

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

2014 NY Slip Op 30244(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 — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

GS PLASTICOS LIMITADA

INDEX NO. 650242/09

- v -

BUREAU VERITAS CONSUMER PRODUCTS SERVICES, INC.

MOTION DATE _____

MOTION SEQ. NO. 28

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for quash/probate

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached ~~Memorandum~~ Memorandum Decision and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 22, 2014

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
GS PLASTICOS LIMITADA,
Plaintiff,

INDEX NO.
650242/09

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

Defendant.

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

Defendant Bureau Veritas Consumer Products Services, Inc. (“BVCPS”) moves, by order to show cause, to quash the subpoena issued by plaintiff GS Plasticos Limitada (“GS”) to non-party American Association for Laboratory Accreditation (“A2LA”) or, in the alternative, for a protective order with respect to the subpoena issued to A2LA. GS opposes the motion, and cross moves to compel A2LA’s compliance with the subpoena and, in the absence of such compliance, to hold A2LA in contempt, and to sanction BVCPS for its motion practice seeking to delay discovery. On the return date of the motion, A2LA agreed to comply with the subpoena, thus rendering that aspect of the cross motion moot.

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*, 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 loquitor*, 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 (hereinafter the February 7 order).

The subpoena issued by this court on April 8, 2013¹, and served on A2LA, a Maryland corporation, on April 22, 2012. Subsequently, the subpoena was submitted to the Circuit Court in Frederick County, Maryland which, on May 7, 2013, issued a localized subpoena which was served the next day (“the Subpoena”). The Subpoena seeks documents in the possession and control of A2LA, from which BVCPS received accreditation to perform the type of testing at issue in this action.

BVCPS now seeks to quash the Subpoena arguing that it (1) is duplicative of requests made in GS’s seventh set of interrogatories, (2) seeks documents of no relevance to its remaining claim for intentional interference with contract, and (3) is being used as tool of harassment and as part of GS’s extra-judicial attack on BVCPS’s business and accreditation. Alternatively, BVCPS seeks a protective order limiting the documents requested in the Subpoena as irrelevant, overly broad and burdensome particularly as the subpoena seeks documents that are not limited to the heavy metals/arsenic testing at issue in this action, and seek documents beyond the 2006 time period at issue and instead seeks documents from 2005 and 2007.

GS opposes the motion, arguing that BVCPS does not have standing to challenge the Subpoena and that in any event, BVCPS has failed to show the information sought in the subpoena is “utterly irrelevant” or fail to relate to the subject matter of the action.²

Discussion

As a preliminary matter, the court finds that BVCPS has standing to challenge the Subpoena, since it is a party to this action and is affected by the Subpoena based on its interest in

¹Contrary to BVCPS’s argument, the Subpoena did not violate the February 7 order which did not govern third-party discovery.

²GS also argues that BVCPS failed to timely object to the Subpoena. However, this argument is without merit as BVCPS made this motion within 20 days of the issuance of the subpoena issued by the Circuit Court in Maryland in accordance with the Uniform Interstate Depositions and Discovery Act.

protecting the confidential, technical and proprietary information given to A2LA. See Financial Structures, Ltd. v. UBS AG, 96 AD3d 433, 434 (1st Dept 2012)(motion court properly exercised its discretion in granting defendants’ motion to quash subpoena served by plaintiff on third-party); Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d at 110-111 (there is “nothing to prevent a nonparty served with an excessively broad 3120 subpoena (or party affected by such subpoena) from moving for a protective order pursuant to CPLR 3103); Hyatt v. State Franchise Tax Bd., 105 AD2d 186, 195 (2d Dept 2013)(holding that “[a] person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications”); see generally, McKinney’s Practice Commentary, C3101:23.

In addition, the cases relied on by GS are not to the contrary as they involve circumstances in which a non-party seeks to quash a subpoena, usually in the context of an official government investigation. See Matter of Norkin v. Hoey, 181 AD2d 248 (1st Dept 1992)(holding that a loan applicant does not have standing to quash a subpoena served upon a bank by a governmental investigative body that requested production of bank records relating to a loan made by the bank); compare Siskin v. 221 Sullivan Street Realty Corp., 162 AD2d 356 (1st Dept 1990)(implying that non-party depositor may have standing to object to a subpoena in strictly civil context). In fact, CPLR 3103(a), was amended in July 2013, to clarify that in addition to a party “any person ...about whom discovery is sought” may move for a protective order.³ See Siegel, New York Practice, § 353 (5th ed. updated Dec. 2013).

