

**GS Plasticos Limitada v Bureau Veritas Consumer
Prods. Servs., Inc.**

2014 NY Slip Op 30243(U)

January 22, 2014

Supreme Court, New York County

Docket Number: 650242/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GS PLASTICOS LIMITADA,
Plaintiff,

INDEX NO.
650242/09

-against-
BUREAU VERITAS CONSUMER
PRODUCTS SERVICES, INC.,

Defendant.

-----X
JOAN A. MADDEN, J.:

Plaintiff GS Plasticos Limitada (“GS”) moves, by order to show cause, pursuant to CPLR 3124, for an order (i) compelling defendant Bureau Veritas Consumer Products Services, Inc. (“BVCPS”) to answer certain interrogatories in GS’ seventh and ninth sets of interrogatories and where requested produce and/or permit GS’s counsel to inspect, copy, test or photograph designated documents or things in BVCPS’s custody and control, (ii) directing that if BVCPS’s does not comply by a certain date that discovery sanctions be imposed (motion seq. no. 026). BVCPS opposes the motion and cross moves to compel responses to its eighth set of interrogatories. BVCPS also separately moves for to vacate GS’s order to show cause to compel discovery based on GS’s failure to comply with Rule 202.7 of the Uniform Rules of the Supreme Court which requires that any motion to compel be accompanied by statement of counsel that a good faith effort was made to resolve the issues raised by the motion (motion seq. no. 027) ¹

Background

GS is a Brazilian manufacturer of toy “premiums” for the promotional market, which are small plastic toys like those found McDonald’s Happy Meals. BVCPS is a provider of testing and inspection services for consumer products. This action arises out of allegations that, *inter alia*,

¹Motion seq. nos. 026 and 027 are consolidated for disposition.

between August 2006 and October 2006, BVCPS issued various reports to Kellogg Brazil, a subsidiary of the Kellogg Company (“Kellogg”), that incorrectly found that GS’s stamps, which were to be used in promotional inserts in Kellogg’s products, contained dangerously high levels of arsenic. It is alleged that as a result of these reports, which were subsequently determined to be false, Kellogg canceled its contract with GS to manufacture the stamps and lost future business opportunities with Kellogg.

The original complaint asserted causes of action for negligence, *res ipsa loquitur*, tortious interference with existing contractual relations, and tortious interference with prospective business relations. BVCPS moved to dismiss the complaint on various grounds. In its decision and order dated April 7, 2010, this court granted the motion to the extent of dismissing all of GS’s claims except for the claim seeking to recover for tortious interference with existing contractual relations.

By decision and order dated October 13, 2011, the Appellate Division, First Department affirmed the court’s April 7, 2010 decision and order. See *GS Plasticos Limitada v. Bureau Veritas*, 88 AD3d 510 (1st Dept 2011). Following certain discovery, GS moved to amend its complaint to assert claims for negligence, and violations of the Donnelly Act, and to add certain allegations in connection with its existing claim for tortious interference with contract. By decision and order dated November 8, 2012, the court denied GS’s motion to amend except to the extent of permitting GS to include additional allegations in connection with its claim for tortious interference with contract with respect to damages to its reputation. Accordingly, the only claim remaining in this action is for tortious interference with contract.

Discovery in this action, which began in early 2010, has been “long and contentious.” GS Plasticos Limitada v. Bureau Veritas Consumer Products Services, Inc., ___ AD3d ___, 2013 WL

6767521 (1st Dept. Dec. 24, 2013). The parties have appeared for 16 discovery conferences, and the parties have made numerous motions related to discovery. At the most recent conference, the court issued an order dated February 7, 2013, requiring that any motions to compel outstanding discovery be made by March 15, 2013, and that all requests for discovery be subsumed in the above motions, and that no new requests for discovery be made. Following the issuance of the February 7, 2013 order, four discovery related motions were made, including, most recently, the instant motion before the court.

In motion seq. no. 027, BVCPS moved to vacate GS's order to show cause to compel its response to GS's seventh and ninth set of interrogatories based on GS's failure to comply with Rule 202.7 of the Uniform Rules of the Supreme Court which requires that any motion to compel be accompanied by statement of counsel that a good faith effort was made to resolve the issues raised by the motion. This motion has been resolved by the court's interim order dated April 4, 2013, which directed that the parties confer and make a good faith effort to resolve the issues and that parties submit one set of papers as to any remaining issues.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 408 (1968).

