

Nick v Schneider

2014 NY Slip Op 33901(U)

September 25, 2014

Supreme Court, Nassau County

Docket Number: 011894-13

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
NORMAN NICK, individually, and as President
of The Ashley Group, THE ASHLEY GROUP and
THE MAST GROUP INC.,

Plaintiffs,

TRIAL/IAS PART: 15
NASSAU COUNTY

Index No: 011894-13
Motion Seq. No. 3
Submission Date: 8-19-14

-against-

IRWIN N. SCHNEIDER, JOEL C. SCHNEIDER,
ESQ., ESTATE OF HERBERT H. SOMMER, ESQ.,
Deceased, and SOMMER & SCHNEIDER, P.A.,

Defendants.

-----x
The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Correspondence dated August 20, 2014.....x
- Bolton Affirmation in Opposition.....x
- I. Schneider Affirmation in Opposition and Exhibits.....x
- Reply Affirmation and Exhibits.....x

This matter is before the Court for decision on the motion by Plaintiffs Norman Nick, Individually, and as President of the Ashley Group, The Ashley Group and The Mast Group, Inc. ("Plaintiffs") filed June 2, 2014 and submitted August 19, 2014. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs move 1) for an Order, pursuant to CPLR § 3124, compelling Defendant Irwin N. Schneider ("Irwin") to fully and reasonably comply and respond to Plaintiffs' Demand for Production of Documents Limited to Issues of Jurisdiction, and Demand for Production of

Electronically Stored Information Limited to Issues of Jurisdiction; 2) for an Order, pursuant to CPLR § 3124, compelling Defendants Joel C. Schneider, Esq. (“Joel”) and Sommer & Schneider, P.A. (“S&S”) to fully and reasonably comply and respond to Plaintiffs’ Demand for Production of Documents Limited to Issues of Jurisdiction over Defendant Irwin N. Schneider, and Demand for Production of ESI Limited to Issues of Jurisdiction over Defendant Irwin N. Schneider; 3) for a conditional order, pursuant to CPLR § 3126, against Defendants Joel and S&S,¹ if they refuse to obey an order for disclosure or wilfully fail to disclose information which the Court finds ought to have been disclosed, granting such penalties and sanctions against said Defendants, as set forth in CPLR § 3126, including but not limited to striking the disobedient party’s answer, finding that the issues to which the information is relevant shall be deemed resolved for purposes of this action or any pending motions in accordance with the claims of the party obtaining the order, rendering a judgment by default against the disobedient party, and imposing monetary sanctions and attorney’s fees; and 4) for a conditional order, pursuant to CPLR § 3126, against Defendant Irwin for refusal to obey an Order for disclosure or wilfully failing to disclose information which the Court finds ought to have been disclosed, granting such penalties and sanctions against said Defendant as set forth in CPLR § 3126, including but not limited to striking the disobedient party’s answer, finding that the issues to which the information is relevant shall be deemed resolved for purposes of this action or any pending motions in accordance with the claims of the party obtaining the order, rendering a judgment by default against the disobedient party, and imposing monetary sanctions and attorney’s fees.

Defendant Irwin opposes the motion.

Defendants Joel and S&S oppose the motion.

¹ Plaintiffs include Irwin N. Schneider in this paragraph, apparently in error, as the word “and “ appears between “Joel” and “S&S” and Plaintiffs request similar relief as to Irwin in paragraph 4 of their Notice of Motion.

B. The Parties' History

The parties' history is outlined in detail in a prior Order ("Prior Order") of the Court dated April 3, 2014 and the Court incorporates the Prior Order by reference as if set forth in full herein. In the Prior Order, which addressed the prior motion ("Prior Motion") by Irwin, a resident of the State of Florida, to dismiss this action against him on the grounds of lack of personal jurisdiction, the Court reserved decision on the Prior Motion and permitted discovery on the issue of personal jurisdiction so that the parties may submit supplemental papers in support of their respective positions on the Prior Motion.

