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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ROY G. JACOBS individually and d/b/a CROSS COUNTY REAL ESTATE, PROPERTIES, LLC and CROSS COUNTY REAL ESTATE PROPERTIES, LLC,

Plaintiffs,

-against-

RE/MAX OF NEW YORK, INC., RE/MAX INTERNATIONAL, INC., RE/MAX BENCHMARK REALTY GROUP, CAROLYN WEBER and HENRY WEBER,

Defendants.

---x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 11182-07
Motion Seq. Nos: 3, 4 & 5
Submission Date: 2/28/11

Papers Read on these motions:

Notice of Motion, Attorney's Affirmation and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Motion, Affirmation in Support,
Affidavits in Support and Exhibits.....x
Rule 19-A Statement.....x
Memorandum of Law in Support.....x
Affirmation in Support/Opposition and Exhibits.....x
Affidavit in Support/Opposition.....x
Memorandum of Law in Support/Opposition.....x
Defendants' Memorandum of Law in Further Support/Opposition.....x
Plaintiffs' Memorandum of Law in Further Support/Opposition.....x

This matter is before the court on 1) the motion filed by Plaintiffs Roy G. Jacobs, individually and d/b/a Cross County Real Estate Properties, LLC and Cross County Real Estate Properties, LLC ("Plaintiffs") on May 28, 2010, 2) the motion filed by Defendants RE/MAX of New York, Inc. ("RMNY"), Carolyn Weber and Henry Weber (collectively "RMNY

Defendants") on January 6, 2011, and 3) the cross motion filed by Plaintiffs on February 15, 2011, all of which were submitted on February 28, 2011. For the reasons set forth below, the Court 1) denies Plaintiffs' motion; 2) denies Defendants' motion except that the Court dismisses the thirteenth cause of action alleging Intentional Infliction of Emotional Distress; and 3) denies Plaintiffs' cross motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) to compel, pursuant to CPLR § 3124; or, alternatively 2) an Order striking the Answer of Defendant RE/MAX Benchmark Realty Group, pursuant to CPLR § 3126.

The RMNY Defendants move for an Order, pursuant to CPLR § 3212, 1) dismissing the Verified Complaint ("Complaint"); and 2) granting RMNY summary judgment on its counterclaim against Roy Jacobs ("Jacobs") for unpaid franchise fees and RMNY's reasonable attorney's fees and costs in the aggregate amount of $226,025.59.

Plaintiffs cross move, pursuant to CPLR § 3212, for summary judgment in favor of Plaintiffs.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated November 25, 2009 ("Prior Decision") (Ex. 4 to Brandofino Aff. in Supp.) and the Court incorporates that Prior Decision herein by reference. The Prior Decision included the following outline of the parties' dispute.

Defendant Re/Max International established a system for the opening and operation of real estate offices under the trade name RE/MAX. RMNY owns the right to franchise the operation of RE/MAX offices in New York State. On or about November 19, 2004, RMNY and Jacobs entered into a Franchise Agreement dated November 19, 2004 ("Franchise Agreement"). Pursuant to the Franchise Agreement, RMNY granted Jacobs a Franchise for an office to be located in Ulster County, New York, for a term of five years, commencing on June 1, 2005. In consideration for RMNY granting the Franchise, Jacobs executed and delivered to RMNY a Guaranty and Assumption of Obligations.

Plaintiffs commenced this action on or about November 2, 2006 to recover money damages against the Defendants for breach of the Franchise Agreement, as well as a Recruiting

Services Agreement dated November 1, 2005 and an Internet Strategy Agreement dated February 6, 2006. The Complaint (Ex. 1 to Brandofino Aff. in Supp.) contains seventeen (17) causes of action: 1) violation of General Business Law ("GBL") § 687(2) prohibiting certain fraudulent and unlawful practices, for which the Weber Defendants are personally liable pursuant to GBL § 691(3) as officers of RMNY, 2) against RMNY for breach of the Recruiting Services Agreement, 3) against RMNY for breach of the Internet Strategy Agreement, 4) against RMNY for breach of the Franchise Agreement, 5) against RMNY, RE/MAX International and Benchmark Realty Group ("Benchmark") for encroachment on territory of franchise, 6) against RMNY for fraud, 7) against RMNY for negligence, 8) against RMNY and Benchmark for tortious interference with franchise, 9) against RMNY for prima facie tort, 10) against Benchmark for unfair competition, 11) against RMNY for injury to business reputation, 12) against RMNY and Benchmark for conspiracy to divert and misappropriate, 13) against RMNY for intentional infliction of emotional distress, 14) against RMNY for deceptive acts and practices in violation of GBL § 349, 15) for injunctive relief, 16) for a declaratory judgment stating that Defendants breached their contractual obligations to Plaintiffs and declaring the extent of Plaintiffs' damages, and 17) for an accounting.

