDE -3 MARINA, INC.,
CHRISBAR ENTERPRISES I INC., and
MARINEMAX OF NEW YORK, INC.,**

Defendants.

-----X

The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation.....X**
- Certification in Further Opposition.....X**

This matter is before the Court for decision on the motion filed by Plaintiff United Title Agency, LLC ("Plaintiff") on January 20, 2009 and submitted on July 8, 2010. ¹ For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3126, 1) striking that portion of the

¹ The Court assumed responsibility for this matter in May of 2009 following the elevation of the Honorable Leonard B. Austin to the Appellate Division, Second Department. As outlined *infra*, Plaintiff's motion makes reference to a decision issued by Justice Austin while he was assigned to this matter.

Defendants' Answer which, by Order of the Honorable Leonard B. Austin dated December 2, 2008 ("Prior Order"), was deemed amended to include a counterclaim for actual damages, based on Defendants' contumacious violation of that portion of the Prior Order that directed the Defendants to a) produce a witness with knowledge of the Defendants' alleged actual damages; and b) produce all documents relating to the Defendants' actual damages; or, alternatively 2) precluding the Defendants from offering evidence of actual damages at trial other than the testimony provided by Michael Lennon ("Lennon") and the documents produced by Defendants pursuant to the Prior Order.

Defendants Surfside-3 Marina, Inc., Chrisbar Enterprises I, Inc. and Marinemax of New York, Inc. ("Defendants") oppose Plaintiff's motion.

B. The Parties' History

The Verified Amended Complaint ("Complaint") (Ex. A to Greenberg Aff. in Supp.), reflects that this is an action against the Defendants to recover damages in the amount of \$160,000.00, plus interest, for breach of contract, conversion, fraud in the inducement and unjust enrichment. The dispute involves Plaintiff's purchase of a 2007, 72 foot Azimut yacht and contemporaneous trade-in of a 2004, 55 foot Azimut yacht.

Defendants served an Answer to Amended Verified Complaint ("Answer") dated October 7, 2008 (Ex. B to Greenberg Aff. in Supp.). On November 26, 2008, counsel for the parties appeared on the record before Justice Austin. The transcript of those proceedings (Ex. C to Greenberg Aff. in Supp.), which Justice Austin so-ordered on December 2, 2008, reflects that Justice Austin addressed Plaintiff's *in limine* application to 1) have the Court determine that Defendants' Answer should be stricken; or 2) permit Plaintiff to introduce the testimony of Frederick Assini with regard to the contents of the written agreement; 3) exclude the liquidated damages clause either due to its failure to be produced in the full version of the original agreement, or as an unenforceable penalty; and 4) bar Defendant from proving actual damages at trial (Tr. at 2-3).

Justice Austin ruled that the liquidated damages clause was stricken as unenforceable, rendering moot the production of the rear side of the contract (Tr. at 4). Justice Austin also held that it was clear from the liquidated damages clause that the parties contemplated that Defendant

would be able to establish its right to damages in the event of a breach (*Id.*). Justice Austin advised counsel that, in his discretion, he deemed the Answer amended to provide for a counterclaim for liquidated damages, and directed that the cap on Defendants' damages was \$160,000 (Tr. at 4-5). Justice Austin adjourned the trial and pre-trial dates and directed as follows:

In the meantime, it is clear the plaintiff should be entitled to a deposition of a witness with knowledge of the defendant with regard to the damages sustained as a result of the alleged breach of plaintiff. That will be a one day deposition on the following terms: All documents that relate to defendants' damages will be produced on or before December 5, 2008, and the deposition, at counsels' convenience, will be scheduled during the week of December 8, 2008. This will be one day and there's a penalty for the delay, or the sanction for the delay I am directing in my discretion that the cost of the transcript and only the cost of the transcript will be borne by defendants in this case.

Tr. at 6.

In his Affirmation in Support of the instant motion, counsel for Plaintiff affirms as follows:

On or about December 5, 2008, counsel for Defendants provided counsel for Plaintiff with a two-page billing invoice and cover letter stating that the invoice was being provided "as per court order" (Ex. D to Greenberg Aff. in Supp.). During the week of December 8, 2008, Defendants advised Plaintiff that they were unable to produce a witness ("Witness") on the issue of damages. Plaintiff agreed to depose Defendants' Witness on December 19, 2008. On December 18, 2008, Defendants advised Plaintiff that they could not produce the Witness until January 8, 2009. In an effort to be accommodating, and believing that Defendants would produce an appropriate Witness, Plaintiff acceded to the new date.

On January 8, 2009, Defendants produced Witness Lennon. Counsel for Plaintiff submits that Lennon's testimony (Ex. E to Greenberg Aff. in Supp.) revealed that he had no personal knowledge regarding many of the relevant events and was of limited use and provides numerous examples in support of this assertion. Counsel for Plaintiff also affirms that, due to Lennon's limitations, "the defendants were compelled to produce two additional witnesses for examinations before trial in this action" (Greenberg Aff. at ¶ 7).

In his Affirmation in Opposition, counsel for Defendants submits that Justice Austin acted appropriately in permitting Defendants to prove actual damages in light of Plaintiff's decision to assert its objection to the liquidated damages clause on the eve of trial.

