

Cioffi v S.M. Foods, Inc.
2014 NY Slip Op 32808(U)
October 20, 2014
Supreme Court, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC,
ATLANTA FOODS INTERNATIONAL,
RUSSELL McCALL'S INC.,
RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS,
SHEILA MARIE IMPORTS,
DOUG JAY,
RYDER TRUCK RENTAL, INC.,
PLM TRAILER LEASING and
DANIEL E. BURKE,

Defendants.

-----X
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER
LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

**Index No. 55391/2011
Motion Date: Sep 8, 2014
Seq. Nos. 32, 33**

The following papers were read on this motion (sequence number 32) by defendants Russell McCall's Inc., Atlanta Foods International and Doug Jay (hereinafter the "Atlanta defendants"), for an order compelling plaintiffs to respond to their Notices for Discovery and Inspection dated May 2, 2014 and January 28, 2014 and striking all of the discovery demands served by plaintiffs between May 1, 2014 and July 11, 2014 except for their Notice to Produce

dated May 6, 2014 (doc # 1318)¹ and imposing sanctions against plaintiffs' counsel.

Order to Show Cause dated August 4, 2014
 Affirmation in Support; Exhibits A-Z and AA-II
 Plaintiffs' Affirmation in Opposition; Exhibits A-L
 Affidavit of Brook Rugemer
 Affidavit of Captain Christopher Calabrese
 Affidavit of Alan Rosenzweig, CPA; Exhibits A-J

The following papers were read on this motion (sequence number 33) by plaintiffs for an order: (1) striking the answer of the Atlanta defendants for their failure to fully comply with discovery and striking the answer of defendants SM Foods, Inc. (hereinafter SM Foods), GFI Boston Inc. (hereinafter "GFI Boston"), Ryder Truck Rental, Inc. (hereinafter Ryder), and PLM Trailer Leasing for their failure to fully comply with discovery; or alternatively, (2) compelling these defendants to fully and completely respond to plaintiffs' discovery demands; (3) precluding Ryder, the Atlanta defendants, SM Foods, GFI Boston, PLM Trailer Leasing and defendant Daniel E. Burke (hereinafter "Burke") from offering any evidence at the time of trial or from rebutting plaintiffs' testimony on certain issues regarding liability; (4) finding that all defendants engaged in the illegal operation of a motor carrier and that they are all responsible for the events giving rise to this lawsuit; (5) for costs, sanctions and attorneys' fees; and, (6) for such other and further relief as the court deems just, proper and equitable.

Order to Show Cause dated August 5, 2014
 Amended Affirmation in Support dated August 4, 2014
 Exhibits A-Q
 Affidavit of Brook Rugemer
 Affirmation in Opposition of the Atlanta Defendants
 Exhibits A-Y
 Affirmation in Opposition of the Defendants/Third-Party Plaintiffs
 Exhibits A-K
 Plaintiffs' Affirmation in Further Support of Their Motion and in Opposition to the Motion by the Atlanta Defendants

Upon the foregoing papers and oral argument heard on September 8, 2014 these motions are determined as follows:

This action arises from a motor vehicle accident which occurred on May 22, 2009. Plaintiffs' first complaint was filed with this court in September 2009. In May 2011 a stipulation of discontinuance without prejudice was filed with respect to that action and this lawsuit was commenced in September 2011. It has been five years since the commencement of the first

¹The doc #s throughout this Decision and Order refer to the number each document has on the NYSCEF system.

lawsuit and more than three years since commencement of the second lawsuit. There have been more than 30 motions in this case and all but a handful have been related to discovery disputes.

Motion Sequence Number 32:

The Atlanta defendants assert that plaintiffs' counsel wants to continue the discovery process in the hope of finding some "morsel of evidence to support plaintiffs' vague and nebulous theories ...". The Atlanta defendants further note that plaintiffs have served more than 20 discovery demands such as interrogatories, notices to produce and notices to admit. The Atlanta defendants assert that plaintiffs' tactic is as follows: to assert a false claim; to demand documents from defendants to support that claim; and then, to conclude that the false claim must be true because defendants fail to refute the claim by failing to produce documents that don't exist. At the oral argument of these motions counsel for the Atlanta defendants added that this is a straightforward personal injury action and that the issues in this matter need to be narrowed.

Presently the Atlanta defendants move for an order striking all but one of plaintiffs' discovery demands dated from May 1, 2014 through July 11, 2014 which are, as set forth in their counsel's affirmation in support of this motion:

- (1) notice to produce electronically stored data dated May 2, 2014 (doc # 1317);
- (2) notice to produce re: GFI New York Inc., dated May 8, 2014 (doc # 1319);
- (3) notice to produce re: GFI Northeast LLC, dated May 8, 2014 (doc # 1320);
- (4) notice to produce fuel tax filings for vehicles dated May 8, 2014 (doc # 1322)
- (5) follow-up notice to produce to all defendants dated May 8, 2014 (doc # 1323)
- (6) third set of interrogatories to defendants dated May 8, 2014 (doc # 1324)
- (7) fourth set of interrogatories to defendants dated May 8, 2014 (doc # 1325)
- (8) notice to admit to all defendants dated May 8, 2014 (doc # 1327)
- (9) notice to produce to all defendants for agreements and fuel tax filings for vehicles dated May 9, 2014 (doc # 1331);
- (10) notice to produce to all defendants for rental, leasing maintenance and fuel agreements and related filings and documents dated May 9, 2014 (doc # 1333).

