

**Groh v Kahlil**

2012 NY Slip Op 32780(U)

November 16, 2012

Supreme Court, Richmond County

Docket Number: 101692/11

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:101692/11  
Motion No.:002, 003**

**AUDRA GROH and  
KRISTI LYNN ERRICHELLO,**

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**KARAM KAHLIL KESHAK a/k/a  
KARAM KHALIL and  
ELEGANT LINEN COLLECTION CORP.,**

*Defendants*

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The following items were considered in the review of the following motions relating to discovery and sanctions.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed [No. 002]</b>	<b>1</b>
<b>Notice of Cross-Motion and Affidavits Annexed [No. 003]</b>	<b>2</b>
<b>Affirmation in Opposition [No. 002, 003]</b>	<b>3</b>
<b>Affirmation in Reply [No. 002]</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiffs seek an order setting sanctions pursuant to CPLR §§3124, 3125 and 3126 against defendant for refusing to comply with two court orders by failing to produce certain documents and for destroying or otherwise disposing of such documents.

Defendants also move for an order granting defendants' counterclaim and finding that defendants are entitled to a protective order for the defendant's employees personal, confidential and private records and defendants' financial records, and sanctions as against plaintiffs and an award for attorney's fees, costs and disbursements for having to respond to the plaintiffs' motion.

Plaintiffs' motion for sanctions is denied. Defendants' motion for a protective order is denied as are the branches requesting sanctions, attorney's fees, costs and disbursements.

## Facts

The underlying action involved a sexual harassment and discrimination claim alleged by plaintiffs against the defendant employer and other officers. A second allegation involves an action for a violation of the New York State Labor Laws by defendant for failing to pay wages, commissions, overtime as well as failing to provide other employee entitlements. Furthermore, plaintiffs also claim a violation of NYS Labor Law §215 which prohibits retaliation for opposing the alleged illegal pay practices.

Plaintiff Audra Groh (“Groh”) alleges that defendant Karam Kahlil Keshak (“Keshak”) made numerous unwanted sexual advances toward during her employment at Elegant Linen Collection Corp. (“Elegant Linen”), another defendant. As a result, Groh claims that she now suffers and becomes nauseous when forced to remember those times. She further alleges that her employment was terminated due to her complaints she filed with the Labor Board. On December 14, 2010, Groh informed Keshak’s son that she would be filing a complaint about workplace abuses. The same day, Groh met with Keshak to repeat her complaint to which he allegedly responded, “OK, good-bye, get out.” The following day, Groh found her belongings readied for her to take home. It was then that Keshak informed her she was terminated because of lack of work. Groh believes she was illegal terminated due to her complaints that she was sexually harassed. She also believes that there are outstanding monies owed to her from her employment.

Plaintiff Kristi Lynn Errichiello (“Errichiello”) also alleges that Keshak made unwanted sexual advances and lewd comments to her. Errichiello quit to escape from the alleged harsh work environment that Keshak created.

Defendants deny all the allegations put forth against them. Keshak denies any knowledge of complaints filed to Labor Board by Groh. Defendants state that Groh was terminated because of reduction in work force, as well as poor performance. With regard to Errichiello, defendants claim that she failed to satisfactorily perform her required duties so her employment status was

changed to that of an independent contractor before she voluntarily quit. Defendants further deny that any monies are owed to either plaintiff.

The crux of the decision lies with the motion practice of the two parties' counsel. With the complaint filed, plaintiffs counsel made a request for production documents on or about July 5, 2011, requesting various documents pertaining to employee records, defendants financial records and those records which defendants should lawfully possess.

Defendants state in their opposition papers that they responded to this request on or about September 30, 2011. Unsatisfied with the documents produced, the plaintiffs filed a motion for sanctions and/or to compel dated October 12, 2011, returnable November 18, 2011. However, pursuant to this court's rules, plaintiff cannot file a motion until there has been a preliminary conference.

