Campbell v Bradco Supply Co.
2014 NY Slip Op 33369(U)
December 10, 2014
Supreme Court, Suffolk County
Docket Number: 11307-2010
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 11307-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 07/30/14
SUBMIT DATE 11/21/14
Mot. Seq. # 004 - Mot D
Next Conference Date: 2/17/15
CDISP - No

MARGARET CAMPBELL,

Plaintiff,

-against-

BRADCO SUPPLY COMPANY and
HARRIS BOSHAK,

Defendants.

MARGARET CAMPBELL
Plaintiff Pro Se
PO Box 2061
Setauket, NY 11733

ELIAS C SCHWARTZ, PPLC
Atty. For Defendants
343 Great Neck Rd.
Great Neck, NY 11021

Upon the following papers numbered 1 to 11 read on this motion by plaintiff to compel discovery, dismiss counterclaims and strike the defendants' answer ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Opposing papers 5-7 ; Reply papers 8-9 ; Other 10-11 (supplemental affidavit) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#004) by the plaintiff for an order compelling responses to her post-deposition discovery demands and for orders dismissing the defendants' amended answer and counterclaims is considered under CPLR 3124 and 3126 and is granted to the limited extent set forth below; and it is further

ORDERED that the compliance conference now scheduled for *January 30, 2015* is hereby adjourned to Tuesday, **February17, 2015** at 9:30 a.m. in the courtroom of the undersigned at which time the court shall inquire into the matters that are the subject of this order.

Plaintiff commenced this action to recover damages sustained by her as a result of the defendants' purported breaches of contract, good faith and warranties, unjust enrichment, and fraud by reason of inducement and deceptive business practices. These claims arise out of a contract for home improvements executed and undertaken by the plaintiff and one or more of the defendants. The defendants asserted two counterclaims in an amended answer served with leave of court.

At issue on this motion is the defendants' response to the plaintiff's post deposition notice of demand for discovery and inspection dated November 30, 2013, which called for the production of documents containing communications by the defendants regarding the plaintiff's contract for the purchase, design and installation of the subject kitchen cabinets, those relating to the work performed by the defendants and their agents and the communications following such installation, as well as, documents referred to by the defendants at their depositions. Also at issue is alleged misconduct on the part of the defendants and/or their counsel at the depositions of the parties previously held herein.

Fifteen items were enumerated in the plaintiff's November 25, 2013 demand for discovery and inspection. By response dated March 26, 2014, the defendants claim that all items have already been turned over to the plaintiff, that no further items exist or are in their possession except for certain black and white photos of the cabinets which are allegedly attached to the response. In their opposing papers, the defendants appear by affirmation of their counsel who details in great length procedural posture of this action and various efforts the defendants have undertaken in an attempt to satisfy the plaintiff through offers of settlement. Defense counsel goes on to assert the following with respect to the issue of discovery defaults:

> Despite the plaintiff's attempt to aggrandize the monetary value of her claims, and the complexity of the subject matter herein, the fact remains that there simply are very few relevant documents that are material and necessary in an action of this nature. Relevant documents include the contract between Defendant Bradco and Plaintiff, estimates, purchase orders and photographs of the kitchen cabinets all of which have been provided to plaintiff by the defendants during the course of discovery. Accordingly, Defendants respectfully submit that the documents required by the plaintiff in or order to prosecute her claims have already been produced by the defendants many times during the course of this litigation (*see* ¶¶ 61, 62 and 63 of defense counsel's affirmation in opposition to the plaintiff's motion).

Counsel concludes by alleging that the:

> Defendants have fulfilled their discovery obligations to Plaintiff in that the relevant documents sought by the plaintiff pursuant to Plaintiff's November 25, 2013 Post Deposition Notice of Demand for Discovery and Inspection were previously produced to the plaintiff during the course of this litigation by Defendants or simply do not exist. To require the production of any additional documents would far exceed the bounds of reasonableness particularly in light of the simplicity of the subject matter surrounding the litigation (*see id.*, at ¶ 67).

For the reasons stated, the motion is granted to the extent set forth below.