The Atlanta defendants assert that many of plaintiffs' demands herein above call for the production of documents with respect to vehicles other than the tractor/trailer involved in the subject accident and therefore the demands are improper, designed to annoy, harass and vex defendants, are designed to provoke motion practice and are designed to delay and prolong this litigation. The Atlanta defendants assert that notwithstanding plaintiffs' refusal to accept this, the evidence shows that the subject vehicle was owned and maintained by Ryder and rented to GFI Boston. The Atlanta defendants point out that the vehicle in question was insured for the subject accident under a primary policy of \$ 1 million and an excess policy of insurance of an additional \$ 1 million, both policies issued by Hanover Insurance Company to SM Foods and GFI Boston.

The Atlanta defendants also seek to have plaintiffs' "trucking" demands and interrogatories stricken. They contend that they had no connection with the ownership,

registration, operation or maintenance of the Ryder vehicle that was involved in the subject accident. The Atlanta defendants state it is improper to require them to produce any evidence (e.g., fuel tax payments) regarding its fleet of vehicles from 2006-11. The Atlanta defendants further state that evidence of trucks or trailers owned by them which may have been improperly registered under any state or federal law is irrelevant to the issues raised in this case.

The Atlanta defendants further note that plaintiffs have never stated specifically and in detail how their equitable theories based upon piercing the corporate veil, successor liability, de facto merger and alter ego liability are related to, or supported by, the documents they demand from the Atlanta defendants.

The Atlanta defendants also move to strike plaintiffs' notice to produce as to GFI New York, Inc., and GFI Northeast, LLC. The Atlanta defendants remind this court that these two entities came into existence in 2011 and 2012, respectively.

The Atlanta defendants move for sanctions against plaintiffs for seeking discovery that is irrelevant and where, to respond thereto, would be unduly burdensome to them. They also state that plaintiffs' latest notice to admit should be stricken insofar as plaintiffs seek the Atlanta defendants to admit matters that are not simple matters for which there can be no substantial dispute at trial. The Atlanta defendants point out as one example that plaintiffs seek them to admit that they conducted business under the name of Sheila Marie Imports, an issue that is very much contested by the parties in this matter.

The Atlanta defendants also seek an order compelling plaintiffs to provide supplemental responses to their notice for discovery and inspection dated January 29, 2014 (doc # 1632) and to respond to their notice for discovery and inspection dated May 2, 2014 (doc # 1657) and striking plaintiffs' claims due to their failure to provide specific and meaningful document responses thereto.

The Atlanta defendants note that in their notice dated January 29, 2014 they sought from plaintiffs production of all documents in their possession which allegedly support their claims against the Atlanta defendants that the Atlanta defendants allegedly owned, registered, leased, maintained and/or controlled the tractor and trailer involved in the subject accident. The Atlanta defendants note that in their response dated April 8, 2014 (doc # 1633) plaintiffs submitted a single document generated by the New York State Department of Transportation which lists the two violations issued with respect to the Ryder tractor involved in the accident. The Atlanta defendants state that in their response plaintiffs referred to deposition testimonies and documents without specifying which portion of the hundreds of pages of documents relate to the specific allegations in their amended complaint. The Atlanta defendants seek meaningful, relevant and specific information and seek a dismissal of the complaint if plaintiffs fail to so provide.

The Atlanta defendants also request an order directing plaintiffs to respond to their notice to produce dated May 2, 2014 (doc # 1657) which seeks that plaintiffs provide to them a copy of any subpoenas they served upon nonparties.

This motion is opposed by plaintiffs. Plaintiffs remind this court that it is their position that the Atlanta defendants had ownership interests and were involved in the operations (including trucking operations), finances, management and dealings of SM Foods, Sheila Marie Imports and GFI Boston to a degree that gives rise to liability under various theories. Plaintiffs further contend that the Atlanta defendants had been, and continue to operate as, the motor carrier on behalf of GFI Boston, SM Foods and Sheila Marie Imports, pursuant to the Federal Motor Carrier Safety Regulations (hereinafter "FMCSR") which define motor carriers. Plaintiffs assert that there are statutory employee theories of liability pursuant to FMCSR. Plaintiffs contend that the Atlanta defendants possess documents that show that they were actually the motor carrier that controlled the motor carrier operations in Massachusetts and that employed and assigned drivers and personnel to the motor carrier operations. Plaintiffs further contend that the documents they now seek will show that the Atlanta defendants controlled the operations of GFI Boston and that there was a merger of operations of Sheila Marie Imports into GFI Boston and into the Atlanta defendants. Plaintiffs assert that it is the actions of the Atlanta defendants that have made discovery in this litigation long and tortured.

In his affidavit dated August 21, 2014 Brooks Rugemer states that he is an expert in the area of trucking and motor carrier operations and OSHA and DOT compliance. Among other things, he opines that defendant Russell McCall's, through its offices in Atlanta, controlled the Sheila Marie Imports motor carrier, under DOT 655323, that was involved in the subject accident. Rugemer notes that defendant Russell McCall's had various agreements with Ryder to provide fuel to vehicles and with motels to house drivers working out of Atlanta, and that it paid countless fines and violations for different types of summonses. Rugemer notes that GFI Boston has never been registered as a motor carrier.

In his affidavit dated August 21, 2014 Alan Rosenzweig, CPA states that after reviewing the various financial, tax and other corporate documents produced by the Atlanta defendants in this case he concluded that the Atlanta defendants had financial and economic control of GFI Boston's operations and that they also controlled the motor carrier operations run out of Massachusetts.

