[* 1]

SHORT FORM ORDER

INDEX No. 38959-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/29/13
ADJ. DATES
Mot. Seq. #003 - Mot D
Mot. Seq. #004 - XMD
CDISP Y____ N x

NBTY ACQUISITION LLC d/b/a LEINER HEALTH PRODUCTS, Plaintiff, -against- MARLYN NEUTRACEUTICALS, INC. Defendant.	SCHOEMAN, UPDIKE & KAUFMAN Attys. For Plaintiff 551 Fifth Ave. New York, NY 10176 McGIVNEY & KLUGER, PC Attys. For Defendant 80 Broad St. New York, NY 10004

Upon the following papers numbered 1 to 9 read on this motion to preclude and cross motion for a protective order; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 7-8; Other 9 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for an order pursuant to CPLR 3126 dismissing the defendant's answer or an order precluding the defendant from introducing certain evidence touching upon the issue of the defendant's liability and/or causation, is considered under CPLR 3126 and is conditionally granted only to the extent that the defendant shall be precluded from adducing any evidence at the trial of this action that relates to the issue of causation *unless* it complies with the directives for disclosure set forth below; and it is further

ORDERED that this cross motion (#004) by the defendant for a protective order and other relief is considered under CPLR 3103 and is denied.

This action arises out of contracts for the purchase of effervescent products in 2009 by the plaintiff, NBTY Acquisition LLC (hereinafter NBTY) from defendant, Marlyn Neutraceuticals, Inc.

(hereinafter Marlyn). The plaintiff alleges that under the terms of its purchase orders, Marlyn agreed to tender and deliver to the plaintiff products which were free of the presence of allergens such as soy. The plaintiff claims that Marlyn breached the contracts by delivering and tendering non-conforming effervescent products containing soy. The plaintiff seeks recovery of damages from the defendant under theories of contract, warranty and tort.

Marlyn commenced a third-party action against Kelatron Corporation (hereinafter Kelatron), a Utah supplier of selenium chelate which Marlyn used in the production of the effervescent products it sold to the plaintiff. In the third-party complaint, Marlyn charged Kelatron with breaches of contract, warranties and tort, for which, recovery of derivative and direct damages was demanded. The third-party action was dismissed by prior order of this court due to a lack of long arm jurisdiction over Kelatron. Thereafter, Kelatron brought suit against Marlyn in Utah, which suit was removed by Kelatron to a federal district in Utah.

Pursuant to a stipulation of counsel entered into at a regularly scheduled conference before this court on January 25, 2013, counsel agreed, in relevant part, as follows: 1) that by February 15, 2013, defendant Marlyn would produce or certify "that no such documents exist", the following: a) documents exchanged with or created in connection with FDA recall of the Air Effervescent, NBE by Marlyn for plaintiff NBTY; b) documents relating to Kelatron's selection and/or certification by Marlyn as a raw material supplier from 2003-2010; c) documents relating to Marlyn's purchase of selenium chelate from 2003-2010 including, but not limited to, allergen certificates, request for allergen certificates or allergens; d) documents relating to other suppliers of selenium chelate to Marlyn from 2003-2010 including, but not limited to product specifications, allergen information, allergen certificates including, but not limited to Albion; e) documents (redacted if necessary or produced subject to Attorneys Eyes Only designations relating to the manufacture of Airborne NBE for other customers of Marlyn for its own accounts from 2005-2010, including, but not limited to, product specifications labeling, allergen certificates, allergen information and the supply of selenium chelate used in the product's manufacture; 2) Deposition of NBTY's designee on March 14, 2013, with no further depositions of NBTY to be taken; 3) compliance conference adjourned to March 29, 2013; and 4) No depositions of Kelatron in this action shall take place absent further order of the court and documents obtained by plaintiff NBTY from Kelatron under a subpoena issued to Kelatron by the plaintiff, and the sharing of the documents produced with defendant Marlyn. The agreement was memorialized in a stipulation signed by counsel that was so-ordered by the court.

