Aldrich v Northern Leasing Sys., Inc.

2011 NY Slip Op 32871(U)

October 12, 2011

Supreme Court, New York County

Docket Number: 602803/07

Judge: Martin Shulman

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SCANNED on 10/14/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: S. Hulman Justice PART 6

INDEX NO. 602803/07

BRADLEY ALDICA

-v-

MOTION DATE

NORTHERN LEASING SYSTEMS INC

MOTION SEQ. NO. 6

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Strike answer

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits A-L	2
Replying Affidavits Exhibit 1-3	3

FILED

OCT 14 2011

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

OCT 14 2011

COUNTY CLERK'S OFFICE NEW YORK

Dated: October 12, 2011

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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BRADLEY C. ALDRICH, MICHAEL ARNOLD, ESTELA SALAS, AND STEPHANIE WEIER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Index No.: 602803/07

Plaintiff(s),

Decision and Order

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN, STEVEN BERNARDONE, RICH HAHN AND SARA KRIEGER, AND JOHN DOES 1-50,

Defendant(s).

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NEW YORK
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MARTIN SHULMAN, J.:

Motion sequences 006 and 007 are consolidated for disposition. In motion sequence 006, plaintiffs in this purported class action move by order to show cause ("OSC") pursuant to CPLR 907 and CPLR § 3126 to strike defendants' answer based upon various alleged discovery defaults. Defendants oppose the OSC and bring a separate motion (sequence 007): (1) pursuant to CPLR § 3126 to preclude plaintiffs from supporting their claims, producing evidence or testifying, or alternatively, to strike the complaint or compel plaintiffs to comply with defendants' discovery demands; and (2) pursuant to CPLR 3110 and 3124 to compel the named plaintiffs to appear for depositions in New York County, or alternatively pursuant to CPLR § 3126, to bar plaintiffs from providing testimony in this case. Plaintiffs oppose defendants' motion.

By prior decision and order dated March 19, 2010 (the "3/19/10 order"), this court *inter alia*: (1) granted plaintiffs' prior discovery motion solely to the extent of directing defendants to a) provide a privilege log; b) respond to interrogatories 11 (identity of

defendants' affiliates), 12 (corporate relationships between defendants and affiliates), 18 (identities and responsibilities of all persons authorized to access credit reports) and 31 (hierarchies of control/management between defendants and their affiliates); and c) produce documents pertaining to contracts and communications with credit reporting agencies ("CRAs"), including payments and invoices, for the period 2003 to date; and (2) granted defendants' prior motion solely to the extent of directing plaintiffs to a) respond to defendants' document demands 2, 10, 13 and 25; b) produce unredacted documents, including credit reports; c) provide individual verifications to interrogatories; and d) supplement their responses to interrogatories 2, 3, 4, 5, 7, 9, 10 and 12; (3) directed all parties to appear for depositions, with out of state plaintiffs' depositions to take place in New York County; and (4) extended plaintiffs' time to move for class certification. The 3/19/10 order provided a specific schedule of dates for compliance with each of the foregoing directives.

Thereafter, the parties required additional time to comply with the 3/19/10 order and this court issued a consent order on April 30, 2010 extending all deadlines. In the meantime, both parties supplemented their discovery responses in an effort to comply with the 3/19/10 order. Defendants also moved to renew and/or reargue the 3/19/10 order, or alternatively, for clarification thereof (the "reargument motion").[1] The instant

[1] Defendants' reargument motion was submitted without opposition on May 21, 2010. However, at a prior May 15, 2010 status conference counsel for the parties agreed to hold that motion in abeyance while they attempted to resolve the issues raised therein by limiting the scope of previously ordered discovery, particularly with respect to electronic discovery and discovery pertaining to defendants' affiliates. As of the date hereof, defendants' counsel has neither withdrawn the reargument motion nor requested that it be restored for determination. As such, plaintiffs have not had an opportunity to submit opposition.

motions are based upon both parties' claims that the other's supplemental responses are insufficient and depositions have not been conducted as per the deadlines in the 3/19/10 order, as extended.

