

Weaver Fabrics Inc. v Kensington Ins. Co.

2011 NY Slip Op 32334(U)

August 29, 2011

Supreme Court, New York County

Docket Number: 601304/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

Index Number : 601304/2010^{J.S.C.}

PART 10

WEAVER FABRICS

vs
KENSINGTON INSURANCE

INDEX NO. _____

Sequence Number : 002

MOTION DATE _____

DISMISS

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

FILED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

AUG 30 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

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

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

Dated: 8/29/11

J. Gische
HON. JUDITH J. GISCHE, s.c.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x

WEAVER FABRICS INC.,

Plaintiff,

DECISION/ORDER
Index No.: 601304/10
Motion Seq. 002

-against-

Present:
Hon. Judith J. Gische
J.S.C.

KENSINGTON INSURANCE COMPANY,

Defendant.

FILED

-----x
Recitation, as required by CPLR 2219 [a], of the papers considered
in the review of this (these) motion(s):

AUG 30 2011

Papers

NEW YORK
COUNTY CLERK'S OFFICE
Numbered

Kensington n/m w/BFM affirm (sep back), exhs	1, 2
Weaver opp w/DSP affirm	3
Kensington reply w/BFM affirm	4

JUDITH J. GISCHE, J.:

Defendant moves, pursuant to CPLR 3126, to dismiss the complaint due to plaintiff's failure to provide discovery or, in the alternative, pursuant to CPLR 3124, to compel plaintiff to provide full and complete copies of its federal tax returns for the tax years 2007, 2008 and 2009, as well as authorizations allowing defendant to obtain those tax records directly from the United States government, and to extend disclosure deadlines due to outstanding discovery.

BACKGROUND

This is an action based on defendant's denial of plaintiff's insurance claim for damage to commercial property that occurred while the property was covered by an insurance policy issued by

defendant.

The action was commenced by the filing of a summons and complaint on May 10, 2010, and issue was joined on June 15, 2010. Motion, Exs. A and B. On or about June 24, 2010, defendant served plaintiff with a Notice for Discovery and Inspection, requesting various documents, including plaintiff's tax returns that are the subject of this motion. Motion, Ex. C. On August 12, 2010, defendant's counsel wrote to plaintiff's counsel requesting responses to those discovery demands. Motion, Ex. D.

Defendant asserts that no response to those demands was forthcoming, a Request for Judicial Intervention was filed and a preliminary conference was scheduled for October 28, 2010. At the preliminary conference, an order was issued requiring responses to discovery demands to be served on or before December 28, 2010. Motion, Ex. E. On January 27, 2011, defendant's counsel wrote to plaintiff's counsel requesting responses to demands that were still outstanding. Motion, Ex. F.

On February 18, 2011, defendant moved for the same relief requested in the instant motion (Motion, Ex. G), and plaintiff responded to defendant's demands on the return date of that motion, in which response, plaintiff objected to providing the requested tax returns. Motion, Ex. H. On March 24, 2011, defendant's motion to strike was resolved by a "so-ordered" stipulation, which provided, in pertinent part:

"Plaintiff shall submit a supplemental response to notice for discovery on or before May 6, 2011 or be

precluded from offering those items in evidence.”

Motion, Ex. I.

Pursuant to that so-ordered stipulation, plaintiff provided a supplemental response, but that response also failed to include the requested tax returns. Motion, Ex. J. Following receipt of the supplemental response, defendant's counsel contacted plaintiff's counsel by telephone, and was informed that plaintiff would not turn over the tax returns. On May 17, 2011, defendant's counsel again wrote to plaintiff's counsel demanding the tax returns. Motion, Ex. K.