Interrogatories must "satisfy the standard of reasonable particularity in identifying the information to be produced." Lobatto v. Lobatto, 109 AD2d 697 (1st Dept 1985). An attorney is

obligated to “propound a properly formulated set of interrogatories” Wyda v. Makita Elec. Works, Ltd., 162 AD2d 133, 133 (1st Dept 1990)(citation omitted). However, when a discovery request is otherwise narrowly defined, the use of “all” it is not so improper as to require judicial intervention. Ensign Bank, F.S.B. v. Gerald Modell, Inc., 163 AD2d 149 (1st Dept 1990). The court will consider the interrogatories at issue in the context of this law.

GS maintains that its service of the seventh and ninth sets of interrogatories is in part attributable to BVCPS’s failure to produce a key document known as the July 2006 Global Correlation result (“Global Correlation document”), until February 2013. According to plaintiff the Global Correlation document “suggests that at least two months before BVCPS began disseminating false arsenic reports BVCPS knew that its reporting limits exceeded the applicable testing limit requirements” (Abduljaami Affirmation of Support, dated June 17, 2013, ¶ 3).

BVCPS’s view of the Global Correlation document is very different from that of GS. BVCPS asserts that the document, which refers to BVCPS’s “detection limit requirements [for arsenic] as specified in European Standard (EN) 71², Part 3” is irrelevant to the issues in this case, with respect to reporting that the arsenic level of GS’s stamps exceeded EN 71 standard of 25 ppm standard.³

²EN 71 is the European Standard specifies safety requirements for toys. Compliance with the standard is legally required for all toys sold in the European Union. See Wikipedia, EN 71, <http://en.wikipedia/wiki/EN71> (as of Jan. 14, 2014).

³Specifically, BVCPS asserts that the only thing the global study found was that the BVCPS in Buffalo was unable to distinguish results that were under 14 ppm, which is irrelevant to the EN 71 standard. Thus, while the maximum limit for passing results were 25 ppm and BVCPS’s reporting limit was 14 ppm, BVCPS “would not be able to report whether a sample passed at 13 or 10 or 5 or 2, but in each case would be able to accurately report that the sample passed with an arsenic level of less than 14” (Polonsky Affirmation in Opposition, dated June 24, 2013, ¶ 5). Thus, BVCPS maintains that these test results met the EN standard for toys, as relevant to this action, since they “achieved the maximum detection limits that are less than the

BVCPS also denies that GS first learned of the document in February 2013, and asserts that it was disclosed during the deposition of a BVCPS witness before May 24, 2011, the date GS issued its third notice of discovery and that when GS sought information regarding the document, BVCPS objected on the grounds of relevance and GS failed to follow up on its request.

In fact, the significance of the Global Correlation document to proving GS's case cannot be determined on its face. At the same time, it appears to be sufficiently relevant to the accuracy of BVCPS's testing procedures to warranted its production.

Seventh Set of Interrogatories

The seventh set of interrogatories, which contains 105 interrogatories, may be divided into the following categories: (1) questions regarding accreditation by the American Association for Laboratory Accreditation ("A2LA"), including compliance with certain proficiency testing requirements, (2) questions regarding BVCPS's quality control procedures for monitoring its testing, (3) questions regarding testing standards used for the stamps at issue, (4) questions regarding procedures and equipment used with respect to the testing of GS's product for arsenic during the relevant period (i.e. between August 2006 and October 2006), including the use of ICP-OES WC-089 (hereafter WC-089) and ICP-OES WC-094 (hereinafter "WC-094) machines⁴; (5) questions as to the number of samples tested using the WC-089 and WC-094 during the period

maximum amounts listed in clause 9 (i.e 25 ppm) in the EN 71 standard."

