

**Carni v Continental Home Loans, Inc.**

2014 NY Slip Op 33833(U)

July 3, 2014

Supreme Court, Nassau County

Docket Number: 601350-13

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 14  
NASSAU COUNTY

**MICHAEL CARNI, and BRUCE SAPER**  
Individually, and on Behalf of All Others  
Similarly Situated,

**Plaintiffs,**

**-against-**

**CONTINENTAL HOME LOANS, INC.,**  
**MICHAEL MCHUGH, ERIC REEPS,**  
**RICHARD TSCHERNIA, SANTO**  
**BARRETTA,**

**Defendants.**

**Decision and Order**

**MOTION SUBMITTED:**  
**April 4, 2014**  
**MOTION SEQUENCE:07, 08, 09,**  
**10, 11, 12, 13**  
**INDEX NO.:601350-13**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

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Affirmation in Opposition (Mot. Seq. #07)	
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### Introduction

In a decision and order dated June 18, 2014, this court denied the Plaintiffs' motion to certify as a class "all inside-sales loan officers who worked for Defendants in their New York office(s) at anytime since May 24, 2007". According to the court:

The named Plaintiffs have not satisfied their burden that certification of this action is appropriate inasmuch as common legal and/or factual issues do not predominate over individualized claims and the interests of judicial economy would not be served by the multitude of fact-intensive "mini-trials" that a class action of this nature would require.

Along with the motion for class certification previously denied by this court, the parties served seven discovery motions, most of which involved discovery related to class certification. Given the denial of class certification, discovery in the instant case is now limited to the named Plaintiffs only. Any discovery sought for the purposes of class certification is beyond the scope of what is material and necessary to the prosecution of this action by the two named Plaintiffs.

In *Feder v Staten Island Hospital* (304 AD2d 470, 471 [1<sup>st</sup> Dept 2003]), the trial court certified the action as a class action and referred the matter to a Special Referee to supervise discovery. The First Department held that the plaintiffs had failed to demonstrate that the class was so numerous, that there was a predominance of common questions of law and fact to the class, or that plaintiffs' claims were typical of the class. The Court reversed the class certification order on the ground that the plaintiffs therein could not "fulfill all the prerequisites of a class

action". Seeking additional discovery, the *Feder* plaintiffs argued to the trial court that the First Department decision "did not close the door on class certification, but merely held that plaintiffs' factual showing was inadequate" and that "further discovery regarding numerosity of the class and commonality of claims is necessary in order to meet the First Department's objections" (*Feder v Staten Island Hospital*, 2003 WL 25594151 (Sup Ct New York County 2003)). The trial court rejected plaintiffs' contention, however. According to Justice DeGrasse:

The First Department's decision is unequivocal. If the First Department felt that further discovery directed to the issue of class certification was warranted, it would have said so. Instead, it cited precedent where class certification was denied without leave for any further discovery.

As this action will not proceed as a class action, its complexity has been greatly reduced. Plaintiffs are entitled solely to discovery relating to their own claims. There is no need for a Special Referee to supervise such discovery. . . . (*Id.* [citations omitted]).

Justice DeGrasse's order limiting discovery to that related solely to plaintiffs' individual claims was affirmed by the Appellate Division on the ground that the First Department's prior reversal of class certification eliminated any need for class-related disclosure and held that the trial court "correctly interpreted such reversal to be without leave to seek a recertification of the class upon completion of additional disclosure" (*Feder v Staten Island Hospital*, 8 AD3d 141 [1st Dept 2004]).

In view of the foregoing, there is no further need for class-related disclosure. With that in mind, the instant discovery motions are decided as follows:

### **The Court's Determination**

#### *Motion Seq. Nos. 7, 10 and 11*

Plaintiffs move, *inter alia*, for an order pursuant to CPLR 3124 compelling the Defendants to produce, for limited inspection pursuant to the technique employed by Plaintiffs' expert, the email server and the computers of Michael McHugh, Eric Reeps, Richard Tschernia, Santo Barretta, Rick Amatulli, and Lauren Gil (Motion Seq. No. 7).<sup>1</sup>

The Plaintiffs also move, *inter alia*, for an order pursuant to CPLR 3124 compelling the Defendants to produce responsive documents, including electronically stored information ("ESI")