Plaintiffs' OSC

Plaintiffs' OSC focuses upon defendants' alleged failure to: produce documentation of payments and invoices concerning CRAs; provide a privilege log; fully respond to interrogatories 18 and 31; and search for and produce emails in accordance with the parameters set forth in U.S. District Judge James S. Gwin's June 2, 2010 decision in a related action pending before the U.S. District Court, Southern District of New York (*Serin, et al. v Northern Leasing Systems, Inc., et al.*, Case No. 7:06-CV-1525 [JG], at Exh. 4 to OSC) ("Serin"), as previously agreed.[2]

In opposition, defendants address plaintiffs' specific claims (see discussion *infra*) and also argue that since plaintiffs failed to move for class certification on or before August 20, 2010 as per the extended court-ordered deadline, the discovery plaintiffs claim is outstanding, all of which relates to the class, is now irrelevant. This argument is rejected as the court extended the time for discovery without date, a fact defendants' counsel acknowledges (see Lillienstein Opp. Aff. at ¶8).

Further, defendants contend that by the time they filed their reargument motion they had largely complied with the 3/19/10 order and, at the last conference held on June 15, 2010, plaintiffs' counsel raised issues only with respect to defendants' email production. According to defendants, plaintiffs filed the instant OSC approximately nine

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[2] Plaintiffs allege defendants produced the emails in the Serin case, but never suggested search terms for this case or responded to plaintiffs' proposed search terms.

months after the June 15, 2010 conference, without ever advising them that other responses were allegedly insufficient, in violation of 22 NYCRR §202.7. The emails attached to plaintiffs' OSC confirm that plaintiffs only corresponded with defendants about electronic discovery and scheduling of depositions.

Upon reviewing the exhibits annexed to defendants' supplemental responses,[3] this court concludes that defendants have adequately responded to interrogatories 18 and 31. Any further details plaintiffs seek may be pursued via depositions. Defendants do not address plaintiffs' claim that they have not provided a privilege log as ordered and as such, defendants are directed to provide same within 30 days.

With respect to payments to and invoices from CRAs for the period 2003 to date, defendants claim *inter alia* to have advised plaintiffs' counsel by letter dated May 12, 2010[4] that such materials were available for plaintiffs to inspect but plaintiffs' counsel never made arrangements to do so. Plaintiffs' counsel apparently did not realize these materials had been made available as they were not expressly referenced in defendants' counsel's May 12, 2010 letter. This inadvertent miscommunication does not warrant the harsh penalty of striking defendants' answer and defendants are directed to again make same available to plaintiffs' counsel within 30 days.

With respect to email production, both parties have been inattentive to each other's requests for further information (see Lillienstein Opp. Aff. at ¶12, fn. 4, 5). Plaintiffs do not refute defense counsel's claim that plaintiffs' proposed search terms

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[3] See Lillienstein Opp. Aff. at Exh. L.

[4] See Lillienstein Opp. Aff. at Exh. K.

were not received until March 11, 2011, and that plaintiffs' counsel failed to respond to defendants' counsel's prior September 3, 2010 email asking that this information be re-sent. Under these circumstances, the court declines to strike defendants' answer but, for the sake of expediting discovery, directs defendant to respond to plaintiffs' proposed search terms within 30 days.

Defendants' Motion

In support of its motion to preclude, defendants cite the following alleged deficiencies in plaintiffs' supplemental responses:[5]

- No unredacted documents were produced;
- Interrogatories 2 and 5: plaintiffs fail to provide addresses or other contact information for the individuals identified;
- Interrogatory 3(b): in response to defendants' request to set forth the knowledge possessed by certain individuals regarding plaintiffs' damages, plaintiffs' response that each named plaintiff possesses such knowledge and that damages shall be proved by expert testimony is insufficient;
- Interrogatory 9: in response to defendants' request for the amount of each plaintiff's damages and how they were calculated, plaintiffs improperly responded that: each plaintiff suffered damages of $50,000 without breaking down the amount allocated to each statutory violation alleged in the complaint; all plaintiffs base their damages on "loss of promotional opportunities and other consequences of the adverse entries, and hedonic damages", while plaintiffs Weier and Aldrich also base their damages on the projected savings they would have benefitted from as a result of obtaining lower interest rates in refinancing;
- Interrogatory 10: in response to defendants' request for plaintiffs to describe in detail each attempt to obtain credit that was adversely affected by defendants'

[5] Plaintiffs claim to have served a second supplemental response dated September 15, 2010, which addresses interrogatory 9 and is included in plaintiffs' opposition (Strutinskiy Opp. Aff. at Exh. 2). Defendants' counsel denies having been served with the second supplemental response, contending "there is a troubling pattern going on here" because there have been other occasions where defendants' counsel does not receive papers plaintiffs' counsel serves by hand delivery. Lillienstein Reply Aff. at ¶3.

actions alleged in the complaint, 3 of 4 plaintiffs summarily responded that they each refrained from seeking credit due to the adverse entry, without specifying what credit they would have applied for; plaintiff Weir alleges several banks denied her credit between 2006-2008, but fails to name the banks, the nature of the transactions, dates, etc.;

- Interrogatory 12: in response to defendants' request for plaintiffs to describe in detail each attempt to obtain credit during the three years prior to any attempt that was adversely affected by defendants' actions alleged in the complaint, 3 of 4 plaintiffs responded that they did not seek credit during that time, to which defendants respond that they thus cannot plausibly claim $50,000 in damages; further, plaintiff Weir responded that she was approved for credit or loans in 2002 and 2003, but again provides no specific details; and

- Plaintiffs fail to respond to document demands 2, 10, 13 and 25.[6]

Plaintiffs insist they are in full compliance with the 3/19/10 order and respond that defendants have simply not reviewed the documents and responses plaintiffs have provided. With respect to document requests, plaintiffs state: 1) on June 1, 2010 they produced over 200 pages of documents, including unredacted copies of plaintiffs' credit reports and correspondence between plaintiffs and third parties; 2) the documents demanded in requests 2 (communications between plaintiffs) and 10 (other leases) do not exist; and 3) the documents demanded in requests 13 (documents plaintiffs provided to defendants) and 25 (communications between defendants and CRAs pertaining to plaintiffs) have been produced to the extent they are in plaintiffs' custody and control.

With respect to plaintiffs' above responses, the court notes that plaintiffs cannot produce documents they do not have. As such, their responses to document demands

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[6] Defendants contend plaintiffs are also in default with regard to document demands 24, 26 and 27. However, this court's 3/19/10 order found such demands to be moot based upon plaintiffs' claim that they have produced documents to the extent they exist and are in their possession and/or control. See 3/19/10 order at p. 10.

2, 10, 13 and 25 are sufficient, though the court is compelled to note that, on this record, it is unclear when plaintiffs affirmatively advised defendants in writing that they do not have the requested documents or have produced what they do have.

As to the unredacted documents plaintiffs were to produce, defendants do not refute plaintiffs' claim that they produced unredacted copies of their credit reports and correspondence between themselves and third parties. As there is no indication on this record that any other unredacted documents are outstanding, the court can only presume that plaintiffs have complied with the 3/19/10 order.

Turning to plaintiffs' interrogatories, defendants' only complaint with plaintiffs' responses to items 2 and 5 is that no contact information was provided for the individuals identified therein. Plaintiffs indicate they are willing to provide last known addresses and as such, are directed to do so within 30 days.

Plaintiffs have also adequately responded to interrogatories 10 and 12 with regard to plaintiffs Aldrich, Arnold and Salas by affirmatively stating that these plaintiffs did not attempt to obtain credit during the relevant time periods. Defendants' incredulity at their projected claims for $50,000 in damages, while understandable in light of their responses, is not a basis to find the responses improper. Whether these plaintiffs will ultimately be able to prove their *prima facie* cases is not before the court on this non-dispositive motion. As to plaintiff Weier, the court finds that this plaintiff sufficiently responded to these interrogatories in plaintiffs' first supplemental responses (Motion at Exh. 3) by providing the names of institutions she applied to for credit and the year of such applications. In opposition to the motion, plaintiffs' counsel elaborates that plaintiff Weir has no recollection of further details and no responsive documentation.

Interrogatories 3(b) and 9 seek information pertaining to plaintiffs' alleged damages. Defendants urge that plaintiffs' failure to properly respond to these interrogatories should result in an order precluding plaintiffs from supporting their damages claims in this case.

This court's 3/19/10 order noted that expert discovery may be needed to calculate plaintiffs' damages but stated that:

> it is insufficient for plaintiffs to vaguely state that they will provide the requested information at an unspecified time determined by them to be appropriate. Accordingly, defendants' motion is granted to the extent that plaintiffs are directed to specify any actual damages, if any, incurred to date by each plaintiff as a result of defendants' alleged conduct, and the manner in which such damages have been preliminarily calculated. Such responses shall be supplemented as further information becomes available.

Interrogatory 3(b) asks plaintiffs to set forth the knowledge possessed by the individuals identified in interrogatory 2 concerning plaintiffs' alleged damages. Plaintiffs responded by stating that each named plaintiff "possesses knowledge of facts underlying damages suffered by [him/her], which damages will be determined by expert testimony." Motion at Exh. 3. Plaintiffs further indicate that the responses will be supplemented as stated in the 3/19/10 order. Plaintiffs' counsel contends they have responded "to the extent reasonably possible." Strutinskiy Opp. Aff. at ¶11.

Interrogatory 9 asks plaintiffs to state the amount of damages they suffered and how computed for each of the various statutory violations alleged in the complaint. Each plaintiff responded that their compensatory damages are calculated at $50,000, without breaking down the amount allocated to each violation. Each plaintiff bases this estimate on "loss of promotional opportunities and other consequences of the adverse

entries, and hedonic damages", while plaintiffs Weier and Aldrich also base their damages on the projected savings they would have benefitted from as a result of obtaining lower interest rates on refinancing.

Plaintiffs' second supplemental response reiterates that an expert report or testimony will be provided at an unspecified date. With minor variations, each plaintiff goes on to state various categories of damages which "do not lend themselves to a statement of calculation but may be subject to an award of damages", such as "mental anguish, embarrassment, fear of losing employment, aggravation of existing medical conditions and fear of relapse, inability to sleep, anxiety, sweats, headaches, increased blood pressure", which will be determined by a jury, as well as "statutory damages up to $1,000 under the FCRA to be valued by jury." Plaintiffs go on to indicate the "range of actual damage verdicts in similar cases . . . have been between $1,000.00 and $700,000.00." Finally, plaintiffs' counsel suggests that depositions would be a more efficient tool to explore these issues.

Defense counsel characterizes the foregoing responses as evasive and notes that since the second supplemental response is unverified it is a nullity. Defendants' position is not without merit - plaintiffs' responses still do not place defendants in a position to estimate plaintiffs' damages with any degree of certainty. Essentially, plaintiffs state that they cannot calculate their actual damages at this time because they require expert assistance or the claimed damages cannot be quantified.

Nonetheless, the court cannot find that plaintiffs made no good faith effort to respond to these demands to the best of their ability. As indicated in the 3/19/10 order, plaintiffs previously objected to these interrogatories as calling for legal conclusions.

Now, plaintiffs explain their inability to calculate their damages precisely and offer an indication as to the type of damages suffered (i.e., such as for physical and/or emotional ailments allegedly caused by defendants' conduct). Accordingly, the court finds no basis for issuing an order of preclusion at this time. However, plaintiffs are directed to furnish individual verifications to their second supplemental responses within 30 days and counsel for the parties shall set a date for the completion of expert disclosure at the next conference.

As a final matter, the court will grant both parties a final chance to complete party depositions under the same terms (priority, location, etc.) set forth in the 3/19/10 order. Such depositions shall be completed on or before December 30, 2011, regardless of the status of written discovery.

The court has considered the parties' remaining arguments and finds them lacking in merit. For all of the above reasons, it is hereby

ORDERED that plaintiffs' OSC (motion seq. 006) to strike defendants' answer is denied, however, defendants are directed to comply with each of the directives listed above within thirty (30) days of the date hereof; and it is further

ORDERED that the portion of defendants' motion (motion seq. 007) seeking an order of preclusion or alternatively to strike the complaint is denied, the portion of the motion seeking to compel plaintiffs' compliance with this court's 3/19/10 order is granted to the extent set forth above and plaintiffs are directed to comply with each of the directives listed above within thirty (30) days of the date hereof; and it is further

ORDERED that depositions of all parties be completed on or before December 30, 2011 in accordance with the terms hereof.

The parties are directed to appear for a compliance conference on November 15, 2011 at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York. At that time, defendants' counsel shall advise the court whether he will proceed with defendants' reargument motion or withdraw same and a new date shall be set for plaintiffs' motion for class certification.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
October 12, 2011

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Hon. Martin Shulman, J.S.C.