In his affidavit dated August 21, 2014 Christopher Calabrese, a law enforcement expert, states that after reviewing newly provided discovery in this matter including the deposition transcripts of Reed (on behalf of Ryder), Crowley (vice president of finance and IT for the Atlanta defendants since 2003, on behalf of the Atlanta defendants) and Greeley (on behalf of SM Foods and GFI Boston), the Ryder rental agreement with GFI Boston, and certain financial documents, he was revising his prior statements in regards to certain aspects of this case. He opines that Ryder, GFI Boston, and the Atlanta defendants engaged in multiple violations of law and that Ryder and GFI Boston violated federal and state laws relating to the unlicensed operation of a motor carrier. Calabrese further asserts that the Atlanta defendants improperly ran a motor carrier in Massachusetts using the DOT number of the entity Sheila Marie Imports that they claim on their website they "acquired" in 2007 (although plaintiffs add the Atlanta defendants now assert that they only purchased the assets). He opines that the violation of these laws by the Atlanta defendants results in their status as the (illegal) motor carrier involved in the

subject accident. Among other “facts” Calabrese asserts that the vehicle in which plaintiff Frederick Cioffi was injured was not covered by insurance (and no insurance ID card or other proof of insurance has been produced to date) and that Burke was hired by the Atlanta defendants.

Plaintiffs contend that which entity filed documents with the Federal Motor Carrier Safety Administration (hereinafter “FMCSA”) and obtained the benefit of the fuel tax filings will help identify who was operating as the motor carrier for operations in Massachusetts. Plaintiffs also contend that if the Atlanta defendants did all the FMCSA and fuel tax filings for all their vehicles and all GFI Boston vehicles, this will establish the type of domination and control to show that the Atlanta defendants were the motor carrier for the operations run out of Massachusetts and known as Sheila Marie Imports including the vehicle involved in the subject accident and that they were in fact Burke’s employer.

Plaintiffs claim that their recent discovery demands are the result of discovery of additional facts that further support their theories of liability. They note that at his deposition Crowley testified, among other things, that defendant Russell McCall’s has fueling agreements with Ryder² and that it has made payments for fuel for trucks operated to and from the Boston warehouse. Plaintiffs further note that Crowley testified that following the close of GFI Boston some of its accounts were serviced by the Atlanta defendants and some accounts are now serviced by the New Jersey operations of the Atlanta defendants.

Plaintiffs contend that the motion of the Atlanta defendants should be denied and that the Atlanta defendants should be compelled to respond to their notices to produce and to admit and to their interrogatories since the responses will reveal the scope and extent of the involvement of the Atlanta defendants in the affairs of GFI Boston, SM Foods and Sheila Marie Imports, which are clearly relevant to corporate veil and successor liability analyses. Responses to the requested discovery will also reveal the scope and extent of the involvement of the Atlanta defendants in the trucking operations as a motor carrier pursuant to FMCSR, including whether they were involved in the trucking operations of GFI Boston and Sheila Marie Imports. According to plaintiffs the requested discovery will also assist in determining if Burke is a statutory employee of the Atlanta defendants. Plaintiffs further contend that the Atlanta defendants have failed to address plaintiffs’ theories of motor carrier and successor liability that they assert are supported by the testimonies of Crowley and Reed. Plaintiffs further assert that the information they now seek is relevant to the issue of whether Burke was a statutory employee of the Atlanta defendants (where statutory employee doctrine arises from the FMCSR) and whether the Atlanta defendants provided trucks and other materials to the motor carrier operations and thus is legally the motor carrier.

²At his deposition conducted on August 5, 2014 Crowley testified (at pages 67-68) that Russell McCall’s has fueling agreements with Ryder and these include agreements for fueling vehicles in Boston among other cities.

Plaintiffs further contend that the Atlanta defendants served an overly broad, improper notice to produce on January 29, 2014 which tracked, allegation by allegation, the claims in plaintiffs' amended complaint and demanded all documents upon which plaintiffs intend to rely upon at trial. Plaintiffs state that most, if not all, of the documents they intend to rely upon at trial will come from the records of the Atlanta defendants.

Motion Sequence Number 33:

This motion is related to the previous motion. Instead of the Atlanta defendants seeking to strike plaintiffs' requests for discovery, plaintiffs now seek to compel the responses from the Atlanta defendants. More particularly, plaintiffs move for an order to, among other things, strike defendants' respective answers due to their alleged failures to make disclosures. At the outset plaintiffs note that the destruction of the computers of GFI Boston has permeated this case and has harmed them in their ability to obtain discovery to support their theories of motor carrier liability against all defendants for Burke's actions on the day of the subject accident and to support their theories of corporate successor liability. Plaintiffs assert that their present demands are designed to obtain material and necessary discovery in connection with their theory that the Atlanta defendants and Ryder are liable as motor carriers and that the Atlanta defendants are liable pursuant to corporate successor theories. Plaintiffs assert that the requested discovery will show who was in fact Burke's employer. Plaintiffs note that the recent demands arise from their reassessment of this matter following Reed's deposition.

The Atlanta defendants oppose this motion. They contend that none of the documents now demanded by plaintiffs including leases, maintenance agreements, fuel tax service agreements and payments for fines and violations with respect to vehicles of the Atlanta defendants, are probative of any issue that is material and relevant to this case. The Atlanta defendants note that this court, in its decision dated August 13, 2012 (Smith, J.) concluded that Ryder was the owner of the subject vehicle which had been leased to GFI Boston as of the date of the subject accident. The court further found that the subject vehicle was in a mechanically safe condition on the date of the accident and the Burke was not under the influence of drugs or alcohol at the time of the accident. Plaintiffs filed a notice of appeal on September 13, 2012. The Atlanta defendants note that this court, in its decision dated November 20, 2012 (Smith, J.), on plaintiffs' motion to reargue and renew, granted reargument and renewal and reversed its earlier determination granting Ryder's motion to dismiss the claims asserted against it based upon the Graves Amendment and reinstated all claims interposed against Ryder. The court stated that there were issues of fact as to whether Ryder engaged in wrongdoing such that the protection of the Graves Amendment was preempted. The court questioned whether Ryder, by permitting defendant GFI Boston to improperly use its DOT registration number, de facto became a motor carrier not merely a lessor. The Atlanta defendants and the remaining defendants filed two separate notices of appeal which are currently pending.