In support of the motion now before the Court, counsel for Plaintiffs affirms that, at a conference on April 10, 2014, the Court set a date of May 2, 2014 for Plaintiffs to serve discovery demands and May 30, 2014 for responses to be served.² On April 22, 2014, Plaintiffs' Demand for Documents ("Document Demand") and Demand for Electronically Stored Information ("ESI Demand") directed to Irwin ("Irwin Demands") were served on then-counsel for Irwin (who is now proceeding *pro se*) and Plaintiffs' Demands directed to Joel and S&S ("Joel Demands") were served on counsel for Joel and S&S, and Plaintiffs provide copies of those Demands. On May 14, 2014, Plaintiffs received Irwin's Response/Objections to Plaintiff's Request for Production of Documents and ESI ("Irwin's Response") (Ex. 5 to Weber Aff. in Supp.)³ On May 14, 2014, Plaintiffs also received Schneider's Response to the Document Demand and Schneider's Response to the ESI Demand ("Schneider Responses") (Exs. 6 and 8 to Weber Aff. in Supp.).

Plaintiffs' Document Demand directed to Irwin contains 39 demands and his ESI Demand contains 32 demands. The Document Demands include demands for documents including, but not limited to, 1) 2011, 2012 and 2013 tax returns of Irwin and his wife, 2) copies of passports for the period of 2011 to the present for Irwin and his wife, and 3) the name, address

² As noted by Plaintiffs' counsel, whose law firm is located in Florida, he did not attend the April 10, 2014 conference but communicated with the attorney who attended the conference on his behalf (*see* Weber Aff. in Supp. at n. 1).

³ There is some confusion regarding the designation of the Exhibits annexed to the Weber Affirmation in Support. By way of example, Plaintiffs' counsel affirms that Irwin's Response to the Demands is Exhibit 6 to the Weber Affirmation in Supp. (*see* Weber Aff. in Supp. at ¶ 7), but that document is Exhibit 5 to the Weber Affirmation in Support. The Court will refer to the Exhibits as they appear in the original motion papers.

[* 4]

and account number of all checking and savings accounts maintained by Irwin and his wife from 2010 to the present. The Irwin Demand also requests extensive documentation relating to this action, including documents relating to stock certificates, promissory notes, wire transfers and bank records. In his Response, Irwin 1) objects to the Demands to the extent that they call for documents protected by privilege and/or the work product doctrine; 2) objects to producing documents that are confidential or contain private information; 3) objects to the Demands to the extent that they impose an obligation greater than that imposed by the CPLR; 4) objects to the Demands as overly broad, burdensome and/or duplicative; and 5) objects to the Demands to the extent that they exceed the limited scope of discovery granted by the Court in the Prior Order.

In response to the ESI Demand, Joel objects to many of Plaintiffs' requests on the grounds that they are "overbroad and burdensome and not properly limited in time or scope." Joel agrees to produce "electronic information concerning non-privileged communications with Irwin Schneider from January 14, 2010 to October 1, 2013 to the extent it exists and can be located." Joel objects to several other requests on the grounds that they are "not limited to jurisdiction issues" and offers to produce the same electronic information regarding non-privileged communications with Irwin. In response to the Document Demand, Joel objects to numerous requests on the grounds that they are "not limited to the issue of jurisdiction over Irwin Schneider." Joel agrees to produce documents responsive to Document Demand items 6, 9, 10, 11, 16, 17, 21, 22, and 25 to the extent that they exist and can be located.

Counsel for Plaintiffs affirms that on May 24, 2014, he received a "255 page package purporting to be a response to Plaintiffs['] Demands" from Joel/S&S" (Weber Aff. in Supp. at ¶ 14). Counsel for Plaintiffs outlines his objections to that production ("Joel/S&S Production") which include that 1) the Production did not designate the specific Demand to which the document corresponded; and 2) 45 of the pages constituted a Memorandum relating to BancCorp Capital which, while concededly relevant under the "totality of circumstances" and to demonstrate that "Irwin submitted the memorandum to his son to ask if he was interested in representing the client" (Weber Aff. in Supp. at ¶ 16(b)), allegedly was not responsive to Plaintiffs' Demand. While characterizing the Joel/S&S Production as "non responsive" (Weber Aff. in Supp. at ¶ 17), Plaintiffs' counsel also submits that the Joel/S&S Production is evidence that "[Irwin] has engaged in substantial business activities in New York." Plaintiffs' Counsel

[* 5]

maintains that, although the Joel/S&S Production provides evidence of Irwin's connection to New York, "[P]laintiff is still entitled to receive meaningful and reasonable responses to the ESI and Document Production Demands" (Weber Aff. in Supp. at ¶ 17).