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<sup>1</sup> While the Plaintiffs Notice of Motion only seeks relief pursuant to CPLR 3124, Plaintiffs' counsel's affirmation also seeks an order "striking Defendants' Answer or to preclude Defendants from contesting any legal issue for their willful failure to comply with their discovery obligations as permitted under CPLR § 3126" (Affirmation in Support of Motion to Compel at ¶ 1 [Motion Seq. No. 7]).

discovery, to Plaintiffs' September 20, 2013 request for the production of documents (Motion Seq. No. 10).<sup>2</sup>

The Defendants cross-move, *inter alia*, for a protective order pursuant to CPLR 3103 limiting the Plaintiffs' request for documents and precluding the Plaintiffs from inspecting the Defendants' servers (Motion Seq. No. 11).<sup>3</sup>

The facts relevant to motion sequence numbers 7, 10, and 11 are as follows:

On July 24, 2013, Plaintiffs served their first Request for Production of Documents on Defendants. The Plaintiffs' request was for "[a]ny and all computer servers used by Continental Home Loans, Inc. during the statutory period" (Ex. "1" to Defendants' Cross Motion [Motion Seq. No. 11]). On August 16, 2013 Defendants filed a Motion for a Protective Order to Strike Plaintiffs' Request for Production of Documents. Defendants agreed to withdraw their motion and Plaintiffs agreed to limit their request and served a second Request for Production of Documents, including ESI, on September 20, 2013.<sup>4</sup> The Plaintiffs' second request for documents included:

All emails sent or received by any of the custodians listed on Rider A to this request for production of documents in which any of the search terms listed on Rider A appear.

All documents sent to, received by or related to any of the custodians listed on Rider A to this request for production of documents in which any of the search terms listed on Rider A appear.

Defendants served their response to this request on October 10, 2013, claiming that the requests to search the computers is overbroad and that searching the computers with the terms provided by Plaintiffs would be unduly burdensome because of the amount of hits it would generate.

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<sup>2</sup> Plaintiffs' motion sequence number 10 seeks essentially the same relief as that sought in Plaintiffs' motion sequence number 7.

<sup>3</sup> While not set forth in the Notice of Motion, the Defendants also ask that "this Court fashion an appropriate remedy pursuant to the New York Uniform Rules of Trial Courts 130-1 given that Defendants have been required to respond to Plaintiffs' completely baseless motion" (Affirmation in Support of Cross Motion at ¶ 20 [Motion Seq. No. 11]).

<sup>4</sup> This second request was more limited than Plaintiffs' initial request made on July 24, 2013.

The parties thereafter appeared for a preliminary conference on October 23, 2013. In section 12(d)(ii) of the preliminary conference order, dated October 25, 2013, the parties agreed as follows:

In the absence of an agreement by the parties, the court shall direct the manner of production upon application of the part(ies). Defendants will make a proposal on or before Nov. 4, 2013. Plaintiff reserves right to seek leave from the court if Plaintiff does not agree w/ Defendants' proposal.

By letter dated November 1, 2013, the Defendants objected to the Plaintiffs' previous request and proposed the following:

We object to Rider A on the grounds that it is overbroad and that it would be unduly burdensome (as well as expensive) to search Continental's computer system for all of the custodians you identified as well as to perform all of the requested searches requested. The basis for our objections is below.

With respect to the custodians, we will agree to search Continental's server and archives for emails from Messrs. McHugh, Reeps, Tschernia, and Barretta and Ms. Gil. These are the persons who would have information concerning the information related to Continental's policies and procedures that you are seeking. Many of the persons you have identified have no relationship to the named Plaintiffs. For example, Lisa Greene, of the accounting department, handles accounts payable and has no involvement with payroll. The same is true of Karen Stauber. Certain branch managers identified had no relationship with the named Plaintiffs. You have also identified some loan officers, such as Robert Hernandez who worked in California from 2009 and 2010, or persons in other positions who would have no relationship to this matter. You have identified nearly 30 custodians and I am not going to set forth our objection with respect to every person you identified. If you believe others would have responsive information, please send me a letter stating the basis and we will consider your request at that time.

\* \* \*

As you are aware, Continental needs to search each custodian's email separately and this causes an increase in cost. Asking that they search the emails of nearly 30 custodians is beyond the scope of what is permissible.