The Atlanta defendants contend that although plaintiffs argue that GFI Boston was not authorized to rent the subject vehicle from Ryder because it was not a motor carrier, this is

irrelevant and fails to state a cause of action. They contend that in 2011 and 2012 plaintiffs were focused on showing that the Atlanta defendants were liable in this matter under the theories of piercing the corporate veil. The Atlanta defendants note that plaintiffs' emphasis as of 2013 has shifted to the DOT number and filings by GFI Boston and SM Foods. The Atlanta defendants claim that plaintiffs cannot show that any of the corporate defendants committed a fraud with respect to the subject motor vehicle or that any of them dominated GFI Boston in such a way that the domination resulted in the wrong perpetrated against plaintiffs. The Atlanta defendants also assert that the FMCSA is irrelevant in this case. According to them that legislation was passed to address abuses that had arisen in the industry which threatened public safety including the use by motor carriers of leased vehicles to avoid responsibility for accidents that occurred while goods were being transported in interstate commerce. The FMCSA imposed a liability insurance requirement which, the Atlanta defendants note, was exceeded in this case. The Atlanta defendants concede that Ryder's US DOT number was displayed on the subject vehicle and not that of the renter. The Atlanta defendants state that regardless, the vehicle was registered, was insured and was mechanically safe and being operated by a driver who was not under the influence of drugs or alcohol. The Atlanta defendants contend that GFI Boston's failure to display its US DOT number was not a fraudulent or otherwise wrongful act which resulted in consequences to plaintiffs. The Atlanta defendants state that Ryder's RPM Agreement dated July 28, 2008 signed by John Greeley on behalf of "Russell McCall's Inc. dba Gourmet Foods International" is a mistake.

This motion is also opposed by defendants/third-party plaintiffs who assert that they have responded to all of plaintiffs' discovery demands and have repeatedly provided affidavits from their principals attesting to the lack of documentation in their possession. They remind this court that requested documents, if they exist, are in the possession of the Atlanta defendants. The defendants/third-party plaintiffs contend that at the time of the subject accident the tractor was leased to GFI Boston dba Sheila Marie Imports and that documentary evidence in this case, as well as the deposition testimonies of Greeley and Reed demonstrate that. They assert that a valid DOT number was registered to Sheila Marie Imports and was in effect on the date of the subject accident and Ryder was not the motor carrier for the subject tractor. Furthermore they note that they've responded to plaintiffs' notices to produce: fuel tax filings; agreements and fuel tax filings for vehicles; FMCSA documents; electronically stored data; and, plaintiffs' notice dated May 6, 2014 and plaintiffs' follow up notice to produce to all defendants. The defendants/third-party plaintiffs assert that throughout this matter they've acted in good faith in the face of burdensome, inappropriate and improper demands. They note that they've produced more than 93 responses, have produced Greeley (on behalf of SM Foods and GFI Boston), Reed (on behalf of Ryder) and Burke for depositions and that they will produce another witness within the next month. Defendants/third-party plaintiffs request that this court sanction plaintiffs and/or order plaintiffs to pay costs.

In their affirmation in further support of their motion plaintiffs contend that because of the complex nature of the national food distribution business of the Atlanta defendants and the creation of shell companies and alter ego operations of the defunct motor carrier Sheila Marie

Imports, plaintiffs have had to drill down into the operations of the Atlanta defendants to understand and to show how the Atlanta defendants controlled Sheila Marie Imports and GFI Boston and why they are legally responsible for the subject accident.

Analysis:

CPLR 3101 (a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Mindful of these principles, as well as the aforementioned arguments and assertions raised by the parties in their written submissions and at oral argument, the court will examine and determine each request for discovery raised on these two motions.

Electronically Stored Data: (doc #1317)

In their notice to produce dated May 2, 2014 plaintiffs sought any and all internal email communications within any of the defendants or email communications between or among the parties regarding: any bills, expenses, invoices of GFI Boston; the sale of assets of Sheila Marie Imports; the sale of assets of GFI Boston; the sale of assets of SM Foods; filings within any state or federal department or agency in connection with motor carrier status and receipt of state or federal violations; rental, lease or use of operation of any vehicle owned by Ryder; master leases, fleet assignments or assignment of leases or rental agreements; the continued use of the name of Sheila Marie Imports after October 2007; the exercise of the option agreement between SM Foods and Russell McCall’s by which Russell McCall’s elected to exercise the option; any inter-company transaction, party loan or credit line obligation of any person that is reflected on GFI Boston tax returns; etc., as well as the identity of the internal custodian of the electronically stored data, by the Atlanta defendants, GFI Boston, SM Foods, Greeley or any of their employees.

Plaintiffs now assert that defendants/third-party plaintiffs have not responded to this demand and that the response of the Atlanta defendants is inadequate.

The response of the Atlanta defendants dated June 17, 2014 stated that the demands were overly broad in scope and time span, were intended to harass and unduly burden the Atlanta defendants and were not intended or designed to produce meaningful or relevant information. In their response dated August 19, 2014 defendants/third-party plaintiffs stated that not only were the demands overly broad in scope, vague, unduly burdensome and sought information outside the scope of discovery but that they were not in possession of any of the requested documents and that all documentation in their possession was previously turned over to the Atlanta defendants.

The court finds that the Atlanta defendants should comply with plaintiffs' request in this regard to the extent that if they have not so provided these documents before, they provide, regarding items 1-4 requested therein, any and all internal email communications amongst them and between them and GFI Boston, SM Foods, and/or Greeley from October 2007 to May 2009, and regarding items 5-8 and 18 all documents requested therein regarding the subject vehicle only from October 2007 to May 2009; items 9, 12, 20 only for the years 2007-09; and items 22 and 23.

