

Luigi Martini Inc. v Tincati USA, Inc.
2012 NY Slip Op 33869(U)
February 24, 2012
Supreme Court, New York County
Docket Number: 109251/11
Judge: Melvin L. Schweitzer
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LUIGI MARTINI INC.,

Plaintiff,

-against-

TINCATI USA, INC.,

Defendant.

Index No. 109251/11

DECISION AND ORDER

Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Plaintiff moves pursuant to CPLR 3124, CPLR 3126(2) and 3042(c) to compel defendant to comply with plaintiff's document demand and demand for a verified bill of particulars.

Plaintiff claims that five such demands on defendant remain unmet. First, plaintiff claims that defendant produced documents labeled “T0001-T00027” along with document responses that failed to state which documents correspond to which demands and that defendant then failed to comply with a later request to provide information matching these documents. Second, plaintiff claims that defendant has failed to provide documents plaintiff requested in response to defendant's counterclaim in which defendant argues that it suffered damages as a result of plaintiff's actions. Third, plaintiff claims that defendant has refused to “identify and produce all original and true copies of bank statements, sales receipts, ledger books and any other documents evidencing revenues earned by defendant during the relevant time period.” Fourth, plaintiff claims that defendant has refused plaintiff's request for copies of tax returns for the relevant time period as well as orders that show merchandise and fabric purchased by defendant for sale in its retail store. Fifth, plaintiff claims that defendant refused plaintiff's demand to produce all

original and true copies of documents that were signed by plaintiff during his affiliation with defendant. Furthermore, plaintiff claims that defendant has argued that some documents requested in Document Requests 9-11 are privileged and defendant has failed to follow the proper procedure for claiming privilege.

Defendant first defends these requests by arguing that plaintiff has failed to follow proper discovery procedure under CPLR 3124, 22 NYCRR 202.7(a)(2) and (c), and 22 NYCRR 202.8(f) and, thus, plaintiff's motion to compel should be found improper. The import of these statutes is that prior to filing a motion to compel discovery, "counsel [must have] conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7. Defendant argues that under *Eaton v Chahal*, "a good faith effort requires 'more than an exchange of computer generated form letters or cursory telephone conversations. Significant, intelligent and expansive contact and negotiations must be held between counsel to resolve any dispute and such efforts must be adequately detailed in an affirmation.'" *Eaton v. Chahal*, 146 Misc 2d 977 (Sup. Ct. Rennselaer Co. 1990). *See also Barber v. Ford Motor Co.* 250 AD2d 552.

Plaintiff's affidavit reveals the history of correspondence between the parties that constitutes the extent of any such good faith effort to compel discovery. Plaintiff demanded a verified bill of particulars on October 12, 2011 which has since been satisfied. On October 13, 2011, plaintiff made its first demand for production of documents and first demand for names and addresses of all witnesses, of which the demand for names and addresses of witnesses has since been satisfied while the demand for production of documents remains in dispute. By letter dated October 26, 2011, plaintiff informed defendant of the insufficiency of defendant's

October 24, 2011 response to the document requested and request further information. Plaintiff sent another letter to defendant on December 5, 2011 reiterating this request and threatening to file a motion to compel discovery. Defendant responded with a letter on December 6, 2011, which plaintiff's affidavit states "provided nothing more than a recitation of its initial objections to the plaintiff's relevant demands. The defendant also claims it is unable to locate responsive documents although it diligently searched for them."

The question remains, do plaintiff's four letters to defendant regarding discovery issues constitute a good faith effort to resolve issues raised by this motion. These letters do not appear to be merely form letters but rather it appears that plaintiff has made specific, thorough requests regarding precise information desired and what exactly about the information provided by the defendant failed to satisfy the discovery request. The court finds the correspondence constitute "significant, intelligent and expansive contact and negotiations" in meeting the good faith requirement of 22 NYCRR 202.7.

Unmet request one: plaintiff requested that defendant identify which documents among "T0001-T0027" correspond to which demands.

Plaintiff claims that defendant's response to the document request which provided documents labeled "T0001-T0027" lacked any information that would correspond these documents to plaintiff's demands. This assertion by plaintiff lacks merit. Exhibit H contains the December 6, 2011 letter from defendant to plaintiff within which it corresponds "documents serially-stamped T0001 through T0027" with "Plaintiff's Document Demand No. 3." The import of Exhibit H is that all documents provided correspond to "Plaintiff's Document Demand No. 3" alone.

Unmet request two: plaintiff demands that defendant provide documents plaintiff requested in response to defendant's counterclaim within which defendant argues that it suffered damages as a result of plaintiff's actions.