On the return November 18, 2011, this court informed plaintiffs of the court rules and held a conference where the court issued a Preliminary Conference order requiring the defendants to produce all the documents which had been requested, but had not yet been produced by December 9, 2011. If any documents were to be withheld due to attorney-client privilege then such documents would be specifically identified as being withheld and the reason for withholding them.

According to plaintiffs, defendants still did not fully comply with the November order by December 9, 2011. Thereafter, plaintiffs again filed a motion for sanctions and/or to compel disclosure dated February 10, 2012, returnable February 15, 2012. Since plaintiffs did not seek leave to file such as a motion, the court requested that it be withdrawn. At this conference, defendants claimed at a conference held on the return date that they had turned over all documents that were requested that they possessed. This court ordered defendant to submit an affidavit stating that either they produced all documents or that any missing documents would be produced by February 24, 2012.

On February 23, 2012, defendants produced some other documents including documents labeled as “time sheets” of several employees. Also produced on that date was a sworn affidavit from Keshak that stated that he provided all documents within his control, which pertained to the plaintiffs and their alleged claims.

The motion for sanctions before this court was the third submitted by the plaintiffs. The first motion was the above mentioned motion dated October 12, 2011. That motion sought sanctions for failure to appear at a deposition, failure to produce demanded documents and failure to certify defendants’ response to plaintiffs’ document request. Plaintiffs failed to seek permission to file this motion. Such was the case again with plaintiffs second motion dated February 10, 2012. This third present motion was filed April 4, 2012 with a return date of April 13, 2012. Before this third motion was decided, plaintiffs sent to the court a letter dated April 17, 2012, requesting leave to submit a motion for sanctions and for an order requiring certain depositions to be completed by a set date and those individuals fail to appear they would be barred from rebutting plaintiffs’ claims at trial.

In support of their motion, plaintiffs submitted a proposed order, counsel’s affirmation and memorandum of law. Plaintiffs contention throughout all of these motions has been that the defendants either destroyed the requested documents as to avoid having to produce them or destroyed the requested documents that they were legally required to maintain once this action was commenced. A third contention is that defendants still possess the requested documents, but refuse to produce them or simply deny having them, and for that reason are in contempt of the court’s orders. It is argued that these requested documents would assist plaintiffs in establishing their claims and that the defendants failure to produce such documents will hinder plaintiffs prosecution of the claims. Plaintiff believes that the requested documents namely the personnel records of all of defendants’ employees would provide an opportunity for the plaintiff to locate other employees who were similarly treated as that of the plaintiffs. These documents would also provide the plaintiff to test his theory that defendants forced its employees to sign on as independent contractors or forfeit their opportunity of employment. The desire for the

defendants' financial records stems from plaintiffs' belief that Groh was not terminated because of corporate downsizing, but instead the records would reflect a healthy thriving company, which would support his claim of illegal termination.

Defendants oppose this motion and cross-move for sanctions and a protective order. In opposition, defendants label plaintiff's continual motions for sanctions and/or to compel as frivolous. Defendants deny all the alleged claims put forth by the plaintiffs. In an affidavit signed by Keshak, he admits that he did not retaliate by terminating Groh's employment, and that he is in full accordance with keeping of legally required documents. He further stated that the numerous sanction motions brought by the plaintiffs have caused him and his company to expend unnecessary time and money in a difficult economic period. Moreover, defendants believe that plaintiffs numerous requests are overly broad and burdensome as plaintiffs did not specify with reasonable particularity what documents they were seeking. They also contend that these documents are irrelevant to the case at hand. And as such seek a protective order for the private financial documents of its employees, officers and the corporate defendant itself.

## **Discussion**

### *Plaintiffs' Motion for Sanctions/to Compel*

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order...the party seeking disclosure may move to compel compliance or a response.<sup>1</sup> A party is entitled to penalties against an opposing party who refuses to obey an order for disclosure or willfully 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.<sup>2</sup> Generally, the nature and degree of the penalty to be imposed pursuant to

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<sup>1</sup> CPLR § 3124.