GFI New York and Northeast: (doc #s 1319 and 1320)

In their two notices to produce dated May 8, 2014 plaintiffs sought several documents related to the companies GFI New York, Inc. and GFI Northeast LLC, respectively, for the period from 2011 to the present (for GFI New York) and 2012 to the present for GFI Northeast. Plaintiffs now assert that GFI New York is a successor to GFI Boston that was created by the Atlanta defendants to take over the operations of GFI Boston after GFI Boston shut down in 2011. They seek to show a relationship between GFI Boston and GFI New York and ultimately the Atlanta defendants. Plaintiffs further assert that these documents will support their theory that there was a de facto merger and mere continuation. Plaintiffs assert that GFI Northeast also may have been created by the Atlanta defendants as a mere continuation of GFI Boston's business once GFI Boston closed down.

In their respective responses dated June 17, 2014 the Atlanta defendants objected to these demands on the grounds that plaintiffs had not established that the information requested was material and necessary to any issue in the case. They also noted that due to the fact that documents were requested for several years, in essence plaintiffs sought the production of a multitude of documents. By several, separate responses dated June 2, 2014, the various defendants/third-party plaintiffs stated that the demands were overly broad, vague, and outside the scope of discovery in this case. They also stated that they were not in possession of the requested documents.

The court recently noted, in its Decision and Order dated August 7, 2014 (Lefkowitz, J.), "...that at this juncture plaintiffs have failed to demonstrate that discovery from GFI Northeast LLC and/or GFI New York Inc....will yield matter that is...material and necessary in their prosecution of this action." Accordingly, these two demands are stricken in their entirety.

Fuel Tax Filings for Vehicles: (doc # 1322)

In yet another notice dated May 8, 2014 plaintiffs sought all fuel tax filings including international fuel tax agreement reports or requests for the subject tractor and trailer. Plaintiffs now assert that learning who filed fuel taxes will provide proof of which entities were the motor carriers and whether any of the defendants were engaged in illegal conduct regarding payment of these taxes.

In their response dated June 17, 2014 the Atlanta defendants stated that insofar as they did not own, operate, control or lease the subject tractor and trailer, nor did they employ the operator thereof, this demand was intended to annoy, harass and unduly burden them and they suggested that plaintiffs serve these demands on counsel for Ryder and defendant PLM Trailer Leasing.

In their respective responses dated June 2, 2014 both GFI Boston and SM Foods stated that this the demand was overly broad, vague and unduly burdensome and that in any event, they were not in possession of the requested documents. In its response dated June 2, 2014 Ryder responded that this demand was overly broad, vague and unduly burdensome.

Counsel for defendants/third-party plaintiffs presently remind this court that GFI Boston and SM Foods are no longer in business and that Greeley has testified and previously stated by affidavit that all documentation regarding these entities was turned over to the Atlanta defendants when GFI Boston ceased doing business. They further state that Ryder was not the motor carrier at the time of the subject accident and therefore it was not required by the New York State Department of Transportation to submit a fuel tax filing.

As this court previously noted, the Atlanta defendants are in possession of the records of GFI Boston, contained in 250 boxes that were shipped to Atlanta. The Atlanta defendants are directed to comply with this demand and provide to plaintiffs a copy of all fuel tax filings for the years 2007 to 2009 for the subject tractor and trailer or provide an affidavit from a person of knowledge regarding their car lease operation and fuel tax filings as to these two vehicles stating that they are not in possession of the requested documents and detailing the reason why.

Further Requests for Fuel Tax Filings for Vehicles: (doc # 1331)

In their notice dated May 9, 2014 plaintiffs sought all lease agreements, rental agreements service agreements, and fuel agreements including fuel tax filings for 26 separate vehicles as well as copies of reports and inspections prepared by law enforcement officers or representatives of any agency and copies of proof of correction of deficiencies identified in the reports and copies of checks or other methods of payment for fines and penalties imposed for summonses, reports or violations. Plaintiffs now state that these documents will help them obtain information regarding master leases, assignments, identify the motor carrier and determine compliance with state and federal regulations.

In their response dated June 17, 2014 the Atlanta defendants stated that the demands were overly broad and intended to harass, vex and annoy. They further stated that plaintiffs only identified the vehicles by VIN number so that they would have to first search and determine if they owned that vehicle. The Atlanta defendants now state that if plaintiffs had the VIN numbers they also had the name of the owner of each vehicle and should therefore demand this information to the correct owner of each vehicle. They note that each defendant is requested to produce several agreements and inspection reports and violation notices for 26 vehicles.

In their respective responses each dated May 23, 2014, PLM Trailer, Ryder, GFI Boston and Burke objected to this demand as overly broad, vague, unduly burdensome and outside the scope of discovery and stated that the rental agreement, as well as other available documentation with respect to the subject tractor and trailer were provided already.

Defendants/third-party plaintiffs now state that they provided a response to this demand.

The court finds that all defendants adequately responded to this demand and that plaintiffs have the rental agreement that is relevant to this matter regarding the subject tractor and trailer.

Further Requests for Rental, Leasing, Maintenance and Fuel Agreements and Related Documents: (doc # 1333)

In another notice dated May 9, 2014 plaintiffs sought, among many documents, all leases, rental agreements or RPM agreements from 2007 through the present between Lily Transportation on the one hand and any of the defendants or GFI New York or GFI Northeast on the other hand, the exemplar lease from Ryder that it used in 2009, copies of all lease and rental agreements for any vehicle leased or rented by Ryder to Sheila Marie Imports between 2005 to the present and/or leased or rented by Ryder to GFI Boston between October 1, 2007 and the present and/or leased or rented by Ryder to SM Foods between October 1, 2007 and the present and/or leased or rented by Ryder to the Atlanta defendants between January 1, 2002 and the present, proof of insurance coverage for the subject tractor/trailer and for any vehicles leased or rented from Ryder in 2009, etc. Plaintiffs now state that these documents will help them obtain information regarding master leases, assignments, identify the motor carrier and determine compliance with state and federal regulations.