⁴ICP-OES, stands for inductively coupled plasma optical emission spectrometry. "It is a type of emission spectroscopy that uses the inductively coupled plasma to produce excited atoms and ions that emit electromagnetic radiation at wavelengths characteristic of a particular element. The intensity of this emission is indicative of the concentration of the element within the sample." See Wikipedia, Inductively coupled plasma atomic emission spectroscopy, http://en.wikipedia/wiki/plasma_atomic_emission_spectroscopy (as of Jan. 14, 2014). The WC 089 and the WC 094 were the two types of ICP/IES machines used by BVCPS to test the samples.

between August 2006 and November 2006, (6) questions regarding whether for the period between August 2006 and November 2006, products taken from the samples tested using the WC-089 and WC-094 were distributed domestically or internationally or in the State of New York and the number of products intended for distribution, (7) questions regarding the number of samples tested using the WC-089 and WC-094 between August 2006 and November 2006 derived from fourteen different categories of products, (8) questions as to number of samples tested using the WC-089 and WC-094 between August 2006 and November 2006 that passed testing and as to number of samples affected by defects in design or manufacture, (9) questions regarding the maintenance and repair of the WC-089 and WC-094, (10) questions regarding the defect that lead to the BVCPS's false finding that the stamps contained arsenic, and (11) the investigation related to the defect causing the inaccurate result, the cause of the false result, including the equipment involved.

BVCPS has responded to the majority of interrogatories seeking relevant information, but has also asserted various objections to some of the interrogatories or parts of the interrogatories on various grounds, including that they are overly broad and burdensome (noting that during this litigation GS has propounded more than 550 interrogatories or hundreds more than propounded by plaintiff), constitute an improper fishing expedition, are irrelevant, and duplicate earlier interrogatories that have already been answered.

The court finds that with the exceptions below, these objections were properly asserted and the interrogatories sufficiently answered. For example, the interrogatories relating to the products taken from the samples tested using the WC-089 and WC-094 were distributed domestically or internationally or in the State of New York and the number of products intended for distribution (interrogatory nos. 21 through 24 and 59 through 62), are wholly irrelevant to

proving the claim of tortious interference with contract. Likewise, interrogatories inquiring as to the number of samples tested using the WC-089 and WC-094 between August 2006 and November 2006 derived from fourteen different categories of products (interrogatories nos. 25 through 28 and 63 through 66) are overly broad and burdensome and therefore properly objected to.

With respect to the interrogatories related to proficiency testing, the court reaches a different result. In interrogatory no. 6, GS inquires whether in 2006, BVCPS had a documented plan of how it intended to cover applicable program requirements needed for A2LA accreditation conducted over a four year period, and requests the BVCPS produce documents relating to the answer. As noted by GS “A2LA requires that laboratories have suitably implemented [proficiency testing] requirements and have a documented plan of how they intend to cover the applicable program requirements or the major self-disciplines and materials/matrices/produce types...on their scope of accreditation over a four year period.” In addition, BVCPS has produced evidence that it received accreditation from the A2LA to perform physical and mechanical tests on toys in February 2008.

BVCPS responded that “it did have such a plan in 2006, that the plan covered a four year period pursuant to A2LA requirements, that the plan did not provide proficiency testing with respect to testing under EN-71 Part 3 or for heavy metals in 2006. Accordingly the documented plan is not relevant to plaintiff’s claim for intentional falsification of arsenic testing results. BVCPS further notes that its Buffalo laboratory was audited in 2006, but that the audit did not cover heavy metals testing.”

In addition, BVCPS now argues that “the proficiency testing is conducted under the auspices of third party testing companies and does not include internal performance testing,

correlation testing or quality controls” (Polonsky Affirmation, at 23). BVCPS also argues that if anything, any information contained in the proficiency report would be relevant to the dismissed negligence and not to the remaining claim for tortious interference with contract, which requires that plaintiff prove that BVCPS intentionally falsified that testing report to interfere with the stamp purchase order.

Here, based on BVCPS’s general response it cannot be ascertained whether the documents related to proficiency testing are relevant to the issues in this action. In particular, the court finds that even if the proficiency testing did not include testing for toys under EN-71 Part 3 or for heavy metals, such testing and the 2006 audit are potentially relevant to broader issues with respect to the equipment or procedures that may impact on the issues in this case. Thus, for example, if the equipment was not properly functioning and BVCPS was aware of this fact based on the proficiency testing such knowledge is potentially relevant to issues of intent.

At the same time, as it would appear that certain documents related to proficiency testing in connection with A2LA accreditation may not be relevant to the issues in this action, BVCPS is directed to provide such documents for in-camera inspection, together with a log indicating the nature and purpose of the document, and an affidavit from a person with knowledge, providing a comprehensible explanation as to why such document or portion of such document is not relevant and thus should not be provided to GS.

