Hittner v Gordon
2011 NY Slip Op 30968(U)
March 30, 2011
18224/08
Docket Number: 18224/08
Judge: Ute Wolff Lally
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

M01)

Present: HON. UTE WOLFF LALLY
Justice

PAUL J. HITTNER,

Plaintiff,

-against-

DANIEL GORDON, I'M A DAY GUY, INC., I'M A DAY GUY, INC. d/b/a SHY LOUNGE, 2686 HEMPSTEAD TURNPIKE, LLC, MODERNE PROMOTIONS, INC., L.I. PROMOTIONS GROUP, INC., CLUB 2686, JD GUYS, INC., MARK LEVINE, JOSEPH ORINGER, JOSEPH MASTROCOVI and RICHARD PETER BEDROSIAN,

Defendants.

Motion Sequence #6
Submitted February 1, 2011

INDEX NO: 18224/08

The following papers were read on this motion to compel:

Notice of Motion and Affs..1-3
Affs in Opposition...4-6
Affs in Reply...7&8
Affs in Sur Reply..9&10
Affs in Further Opposition..11&12
Affs in Rejoinder..13&14

Upon the foregoing papers, it is ordered that this motion by plaintiff, Paul J Hittner, for an order: (1) pursuant to CPLR 3124 compelling defendants to produce documents relating to their sale of the nightclub known as Shy Lounge, formerly located at 2686 Hempstead Turnpike in Levittown, New York; and (2) pursuant to CPLR 3126 and the

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common law doctrine of spoliation precluding the "Day Guy Defendants" from introducing certain testimony and evidence because of their prejudicial failure to provide discovery is determined as follows:

The plaintiff commenced this action seeking to recover money damages for personal injuries allegedly sustained as the result of an assault outside of the club known as Shy Lounge. The alleged assault occurred on October 4, 2007 at approximately 3:30 a.m.

The "Day Guy Defendants" which consist of I'm a Day Guy, Inc., I'm a Day Guy, Inc. d/b/a/ Shy Lounge, 2686 Hempstead Turnpike, LLC, Club 2686, J.D. Guys, Inc., Mark Levine and Joseph Oringer, formerly owned and operated a nightclub in Levittown, New York known as Shy Lounge. It is alleged that this nightclub traditionally had a "gay night" on Wednesdays for at least 10 years. It is further alleged that the plaintiff is a gay male.

The plaintiff alleges, in his complaint, that as the plaintiff and "another individual were exiting the building and proceeding to the parking lot, defendant Gordon, who was just finishing his dance shift at the club, accosted the other individual, and then Mr. Hittner. Defendant Gordon used the word 'faggot' and other racial slurs."

In November, 2009, the Day Guy Defendants sold the assets of Shy Lounge to Belle's Party Place Limited ("Belle's"). Defendant 2686 Hempstead Turnpike, LLC, of which Levine is a principal owner, however, continues to own the real property and is now Belle's landlord.

On December 17-18, 2009, the Day Guy Defendants failed to appear for court-ordered depositions. This default prompted plaintiff's first motion to compel or for a conditional order of preclusion. On June 3, 2010, defendants Levine and Oringer were

deposed. At his examination before trial, Levine disclosed the sale of I'm a Day Guy Inc.'s assets and plaintiff immediately sought production of any documents relating to the subject sale. The defendants' counsel objected to the request as "irrelevant."

On November 1, 2010, a conference was scheduled by the court in an effort to resolve the discovery issues. At said conference, the plaintiff offered to cover the sale documents by a confidentiality stipulation and order. The Day Guy Defendants offered "a redacted copy of the sale contract and copies of the corporation's formation documents" provided plaintiff execute a Non-Disclosure Agreement and agree to withdraw the discovery motion.

In support of his motion to compel, plaintiff submits that he has established the relevance and materiality of his document request, which is for the sale agreement and, the complete transaction file, including all schedules to the sale agreement, all emails and other correspondence relating to the sale, all financing documents, all valuation documents and all documents concerning 2686 Hempstead Turnpike, LLC's continuing involvement with the property as landlord. The requested items relate to: (a) express or implied assumption of liability by Belle's per *Grant-Howard Assocs. v General Housewares Corp.*, 63 NY2d 291, 297 and *American Standard, Inc. v OakFabco, Inc.*, 14 NY3d 399; and (b) fraudulent transfer determinations under Debtor and Creditor Law § 273-a.

Initially, defendants assert that plaintiff's motion for an order pursuant to CPLR 3124 should be denied as plaintiff's counsel failed to provide an affirmation of good faith efforts regarding the resolution of any alleged dispute as required by 22 NYCRR § 202.7, The Uniform Rules for the Trial Courts.

In paragraph 3 of his affirmation, plaintiff's counsel, Maury B. Josephson, expressly states that "[g]ood faith efforts have been made by counsel to resolve the issues raised on the motions [and] the Court authorized plaintiff to make this motion at a conference held on July 7, 2010." Furthermore, the record reveals that the parties were unable to resolve these discovery issues. Therefore, this court rejects defendants' said argument.