In their response dated June 18, 2014 the Atlanta defendants objected to this demand as overly broad and intended to harass, vex and annoy them and stated that the information sought as to any vehicle other than the vehicles involved in the subject accident were not material, necessary or relevant to the issues of this case. These assertions are presently reiterated in their opposition papers. The Atlanta defendants note that, at least regarding proof of insurance, already it has been established in this matter that the subject tractor and trailer were covered under two Hanover Insurance policies providing a total of \$ 2 million in coverage.

The court finds that all defendants adequately responded to this demand and that plaintiffs

already have documents requested in this demand that are relevant to this matter regarding the subject tractor and trailer. The court notes that in his affirmation in support of their motion, plaintiffs' counsel concedes that during the deposition testimony of Reed (Ryder's witness who was deposed on February 20, 2014) a 25 page lease agreement between Lily Transportation and Sheila Marie GFI Boston was provided.

Notice to Produce : (doc # 1318)

In their notice dated May 6, 2014 addressed to Greeley, SM Foods, GFI Boston, Russell McCall's and Jay, plaintiffs sought, for the period of 2007 to the present: the general ledger for SM Foods; tax schedules and all accounting documents and other records relied upon for the filing of tax returns of SM Foods; income statements, expense statements; and, year end papers and adjusting journal entries for SM Foods and GFI Boston.

In their response dated June 17, 2014 the Atlanta defendants stated that they are not in possession of the requested documents for SM Foods. They further stated that year end papers and/or adjusting journal entries, including federal and state tax returns for GFI Boston for the years 2007-2010 have been provided already.

In their response dated June 23, 2014 defendants/third-party plaintiffs objected to this demand as overly broad, vague, unduly burdensome and outside the scope of discovery and stated that the request was made of Greeley (among others) who is not a party to this action. As to the documents requested regarding GFI Boston they stated they were not in possession of this documentation.

If the assertion of the Atlanta defendants that GFI Boston's financial and accounting records have been provided and this court notes that the accounting and financial records regarding SM Foods and GFI Boston previously were sought from nonparty Julian Friedman, CPA, by either plaintiffs, the Atlanta defendants or both and that the discoverability of these types of documents were the basis of two previous orders of this court and the basis of two open commissions issued by this court. The court finds that the document demands set forth herein have been responded sufficiently thereto.

Follow Up Notice to Produce to All Defendants: (doc # 1323)

In their notice dated May 8, 2014 plaintiffs sought, among other documents, investigation reports prepared by any of the defendants in connection with the subject accident; inspection reports or logs prepared by Burke in connection with his inspection of the subject tractor and trailer from January 1, 2009 through May 30, 2009; the name of the directors and officers for Russell McCall's, SM Foods PLM Trailer Leasing, GFI Boston from 2007 to the present; copies of all documents terminating SM Foods' involvement with GFI Boston; all K-1s issued to all members of GFI Boston; the complete set of closing documents that created GFI Boston; all documents filed by any defendant on behalf of Sheila Marie Imports from 2007 through 2012

with certain, enumerated governmental agencies or departments; and, documents identifying the operations of GFI Boston throughout its existence. Plaintiffs now contend that this notice set forth demands for documents that have been outstanding for years.

In their response dated June 17, 2014 the Atlanta defendants stated that the demands were duplicative of other demands previously served by plaintiffs to which they've responded or to which this court has ruled to be outside the scope of discovery.

Presently the Atlanta defendants state that plaintiffs' demands herein are the same demands which have been ruled upon previously.

In their response dated June 23, 2014 defendants/third-party plaintiffs stated that all inspection reports regarding the subject incident that were prepared by them had been provided previously and that the remaining demands were inapplicable to them.

In its Decision and Order dated September 27, 2012 this court (Lefkowitz, J.) ruled on some of the demands repeated here: for example, this court held that the request for the list of names of shareholders, officers and directors of the various corporate entities was improper without explanation of how these demands sought material and relevant information. This court also notes that the Closing Binder that contains all of the transactional documents including the 2007 formation of GFI Boston LLC and the sale of Sheila Marie Imports Ltd. to Russell McCall's has been provided already to plaintiffs.

The court finds that plaintiffs' request for all documents requested herein including but not limited to those filed by any defendant on behalf of Sheila Marie Imports from 2007 through 2012 with certain, enumerated governmental agencies or departments is an unduly burdensome one, again without a viable explanation from plaintiffs of how these demands seek material and relevant information.

Notice to Produce: (doc # 1293)

In their notice dated April 23, 2014 plaintiffs sought all documents appointing officers for GFI Boston and Sheila Marie Imports; all corporate records indicating the elections for officers of GFI Boston and Sheila Marie Imports; all documents verifying the appointment of all officers by Jay as manger of GFI Boston for the years 2006-2012; list of all accounts of GFI Boston and Sheila Marie Imports that have been transferred to GFI Northeast or GFI New York; all employment agreements, identity of employees, shareholders, officers, directors, operating agreements as to GFI Northeast and GFI New York; and, employment agreements for Greeley with Russell McCall's, GFI Northeast, GFI New York and Atlanta Foods International.

The Atlanta defendants have not responded to this notice. Defendants/third-party plaintiffs' two responses each dated June 2, 2014 on behalf of SM Foods and GFI Boston, respectively, assert that this demand is overly broad, vague, unduly burdensome and outside the scope of discovery and stated that they have provided all documentation currently in their

possession and that all other documentation was turned over to the Atlanta defendants prior to the commencement of this action. Regarding the list of all accounts that was requested, defendants/third-party plaintiffs stated that no such accounts exist.