Following the passage of certain dead-line dates set forth in the January 25, 2013 so-ordered discovery stipulation, the plaintiff interposed this motion to sanction the defendant, by way of dismissal or preclusion, failing to provide the documents and other materials that were the subject of such order. The defendant cross moves for a protective order against the disclosure of further documentation called for by subparagraph 1(e) of the January 25, 2013 order, which admittedly, would amount to a defacto modification of those provisions of such order. The demand for this relief is premised upon claims that the defendant's business relationship with a national retailer would be jeopardized by such disclosure. The defendant further asserts that it obtained a subpoena requesting the production of documents and compelling Kelatron's testimony at a deposition in this action due to the plaintiff's failure to issue to Kelatron the document subpoena that was the subject of item numbered 4 of the January 25, 2013 order. While the defendant is in receipt of such subpoena which issued out of the Utah court, it has not served such subpoena upon Kelatron, in light of the court's prohibition against it under item 4 of the January

25, 2013 order. Like the modification sought with respect to item 1(e) of the order, this demand for relief would effect a defacto lifting of the conditional stay imposed upon the defendant's discovery of Kelatron in this action that is the subject of item 4 of the January 25, 2013 order. The defendant claims to have fully furnished responses to all other items called for by the January 25, 2013 order. Finally, the defendant claims an entitlement to a privilege log from the plaintiff.

The court shall first consider the defendant's cross motion, as determination thereof may render portions of the plaintiff's motion-in-chief academic. As indicated above, the defendant seeks a protective order against the disclosure of the items it agreed to produce in subparagraph 1(e) of the January 25, 2013 order. In effect, this would constitute a modification of the court's order which directed the production of such documents to which counsel stipulated to. The defendant also requests the court to modify item #4 of the stipulation so as to permit the defendant to depose and to otherwise seek disclosure from Kelatron to aid in the defense of this action. The granting of this relief would effect a defacto lifting of the conditional stay imposed upon the defendant's discovery of Kelatron in this action. For the reasons stated below the defendant's cross motion is denied.

Pursuant to CPLR 3103, the court may "make a protective order" with respect to a discovery demand that is inappropriate (*see* ***D'Adamo v Saint Dominic's Home***, 87 AD3d 966, 929 NYS2d 301 [2d Dept 2011]). In any such order, the court may deny, limit, condition or regulate the use of any disclosure device to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]; *see* ***Accent Collections, Inc. v Cappelli Enter., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]).

"A party seeking to set aside such a stipulation will be granted such relief only upon a showing of good cause sufficient to invalidate a contract, such as fraud, overreaching, duress, or mistake" (***Esposito v Podolsky***, ___ AD3d___, 2013 WL 1223313 [2d Dept 2013]; *see* ***McCoy v Feinman***, 99 NY2d 295, 302, 755 NYS2d 693 [2002]; ***Hallock v State of New York***, 64 NY2d 224, 230, 485 NYS2d 510 [1984]; ***Sheng v State Div. of Human Rights***, 93 AD3d 851, 941 NY.2d 215 [2d Dept 2012]). In addition, courts will not set aside a stipulation due to its purported unconscionability simply because, in hindsight, a party decides that the agreement was improvident, was not the most advantageous to the dissatisfied party, or because a party had a change of heart (*see* ***Ricca v Ricca***, 57 AD3d 868, 870 NYS2d 419 [2d Dept 2008]; ***Town of Clarkstown v M.R.O. Pump & Tank, Inc.***, 287 AD2d 497, 731 NYS2d 231 [2d Dept 2001]).

Here, the defendant failed to demonstrate its entitlement to the protective order requested or to modifications of the schedule of discovery stipulated to by counsel and so-ordered by the court at the proceedings conducted on January 25, 2013 during the conference. The cross moving papers failed to demonstrate that such an order is necessary to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person. Militating against a finding that a protective order is warranted is that the defendant agreed to the discovery items set forth in the January 25, 2013 order after a lengthy conference with the court. The defendant's attempt to show disadvantage or prejudice by its reliance upon contracts and confidentiality agreements with other of its customers, including a national retailer is wholly unavailing. The contractual clauses regarding confidentiality and disclosure owing to the national retailer contemplates, rather than precludes, the disclosure of the information and documentation called for in subparagraph 1 of the so-ordered stipulation of January 25, 2013. Even if it were otherwise, the existence of contracts between the defendant and others binds

neither the plaintiff or the court and thus provides no basis for an alteration of the plaintiff's entitlement to discovery under the laws of this state.