Pursuant to CPLR 3101(a), "full disclosure of all matter material and necessary in the prosecution or defense of an action" is required. The phrase "material and necessary" should 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" (***Auerbach v Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006], *quoting* ***Allen v Crowell–Collier Pub. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). The Supreme Court is thus vested with broad discretion to oversee the discovery process and to determine what is "material and necessary" as that phrase is used in CPLR 3101(a) (*see* ***Auerbach v Klein***, 30 AD3d 451, *supra*; *see also* ***Orgel v Stewart Title Ins. Co.***, 91 AD3d 922, 938 NYS2d 121 [2d Dept 2012]; ***Giano v Ioannou***, 78 AD3d 768, 911 NYS2d 398 [2d Dept 2010]). The terms material and relevant have been read to include evidence required for trial preparation as well as inadmissible matter that may lead to the disclosure of admissible proof (*see* ***Montalvo v CVS Pharmacy, Inc.***, 81 AD3d 611, 915 NYS2d 865 [2d Dept 2011]).

It is incumbent on the party seeking disclosure 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 (*see* ***Allen v Crowell–Collier Pub. Co.***, 21 NY2d 403, *supra*). Unsubstantiated, bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy (*see* ***Beckles v Kingsbrook Jewish Med. Ctr.***, 36 AD3d 733, 830 NY2d 203 [2d Dept 2007]). Instead, a showing that the method of discovery sought will result in the disclosure of relevant evidence or matter that is reasonably calculated to lead to the discovery of admissible proof bearing on the claims is required (*see* ***Vyas v Campbell***, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). Where issues are limited by undisputed facts or defenses in bar, discovery may be correspondingly limited (*see* ***Markel Ins. Co. v Bottini Fuel.***, 89 AD3d 1212, 932 NYS2d 570 [3d Dep 2011]; ***Davis v Cornerstone Tel. Co., LLC***, 78 AD3d 1263, 910 NYS2d 254 [3d 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]). Remedies for the failure to comply with court ordered discovery deadlines are provided in CPLR 3124 and 3126. These rules provide, respectively, for the issuance of orders directing the recalcitrant parties to comply with any and all requests, notices or demands and/or for the imposition of sanctions such as orders of preclusion or dismissal of the pleadings served by the party in default.

To be entitled to relief under CPLR 3124, the movant need only establish that a demand, notice, interrogatory or the like has gone unanswered, ignored or was not responded to fully in good faith and that a good faith effort to resolve the issue was attempted by the movant prior to interposition of the motion as attested to in affirmation of good faith (*see* 22 NYCRR 202.7[a][b][c]). To be entitled to the relief afforded by Rule 3126, the movant must establish, in addition to satisfying the good faith affirmation requirements, that an adverse party refused to obey an order for disclosure or wilfully failed 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 El. 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]). This rule is distilled from the more general rule which provides that in order for the court to impose a provident sanction due to a failure to disclose, the sanction must be 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]). 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]).

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 Envtl. 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" will not necessarily defeat a motion for sanctions under CPLR 3126 (*see* ***Mikhailov v Katan***, 116 AD3d 744, *supra*), particularly where the default in providing disclosure results from repeated instances of disobedience of directives contained in prior court orders or party demands stipulated to by counsel at court conducted conferences (*see* ***Arpino v F.J.F. & Sons Elec. Co., Inc.***, 102 AD3d 201, *supra*).