The defendant has submitted a counterclaim for damages as a result of plaintiff's alleged actions. The documents supporting plaintiff's motion to compel discovery indicate that "Document Request No. 6" stated, "Please identify and produce all original and true copies of invoices, cancelled checks, credit card statements and any other document evidencing payment made or costs incurred that support the Defendant's claim for damages caused by the Plaintiff." In defendant's "Responses and Objections to Plaintiff's First Demand for the Production of Documents", it stated that in regards to "Document Request No. 6", it objected "to the extent this request seeks identification of 'all' 'and any other' document to the extent this request is overly broad and/or unduly burdensome." Defendant indicated that, subject to this objection, it would "undertake a reasonable search and produce or make available for inspection and/or copying documents responsive to this request." In defendant's December 6, 2011 response to plaintiff's December 5, 2011 letter reiterating its discovery request, defendant, in regards to plaintiff's "Document Demand No. 6", stated "We are attempting to obtain documents responsive to these requests." Defendant's affidavit in opposition addresses the issue in an unclear manner. This affidavit provides, first, that if "documents don't exist or if Defendant is not in possession of documents responsive to Plaintiff's demand, Defendant cannot produce them" and second, regarding the question of whether the defendant has provided documentation of its losses, the defendant states that it has done so. None of this suggests that defendant has provided documentation of its losses and therefore the court grants plaintiff's motion to compel discovery relating to this request.

Unmet request three: plaintiff demands that defendant “identify and produce all original and true copies of bank statements, sales receipts, ledger books and any other documents evidencing revenues earned by defendant during the relevant time period.”

Following plaintiff's demand that defendant “identify and produce all original and true copies of bank statements, sales receipts, ledger books and any other documents evidencing revenues earned by the Defendant during the relevant time period,” defendant responded that the requested documents were overly broad, unduly burdensome or immaterial. The only documents defendant has provided, “T0001-T0027”, do not include bank statements, and other financial documents included among these only detail the relationship between plaintiff and defendant without providing a broader picture of defendant's sales. Plaintiff argues that since this is an action based on a sales commission, documents detailing defendant's overall sales are material and necessary. The court agrees.

Unmet request four: plaintiff claims that defendant has refused plaintiff's request seeking copies of tax returns for the relevant time period as well as orders that show merchandise and fabric purchased by defendant for sale in its retail store.

None of the documents submitted by defendant meet plaintiff's request for copies of tax returns, and orders showing merchandise and fabric purchased by defendant for sale in its retail store. Defendant is to produce defendant's tax returns as requested.

Unmet request five: plaintiff claims that defendant refused the plaintiff's demand to produce all original and true copies of documents that were signed by plaintiff during his affiliation with defendant.

In response to the plaintiff's demand that defendant produce all original and true copies of documents that were signed by plaintiff during his affiliation with defendant, defendant states that it's “search has revealed no documents responsive to this request, except as has already been produced.” The provided documentation does include a few submissions where plaintiff's name

is written on them. It is not clear whether these documents were signed by plaintiff or whether plaintiff's name was written on them for some other purpose. Defendant is directed to provide any documents signed by plaintiff and identify such documents as signed by plaintiff.

Further claim: plaintiff claims that defendant has argued that some documents requested in "Document Requests 9-11" are privileged and yet defendant has failed to follow the proper procedure for claiming privilege.

Defendant has failed to follow the procedure for claiming privilege outlined in CPLR 3122. CPLR 3122 provides "This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum." Defendant is directed to provide a privilege log in compliance with CPLR 3122.

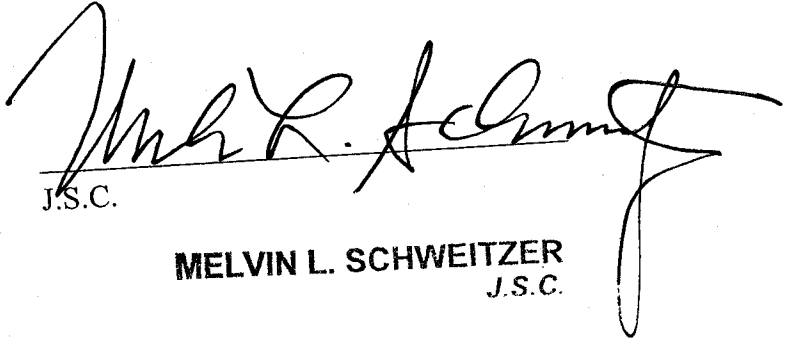
Accordingly, it is

ORDERED that plaintiff's motion to compel is granted in part and denied in part in accordance with this Decision and Order; and it is further

ORDERED that defendant is directed to comply within 30 days of the date of this Decision and Order.

Dated: February 24, 2012

ENTER:


J.S.C.

MELVIN L. SCHWEITZER
J.S.C.