Splash, LLC v Shullman Family Ltd. Partnership
2014 NY Slip Op 32995(U)
October 20, 2014
Supreme Court, Westchester County
Docket Number: 56585/2013
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

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SPLASH, LLC, SPLASH MANAGEMENT GROUP, LLC, SPLASH BEDFORD HILLS, LLC, MARCH CURTIS and CHRISTOPHER FISHER,

Plaintiffs,

-against-

SHULLMAN FAMILY LIMITED PARTNERSHIP, ROBERT SHULLMAN, MICHAEL SHULLMAN, and RUSSELL SPEEDERS CAR WASH, LLC,

Defendants.

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DECISION & ORDER

Index No. 56585/2013
Decision Date: Oct 20, 2014
Motion Seq. No. 8

LEFKOWITZ, J.

The following papers were read on this motion by defendants Shullman Family Limited Partnership, Robert Shullman, Michael Shullman (hereinafter defendants)[1] for an order dismissing the complaint for failure to comply with discovery demands; or, compelling plaintiffs to provide all discovery demanded by defendants; or, precluding plaintiffs from offering any evidence at trial; and, for such other and further relief as this court deems just and proper.

Order to Show Cause dated September 18, 2014
Affirmation in Support; Exhibits A-V
Memos of Law
Affirmation in Opposition; Exhibits A-J

Upon the foregoing papers and oral argument heard on October 20, 2014 this motion is determined as follows:

In this action plaintiffs claim that defendants breached the implied covenant of good faith in a commercial lease for a car wash business located at 527 North Bedford Road in Bedford Hills, New York (which plaintiffs refer to as the "demised premises") at premises owned by defendants, that defendants tortiously interfered with plaintiffs' prospective business relations in relation to defendants' alleged opposition to their applications to obtain variances, a special use

[1]Defendant Russell Speeders Car Wash LLC filed a separate answer.

permit and site plan approval for plaintiffs to operate their business at a new facility located at 562-570 North Bedford Road (which plaintiffs refer to as the new location), a short distance from the demised premises, and intentional and negligent property damage arising from an incident that occurred in March 2013. The factual background of this case has been more fully set forth in this court's order dated October 8, 2013 (Connolly, J.) and this court's order dated January 6, 2014 (Lefkowitz, J.).

The Preliminary Conference Stipulation was executed on December 2, 2013 and so-ordered by this court (Lefkowitz, J.). Among other things, the stipulation provided that demands for discovery and inspection be served by defendants before December 31, 2013. Defendants served discovery demands and interrogatories on or about February 7, 2014. Plaintiffs objected thereto on the basis of the untimeliness of service and their alleged impropriety.

On or about November 6, 2013 defendant Russell Speeders Car Wash LLC served various discovery demands. Plaintiffs served their responses thereto on or about May 5, 2014. On page two of their verified bill of particulars, plaintiffs set forth the damages they alleged they sustained.

Plaintiffs' witness was deposed on June 27, 2014.

Defendants served their combined notice for discovery and inspection and second set of interrogatories on or about July 23, 2014. By notice dated August 1, 2014 plaintiffs set forth their objections to these discovery demands.

The court notes that several compliance conferences were held on this matter. Compliance conference orders addressing discovery matters were issued on March 5, 2014, March 12, 2014, May 21, 2014, July 2, 2014 and August 14, 2014.

Presently defendants assert that plaintiffs have failed to produce any discovery or to properly respond to any of their discovery demands, that plaintiffs' actions in this regard are wilful and contumacious and that these failures have precluded their ability to properly prepare a defense. More particularly, in their memo in support of their motion, defendants assert that plaintiffs have willfully refused to comply with responding to defendants' interrogatories. Defendants state that plaintiffs have not responded to the interrogatories in accordance with CPLR 3133 and that plaintiffs' failure to timely move to strike the interrogatories now forecloses all inquiry into the propriety of the information sought.

Plaintiffs oppose this motion. They assert that they are not refusing to comply with discovery. What plaintiffs are not willing to do is to allow a competitor to have unfettered access to their business relations for other locations not at issue in this case which they assert is what the defendants are attempting to do. Plaintiffs assert that they are presently compiling information to provide to defendants regarding those parts of defendants' demands that are proper.

Parties to an action are entitled to reasonable discovery of facts that are relevant to the controversy at issue and CPLR 3101 (a) permits discovery of "all matter material and necessary in the prosecution or defense of an action." However unlimited disclosure is not mandated and the court may deny, limit, condition or regulate the use of a disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts (*see Diaz v City of New York*, 117 AD3d 777 [2d Dept 2014]).

CPLR 3126 states that if any party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them, an order prohibiting the disobedient party from supporting or opposing designated claims or defenses. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). CPLR 3124 states that if a person fails to respond to or comply with any type of discovery request, the party seeking disclosure may move to compel compliance or a response.

CPLR 3130 (1) provides in relevant part that after commencement of an action, any party may serve upon any other party written interrogatories. Where the interrogatories are palpably improper as unduly burdensome and overly broad, a motion to compel responses to the interrogatories is properly denied (*Friedler v Palyompis*, 24 AD3d 501 [2d Dept 2005]; *Holness v Chrysler Corp.*, 220 AD2d 721, 722 [2d Dept 1995]).