<sup>2</sup> CPLR § 3126.

CPLR § 3126 against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court.<sup>3</sup> The general rule is that a court must impose a sanction commensurate with the particular disobedience it is designed to punish.<sup>4</sup> Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious.<sup>5</sup>

A party seeking sanctions against another must comply with all rules in the CPLR for bringing a motion. In addition, no motion relating to disclosure or to a bill of particulars shall be filed with the court unless it was served with a notice of motion and an affirmation of good faith.<sup>6</sup> The affirmation must demonstrate a good faith effort in resolving the issues raised by the motion and shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions.<sup>7</sup> If no consultation with opposing counsel was held, then the affirmation must include a good cause why it was not held.<sup>8</sup>

Defendants properly assert in their memorandum of law that plaintiffs did not state in their affirmation that plaintiffs attempted to resolve the issues prior to filing this motion. Therefore, their motion for sanctions is denied because plaintiffs have failed to attach an affirmation of good faith, nor did they attach an explanation as to why a conference was not held. Irrespective of the lack of a good faith affirmation, this court would still have denied sanctions because the record supports that the defendants substantially complied with the court ordered discovery.

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<sup>3</sup> *Lotardo v. Lotardo*, 31 A.D.3d 504 [2<sup>nd</sup> Dept. 2006].

<sup>4</sup> *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737 [2<sup>nd</sup> Dept. 2012].

<sup>5</sup> *Id.*

<sup>6</sup> 22 NYCRR § 202.7.

<sup>7</sup> 22 NYCRR § 202.7©.

<sup>8</sup> *Id.*

Plaintiffs also seek an order to compel the defendants to produce requested documents that have not been produced. The plaintiffs direct the court to an attached exhibit which they label as “Plaintiffs’ First Request For Documents.” Defendants contend that this attached exhibit is different from the document request that was served. They contend that this document request was prepared purposefully for this motion. However, upon comparison with the document request that the defendants alleged were served and attached to their opposition papers, the finds that the document request provided by plaintiffs is the same one served upon defendants. The explanation for the different appearance was addressed by the plaintiffs who stated that those paragraphs listed on the attached exhibits were the only discovery requests at issue. Although, plaintiffs course of action in editing the document request was ill-advised, the court will acknowledge it as true and will focus its decision based upon it.

The remaining document sought by plaintiffs and listed in the abridged request are:

- 1. Personnel records for all employees showing the date of hire, dates of termination, dates of any layoffs, dates of return to work, disciplinary actions, pay rates, promotion, suspensions or any disciplinary actions, current address, telephone, e-mail address, and all pay records;**
- 2. Personnel records for all who were considered to be independent contractors, including dates of hire, dates of termination, dates of any layoffs, dates of return to work, disciplinary actions, pay rates, promotions, suspensions or any disciplinary actions, current address, telephone, e-mail address, and all pay records;**
- 3. All records showing whether persons working for the benefit of Defendant were employees, or independent contractors, including W-2 statements, Form 1099 statements, and all documents showing whether employees of Defendants were exempt or non-exempt; and**
- 4. All records and documents maintained by the Defendants to establish compliance with the New York State Wage & Hour Laws, including, but not limited to, New York State Labor Law Sections 160, 162, 191, 191.1, 191.1 ©, 193, 195.5, 197, 198, 198-a, 198-c, 215, 661, 663, 736, 738.**

Under CPLR 3101(a) there shall be full disclosure of all evidence “material and necessary” in the prosecution or defense of an action, regardless of the burden of proof. The words “material and necessary” are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. A party’s right to discovery is not unlimited, however, and may be curtailed when it becomes an unreasonable annoyance and tends to harass and overburden the other party.<sup>9</sup> The supervision of discovery is generally left to the trial court’s broad discretion.<sup>10</sup>

With regards to plaintiffs’ request listed above as 1 through 3, the court agrees with defendants that this request is overly broad as plaintiffs cannot expect defendants to turn over years worth of documents relating to every and all employees that have worked at Elegant Linen.