The court will next consider whether BVCPS is entitled to quash or modify the subpoena and/or whether a protective order is warranted. “It is well settled that the purpose of a subpoena

³The amendment, which took effect on July 31, 2013, applies to all actions pending, or commenced after that date. Siegel, New York Practice, § 353

duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.” Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 108 (1st Dep’t 2006). “For [such] purposes, a party is distinguished from a nonparty[,] and where disclosure is sought against a nonparty[,] more stringent requirements are imposed on the party seeking disclosure.” Id.

A party’s entitlement to discovery of material and necessary materials, is “tempered by the trial court’s authority to impose, in its discretion, appropriate restrictions on demands which are unduly burdensome, and to prevent abuse by issuing a protective order where the discovery request may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” Kooper v. Kooper, 74 A.D.3d 6, 10 (2nd Dep’t 2010). See generally CPLR 3101(a)(4). See also Tannenbaum v. City of New York, 30 A.D.3d 357, 358-59 (1st Dep’t 2006) (holding that trial court properly exercised its discretion in denying requests to depose a non-party in the absence of special circumstances); but see, Velez, 29 A.D.3d at 112 (noting that “the proper standard in assessing a motion to quash a subpoena duces tecum pursuant to a protective order is whether “the materials sought are utterly irrelevant to any proper inquiry”)

In keeping with these principles, when discovery is sought from a non-party, the court considers whether the disclosure is warranted by examining whether the proponent of disclosure can obtain the evidence from sources other than the non-party. Financial Structures, Ltd. v. UBS AG, 96 AD3d at 434; Reich v. Reich, 36 A.D.3d 506, 507 (1st Dep’t. 2007); see also MBIA Ins. Corp. V. Credit Suisse Securities (USA) LLC, 103 AD3d 486 (1st Dept 2013)(holding that court properly found that plaintiff was not entitled to an open-ended commission to obtain document disclosure where the plaintiff failed to show that information was not available from other sources, and the information sought was unduly burdensome).

Here, certain of the demands in the Subpoena, and in particular, demands 1 through 11,

which seek all correspondence, memorandum or other documents regarding BVCPS's documented plan, proficiency testing, corrective analysis and accreditation are in the possession of BVCPS, and are the subject of GS's third set of interrogatories. BVCPS objected to the interrogatories relating to proficiency testing and accreditation by the A2LA on various grounds, including that its 2006 plan and the proficiency testing in 2006 did not include heavy metal testing at issue here and therefore that the information sought by GS was irrelevant. However, in connection with GS's motion to compel a response to this discovery, this court found that the relevance of the documents and information sought could not be determined based on BVCPS's objections. The court also noted that even if the proficiency testing did not include testing for toys under EN-71 Part 3 or for heavy metals, such testing were potentially relevant to broader issues with respect to the equipment, including whether BVCPS knew about potential defects with its equipment prior to testing GS's samples. Accordingly, the court ordered that BVCPS provide the documents sought in the interrogatories for in-camera inspection and also that it answer interrogatories relating to the proficiency testing and/or to provide to the court for in-camera review an affidavit of a person with knowledge, providing a comprehensible explanation as to why the information sought is not relevant to the issues in the action.

Under these circumstances, and as the broad nature of the demands is almost certain to result in the production of numerous documents unrelated to the issues in this action and which may reveal BVCPS's proprietary and business information, the court finds that demands 1 through 11 of the Subpoena should be held in abeyance pending BVCPS's response to GS's seventh set of interrogatories. In particular, BVCPS's response and the court's in-camera review of documents related to A2LA's accreditation and proficiency testing in connection with this response, is likely to shed light on the relevance of the documents sought in the Subpoena, and to the extent to which, any further materials should be produced by A2LA.

As for demands 12 through 15, which seek documents as to BVCPS's participation in a July 2006 and November 2006 in a Global Correlation Program and, in particular, findings with respect to GS's reporting and detection of limits for arsenic, are directly related to the issues in this action. Moreover, while BVCPS argues that these demands concern BVCPS's internal global correlations studies and are thus not relevant to the proficiency testing performed by A2LA, GS denies this is the case. In any event, if A2LA has no information about the program/studies, the Subpoena will yield no documents.

Accordingly, it is


ORDERED that motion quash the Subpoena or for a protective order is granted only to the extent that the Subpoena is held in abeyance with respect to demands nos. 1 through 11, pending BVCPS response to GS's seventh set of interrogatories, and this court's in-camera inspection of documents related to A2LA accreditation and proficiency testing in connection with this response and is otherwise denied; and it is further

ORDERED that A2LA is directed to respond to demands nos 12 through 15 in the Subpoena within 30 days of service upon by GS of a copy of this order; and it is further

ORDERED that GS's cross motion to compel A2LA's compliance with the Subpoena and, in the absence of such compliance, to hold A2LA in contempt is denied as moot as A2LA has agreed to respond the Subpoena; and it is further

ORDERED that the GS's cross motion for sanctions is denied.

DATED: January 2, 2014



J.S.C.

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