

595393 Alberta Ltd. v Fossil Indus., Inc.

2014 NY Slip Op 32406(U)

September 8, 2014

Supreme Court, Suffolk County

Docket Number: 60275-13

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

The plaintiff is engaged in the business of graphic designs and signage fabrication and installation for outdoor use. In 2008, the plaintiff began to purchase the defendant's graphic laminated signage products for outdoor use and allegedly relied upon the defendant's representations and guarantees as to the efficacy and fitness of such products for their intended purposes. In 2010, the products purchased and installed by the plaintiff for its customers began to fail. In response, the defendant allegedly began to impose different and more limited warranties on its purchase orders which conflicted with the express warranties contained in the defendant's promotional literature. The plaintiff commenced this action after the defendant failed to honor its obligations under its agreements and warranties contained in the defendant's product literature.

At issue on this motion is the propriety of the defendant's responses to the plaintiff's First Request for Documents wherein the plaintiff demanded that the defendant specify the particular warranties, if any, that accompanied each purchase order. Since these transactions were accomplished through e-mails, the plaintiff demanded, and the court so directed, that these e-mails be provided in their native electronic format, together with their associated meta-data, which the defendant failed to furnish. The instant motion was made following unsuccessful attempts at resolving the issues.

The defendant's opposition to the plaintiff's demands for the production of e-mails relating to purchase orders and attachments thereto in the native electronic formats with the associated meta-data rests on an affidavit of the defendant's President in which he states that:

7. Until very recently, FOSSIL utilized a software known as Filemaker for its emails and storage of other electronic data. Filemaker bundles emails into a "contacts" file upon sending and transfers the emails from a particular contact into a "note Field". This is the "native format" of the communications. Unfortunately, the metadata is not preserved in this format.
8. All of the communications sought by Plaintiff are already in Plaintiff's possession inasmuch as Plaintiff only seeks communications between itself and Defendant. As this Court can see from the voluminous documents already produced by FOSSIL and submitted to this Court as exhibits to Plaintiff's motion, a good faith effort has been made to comply with Plaintiff's discovery requests. If the production is unsatisfactory to Plaintiff, it is only because of impossibility of production on the part of the Defendant.

In reply, the plaintiff submits an affidavit of a computer forensics expert who disputes the assertions of the defendant providing as follow:

7. I am familiar with Filemaker database products since their emergence into the mass market as “nutshell” in the 1980s, renamed to “filemaker” in the 1990s and its development as business database management system.
8. I am aware that emails and attachments can be saved in Filemaker to a Contacts file. How the user saves the email, attachment or file to a Contacts file is largely a matter of choice among the business user and any IT support or consultant they may use.
9. Saving documents from one for, such as a Message, Word Document or PDF format into separate or combines PDF files will in every instance change the file creation date and the file last modification date usually disclosed in a Windows system. These file “metadata” dates are important to authenticating the creation or modification dates when those documents are produced in litigation discovery.
10. Filemaker is not an email system. A business user cannot generate or send or receive an email using Filemaker. Rather, and as used by Fossil, Filemaker is a storage and archiving tool. The metadata for the underlying emails and attachments sought by plaintiffs were necessarily once contained in Outlook messages, or apple email messages, or some other email system that Fossil was using when it sent and received emails.
11. From my review of the De Cesare affidavit, I found that Fossil did not disclose what email system it had been using or what happened to the original emails and files it subsequently stored in Filemaker.
12. In my experience, business clients may have an archiving system in which to store important emails and files, but may also have desktop, server or backup copies of those emails or files. If Fossil has such underlying files, in my experience, it would have been incumbent upon them to produce or at least disclose them in response to a request for authenticating metadata. If Fossil no longer has such underlying files, it is not in a position to offer its files with any authenticating information about dates.

The plaintiff contends that the defendant's failure to produce the e-mails as directed in the preliminary conference order warrants the granting of this motion in its entirety. In addition, the plaintiff complains that certain of the defendant's initial responses to the plaintiff's document and discovery demands were less than full and forthright as evidenced by the affidavit in opposition submitted by an officer of the defendant in which relevant facts concerning prior commenced litigation and other matters not previously revealed are therein advanced. For the reasons stated below, the motion is granted, conditionally, to the extent stated below.

Pursuant to CPLR 3126(3), this court is authorized to strike the pleadings of or to preclude the presentation of trial evidence by any and all parties who refuse to obey an order for disclosure or who wilfully fail to disclose information which the court finds ought to have been disclosed (*see Tos v Jackson Hgts. Care Ctr., LLC*, 91 AD3d 943, 937 NYS2d 629 [2d Dept 2012]; *Palomba v Schindler Elevator Corp.*, 74 AD3d 1037, 903 NYS2d 137 [2d Dept 2010]; *Nicolia Ready Mix, Inc. v Fernandes*, 37 AD3d 568, 829 NYS2d 704 [2d Dept 2007]; *Mendez v City of New York*, 7 AD3d 766, 778 NYS2d 501 [2d Dept 2004]). The general rule is that a court must impose a sanction 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]). Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (*see Mikhailov v Katan*, 116 AD3d 744, 983 NYS2d 614 [2d Dept 2014]; *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]). Willful and contumacious conduct can be inferred from a party's repeated failure to respond to demands or to comply with discovery orders and the absence of any reasonable excuse for such failures (*see Quinones v Long Is. Jewish Med. Ctr.*, 90 AD3d 632, 933 NYS2d 907 [2d Dept 2011]; *Workman v Town of Southampton*, 69 AD3d 619, 892 NYS2d 481 [2d Dept 2010]).


"The failure to comply with court ordered deadlines and to provide good-faith responses to discovery demands 'impairs the efficient functioning of the courts and the adjudication of claims'" (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207, 959 NYS2d 74 [2d Dept 2012]). While it has been held that substantial compliance, even where tardy, militates against a finding of a willful and contumacious default in responding to outstanding discovery demands (*see 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]; *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 863 NYS2d 193 [2d Dept 2008]), such compliance must indeed be substantial and represent a good faith response to the outstanding demands (*see H.R. Prince, Inc. v Elite Env'tl. Sys., Inc.*, 107 AD3d 850, 968 NYS2d 122 [2d Dept 2013]; *cf., S.R. Garden City, LLC v Magnacare, LLC* 114 AD3d 925, 981 NYS2d 133 [2d Dept 2014]). Accordingly, "substantial compliance" may not necessarily defeat a motion for sanctions under CPLR 3126 (*see Mikhailov v Katan*, 116 AD3d 744, *supra*), particularly where there has been a failure to obey prior court orders directing disclosure, party demands stipulated to, or where the responses furnished or items produced do not constitute good faith responses (*see Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, *supra*).

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Here, the court finds that the defendant's response is inadequate under the circumstances of this case and that such inadequacy warrants the drawing of an inference of willful conduct on the part of the defendant which frustrated the schedule of discovery agreed to by counsel and fixed in an order of the court. Accordingly, the answer served by the defendant shall be dismissed unless it furnishes the e-mails in the format agreed to and full and complete responses to the discovery demands of the plaintiff that are subject of this motion on or before October 15, 2014.

The issue of whether the conditional dismissal of the answer herein directed shall have abated or been converted into one that is absolute in nature shall be the subject of an inquiry by the court at the conference now scheduled for Thursday, October 23, 2014 in the courtroom of the undersigned. Counsel are thus directed to appear thereat ready for the court's inquiry and all other matters that may constitute proper subjects of such conference.

Dated: September 8, 2014



THOMAS F. WHELAN. J.S.C.