Defendants interposed a Verified Answer dated December 18, 2006. That Answer, in addition to addressing the allegations in the Complaint, contained nine (9) affirmative defenses, but did not assert any counterclaims.

In the Prior Decision, the Court granted the motion of the RMNY Defendants for leave to amend their Verified Answer to include a Counterclaim alleging Plaintiffs' breach of the Franchise Agreement by failing to pay fees into a designated escrow account. The Court denied the motion of the RMNY Defendants for leave to assert a counterclaim for defamation.

The RMNY Defendants subsequently served a Verified Amended Answer ("Amended Answer") (Ex. 5 to Brandofino Aff. in Supp.). In the Amended Answer, the RMNY Defendants asserted a counterclaim ("Counterclaim") against Jacobs in which they alleged that Jacobs " has defaulted on his obligations under the Franchise Agreement by, inter alia, failing to pay to RMNY any of the fees, charges, and commissions (collectively the "Franchise Fees") that have accrued under the terms of the Franchise Agreement since at least February 2006, despite demand."

In his Affirmation in Support of Plaintiffs' motion for an Order to compel, or to strike the Answer of Defendant RE/MAX Benchmark Realty Group ("Benchmark"), counsel for Plaintiffs ("Plaintiffs' Counsel") affirms that Benchmark failed to provide certain discovery. Plaintiffs' Counsel provides a transcript (Ex. A to Minard Aff. in Supp.) in which Mr. Clarino ("Clarino") agreed that he would review a particular list and advise Plaintiffs which transactions were in Ulster County. Plaintiffs' Counsel submits that this documentation is relevant to the claim for tortious interference by Benchmark with the contract between Plaintiffs and RMNY given that Plaintiff had the only RE/MAX office in Ulster County, but Benchmark, located in adjacent Orange County, received the Ulster County leads. Plaintiffs submit that Benchmark's failure to provide the documents is in violation of a stipulation ("Stipulation") that the Court so-ordered on March 22, 2010 (Ex. G to Minard Aff. in Supp.). Pursuant to the Stipulation, Benchmark agreed to produce, no later than April 5, 2010, the items specified by Clarino in the transcript provided, relating to agents who sold or listed in Ulster County during a specified period of time. Plaintiffs' Counsel affirms that a list provided by Benchmark is "incomprehensible" (Minard Aff. in Supp. at ¶ 20) and that it cannot be discerned from that list which transactions took place in Ulster County. Plaintiffs' Counsel attempted, unsuccessfully, to resolve this issue with Benchmark's counsel prior to filing the instant motion. Plaintiffs' Counsel submits that Benchmark's alleged failure to provide the documents at issue is indicative of its lack of cooperation generally, including its failure to appear in a timely manner at a conference directed by the Court.

In his Affidavit in Support of the motion for summary judgment by the RMNY Defendants, Henry F. Weber, the President of RMNY, outlines the parties' relationship as well as relevant provisions of the Franchise Agreement and Recruiting Services Agreement ("Recruiting Agreement") related to the recruitment of sales associates (Ex. C to Weber Aff. in Supp.). Weber alleges that Jacobs breached that Agreement by 1) improperly rejecting prospective recruits, in some cases because they were "too fat" (Weber Aff. in Supp. at ¶ 18), according to Carolyn Whitmore ("Whitmore"), Jacobs' office manager; and 2) failing to successfully recruit agents despite bring provided with training and resources to assist him with that recruitment.