With respect to Defendants' production of discovery regarding their damages, Defendants' counsel affirms that Defendants "augmented their prior production of various invoices and statements of interest accrued, by producing a commercial invoice for the boat in question from the boat's manufacturer" (Hamad Aff. at ¶2). Defendants' counsel also affirms that the deposition of Lennon was adjourned on one occasion to accommodate the schedule of Plaintiff's counsel. Defendants' counsel also submits that Plaintiff's motion should be denied because Lennon did not have the opportunity to review the transcript of his deposition and make any appropriate changes.

Counsel for Defendants also submits that counsel for Plaintiff has "significantly mischaracterized" the testimony of Lennon (Hamad Aff. at ¶ 5). Counsel for Defendants notes that on page 10 of the Transcript, Lennon mentioned that he was not in possession of the file. Counsel for Defendants affirms that he urged counsel for Plaintiff to ask Lennon about the records that were produced in discovery which contained exact numbers about which Lennon could testify, and that counsel for Plaintiff declined to do so (Tr. at 13). There was the following colloquy between counsel during Lennon's deposition, following Lennon's testimony that certain relevant information could be obtained from a particular file which Lennon did not possess:

[Defendants' counsel]: Let the record show we've produced the contents of that entire file to Plaintiff's counsel. As a matter of fact, he has an exhibit list here in this binder. (Indicating)

[Plaintiff's counsel]: I don't know that to be true and you're not testifying.

Tr. at 27-28:

Counsel for Defendants contends that, at trial, Lennon will be provided with those records and will therefore be able to provide more precise responses on the issue of damages.

By decision dated September 15, 2009, the Appellate Division, Second Department reversed Justice Austin's determination in the Prior Order that the liquidated damages provision

was an unenforceable penalty. *See United Tit. Agency, LLC v. Surfside-3 Mar., Inc.*, 65 A.D.3d 1134 (2d Dept. 2009). The Second Department held that Justice Austin should not have granted that branch of Plaintiff's motion which was for summary judgment determining that the liquidated damages provision contained in the parties' contract was an unenforceable penalty as a matter of law. *Id.* at 1135.

C. The Parties' Positions

Plaintiff submits that Defendants' conduct in producing a Witness who was unable to provide Plaintiff with meaningful information regarding the calculation of Defendants' alleged damages is in violation of the Prior Order and warrants the Court's striking of the portion of the Answer that Justice Austin deemed amended to include a counterclaim for damages. Alternatively, Plaintiff contends that the Court should issue an Order precluding the Defendants from offering evidence of actual damages at trial other than the testimony of Lennon and the documents produced to Plaintiff pursuant to the Prior Order.

Defendants submit that Plaintiff should not be rewarded for declining to permit Lennon, at his deposition, to refer to records produced during discovery that would have permitted him to provide more precise and meaningful responses.

In his Reply Affirmation, Plaintiff's counsel affirms that, prior to November 26, 2008, because there was no claim for damages by Defendants, no discovery was conducted on that issue. Plaintiff's counsel submits that, in light of that fact, the Prior Order cannot be interpreted to mean that "plaintiff was suppose[d] to attempt to cull out documents produced earlier in the litigation when there was no actual damages claim and try to figure out what the defendants' actual damages are from such documents (Reply Aff. at ¶ 2)." Plaintiff's counsel also submits that Defendants should have produced a witness "who reviewed documentation and could give specific answers as to the alleged actual damages sustained by the defendants" (Reply Aff. at ¶ 3).

In his Certification in Further Opposition,² Defendants' counsel submits that Plaintiff's counsel "clearly seeks to manipulate the Court's prior decisions in order to gain an unfair and

² Although the Court did not authorize this submission, the Court will, in its discretion, consider it.

disingenuous tactical advantage” (Cert. in Further Opp. at ¶ 3). Defendants’ counsel also contends that Plaintiff’s counsel has apparently conceded that he elected not to question Lennon about documents previously provided, and argues that he should not be rewarded for that election. Finally, Defendants’ counsel submits that Lennon did provide relevant testimony regarding damages, including testimony regarding work performed on the boat, interest payments and lost profits.

RULING OF THE COURT

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.

The Court concludes that Defendants complied with the Prior Order by supplying the two-page invoice, which supplemented prior discovery provided by Defendants, and making Lennon available to be deposed. Plaintiff’s counsel declined, at Lennon’s deposition, to make use of the documentation previously provided by Defendants which may explain Lennon’s inability to provide more detailed and specific responses. The Court cannot conclude, under the circumstances, that Defendants refused to obey an order for disclosure or wilfully failed to

disclose information which the court finds ought to have been disclosed. Moreover, in light of the Appellate Division's decision reversing Justice Austin's decision striking the liquidated damages clause, the underlying reason for the discovery that is the subject of this motion is no longer present. Accordingly, the Court denies Plaintiff's motion in its entirety.

This constitutes the decision and order of the court.

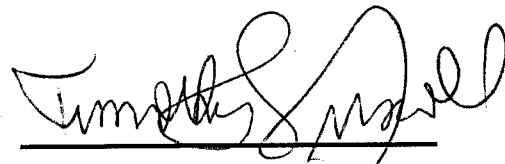
All matters not decided herein are hereby denied.

Counsel are reminded of their required appearance before the Court on November 18, 2010 at 9:30 a.m. for a Pre-Trial Conference.

ENTER

DATED: Mineola, NY

August 26, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 31 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**