Nor is the defendant entitled to the lifting of the conditional stay imposed upon the taking of a deposition of former third-party defendant Kelatron that was the subject of item #4 of the so-ordered stipulation. Neither of the conditions imposed upon any such deposition, namely, review of the documents subpoenaed by the plaintiff from Kelatron and a further order of the court granting the defendant leave to depose Kelatron with respect to the issues in dispute in this action were satisfied prior to the defendant's procurement of a subpoena from the Utah court. The defendant's complaints about the lack of formal service of the subpoena upon Kelatron are unavailing, since it appears that service thereof was effected on Kelatron's Utah counsel. Although it appears that there's been no exchange between parties to this action of documents received, if any, from Kelatron under the plaintiff's subpoena, the delay could have been avoided by the parties' inclusion of more express terms regarding the time within which the exchange of subpoenaed documents had to have been completed. The defendant's complaints about the limited scope of the plaintiff's subpoena could have likewise been cured by the defendant's employment of more express terms in the stipulation.

Finally, the record reveals that the privilege log to which the defendant claimed an entitlement to has been supplied by the plaintiff. Accordingly, the defendant's cross motion (#004) for a protective order and for an order modifying or otherwise relieving the defendant from certain terms of the so-ordered discovery stipulation of January 25, 2013 is denied.

Also denied are those portions of the plaintiff's motion wherein it seeks dismissal of the answer served by defendant Marlyn. Before a court invokes the drastic remedy of striking a pleading, or even the lessor remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (*see* ***Arimont v Iwakawa***, 60 AD3d 795, 874 NYS2d 392 [2d Dept 2009]; ***Allen v Calleja***, 56 AD3d 497, 867 NYS2d 529 [2d Dept 2008]; ***Moog v City of New York***, 30 AD3d 490, 490–491, 820 NYS2d 593[2d Dept 2006]). This rule is distilled from a more general rule that in order for the court to impose a provident sanction due to a failure to disclose, the sanction must be commensurate with the particular disobedience it is designed to punish (*see* ***Zakhidov v Boulevard Tenants Corp.***, 96 AD3d 737, 945 NYS2d 756 [2d Dept 2012]). Thus, substantial compliance, even where tardy, militates against a finding of a willful and contumacious default in responding to outstanding discovery demands (*see* ***Korchak v Santana***, 102 AD3d 928, 958 NYS2d 484 [2d Dept 2013]; ***Delarosa v Besser Co.,*** 86 AD3d 588, 926 NYS2d 910 [2d Dept 2011]; ***LOP Dev., LLC v ZHL Group, Inc.***, 78 AD3d 1020, 911 NYS2d 637 [2d Dept 2010]; ***Hutchinson v Langer***, 71 AD3d 735, 896 NYS2dd 439 [2d Dept 2010]; ***ACME ANC Corp. v Read***, 55 AD3d 854, 866 NYS2d 359 [2d Dept 2008]; ***Resnick v Schwarzkopf***, 41 AD3d 573, 836 NYS2d 415 [2d Dept. 2007]).

Here, the record contains sufficient evidence of the defendant's substantial, albeit tardy, compliance with the so-ordered discovery stipulation of January 25, 2013 so as to remove the CPLR 3126 sanction of dismissal of the defendant's answer from the case at this juncture. However, the record contains due evidence that supports the plaintiff's contention that full compliance is lacking due to certain insufficiencies in the defendant's responses. Under these circumstances, the court finds that the plaintiff is entitled to a conditional order precluding the defendants from introducing evidence that in any way touches upon the issue of causation at the trial of this action unless the defendant timely serves

discovery items which remedies certain of the insufficiencies compla ined of by the plaintiff. Accordingly, the defendant is hereby directed to serve the plaintiff with the documents that are the subject of ¶¶ 6, 8, 10, 11, as amplified by ¶ 13, of the reply affirmation of plaintiff's counsel, and/or a certification under oath that, after a detailed due and diligent search, one or more of such documents do not exist or are not in its possession. Service of these items must be made by May 9, 2013.

In view of the foregoing, the defendant's cross motion (#004) is denied, while the plaintiff's motion-in-chief (#003) is granted, conditionally, to the extent that the defendant shall be precluded from adducing any evidence at the trial of this action that relates to the issue of causation *unless* it complies with the directives for disclosure above. The court shall inquire whether the conditional nature of this order of preclusion has been removed at the compliance conference now scheduled for Friday, **May 17, 2013.**

DATED: 4/10/13

THOMAS F. WHELAN, J.S.C.