We will agree to search the following search terms, on the condition that we will have further discussion to limit those terms in the event that any search results in more than 500 hits: "record! W/5 time"; "schedule! W/5 pay"; "schedule! W/5 work"; commission!; overtime!; "minimum wage"; "part time"; "outside sales"; "tardy"; "off-the clock"; "off w/3 clock"; "FLSA"; "Fair Labor Standards Act"; "evening! W/5 work"; "vacation"; "dock"; "payroll"; "hours"; "Carni"; "Saper."

This is a [sic] an extremely broad search. We cannot agree to search the other terms you have identified, as a search of those terms could result in thousands of hits that would involve nonresponsive information and also would seek information that is irrelevant and unlikely to lead to the discovery of admissible evidence. For example, "more /5 40" would obtain information related to borrowers who have a credit score of "more than 640," which is a term that would be throughout Continental's email system. "Reduc!" would hit every time the word reduced or reduction appears in any email, again, those are words that would incur thousands of hits. "Approval" and "locl" are similarly problematic. Searches that produce thousands of hits not only increase the expense and time of the search, they then involve the attorney hours to review the documents before production for privilege and other purposes. Accordingly, we have excluded the search terms that would plainly lead to such results.

The relevant email documents found by the search will be produced in its metadata and native format in pst files. Please advise whether the above proposal is acceptable or whether you would like to discuss this matter further.

With respect to Defendants' document production, served herewith are responsive documents including: 1) compensation data for Carni and Saper in the form of a Paychex Report; 2) credit pull reports for Carni produced in the format received from Credit Plus; and 3) Continental's employment policy handbook and various other documents" (Ex. "5" to Defendants' Cross Motion for Protective Order [Motion Seq. No. 11]).<sup>5</sup>

By letter dated November 8, 2013, the Plaintiffs rejected the Defendants' November 1, 2013 proposal. The Plaintiffs thereafter served two motions to compel and the Defendants served a motion for a protective order.

In support of their motions to compel, the Plaintiffs argue that ESI discovery is critical "because it will resolve two of the hotly-disputed issues in this case; namely, the number of hours Plaintiffs worked and where they primarily performed their duties" and, further, that they need the ESI discovery to determine payroll, wages, and hours for the Plaintiffs and all other putative class members. In their motions, the Plaintiffs "ask the Court to require the Defendants to permit Plaintiffs to: 1) image the requested servers and hard drives; 2) conduct the requested search terms on the imaged data; and 3) review that information once Defendants have had the

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<sup>5</sup> The Defendants' search, in accordance with the parameters set forth in their November 1, 2013 letter "resulted in over 80,000 documents and Defendants are in the process of conducting a privilege review of this large amount of documents". According to the Defendants, "this process is time consuming and expensive and Defendants are producing documents on a rolling basis after the privilege review is completed. To date, Defendants have produced over 4,000 documents and will continue to produce documents on a rolling basis so that there is no reason for Plaintiffs to have access to the servers that Defendants have already searched" (Defendants' Affirmation in Support of Cross Motion for Protective Order at ¶ 13 [Motion Seq. No. 11]).

opportunity to review the data for privilege” (Affirmation in Support of Motion to Compel at ¶ 26 [Motion Seq. No. 7]).<sup>6</sup>

Defendants argue that the request is overbroad because it is a “fishing expedition” for more clients, and because the custodians listed on Plaintiffs’ Rider A have no relationship with the Plaintiffs. Defendants also argue that they are not trying to avoid discovery as evidenced by their good faith of proposing search terms and disclosing 4,000 documents of the 80,000 documents found with the intent to disclose more as a privilege review is complete.

Given its broad discretionary power to control and supervise discovery under CPLR 3101(a), the court denies the Plaintiffs’ motions to compel and grants so much of the Defendants’ motion for a protective order to the extent that the Defendants shall provide ESI and responsive documents set forth in the Defendants’ November 1, 2013 letter. Defendants request for sanctions is denied.