Interrogatory 11 requests that BVCPS list the date, result(s) and final result for proficiency testing in 2006 and to identify all documents relating to the answer and to identify those documents not already produced. BVCPS has objected to the Interrogatory on various grounds including that it was not scheduled to perform chemical or heavy metals proficiency testing in 2006. Contrary to BVCPS’s position, the response to this interrogatory may be relevant to the

issues in this action for the reasons explained in connection with interrogatory no. 6.

Accordingly, BVCPS is directed to respond to this interrogatory or, in the alternative, to provide to the court for in-camera review an affidavit of a person with knowledge, providing a comprehensible explanation as to the type of test performed, and the reason why the results of such test(s) are not relevant to the issues in this action, together with any relevant documents.

Interrogatory 12 asks whether in 2006, “BVCPS submitted to the A2LA corrective action responses, including root cause analysis, for any outlying or unacceptable final results relating to testing/calibration on their A2LA Scope of accreditation,” and for BVCPS to identify all documents relating to the answer, and to identify those documents not already produced. BVCPS responded that there was no proficiency testing performed for heavy metals testing and therefore it was not required to submit any corrective action plan. BVCPS also responded that internal quality control data, such as the global correlation studies performed by BVCPS, are not provided to A2LA and thus were not responsive to the interrogatory.

Contrary to BVCPS’s position, the answer to this interrogatory is potentially relevant for the reasons explained in connection with interrogatory no. 6. Moreover, that the corrective action taken as a result of GS’s internal quality control procedures are distinct from corrective action responses to A2LA does not provide a basis for withholding this information.

Accordingly, BVCPS is directed to respond to this interrogatory or, in the alternative, to provide to the court for in-camera review an affidavit of a person with knowledge regarding the information sought in this interrogatory, together with the documents relating to this information. The affidavit shall provide a comprehensible explanation as to nature of any corrective action responses and the reason why such responses are not relevant to the issues in this action.

Interrogatory No. 13, which requests any A2LA corrective action responses for 2007,

together with documentation related to such responses, is also potentially relevant. Accordingly, BVCPS is directed to respond to this interrogatory or, in the alternative, to provide to the court for in-camera review an affidavit of a person with knowledge regarding the information sought in this interrogatory, together with the documents relating to this information. The affidavit shall provide an explanation as to nature of any corrective action responses and the reason why such responses are not relevant to the issues in this action.

Interrogatory Nos. 17, 18, 19, 20 ask the precise number of samples tested using the WC-089 in each of August, September, October and November 2006, while Interrogatory Nos. 29, 30, 31, and 32, ask the number of samples passed the testing using the WC-089 during those months. The same questions are asked with respect to the WC-094 in interrogatory nos. 55, 56, 57, 58, and 67, 68, 69, 70. The samples are not limited to the Stamps.

With respect to the questions as to the precise number of samples, BVCPS responded that during the relevant time period, it tested approximately 150 to 200 samples collectively on both machines. Plaintiff argues that this response is not acceptable as BVCPS has failed to provide a factual basis for the estimation and the days/dates the machines were used and the method used to derive this estimate. While BVCPS asserts it has met this condition, by stating that the machines were used each business day and the number of samples tested was estimation was “based on the experience and recollection of the BVCPS’s Heavy Metals Laboratory,” such statements are insufficient to provide a factual basis for its response.

Accordingly, BVCPS is to answer interrogatory nos. 17, 18, 19, 20, 55, 56, 57, 58, by providing GS with an affidavit of a person with knowledge as to how the estimation of 150 to 200 samples per month was reached and the basis for determining that the machines were used each business day.

With respect to the interrogatories regarding the number of samples which passed testing using the WC-089 and WC-094, BVCPS responds that the question is unduly burdensome as it would require it review thousands of tests reports for all products to determine if products passed testing. In addition, BVCPS contends that the defect only affected the arsenic results in samples that included liquid glycerin of the type used in GS's ink and that to BVCPS's knowledge, no other samples contained this type of ink.

The information as to the number of samples that passed testing during the months that GS's samples were tested is relevant as to BVCPS's position that defects in the equipment caused the false report of arsenic rather than any conduct by BVCPS. Thus, for example, if only GS's product failed to pass testing during these months, such evidence would be arguably relevant. Moreover, GS is not required to accept BVCPS's position that the defect only affected the arsenic results in samples that included liquid glycerin of the type used in GS's ink. Accordingly, BVCPS shall respond to interrogatory nos. 29, 30, 31, 32, 67, 68, 69, 70.