The court finds that plaintiffs have failed to show how this discovery and these requested documents are material and necessary to the prosecution of their claims.

FMCSA Documents: (doc # 1336)

By notice dated May 9, 2014 plaintiffs sought all documents required by the USDOT and the FMCSA relating to the vehicles involved in the subject accident. Plaintiffs also sought certificates of insurance, riders to insurance policies and other documents relating to the procurement of insurance coverage for the subject vehicle. Plaintiffs presently note that although the list of documents is extensive, every motor carrier must comply with these regulations. Plaintiffs ask this court to refer to the affidavit of Brook Rugemer wherein he explains these federal requirements. For example, plaintiffs note that federal requirements mandate driver qualification and screening. Plaintiffs assert that such records may show what motor carrier hired and controlled Burke and who/what entity is liable for his negligence. Plaintiffs note that federal regulations require driver call records, telephone records, progress records, text message records, etc., and that these records are relevant to the facts leading up to the subject accident. Plaintiffs further note that federal regulations require driver inspection reports. Plaintiffs contend that the insurance documents sought will show whether there is more coverage available than the coverage already revealed.

In their response dated June 17, 2014 the Atlanta defendants stated that the demands were overly broad, argumentative, not intended to produce meaningful or relevant information but instead intended to annoy, harass, vex and unduly burden them. The Atlanta defendants further stated that they did not have any legal responsibilities and/or duties with respect to the FMCSA regarding the subject vehicles. The Atlanta defendants presently note that the fact that plaintiffs make reference to the FMCSA does not enhance the legitimacy or relevance of the documents being demanded.

In its response dated May 23, 2014 Ryder objected to this demand as being unduly burdensome, overly broad and vague and stated that it was not in possession of the requested documentation. Regarding maintenance records, Ryder asserted that it previously provided those to plaintiffs and further noted that all certificates of insurance and riders to insurance policies evidencing insurance coverage with respect to the subject vehicles previously were provided.

In its response GFI Boston also objected to this demand as burdensome, overly broad, vague and outside the scope of discovery. GFI Boston further noted that it provided all documents within its possession responsive to this demand and that all documents, whether responsive or not, were given to the Atlanta defendants prior to the commencement of this litigation.

Presently Ryder claims that it was not the motor carrier regarding the subject vehicle and although plaintiffs contend that Ryder is not protected under the Graves Amendment (which states that the owner of a vehicle that rents it out is not liable by way of ownership for harm that arises out of the use, operation or possession of the vehicle unless there is negligence or criminal wrongdoing on the part of the owner) the subject of its liability under the Graves Amendment is currently pending appeal.

The court notes that in its Decision and Order dated May 12, 2014 (Lefkowitz, J.), it found that Ryder had submitted relevant maintenance and service records including vehicle maintenance records and the affidavit of its maintenance manger dated May 17, 2012 to which a printout of the maintenance history of the subject tractor and a NYS DOT report dated May 26, 2009 were appended.

It is unlawful for any person or corporation that is required to have operating authority from the FMCSA or the DOT to transport property or passengers by motor vehicle and to engage in such transport unless each vehicle utilized in such transportation is first registered with the Department and such vehicle carries appropriate identification evidencing such registration in accordance with rules and regulations promulgated by the Commissioner (17 NY Jur 2d, Carriers § 74). The court notes that plaintiffs' expert stated that a motor carrier is an entity that owns or leases commercial trucks for the purpose of transporting freight or people in commerce. Ryder's contention throughout this litigation has been that it was not the motor carrier in this case.

The court finds that plaintiffs' access to some of these requested documents may show what motor carrier hired and controlled Burke and who/what entity is liable for his negligence. Thus, in light of the fact that any such documents would be in the possession of the Atlanta defendant since GFI Boston previously turned over all its records to them, at this juncture it is proper for the Atlanta defendants to comply with this notice to the extent of providing to plaintiffs any and all documents required by the US DOT and FMCSA, in its possession, as to the subject vehicles involved in the subject accident, only, and only as pertaining to Burke, for the year 2009, and/or to provide an affidavit from one of its principals or employees with knowledge stating what search was made to locate these documents, when and the result thereof.

Interrogatories: (doc #s 1324 and 1325)

Plaintiffs served defendants with a third and fourth set of interrogatories dated May 8, 2014. The Atlanta defendants responded thereto by two separate responses each dated June 17, 2014. Presently, the inadequacies, if any, of the responses thereto is not an issue raised by plaintiffs on these two motions.

Notice to Admit: (doc # 1327)

In their notice dated May 8, 2014 plaintiffs sought defendants to admit 46 "facts". The Atlanta defendants responded thereto by notice dated June 17, 2014. CPLR 3123 (a) states, in relevant part, that "a party may serve upon any other party a written request for admission by the

latter of the truth of any matters of fact set forth in the request as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. Each of the matters of which an admission is requested shall be deemed admitted unless within 20 days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.”

A notice to admit is designed to remove from the case those uncontested matters which are easily provable and would present a time-consuming burden at trial, but cannot be used to seek admissions of material issues, ultimate or conclusory facts, or an interpretation of law (*Jet One Group Inc. V Halycon Jet Holdings Inc.*, 111 AD3d 890 [2d Dept 2013]; *Priceless Custom Homes v O’Neill 104 AD3d 664* [2d Dept 2013]; *Nacherlilla v Prospect Park Alliance*, 88 AD3d 770 [2d Dept 2011]; *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760 [1st Dept 1984]). Issues which go to the heart of the matter are not the proper subjects for a notice to admit and should be stricken (*Nacherlilla v Prospect Park Alliance*, 88 AD3d at 772; *DeSilva v Rosenberg*, 236 AD2d 508, 509 [2d Dept 1997]). A notice to admit may not be used as a substitute for other discovery devices, such as taking depositions before trial (*Singh v G & A Mounting & Die Cutting*, 292 AD2d 516 [2d Dept 2002]; *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 760-761 [1st Dept 1984]).