*Motion Seq. No. 8*

The Plaintiffs move, *inter alia*, for an order pursuant to CPLR 3124 compelling the Defendants to answer interrogatories dated September 17, 2013.<sup>7</sup>

The Plaintiffs’ September 17, 2013 interrogatories consisted of thirteen questions “primarily designed to understand how many loan officers were subjected to the same compensation scheme as the two named Plaintiffs and the extent to which Defendants utilized their allegedly illegal wage scheme” (Affirmation in Support of Motion to Compel [Motion Seq. No. 8 at ¶ 5). According to the Defendants, “Plaintiffs here seek information related to the dimensions of the class they seek to certify, such as the identity of loan officers. Because no class has been certified, Defendants should not be required to engage in time-consuming and expensive discovery responding to requests related to potential class members who are not properly part of this case” (Defendants’ Opposition to Plaintiffs’ Motion to Compel [Motion Seq.

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<sup>6</sup> The Plaintiffs also “request that the Defendants be compelled to produce an index of documents they have in the 80,000 ESI they have compiled and produce a privilege log immediately” (Plaintiffs’ Affirmation in Support of Motion to Compel [Motion Seq. No. 7 at ¶ 27]).

<sup>7</sup> In his affirmation, Plaintiffs’ counsel seeks “an order compelling Defendants to answer Plaintiffs’ interrogatories under CPLR § 3124 or to preclude Defendants from contesting any legal issue for their willful failure to comply with their discovery obligations as permitted under CPLR § 3126.”

No. 8] at ¶ 7).<sup>8</sup> Given Defendants' objections, the Defendants' responses to interrogatories were limited solely to the named Plaintiffs.

In support of their motion to compel, the Plaintiffs argue that the information sought in the interrogatories is necessary to understand how many loan officers were subjected to the same compensation scheme and the extent to which the Defendants used the scheme. Plaintiffs also claim that the information sought is: "relevant to any potential class damages Defendants' conduct might have caused" and is necessary to determine the size of the class and to identify other members.

The Defendants object to Plaintiffs' interrogatories which they say are an "attempt to gain unfair advantage by prematurely obtaining contact information for all potential class members" (Defendants' Opposition to Motion to Compel [Motion Seq. No. 8 at ¶ 2]).

CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR § 3101[a] states that, "[g]enerally, there should be full disclosure of all matter material and necessary in the prosecution or defense of an action." Notwithstanding the liberal standard to be applied to what is material and necessary, and in light of the court's decision to deny class certification, Plaintiffs' interrogatories are overbroad and unduly burdensome and, accordingly, the Plaintiffs' motion is denied (*see Feder v Staten Island Hospital*, 8 AD3d 141 [1st Dept 2004]).

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<sup>8</sup> Specifically, Defendants objected to Plaintiffs' interrogatories on two grounds:

1. Plaintiffs' Interrogatories contain a number of requests related to information for individuals other than the named Plaintiffs. No class has been certified at this time and discovery related to the merits of any potential class is overbroad and premature. These discovery requests go beyond discovery related to ascertaining the dimensions of the group of individuals who share plaintiffs' grievance and are instead directed at determining liability for an unnamed group of individuals.
2. Plaintiffs' Interrogatories contain a number of requests seeking information for individuals in a class other than the named Plaintiffs' class. These requests go beyond discovery related to the claims and defenses in this case and are not likely to lead to the discovery of admissible evidence. In fact the named Plaintiffs were clearly outside sales loan officers and discovery should not be had on a class basis when the named Plaintiffs are so clearly not members of the purported class.

(Ex. "B" to Plaintiffs' Motion to Compel [Motion Seq. No. 8 at ¶¶ 1, 2]).

*Motion Seq Nos 9 and 13*

The Plaintiffs move “for an order confirming that Defendants have failed to comply with CPLR § 3123 and thus have admitted certain facts” and the Defendants cross-move for an order pursuant to CPLR 3103 for a protective order striking Plaintiffs’ Requests to Admit Facts (“Notice to Admit”) (Motion Seq. Nos. 9 and 13, respectively).

On July 23, 2013 the Plaintiffs served their Notice to Admit on the Defendants. On August 16, 2013, the Defendants filed a motion for a protective order to strike Plaintiffs’ Notice to Admit. The Defendants withdrew the motion for a protective order in an effort to resolve the dispute. Plaintiffs thereafter served a second Notice to Admit on September 16, 2013. Defendants did not respond to the Plaintiffs’ second Notice to Admit because they were arguably “beyond the permissible scope of a notice to admit”. According to the Defendants, Plaintiffs’ requested admissions of “material issues or ultimate or conclusory facts” and “admissions as to each and every element of Plaintiffs’ claims”, which have been denied by the Defendants (Affirmation in Opposition at ¶¶ 9-11 [Motion Seq. No. 9]).