In the present action, defendants' request for the first set of interrogatories contains 35 items, several with subparts. Defendants' request for the second set of interrogatories contains 43 items, several with subparts. The court agrees with plaintiffs that there are only two locations that are at issue in this case, the demised premises plaintiffs rented from defendants and the new location to which plaintiffs intended to move. Plaintiffs persuasively argue that information and documents relating to its other businesses are irrelevant and discovery thereof may allow its competitors to have unfettered access to their business relations.

With these principles in mind and in light of the circumstances of this case, the court finds that in light of plaintiffs' cooperation in the discovery process any sanction pursuant to CPLR 3126 is improper. Many of the defendants' requests for information are irrelevant and/or may cause unreasonable annoyance, expense, embarrassment, disadvantage and prejudice to plaintiffs. However, at this juncture it is proper to issue an order compelling plaintiffs to comply with certain outstanding discovery demands.

Although the preliminary conference stipulation provided that demands for discovery would be served by defendants before December 31, 2013 defendants untimely served their demands on February 7, 2014. Notwithstanding the untimeliness of the demands, plaintiffs served their objections thereto a few weeks later, on February 28, 2014. Upon its review of defendants' requests and plaintiffs' responses thereto, this court finds that plaintiff's objections are proper as to items numbered 2, 4, 6, 7, 9-15 (a) and 30-32. Although plaintiffs did not object thereto, this court finds that defendants' demands in items 13- 14 and 15 (a) are irrelevant and

improper. Item number 8 has been provided in the form of a redacted copy of the lease for the new location. However, if they haven't already done so, plaintiffs are directed to provide to defendants responses to their items numbered 1, 3, 5, 16-17 and 18- 27 (a) (regarding the new premises only) and 28, 29, 33-34 and 35 (regarding the property damage arising from the incident that allegedly occurred in March 2013).

Defendants' combined notice for discovery and their second set of interrogatories were served on or about July 23, 2014 and plaintiffs responded thereto on or about August 1, 2014. Upon its review of defendants' requests and plaintiffs' responses thereto, this court finds that the following requests are improper and/or plaintiffs' objections are proper as to items numbered 1, 2, 3 (b) (i); 3(b)(vii-x; as they regard personal information); 3(b)(xiii); 3(b) (xiv-xv; as they regard all entities other than the subject two locations); 3 (b) (xvi-xviii; as they regard all entities other than the subject two locations); 4 (lease was provided and properly redacted to conceal the rent paid); 5-10; 13 (defendants are either already in possession of these requested documents and/or these documents are public and can be obtained by defendants directly); 11-12; 14; 21; 41-43.

Plaintiffs have provided already or have agreed to provide the following documents: 3 (b)(ii-iv; vi), 3 (b) (v; but only as to managing members and not as to managers of the individual car washes); 3 (b) (xi-xii; only as to the two subject locations and omitting copies of checks to protect the names of plaintiffs' vendors and suppliers and what plaintiffs paid for supplies and merchandise, and any and all other confidential business information); 3 (b) (xiv; as it regards the two subject locations only, redacted to conceal the rent paid for the new location); 3(b) (xv; only the management agreements regarding the two subject locations); 3 (b) (xvi-xviii; as they regard only the subject two locations); 3 (b) (xix-xx); 3 (b) (xxi-xxiii; redacted to conceal the exact services provided); 15-20; 22-40.

In light of the foregoing it is:

ORDERED that defendants' motion is granted only to the limited extent that if they have not done so already, plaintiffs are directed to provide, on or before November 5, 2014, the following items requested by defendants:

(1) in defendants' first set of interrogatories dated February 7, 2014: items numbered 1, 3, 5, 16-17 and 18- 27 (a) (regarding the new premises only) and 28, 29, 33-34 and 35 (regarding the property damage arising from the incident that allegedly occurred in March 2013); and

(2) in defendants' second set of interrogatories dated July 23, 2014: 3 (b)(ii-iv; vi), 3 (b) (v; but only as to managing members and not as to managers of the individual car washes); 3 (b) (xi-xii; only as to the two subject locations and omitting copies of checks to protect the names of plaintiffs' vendors and suppliers and what plaintiffs paid for supplies and merchandise, and any and all other confidential business information); 3 (b) xiv; as it regards the two subject locations only, redacted to conceal the rent paid for the new location); 3(b) (xv; only the management

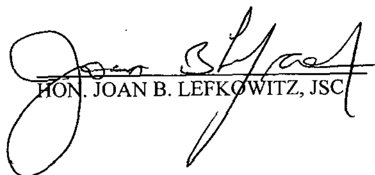
agreements regarding the two subject locations); 3 (b) (xvi-xviii; as it regards only the subject two locations); 3 (b) (xix-xx); 3 (b) (xxi-xxiii; redacted to conceal the exact services provided); 15-20; 22-40; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on November 19, 2014; and it is further,

ORDERED that defendants are directed to serve a copy of this order upon all parties within seven days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 20, 2014



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