In the event a party served with a Notice to Admit challenges the reasonableness of the requests for admissions or contends that the requests seek to elicit privileged information, the party must either serve a sworn statement setting forth in detail any claim of privilege or file a motion for a protective order pursuant to CPLR 3103 (*McCue v McCue*, 225 AD2d 975, 977 [3d Dept 1996]; Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3123:5 - C3123:6). Requests for admissions that go to the very essence of the dispute at issue are palpably improper, and the failure of a party to respond to those requests does not transform those demands into admissions of fact (*Burnside v Foglia*, 208 AD2d 1085 [3d Dept 1994]).

Although the Atlanta defendants did not respond to the notice within 20 days, upon review of those items sought to be admitted, this court finds they were palpably improper; for example, the majority of the items sought to be admitted went to the very heart of this matter . This notice is the subject of the motion of the Atlanta defendants for a protective order. The court finds that this notice should be stricken in its entirety.

Notice for Discovery and Inspection of the Atlanta Defendants: (doc #s 1632 and 1657)

In their notice dated January 28, 2014 the Atlanta defendants sought 98 items which both plaintiffs and the Atlanta defendants presently state tracked the allegations raised by plaintiffs in their amended complaint. Plaintiffs’ response is dated April 8, 2014. Presently plaintiffs assert

that it is the Atlanta defendants who are in exclusive control of these documents. The court notes that the issue of which party is in control of certain documents such as those sought herein has been contested since the commencement of this action. The court declines to dismiss the amended complaint on the basis of plaintiffs' response to this notice.

In their notice dated May 2, 2014 the Atlanta defendants sought from all other parties copies of any subpoena duces tecum and any responses thereto, issued in this action or under the prior action under index number 17573/2009. The court directs all parties to comply with this notice on or before November 14, 2014.

Oral Argument on September 8, 2014:

Among other arguments asserted by plaintiffs' counsel, he stated that the Atlanta defendants have failed to produce their witness, Ken Swords for a deposition and that the Atlanta defendants have not fully complied with previous directives of this court to provide certain discovery. Counsel for the Atlanta defendants stated that Ken Swords will be produced as a witness for an examination before trial.

In light of the foregoing it is:

ORDERED that the branch of the motion by the Atlanta defendants seeking an order compelling plaintiffs to respond to their notices of discovery and inspection is granted to the extent that if they have not already done so, plaintiffs are directed to fully respond to the notice for discovery and inspection dated May 2, 2014 by providing copies of any subpoena duces tecum and any responses thereto, issued in this action or under the prior action under index number 17573/2009 on or before November 14, 2014; and it is further,

ORDERED that the branch of the motion by the Atlanta defendants seeking an order striking all of plaintiffs' discovery demands served between May 1, 2014 and July 11, 2014 (except for plaintiffs' notice to produce dated May 6, 2014 (doc# 1318) is granted except that the Atlanta defendants are directed to, on or before November 14, 2014 respond to plaintiffs' discovery requests as follows: (1) if they have not previously done so, they provide, regarding plaintiffs' notice known as doc # 1317 in the NYSCEF system, items 1-4 requested therein, any and all internal email communications amongst them and between them and GFI Boston, SM Foods, and/or Greeley from October 2007 to May 2009, and regarding items 5-8 and 18 all documents requested therein regarding the subject vehicle only from October 2007 to May 2009; items 9, 12, 20 only for the years 2007-09; and items 22 and 23; (2) comply with plaintiffs' notice known as doc # 1322 in the NYSCEF system to the extent of providing to plaintiffs a copy of all fuel tax filings for the years 2007 to 2009 for the subject tractor and trailer or provide an affidavit from a person of knowledge regarding their car lease operation and fuel tax filings as to these two vehicles stating that they are not in possession of the requested documents and detailing the reason why; and (3) to comply with plaintiffs' notice known as doc # 1336 in the NYSCEF system to the extent of providing to plaintiffs any and all documents required by the US

DOT and Federal Motor Carrier Safety Administration, in its possession, as to the subject vehicles involved in the subject accident, only, and only as pertaining to Burke, for the year 2009, and/or to provide an affidavit from one of its employers with knowledge stating what search was made to locate these documents, when, and the result thereof; and it is further,

ORDERED that the branch of plaintiffs' motion seeking an order striking the answers of the defendants or precluding them from offering any evidence at the time of trial or from rebutting their evidence on certain issues regarding liability is denied; and it is further,

ORDERED that the branch of plaintiffs' motion seeking an order compelling defendants to fully and completely respond to their discovery demands is granted to the limited extent set forth directly herein above; and it is further,

ORDERED that the branches in each of these motions seeking costs, sanctions and/or attorneys fees, are denied; and it is further,

ORDERED that if they have not already done so, the Atlanta defendants are directed to produce Ken Swords for a deposition on or before November 14, 2014 at a time and place to be set by them upon notice to all parties; and it is further,

ORDERED that on or before October 31, 2014 plaintiffs provide to all parties a detailed schedule of all discovery previously ordered by this court which they contend the Atlanta defendants have not provided, including the item of discovery and the date of the order directing that discovery (with the NYSCEF number of that order), and that on or before November 14, 2014 the Atlanta defendants comply therewith by providing the outstanding discovery or provide a schedule from their counsel listing the item of discovery, when it was provided and where it can be found on the NYSCEF system; and it is further,

ORDERED that all parties are directed to appear in the Compliance Part, Courtroom 800 on December 2, 2014 at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 20, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.