However, the court does find that all records and documents maintained by the defendants to demonstrate that they are fully in compliance with those specifically above mentioned codes are to be produced for the period of plaintiffs earliest date of employment to the present. These documents fall within the wide net of discovery, however, may fall outside the purview of admissibility. Such an issue is reserved to the trial court.

Plaintiffs also proposed the theory of spoliation to support their motion for sanctions. The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised the movant’s ability to prove a claim or defense.<sup>11</sup> As this court finds that certain requests made by the defendants were not discoverable or irrelevant to the present case, the non-production of these sought documents could not be fatal or hinder plaintiffs’ claims. Moreover, the record is devoid

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<sup>9</sup> *Harrison v. Bayley Seton Hosp., Inc.*, 219 A.D.2d 584 [2<sup>nd</sup> Dept. 1995].

<sup>10</sup> *Geffner v. Mercy Medical Center*, 83 A.D.3d 998 [2<sup>nd</sup> Dept. 2011].

<sup>11</sup> *Mendez v. La Guacatala, Inc.*, 95 A.D.3d 1084 [2<sup>nd</sup> Dept. 2012].

of proof that defendants by their own purposeful actions or by negligence destroyed any documents.

*Defendants' Motion for Sanctions*

The court pursuant to its discretionary power to award sanctions finds that the defendants are not entitled to an order of sanctions against the plaintiffs. Although defendants have substantially complied with plaintiffs' discovery requests, defendants have not produced all discoverable documents to plaintiffs. Therefore, plaintiffs motions to compel were proper.

*Defendant's Motion for a Protective Order*

Defendants seek an order for the private and confidential financial records of its employees and for their own private and confidential financial records. The court may make at any time on its own initiative, or on motion of any party or of any person from who discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.<sup>12</sup>

As the court has already denied access to the private and confidential records of the employees sought by the plaintiffs, the court will address the private and confidential financial records of the defendant Elegant Linen and Keshak.

Courts do not favor disclosure of income tax returns without some showing that the particular information in tax returns has some specific application to the case or that other sources of information are likely to be inaccessible or unproductive.<sup>13</sup>

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<sup>12</sup> CPLR § 3103(a).

<sup>13</sup> *Panasuk v. Viola Park Realty, Inc.* 41 A.D.3d 804 [2<sup>nd</sup> Dept. 2007].

The motion for a protective order for all the personal financial records of defendant Keshak is granted as those records are not relevant to any of the claims alleged. However, the motion for a protective order of defendant Elegant Linen's financial records is denied. The financial records of Elegant Linen may prove plaintiffs' claim that Groh was not terminated due to corporate downsizing.

Additionally, plaintiffs are required to provide defendants with a supplemental bill of particulars detailing the alleged violations and their respective statutory counterpart. Plaintiffs must also produced defendants with HIPPA authorizations for both plaintiffs.

Furthermore, plaintiffs are entitled to take the necessary steps to redact from open court records the information that is barred from disclosure pursuant to NYS Labor Law § 203-d(1)(d).

Accordingly, it is hereby:

ORDERED, that plaintiffs' motion for sanctions is denied; and it is further

ORDERED, that defendants must produce defendant financial records all records and documents maintained by Elegant Linen to establish compliance with the New York State Wage & Hour Laws, including, but not limited to, New York State Labor Law Sections 160, 162, 191, 191.1, 191.1 ©, 193, 195.5, 197, 198, 198-a, 198-c, 215, 661, 663, 736, 738 from the date of the plaintiff's employment through the present by December 31, 2012; and it is further

ORDERED, that defendants' motion for sanctions and protective order is denied; and it is further

ORDERED, that plaintiffs must produce a supplemental bill of particulars and HIPPA authorizations by December 31, 2012; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on **January 16, 2012 at 9:30 a.m.** for a Compliance Conference.

ENTER,

DATED: November 16, 2012

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Joseph J. Maltese  
Justice of the Supreme Court