The disclaimer letter that forms the basis of this lawsuit was sent to plaintiff on March 31, 2010, and states, in pertinent part:

“Our investigation has revealed that your company's inventory as of December 31, 2008, was valued at \$345,600. For the period of January 1, 2009, to November 11, 2009, the company made purchases of approximately \$114,419.61. With the adjustments the actual purchases received were \$109,017.44. Accordingly, on or about the date of loss the total inventory available for sale was \$454,617.44. However, your total sales for the period of January 1, 2009, through November 30, 2009, was \$372,146.13. Using the cost of goods sold percentage used on your 2008 Federal Tax Return (48.74%), there is a total sales at cost of \$181,384.02. Accordingly, by deducting the sales at cost from the total available stock for sale, we note a total inventory as of November 30, 2009, at \$273,233.42. Unfortunately, your company suffered a claim for water damage for which you submitted claims totaling \$364,853.08. When we consider the August 3, 2009, loss with the amount of available inventory, it is clear that the inventory held by your company on November 12, 2009, had a net negative inventory value.”

Motion, Ex. L.

It is defendant's position that the requested tax returns contain valuations of the plaintiff's inventory and are necessary to determine how plaintiff valued its inventory to the government so as to ascertain whether plaintiff is using the same formula for alleging damage in the instant action. Defendant asserts that it has made good faith efforts to avoid making the present motion, as evidenced by the attached documents regarding requests for discovery. Att. Aff. of Good Faith.

In opposition to the instant motion, plaintiff states that it has produced its purchase invoices for the items allegedly damaged by water, and that the items are available for inspection. Therefore, according to plaintiff, the production of tax returns is unnecessary and unduly burdensome, and defendant has not met its burden of demonstrating the necessity for disclosure of the tax returns.

In reply, defendant argues that the requested tax returns contain valuations for the damaged property that are material and necessary to the defense of the litigation, that providing their disclosure is neither intrusive nor unduly burdensome, and that the returns concern a business, not an individual, and so should not be considered sensitive and private personal information.

DISCUSSION

CPLR 3126 provides for the imposition of penalties if a party wilfully refuses to obey a discovery order. Such penalties may include striking the recalcitrant party's pleadings or precluding

that party from introducing evidence at trial relating to those matters which the party has failed to disclose during discovery. However, striking the pleadings is a drastic measure and CPLR 3126 is an enforcement mechanism, giving the court power to impose various penalties for failure to obey a court order. *Postel v New York University Hospital*, 262 AD2d 40 (1st Dept 1999).

Defendant's motion is denied.

"Disclosure of tax returns is generally disfavored due to their confidential and private nature. The party seeking an order to compel their production must make a strong showing of necessity and desirability. Defendant has not made a sufficiently strong showing that the information contained in plaintiff's tax returns is indispensable to this litigation and unavailable from other sources [internal citations omitted]."

Briton v Knott Hotels Corp., 111 AD2d 62, 62-63 (1st Dept 1985); *Manzella v Provident Life and Casualty Co.*, 273 AD2d 923 (4th Dept 2000); *Walter Karl, Inc. v Wood*, 161 AD2d 704 (2d Dept 1990).

In order to meet its burden, the party seeking disclosure of tax returns must

"[explain] its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit the examination of the return to relevant material through redaction of extraneous information."

Manbar Realty Corp. v Pater Realty Co., 242 AD2d 208, 209-210 (1st Dept 1997) (defendant sought disclosure of plaintiff's corporate returns).

In the case at bar, defendant has failed to explain why plaintiff's invoices and the physical property itself would be

insufficient to determine the items' value. Defendant has merely asserted conclusory statements that the tax returns are needed, which fail to meet the requisite burden necessary to warrant disclosure, even for corporate tax returns. *Id.*

The only exception to the general principle disfavoring disclosure involves situations in which there are indicia of fraud, which create a special circumstance that would warrant discovery of tax returns. *Dore v Allstate Indemnity Co.*, 264 AD2d 804 (2d Dept 1999); *Four Aces Jewelry Corp. v Smith*, 256 AD2d 42 (1st Dept 1998). However, in the instant matter, whereas defendant has included a one-line boilerplate affirmative defense of fraud in its answer, it has not mentioned fraud once in the present motion. Therefore, defendant has not alleged a special circumstance that would allow it access to plaintiff's returns.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion is denied; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 29, 2011

So Ordered:

FILED

AUG 30 2011

NEW YORK
COUNTY CLERK'S OFFICE
Hon. Judith J. Gische, J.S.C.