

Aldrich v Northern Leasing Sys., Inc.

2014 NY Slip Op 32313(U)

August 28, 2014

Sup Ct, New York County

Docket Number: 602803/07

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
8/29/14
E

PRESENT: SHULMAN
Justice

PART 1

ALDRICH, BRADLEY C., ET AL.

INDEX NO. 602803/07

MOTION DATE _____

MOTION SEQ. NO. 16

-v-
NORTHERN LEASING SYSTEMS, INC.,
ET AL.

The following papers, numbered 1 to _____, were read on this motion to strike/preclude

Notice of Motion/Order to Show Cause — Affidavits — Exhibits 1-9 | No(s). 1

Notice of Cross-Motion 1-4 | No(s). 2

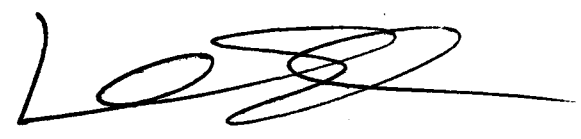
Answering Affidavits — Exhibits _____ | No(s). 3,4

Repeating Affidavits _____
Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision and order.

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

FILED
AUG 29 2014
NEW YORK
COUNTY CLERKS OFFICE

Dated: Aug. 28, 2014



_____, J.S.C.
HON. MARTIN SHULMAN, J S C

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
BRADLEY C. ALDRICH, MICHAEL ARNOLD,
ESTELA SALAS, AND STEPHANIE WEIER, ON
BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,

Index No.: 602803/07

Plaintiff(s),

Decision and Order

-against-

Motion Seq. 016

NORTHERN LEASING SYSTEMS, INC., JAY
COHEN, STEVEN BERNARDONE, RICH HAHN
AND SARA KRIEGER, AND JOHN DOES 1-50

FILED

Defendant(s).

-----X AUG 29 2014

MARTIN SHULMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants move by order to show cause ("OSC") pursuant to CPLR 3126 to preclude plaintiffs from supporting their claims or, alternatively, pursuant to CPLR 3124 to compel compliance with defendants' Fifth Request for Discovery and Inspection of Documents and Third Set of Interrogatories (the "Demands") dated October 15, 2013 (OSC at Exh. 4). Defendants' OSC also seeks sanctions against plaintiffs and their counsel for frivolous conduct pursuant to 22 NYCRR §130-1.1, *et seq.* and recovery of the counsel fees and expenses incurred in bringing this motion.

Plaintiffs cross-move to preclude defendants from presenting evidence at trial or to strike their answer based upon their alleged failure to appear for depositions.

Alternatively, plaintiffs seek an order directing defendants to appear for depositions on a date certain to be held at the court house, and payment of reasonable attorneys' fees and expenses plaintiffs incurred in connection with this OSC and a prior OSC which culminated in this court's order dated March 27, 2014 (motion sequence 014).

This court first addresses plaintiffs' cross-motion based upon defendants' purported failure to appear for depositions. This court's March 27, 2014 order *inter alia* directed that the four (4) individual defendants' depositions be completed on or before June 4, 2014. Initially, counsel for the parties confirmed dates for each deposition. Ultimately, it was necessary to postpone these dates because counsel for plaintiffs and defendants were engaged in a continued hearing before this court in another matter. Thereafter, plaintiffs' counsel attempted to schedule defendants' depositions throughout the month of June. Defense counsel provided proposed dates on June 30 and July 1, however, these dates were inconvenient to plaintiffs' counsel, who proposed other dates.

Since plaintiffs filed this cross-motion one (1) of the four (4) outstanding depositions has been completed. Despite there being some delay in confirming dates, this court cannot conclude that defendants' conduct has been so wilful or contumacious to warrant discovery sanctions or the imposition of monetary sanctions. Accordingly, these portions of the cross-motion are denied. The portion of the cross-motion seeking to compel defendants' appearance for depositions is granted to the extent that the outstanding depositions of the individual defendants shall be completed on or before September 30, 2014. As plaintiffs offer no rationale for holding the depositions at the courthouse, this portion of the cross-motion is also denied.

Turning to defendants' OSC, defendants contend that plaintiffs have not adequately responded to certain document demands and interrogatories addressed to the complaint's amendment to add claims regarding the alleged failure to comply with GBL §380-b[b]'s notice provision. This court first addresses the sufficiency of plaintiffs' responses to document demands 5, 6, 8, 9 and 11. Plaintiffs initially responded to the

Demands on or about November 25, 2013 (OSC at Exh. 5). By stipulation/order dated February 4, 2014, this court previously directed plaintiffs to supplement their responses. Plaintiffs served their supplemental response on or about February 14, 2014 (OSC at Exh. 8). Defendants object to plaintiffs' responses, noting that they have produced no documents and in their supplementary response, merely reiterated their prior objections, in violation of this court's February 4, 2014 order.

Plaintiffs object to the demands at issue on the grounds that they are duplicative and served only to harass. They go on to respond that to the extent responsive documents exist and are in their possession, custody or control, they have already been produced. Finally, plaintiffs claim defendants are more likely to be in possession of the documents sought, which pertain to their alleged violation of GBL §380-b[b]'s notice requirement.