Notwithstanding the parties’ efforts to resolve the issues relating to Plaintiffs’ second Notice to Admit, the instant motion and cross motion were made.

"A notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6 [1st Dept 2000]).

Here, because the Plaintiffs’ notice to admit improperly demanded that Defendants concede matters that were in dispute and “not clear-cut matters of fact about which there could be no reasonable dispute”, the Defendants had no obligation to furnish admissions in response to Plaintiffs’ notice (*see Orellana v City of New York*, 203 AD2d 542, 543 [2d Dept 1994]).

Accordingly, the Plaintiffs’ motion “for an order confirming that Defendants have failed to comply with CPLR § 3123 and thus have admitted certain facts” is denied except for facts numbered 1 and 2 which are admitted. The Defendants’ cross motion for a protective order is granted to the extent of vacating and striking from Plaintiffs’ Notice to Admit items numbered 3 through 33.

*Motion Seq. No. 12*

The Plaintiffs move for an order quashing 13 non-party subpoenas issued by the Defendants on January 10, 2014.<sup>9</sup> At the time the subpoenas were issued, party depositions had not been concluded, in contravention of this court's Preliminary Conference Order which stated that "[d]epositions of non-party witnesses shall not be noticed until the conclusion of all party depositions unless otherwise agreed by all part(ies) or ordered by the Court" (Ex. "A" to Motion to Quash at ¶ 5[c]).

The Supreme Court has broad discretion in the supervision of discovery (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]). Rule 13(a) of the Rules of the Commercial Division of the Supreme Court (Uniform Rules for the New York State Trial Courts § 202.70) provides that "[p]arties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders."

Inasmuch as the Defendants have failed to comply with the scheduling order set forth in the November 1, 2013 Preliminary Conference Order, the Plaintiffs' motion to quash the 13 non-party subpoenas issued by the Defendants is granted.

**Conclusion**

Based on the foregoing, it is hereby

Ordered that the Plaintiffs' motions, *inter alia*, for an order to compel pursuant to CPLR 3124 certain documents and e-discovery are denied (Motion Seq. Nos. 7 and 10); and, it is further

Ordered that the Plaintiffs' motion, *inter alia*, for an order to compel pursuant to CPLR 3124, Defendants to answer interrogatories dated September 17, 2013 is denied (Motion Seq. No. 8); and, it is further

Ordered that the Plaintiffs' motion for an order pursuant to CPLR 3123 is denied, except for those facts set forth in numbers 1 and 2 of the Plaintiffs' Requests to Admit Facts dated September 16, 2013, which are admitted (Motion Seq. No. 9); and, it is further

Ordered that the Defendants' cross motion for a protective order pursuant to CPLR 3103 is granted to the extent of vacating and striking from the Plaintiffs' Request to Admit Facts dated

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<sup>9</sup> The non-party subpoenas were served upon the 10 individual who submitted affidavits in support of Plaintiffs' prior application for class certification. The remaining three non-party subpoenas were served upon the wife of Bruce Saper, the girlfriend of Michael Carni, and Tim Holman, whose house Carni frequently stayed at during his employment with Continental.

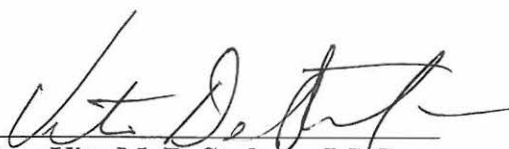
September 16, 2013, those items numbered 3 through 33; and the motion is, in all other respects, denied (Motion Seq. No. 13); and, it is further

Ordered that the Defendants' cross motion for a protective order is granted to the extent that the Defendants shall provide electronically stored information and responsive documents set forth in the Defendants' November 1, 2013 letter and annexed to the Defendants' cross motion at exhibit "5", and the cross motion is, in all other respects, denied (Motion Seq. No. 11); and, it is further

Ordered that the branch of Plaintiffs' motion for an order quashing 13 non-party subpoenas issued by the Defendants on January 10, 2014 is granted and the motion is, in all other respects, denied (Motion Seq. No. 12).

This constitutes the decision and order of the court.

Dated: July 3, 2014



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
JUL 07 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE