

**American Petroleum Distributions, LLC v American Express Co. Inc.**

2012 NY Slip Op 31604(U)

June 11, 2012

Supreme Court, Nassau County

Docket Number: 15523-11

Judge: Steven M. Jaeger

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SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEVEN M. JAEGER,**  
Acting Supreme Court Justice

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AMERICAN PETROLEUM DISTRIBUTORS,  
LLC,

Plaintiff,

-against-

AMERICAN EXPRESS COMPANY INC.,

Defendant.  
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TRIAL/IAS, PART 41  
NASSAU COUNTY  
INDEX NO.: 15523-11

MOTION SUBMISSION  
DATE: 4-16-12

MOTION SEQUENCE  
NOS. 001 and 002

The following papers read on this motion:

- |   |   |
|---|---|
| Notice of Motion, Affirmation, and Exhibits                         | X |
| Notice of Cross-Motion, Affirmation, and Exhibits                   | X |
| Plaintiff's Affirmation in Opposition to Cross-Motion               | X |
| Reply Affirmation in Support of Cross-Motion                        | X |
| Amended Affirmation in Opposition to Plaintiff's Motion to Preclude | X |

Motion pursuant to CPLR 3126 by plaintiff American Petroleum

Distributors, LLC to preclude defendant from opposing any of plaintiff's claims or supporting any of its defenses; from offering in evidence those documents requested, but not produced, in plaintiff's first request for documents (December 22, 2011) or from producing in evidence any testimony from persons designated in plaintiff's notice to take deposition; and to strike defendant's answer is denied.

Cross motion by defendant American Express Company, Inc. pursuant to CPLR 3124 to compel plaintiff to comply fully with defendant's amended notice

for discovery and inspection (January 16, 2012) and demand for authorizations (December 16, 2011) is determined as hereinafter provided.

This action arises from defendant's alleged theft of the sum of \$52,765.89 from plaintiff's bank account maintained at JP Morgan Chase Bank by unauthorized electronic transfer of funds from plaintiff's bank account to defendant during the period September 9, 2011 through October 3, 2011, and the alleged withholding of the sum of \$10,361.43<sup>1</sup> due and owing plaintiff as and for American Express credit card charges processed by plaintiff through defendant Amex Merchant's Account ID# 6318829207 for the business located at 1245 Nepperhan Avenue, Yonkers, New York. Plaintiff's amended complaint asserts causes of action sounding in theft/unjust enrichment and breach of contract/unjust enrichment.

Pursuant to the Preliminary Conference Stipulation and Order dated February 15, 2012, responses to the demands for discovery and inspection previously served by both parties were to be provided by March 15, 2012. On or before that date, plaintiff was to provide responses to defendant's demands including: amended notice for discovery and inspection dated January 16, 2012;

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<sup>1</sup>In addition, plaintiff alleges that defendant has advised plaintiff of its intention to deduct the sum of \$2,761.19 from credit card charges processed by defendant under plaintiff's account ID # 6318829082.

amended first set of interrogatories dated January 16, 2012; demand for authorizations dated December 16, 2011; demand for statements dated December 16, 2011; and demand for witnesses dated December 16, 2011.

All parties were to exchange the names and addresses of eye witnesses, notice witnesses, statements of opposing parties and photographs, or, if none, provide an affirmation to that effect. Depositions were to be conducted on April 10, 2012.

Claiming that it had responded to all of defendant's discovery requests prior to February 27, 2012, plaintiff seeks to prohibit defendant from opposing any of plaintiff's claims or supporting any of its defenses. Plaintiff seeks also to preclude defendant from producing in evidence those documents requested in plaintiff's first request for production of documents; from producing in evidence any testimony from persons designated in plaintiff's notice to take deposition and to strike defendant's answer. Based on defendant's purported refusal to provide discovery, or a witness with personal knowledge of the actual theft of money from plaintiff's bank account, plaintiff seeks a default judgment against defendant for the amount demanded in the complaint.

In response, defendant argues that plaintiff's initial discovery response to defendant's amended notice for discovery and inspection and demand for

authorizations are inadequate, as a matter of law, in that plaintiff has failed to provide the requested documentary evidence *vis-a-vis* its alleged contractual relationship with defendant or authorization for relevant checking account records and/or documents pursuant to which defendant was authorized to make withdrawals. Defendant, therefore, has cross moved to compel plaintiff to fully comply with the subject requests.

It is well settled that a party is entitled to full disclosure of all matter that is “material and necessary in the prosecution or defense of an action.” CPLR 3101(a). The decision as to what is material and necessary is left to the sound discretion of the court (*Buxbaum v Castro*, 82 AD3d 925 [2<sup>nd</sup> Dept 2011]), and includes “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]. Requests, however, may not be overbroad, burdensome or lacking in specificity nor may they seek irrelevant information. *Osowski v AMEC Constr. Mfgt., Inc.*, 69 AD3d 99, 106 [1<sup>st</sup> Dept 2009].