Ninth Set of Interrogatories

The ninth set of interrogatories contains 33 interrogatories, all relating to BVCPS's policies and practices for preserving documents. GS maintains that these interrogatories are relevant to determining whether BVCPS improperly withheld documents during this litigation and argues that the belated production of the Global Correlation document highlights the need for such responses. GS also points to the April 2012 deposition testimony of Richard McMahon ("McMahon"), the engineer for BVCPS, who signed the test reports at issue in which he denied that anyone from BVCPS collected documents from him or asked him to preserve any documents.

BVCPS maintains that the ninth set of interrogatories duplicates many of the interrogatories in the third set of interrogatories, that the interrogatories are unduly burdensome,

and seek privileged information including attorney-client communications and work product. BVCPS also points out that in August 2012, counsel for the parties met and conferred with respect to GS's third set of interrogatories, which like the ninth set, relates to preservation of documents and that counsel for GS agreed to accept BVCPS's responses and objections to the third set. Accordingly, BVCPS argues that GS has waived its right to seek further response to the ninth set of interrogatories. BVCPS further asserts that GS has failed to adequately respond to BVCPS's eighth set of interrogatories, which relates to GS's policies and procedures regarding document preservation, and cross moves to compel GS to respond to the eighth set of interrogatories in the event that it is required to provide a further response to GS's ninth set of interrogatories.

Parties may use interrogatories to inquire about "documentation and spoliation of evidence" Brown v. Parfums Jacques Bogart, 12 Misc3d 1187(A), *3 (Sup Ct NY Co. 2006); Brandon v. Chefetz, 94 AD2d 668 (1st Dept 1983). That being said, however, the court finds that under the circumstances here, when, after years of discovery, there is no evidence of spoliation of evidence and BVCPS has answered numerous interrogatories regarding its policies of procedures with respect to document preservation, that the additional responses sought by GS are overly broad and burdensome or irrelevant. See Albert v. Time Warner Cable, 225 AD2d 248 (1st Dept 1998).

In this connection, BVCPS's belated production of the Global Correlation document is not evidence of spoliation but rather, at most, shows that BVCPS withheld a relevant document. As for McMahon's testimony that he was not asked to preserve documents, in response to interrogatory no. 32, BVCPS stated that McMahon did not search his files but his work emails and files were searched by BVCPS. Furthermore, the court notes that McMahon testified four months before counsel for GS's agreed to accept BVCPS's objections and responses to GS's third

set of interrogatories, which also relates to the BVCPS' policies and procedures for preservation of documents.

In sum, as the ninth set of interrogatories is largely duplicative of the third set of interrogatories and GS agreed to accept BVCPS's response to the earlier set, and in the absence of any evidence of spoliation of evidence by BVCPS, GS's motion to compel a further response to the ninth set of interrogatories is denied in its entirety. BVCPS's cross motion to compel with respect to its eighth set of interrogatories is therefore also denied.

Conclusion

In view of the above, it is

ORDERED that GS's motion to compel BVCPS to respond to various interrogatories contained in its seventh and ninth sets of interrogatories and for related relief (motion seq. no. 026) is granted only to the extent of directing that within 60 days of entry of this order, BVCPS shall respond to interrogatories nos. 6, 11, 12, 13, 17, 18, 19, 20, 58, 29, 30, 31, 32, 55, 56, 57, 67, 68, 69, 70 or, in the alternative, with respect to interrogatories nos. 6, 11, 12, and 13 provide the affidavits, information and/or relevant documents to the court for in camera inspection in accordance with this decision and order on or before March 20, 2014; and it is further

ORDERED that BVCPS's cross motion to compel is denied; and it is further

ORDERED that BVCPS's motion to vacate GS's order to show cause to compel its response to GS's seventh and ninth set of interrogatories (motion seq. no. 027) is resolved as per the court's interim order dated April 4, 2013; and it is further

ORDERED that the parties shall appear for a status conference/in camera inspection in Part 11, room 351, 60 Centre Street on March 27, 2014 at 2:30 pm.

DATED: January 20, 2014



J.S.C.

HON. JOAN A. MADDEN
J.S.C.