Weber also addresses Jacob's involvement with RMNY's Information Data Exchange ("IDX System"), which was technology designed for RE/MAX's website platform. In or about

March of 2006, Jacobs entered into a contract (Ex. D to Weber Aff. in Supp.) related to use of the IDX system and inclusion of Jacobs' franchise office as a link on certain RE/MAX websites. Jacobs lodged numerous complaints regarding the websites, which Weber discusses in detail, all of which were appropriately addressed by RE/MAX.

Weber affirms that Jacobs has not paid to RMNY any of the fees that have accrued under the terms of the Franchise Agreement since February of 2006, despite RE/MAX's demand. As a result, Jacobs owes RMNY a total of $226,025.59 consisting of monthly management fees, promotions fund fees, regional development fees, hot air balloon fund fees, late charges/interest on late payments and attorney's fees. During his deposition in 2009, Jacobs admitted that he withdrew all of the funds he had placed in escrow for the payment of franchise fees, without RMNY's consent.

In his Affidavit in Support, Robert Fulton ("Fulton") affirms as follows:

Fulton is the President of Real Leads, Inc., a company whose services include the development and hosting of real estate websites. Fulton explains the operation of the IDX System, which he describes as "a tool for both consumers and franchise owner/brokers and their sales associates" (Fulton Aff. in Supp. at ¶ 5). It includes a "round-robin rotation" (*id.* at ¶ 8) which is intended to distribute visitors in a balanced fashion by referring visitors to the office that was least recently visited. There are exceptions to the round-robin rotation, which Fulton lists and explains. Fulton describes the complaints voiced by Jacobs in 2006, as well as the manner in which all those complaints were addressed and corrected.

In his Affirmation in Support of Plaintiffs' cross motion, Plaintiffs' Counsel reaffirms Plaintiffs' theory of the case, which is that RMNY did not provide Plaintiffs with the services promised. By way of example, 1) when customers called RMNY's 1-800 telephone number regarding properties in Ulster County, they were given Benchmark's telephone number; 2) RMNY's map of its offices, which was distributed to the public, did not reflect Plaintiffs' Ulster County Office; 3) James Walker ("Walker"), an RMNY employee, testified that RMNY made "a conscious decision" (Minard Aff. at ¶ 4) to favor Benchmark over Plaintiffs' franchise; 4) the identified problems with the website were not corrected, resulting in Benchmark continuing to be the favored realtor; and 5) RMNY never provided Jacobs and Cross County with the Grand Opening as promised in the Franchise Agreement.

The deposition transcripts provided (Exs. A, B and C to Minard Aff.) include testimony by Walker that 1) to the best of his knowledge, "there was very little or nothing done to help the broker with the interview process, with the presentation process, with the objection handling part of it and with the follow up part of it which is probably three quarters of the recruiting process" (Ex. C at p. 28); 2) "offhand," he would agree that Benchmark, an Orange County realtor, was given an unfair advantage over Cross County by receiving the leads for Ulster County (*id.* at p. 86); and 3) Carolyn Weber was "well aware of the problem" with the website (*id.* at pp. 92-93) and, during the time that she was discussing these problems with the technical people, "[Jacobs] isn't getting his franchise off the ground so to speak" (*id.* at p. 93).

In addition, Carolyn Weber 1) conceded that a particular website search was not consistent with the concept of "home field advantage" because the search should have gone directly to the Ulster County Office (Ex. B at pp. 293-294), and 2) testified that RMNY was "never able to get...together" a gathering in connection with Cross County's franchise opening as promised (*id.* at pp. 417-418).

In his Affidavit in Support of Plaintiffs' cross motion, Jacobs affirms, *inter alia*, that 1) Jacobs relied on RMNY's representations, that, if he opened an agency, it would provide him with, *inter alia*, a state-of the art web search platform and grand opening; 2) he attended a RE/MAX seminar that explained the "RE/MAX System" in detail, and advised the attendees that this system provided "global search capability for property located throughout the nation" (Jacobs Aff. at ¶ 6); 3) following his execution of the Recruiting and Internet Strategy Agreements, he failed to received promised services, in part because potential clients were being diverted to Benchmark; 4) RMNY did not satisfactorily address his concerns and complaints regarding the internet system, which Jacobs attributes to RMNY's failure to understand the Ulster County Market; and 5) RMNY's failure to address the website issues affected Jacobs' recruiting efforts.