While the disclosure provisions of the CPLR should be liberally construed, the scope of permissible discovery is not unlimited and the principle of "full disclosure" does not give a party the right to uncontrolled and unfettered disclosure (*see* ***Friel v Papa***, 87 AD3d 1108, 930 NYS2d 39 [2d Dept 2011; ***JFK Family Ltd. Partnership v Millbrae Natural Gas***, 83 AD3d 899, 920 NYS2d 708 [2d Dept. 2011]). Where demanded documents cannot be found, the disclosing party cannot be compelled to produce or be sanctioned for failing to produce them as no party is required to garner or manufacture documents or information which are not in existence or which they do not possess or control (*see* ***Deer Park Assoc. v Town of Babylon***, 121 AD3d 738, 993 NYS2d 761 [2d Dept 2014]; ***Gottfried v Maizel***, 68 AD3d 1060, 890 NYS2d 352 [2d Dept 2009]; ***Argo v Queens Surface Corp.***, 58 AD3d 656, 656–657, 871 NYS2d 657 [2d Dept 2009]; ***Maffai v County of Suffolk***, 36 AD3d 765, 766, 829 NYS2d 566 [2d Dept 2007]). In such cases, the party called upon to disclose must provide affidavits showing that good faith efforts had been made to locate the documents and the results thereof (*see* ***Lomax v Rochdale Vil., Inc.***, 76 AD3d 999, 907 NYS2d 690 [2d Dept 2010]).

A review of the plaintiff's Notice of Demand for Discovery and Inspection reveals that many of the document demands advanced in items numbered 1, 2, 3, 4, 5 6, 7, 10 12, 13, and 14 are overbroad and/or redundant in nature or call for irrelevant and immaterial matter. However, the defendants did not object to the production of these items on these grounds in their response which was served tardily. Nor did they expressly articulate objections to the materiality and relevance of these items in their opposing papers. A review of defendants' March 26, 2014 discovery response reveals that the same is inadequate except for items 1,7, and 14 while review of the defendants' opposing papers reveals and that no reasonable excuse for the defendants' failures to timely and substantially comply was advanced therein. The court thus finds that the defendants' response constitutes a failure

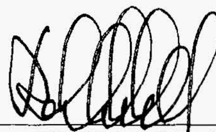
to comply, substantially and in good faith, with the plaintiff's November 30, 2013 Notice of Demand for Discovery and Inspection.

The defendants are thus directed to serve full responses, denominated as "supplemental responses" to items 2, 3, 4, 5, 6, 8, 9, and 11 and shall therein detail the search for all items listed in each of these demands, the results of those searches including the existence or non-existence of the documents, their location and to produce copies of all such documents that are within the defendants' control and to provide appropriate affidavits that the documents do not exist. The defendants are further directed to respond in like manner to item numbered 15. The defendants need not furnish further responses to the items numbered 1,7 and 13, except to the extent that they are under a continuing duty to supplement previously furnished responses. Nor are the defendants required to respond to items numbered 10, 12, and 14 as these items call for production of documents that are beyond the bounds of usefulness and reason. The defendants' supplemental responses, coupled with the production of the found documents and any affidavits regarding searches undertaken and the non-existence or unfound nature of any of the documents for which supplemental responses are required by the terms of this order, must be served upon the plaintiff not later than February 6, 2014. Those portions of the instant motion wherein the plaintiff seeks relief pursuant to CPLR 3124, are thus granted to the extent outlined.

The remaining portions of this motion wherein the plaintiff seeks dismissal of the answer and counterclaims of the defendants and other relief under CPLR 3126 are denied, but such denial is without prejudice to the interposition of a new and further motion for like relief following the plaintiff's receipt of the supplemental responses of the defendants. The absence of a prior order with respect to these matters militates against a finding that the defendants have acted willfully in an effort to defeat a schedule of discovery that has been fixed by the court. The quality and completeness of the defendants' supplemental responses to the plaintiff's November, 30, 2013 written Notice of Demand for Discovery and Inspection will reveal their true intentions with respect to complying substantially and in good faith to the plaintiff's demands to the extent now required by the terms of this order.

All other relief demanded by the plaintiff with respect to the defendants' responses to the plaintiff's Notice of Demand for Discovery and Inspection is denied as the court finds it to be beyond the scope of that which is necessary and material to the prosecution and defense of the claims interposed by and against her in this action as measured by the test of usefulness and reason. All other relief demanded with respect to depositions, hospital records, sanctions and other relief is denied except that the defendants' counsel is hereby directed to return the original deposition transcripts to the plaintiff by service effected on or before January 5, 2014.

DATED: 12/10/14



THOMAS F. WHELAN, J.S.C.