As to the merits, defendants assert that plaintiff's counsel's "continued and irrelevant unreasonable requests constitute a waste of judicial resources, are improper, harassing and have caused the defendant to incur in excess of seven thousand dollars ($7,000) in legal fees in the defense of the meritless motion." Defendants also argue that plaintiff should first establish liability before engaging in voluminous discovery devices.

Moreover, as with the sale documents, on November 14, 2010, defendants offered to produce redacted copies of the organizational documents related to the Day Guy Defendants, provided that the parties execute a non-disclosure agreement. This offer was rejected by plaintiff's counsel.

With respect to the identification of certain employees, the Court notes that defendants have provided a copy of the relevant payroll records. As a result thereof so much of plaintiff's motion which seeks an order precluding the Day Guy Defendants from calling any witness claiming to be a bartender or a bouncer at Shy Lounge on October 3-4, 2007, is denied.

CPLR 3101(a) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406-407). The scope of disclosure is "open and far reaching," (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954; *Allen v*

Crowell-Collier Pub Co., supra), and the resisting party must establish its immunity from the discovery request. (*Spectrum Systems Intern. Corp. v Chemical Bank*, 78 NY2d 371, 377).

Nevertheless, "unlimited disclosure is not required" (*Smith v Moore*, 31 AD3d 628; *Auerbach v Klein*, 30 AD3d 451), nor will "*carte blanche* demands" be honored (*European American Bank v Competition Motors, Ltd.*, 186 AD2d 784, 785; *see also Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531), particularly where the demands at issue would attach "undue attention" to collateral matters (*Blittner v Berg and Dorf*, 138 AD2d 439, 440-441), or where they are overly broad, unduly burdensome, or lacking in specificity (*see Paradis v F.L. Smithe Machine Co., Inc.*, 25 AD3d 594, 595; *Brandes v North Shore University Hosp.*, 1 AD3d 550; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 471, *lv to app dism.* 99 NY2d). Significantly, the court possesses broad discretion to limit discovery in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, and also to determine what is material and necessary as that phrase is used in CPLR 3101(a). (*Auerback v Klein*, *supra*).

Moreover, although the failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by CPLR 3122 forecloses inquiry into the propriety of the requests made (*see Saratoga Harness Racing Inc. v Roemer*, 274 AD2d 887; *Otto v Triangle Aviation Services, Inc.*, 258 AD2d 448), a party need not provide responses to demands which are, *inter alia*, palpably improper. (*Saratoga Harness Racing, Inc. v Roemer, supra; Holness v Chrysler Corp.*, 220 AD2d 721; *Zambelis v Nicholas*, 92 AD2d 936). Material is palpably improper if it is of a confidential and private

nature, irrelevant to the issues in the case, or is overbroad (*e.g., Shapiro v Central General Hosp., Inc.*, 171 AD2d 786, 787-8).

Turning to the disputed demands in the matter at bar, the court notes that they are often prefaced by the disfavored, overly general language such as, "all," "any and all" or "each and every." (*Haroian v Nusbaum*, 84 AD2d 532, 533; see also *MacKinnon v MacKinnon*, 245 AD2d 690, 691; *Benzenberg v Telecom Plus of Upstate New York, Inc.*, 119 AD2d 717; *Hudson Val. Tree v Barcana*, 114 AD2d 400, 401; *Zambelis v Nicholas, supra*). Moreover, many of the requests are open-ended, overbraod and/or lacking in ostensible materiality and relevance. To the extent that some of the demands at issue may be proper and more narrowly crafted request might reasonably elicit discoverable matter, courts are not obligated to prune defective demands or requests. (*Village of Mamaroneck v State*, 16 AD3d 674).

Applying these principles to the case at bar, we find that the disputed requests are overbroad and seek information which is not "material and necessary" to the issues in this case at this juncture.

Notwithstanding the foregoing, defendants are directed to provide a redacted copy of the sale contract and copies of the corporation's formation documents pursuant to a confidentiality stipulation and order within twenty (20) days after a service of this order with notice of entry upon plaintiff's attorney.

Accordingly, the branch of the motion which seeks documents concerning whether the Day Guy Defendants maintained corporate formalities, particularly as between the entity defendants and their owners (defendants Levine and Oringer), is denied.

The branch of the motion which seeks an order pursuant to CPLR 3126 and the common law doctrine of spoliation based upon defendants' failure to provide discovery is likewise denied.

Plaintiff has not demonstrated that the alleged spoliation left him "prejudicially bereft" of a means of prosecuting his own claims or of defending against the defendants' claims. (*Shayovich v 800 Ocean Parkway Apartment Corp.*, 77 AD3d 814; *Fossing v Townsend Manor Inn, Inc.*, 72 AD3d 884; *Weber v Harley Davidson Motor Co., Inc.*, 58 AD3d 722). Consequently, we decline to issue an order of preclusion as a sanction for spoliation of evidence. (*Shayovich v 800 Ocean Parkway Apartment Corp., supra; Fossing v Townsend Manor Inn, Inc., supra*).

Finally, defendants' request for costs and sanctions is denied as defendants failed to serve a notice of cross-motion seeking such relief. (CPLR 2215).

Dated: March 30, 2011

UTE WOLFF LALLY, J.S.C.

ENTERED
APR 07 2011
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