As this court has noted previously, plaintiffs cannot produce documents they do not have. That being said, plaintiffs should nonetheless specifically identify previously produced documents that are responsive to these demands and affirmatively state in a written response that they have no others. This should have been done in response to the February 4, 2014 order. Instead, plaintiffs further delayed this action's resolution by merely restating the same objections which were already found to require supplementation. Such disregard of this court's order evidences a lack of good faith on plaintiffs' counsel's part and is a waste of judicial resources. Defendants' OSC is granted to the extent that plaintiffs are directed to serve an appropriate and complete supplemental response to document demands 5, 6, 8, 9 and 11 as directed herein below.

Defendants' OSC further takes issue with plaintiffs' responses to portions of interrogatories 3 and 4. Interrogatories 3[d] through 3[h] ask plaintiffs to identify the specific knowledge possessed by those witnesses plaintiffs identified in response to interrogatory 2 as having knowledge of defendants' alleged wilful and/or negligent violation of GBL §380-b[b]'s notice provision, while interrogatory 4 seeks details regarding each plaintiff's damages on these newly added claims.

With respect to the portions of interrogatory 3 at issue herein, plaintiffs initially responded that they answered these questions at their depositions. However, as defendants note, plaintiffs were deposed prior to the complaint's amendment to add claims regarding the alleged failure to comply with GBL §380-b[b]'s notice provision. Plaintiffs supplemented this response by objecting to these interrogatories as improperly seeking information regarding the ultimate issues in this case and requiring legal conclusions on such material issues. Notwithstanding the foregoing objection, plaintiffs broadly respond that defendants knowingly obtained their consumer credit reports under false pretenses and for impermissible purposes, as evidenced by defendant NLS's representative's deposition testimony.

At the outset, plaintiffs' objection that interrogatory 3[d] through 3[h] calls for legal conclusions and/or information concerning the ultimate issues in the case lacks any merit whatsoever. Given this court's February 4, 2014 order, this specious objection can only be deemed to be interposed in bad faith.

In their opposition, plaintiffs explain that the only knowledge they possess is that they did not receive the required notice, thus the only persons having knowledge responsive to these interrogatories are defendants. Plaintiffs contend they cannot

possibly state the details of defendants' knowledge of their alleged statutory violations. This position is inconsistent with plaintiffs' initial response referring defendants to unspecified portions of their deposition testimony.

Plaintiffs must clarify their position. If prior deposition testimony is responsive to interrogatory 3[d] through 3[h], the specific testimony should be identified and elaborated upon. Alternatively, if plaintiffs are unaware of the specific knowledge possessed by potential witnesses they should so state under oath. The information sought is material and relevant to identifying each defendant's potential liability. Accordingly, this portion of the OSC is granted to the extent that plaintiffs are granted one final opportunity to serve appropriate responses.

As to interrogatory 4 pertaining to damages for defendants' alleged violation of GBL §380-b[b], plaintiffs initially responded by referring to their expert's report. They supplement this response by: reiterating their reliance on their expert's report; stating that actual damages will be determined by the trier of fact; and alleging that their damages (including damages for conditions such as mental anguish, embarrassment, inability to sleep, anxiety, etc.) are not liquidated and do not lend themselves to calculation, however, actual damages verdicts in similar cases range between \$1,000 and \$700,000.

Defendants dispute that plaintiffs' expert's report is responsive because no expert report was provided for plaintiff Arnold and the expert's reports for plaintiffs Aldrich and Salas pre-date their GBL §380-b[b] claims. They further argue that there is no legal support for plaintiffs' claim that their damages cannot be calculated or for their failure to substantiate the range of damages recovered in similar cases.

Plaintiffs do not address the lack of an expert's report with respect to plaintiff Arnold and this omission must be rectified. They elaborate that the damages attributable to defendants' alleged NYFCRA violations are also attributable to the newly added claim, explaining that if defendants had given proper notice plaintiffs would have been able to prevent the harm caused by subsequent violations.

Defendants emphasize that it is critical for plaintiffs to specify their damages for the newly added GBL §380-b[b] lack of notice claim as this is now the only remaining claim that can possibly be certified for class status. While this court acknowledges defendants' concern, nonetheless, plaintiffs' supplemental response is not so deficient as to warrant discovery sanctions under CPLR 3126 or sanctions for frivolous conduct under 22 NYCRR §130-1.1, *et seq.* Plaintiffs' counsel's explanation as to how plaintiffs' expert's report is responsive sufficiently responds to interrogatory 4. The OSC is granted, however, to the extent that plaintiffs are directed to supplement their response with respect to plaintiff Arnold.

The court has considered the parties' remaining arguments and finds them lacking in merit. For all of the above reasons, it is hereby

ORDERED that defendants' OSC is granted to the extent that, on or before September 12, 2014, plaintiffs shall supplement their responses to defendants' Demand in accordance with the terms of this decision and order, and upon their failure to do so sanctions will be imposed awarding defendants the legal fees, costs and disbursements incurred in connection with this portion of the OSC;¹ and it is further

¹ In such event, defendants shall submit a proposed order on notice directly to chambers, accompanied by an affirmation of default and supporting proof as to the

ORDERED that defendants' OSC is otherwise denied; and it is further

ORDERED that plaintiffs' cross-motion is granted to the extent that defendants Cohen, Hahn and Krieger are directed to appear for depositions, which shall be completed on or before September 30, 2014, and the cross-motion is otherwise denied.

The parties are directed to appear for a compliance conference on October 7, 2014 at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 28, 2014



Hon. Martin Shulman, J.S.C.

FILED
AUG 29 2014
NEW YORK
COUNTY CLERK'S OFFICE

amount of fees, costs and expenses incurred.