CPLR 3101(a) is to be interpreted liberally in favor of disclosure. *Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2<sup>nd</sup> Dept 2011]. The documents sought, however, must be material and necessary to the prosecution or defense of

the action so as to assist preparation for trial by sharpening the issues and reducing delay and prolixity. *Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2<sup>nd</sup> Dept 2009]. The phrase “material and necessary” is to be interpreted liberally and the test is one of “usefulness and reason.” *Kooper v Kooper*, 74 AD3d 6, 10 [2<sup>nd</sup> Dept 2010] (internal quotation marks omitted).

While the nature and degree of penalty sought to be imposed for the failure to comply with an order of disclosure is a matter of discretion with the court, the striking of a pleading is inappropriate absent a clear showing that the failure was willful, contumacious or in bad faith. *Workman v Town of Southampton*, 69 AD3d 619, 620 [2<sup>nd</sup> Dept 2010]. Willful and contumacious conduct can be inferred from a party’s repeated failure to respond to demands, or to comply with discovery orders, absent a reasonable excuse. *Horne v Swimquip, Inc.*, 36 AD3d 859 [2<sup>nd</sup> Dept 2007]. Where the failure to disclose is neither willful nor contumacious, a single instance of non-compliance does not warrant the striking of a party’s pleading. *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1<sup>st</sup> Dept 1999].

Here, it does not appear that defendant has willfully or contumaciously obstructed the course of disclosure. Defendant has provided responses to plaintiff’s first request for documents and demand for witnesses. The court notes

that plaintiff's objection to defendant's proposed deposition witness is unavailing as well as premature.

A corporate entity has the right to designate, in the first instance, the employee who shall be examined. *Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 917 [2<sup>nd</sup> Dept 2011]; *Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2<sup>nd</sup> Dept 2010]. Plaintiff has failed to demonstrate that defendant's proposed disposition witness has insufficient knowledge of the complained of transaction or is otherwise inadequate. *Conte v County of Nassau*, 87 AD3d 559, 560 [2<sup>nd</sup> Dept 2011]. As such, plaintiff's objection to defendant's proposed deposition witness lacks merit.

Inasmuch as defendant has complied with plaintiff's disclosure requests, plaintiff's request for sanctions pursuant to CPLR 3126 is denied. Further, plaintiff has failed to provide an affirmation of good faith in accordance with the requirements of 22 NYCRR 202.7(c) which provides that the affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." An affirmation that does not show that the movant attempted to obtain discovery, that was previously ordered prior to initiating a discovery motion, is inadequate. *Natoli v Milazzo*, 65 AD3d 1309,

1310-1311 [2<sup>nd</sup> Dept 2009]; *Tine v Courtview Owners Corp.*, 40 AD3d 966, 967 [2<sup>nd</sup> Dept 2007].

With respect to defendant's cross motion to compel plaintiff to provide a more complete response to its discovery requests, the court notes that CPLR 3120(1)(i) permits discovery of "designated documents . . . which are in the custody or control of the party. . . ." It is axiomatic that a party may not be compelled to produce, or sanctioned for failing to produce, information that does not exist or which he does not possess. *Vaz v New York City Tr. Auth.*, 85 AD3d 902, 903 [2<sup>nd</sup> Dept 2011]; *Corriel v Volkswagen of Am.*, 127 AD2d 729, 731 [2<sup>nd</sup> Dept 1987]. The failure to provide information in its possession, however, will preclude a party from later offering proof regarding that information at trial. *Sagiv v Gamache*, 26 AD3d 368, 369 [2<sup>nd</sup> Dept 2006].

Where, as here, a party objects to an item of disclosure on the sole ground that it is not in possession of any documents responsive to the particular request, the objection must be supported by an affidavit of the party itself detailing the efforts made to locate the documents at issue, or an affidavit from any other person having knowledge of where the documents are, or should be, located. *Fugazy v Time Inc.*, 24 AD2d 443 [1<sup>st</sup> Dept 1965]. Plaintiff has failed to provide such an affidavit.

In addition to a cause of action for theft of money, plaintiff asserts a cause of action for breach of contract. To establish such a claim, plaintiff must demonstrate: 1) the existence of a contract between plaintiff and defendant; 2) consideration; 3) performance by plaintiff; 4) breach by the defendant; and 5) damages resulting from the breach. *Furia v Furia*, 116 AD2d 694, 695 [2<sup>nd</sup> Dept 1986]. Plaintiff cannot, therefore, avoid the production of, *inter alia*, documentary evidence of the alleged contract/agreement supportive of its allegations and claims.

Plaintiff is directed to respond more fully to defendant's notice for discovery and inspection (January 16, 2012) and demand for authorizations (December 16, 2011). To the extent that documents are not in plaintiff's possession, a member of plaintiff LLC shall provide an affidavit regarding their unavailability indicating that a thorough search was conducted in a good faith effort to produce same. *Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1<sup>st</sup> Dept 2011].

Dated: June 11, 2012



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STEVEN M. JAEGER, A.J.S.C.

**ENTERED**

JUN 12 2012

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**