C. The Parties' Positions

Plaintiffs submits that, in light of Benchmark's persistent failure to provide the documentation related to Benchmark agents or brokers who listed or sold real estate in Ulster County from 2004 to the present, the Court should strike Benchmark's Answer and impose sanctions, including an award of counsel fees to Plaintiffs.

The RMNY Defendants submit that the Court should dismiss the Complaint on the grounds, *inter alia*, that 1) the allegations in counts two, three and four are belied by the express terms of the Recruiting, Internet and Franchise Agreements; 2) the first, sixth, twelfth and fifteenth causes of action, alleging fraud, cannot be sustained because Plaintiffs have not established that the RMNY Defendants knowingly made material representations to Jacobs on which he relied; 3) Plaintiffs have failed to provide sufficient allegations to establish their fifth, seventh, eighth, ninth, tenth, eleventh and thirteenth causes of action for encroachment on territory of franchise, negligence, prima facie tort, injury to business reputation, and intentional inflection of emotional distress; and 4) Plaintiffs have failed to provide allegations supporting the fifteenth, sixteenth and seventeenth causes of action for an injunction, declaratory judgment and accounting.

The RMNY Defendants submit, further, that they have set forth evidentiary facts entitling them to summary judgment on the counterclaim against Plaintiffs by producing the Franchise Agreement and guaranty executed by Jacobs, and demonstrating Plaintiffs' breach of those agreements.

Plaintiffs submit that they have demonstrated their entitlement to summary judgment on the causes of action in the Complaint. Plaintiffs contend, further, that the RMNY Defendants have not demonstrated their right to judgment on the Counterclaim in light of the existing issues regarding their breach of the Franchise, Internet Strategy and Recruiting Agreements, which are independent but related agreements that are intertwined with the guaranty on which the RMNY Defendants base their right to judgment.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Discovery Sanctions

CPLR § 3124 provides as follows:

> If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

CPLR § 3126 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:
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> 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
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> 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.

Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 is a matter of discretion with the court. In addition, the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious. *1523 Real Estate, Inc. v. East Atlantic Properties, LLC*, 41 A.D.3d 567, 568 (2d Dept. 2007) (internal citations omitted).

C. Application of these Principles to the Instant Action

The Court denies Plaintiffs' motion to compel, or to strike the Answer of Benchmark, in light of the public policy favoring resolution of actions on the merits, the documentation provided by Benchmark, and the fact that Plaintiffs will have the opportunity to examine witnesses at trial regarding the alleged incompleteness or inadequacy of the documentation provided.

The Court notes that Plaintiffs' memoranda of law do not address the thirteenth count of the Complaint alleging Intentional Infliction of Emotional Distress. The Court dismisses the thirteenth count of the Complaint, alleging Intentional Infliction of Emotional Distress, based on the Court's conclusion that the alleged statements are not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. *See Akpinar v. Moran*, 2011 N.Y. Slip Op. 2811 * 2 (1st Dept. 2011), quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993) (internal quotation marks and citations omitted).

The Court denies the RMNY Defendants' motion to dismiss the remaining counts in the Complaint, and Plaintiffs' cross motion for summary judgment, based on the Court's conclusion that Plaintiffs have set forth a *prima facie* case on the remaining causes of action and in light of the disputed factual assertions which necessitate a trial. The Court also denies the RMNY Defendants' motion for summary judgment on the Counterclaim in light of the relationship between Jacobs' guaranty and the agreements at issue. *See Regal Limousine, Inc. v. Allison Limousine Service, Ltd.*, 136 A.D.2d 534 (2d Dept. 1988) (trial court correctly denied motion for summary judgment on promissory note where alleged breach of related contract and underlying obligation were intertwined).

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance for a conference before the Court on June 14, 2011 at 9:30 a.m.

DATED: Mineola, NY
April 25, 2011

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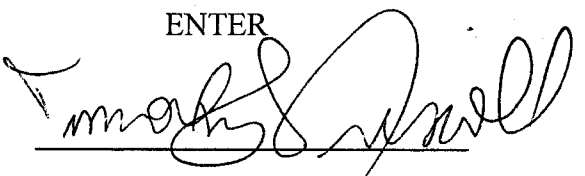

HON. TIMOTHY S. DRISCOLL
J.S.C.