In opposition, counsel for Joel/S&S ("Joel Counsel") submits that "Plaintiff complains that the documents produced support his position" (Bolton Aff. in Opp. at ¶ 2). With respect to Joel/S&S' position that they will only agree to produce documents from January 14, 2010 to October 1, 2013, Joel Counsel affirms that Joel/S&S asserted this objection because 1) the Complaint alleges that the events in question started in January 2010; and 2) this action was commenced on October 1, 2013.

Joel Counsel also affirms that Joel/S&S experienced a "crash" of their email program (Bolton Aff. in Opp. at ¶ 5) and no emails prior to that date can be retrieved. The Court has already directed that Joel appear for a deposition about this crash, and Joel/S&S have conducted a diligent search of all other records available, including computer files, and have advised Joel Counsel that no additional documents responsive to Plaintiffs' requests exist, beyond those already produced. Joel Counsel submits that Plaintiffs' characterization of the Joel/S&S Production as "dilatatory" (*see* Weber Aff. in Supp. at ¶ 14) is misplaced in light of the fact that Joel/S&S provided their Production within 27 days of the Demands and produced all responsive documents within 39 days thereof. Moreover, Joel Counsel submits, Plaintiffs' objection to the manner in which documents were produced is without merit, as the documents were produced in the manner in which they were maintained in the ordinary course of business, as required by CPLR § 3122(c).

Irwin opposes the Demands on the grounds *inter alia* that 1) Plaintiffs' request for copies of monthly statements issued to Irwin and his wife from the Boca West Country Club is not relevant to the allegations of fraud in the Complaint; 2) Plaintiffs' requests for tax returns from 2011, 2012 and 2013 and passport information of Irwin and his wife are not relevant to this action; and 3) other documents requested are not relevant to the limited jurisdictional issue that was the subject of the Prior Order.

Irwin also addresses the allegations in paragraphs 22 through 25 of the Complaint (Ex. 26 to Weber Reply Aff.) concerning corporations under the management or control of Martin Zoyes ("Zoyes") and/or Peter Ruggeri ("Ruggeri"). Irwin provides affidavits of Zoyes (Ex. 2 to Irwin Aff. in Opp.) and Ruggeri (*id.* at Ex. 3). Zoye and Ruggero affirm that, at all relevant times, they were the Chief Financial Officers of Hi Score Corporation, a Florida corporation. Zoyes and

[* 6]

Ruggero affirm that 1) they have never spoken with or consulted Irwin in any business or personal capacity; 2) they do not know, and have never met Irwin; 3) Irwin has never provided Zoyes, Ruggero or Hi Score Corporation with legal services, business services or consulting services, and Zoyes, Ruggero and Hi Score Corporation have never had business dealings with Irwin; 4) at all relevant times, Hi Score's corporate counsel was Joel Schneider, Esq. of Sommer & Schneider; and 5) it has always been their understanding that, even when Joel's law partner Herb Sommer was alive, Joel performed all of his legal work by himself.

In reply, Plaintiffs submit *inter alia* that 1) the fact that certain emails produced support Plaintiffs' contention that Irwin engaged in substantial business activities in New York "does not mean [that Joel] is absolved from providing meaningful and reasonable responses to the ESI and Document Production Demands" (Weber Reply Aff. at ¶ 15); and 2) contrary to Joel/S&S' position, many of the documents requested are relevant to the issue of jurisdiction.

C. The Parties' Positions

Plaintiffs submit that the Court should require Defendants Irwin, Joel and S&S to produce all of the documents in Plaintiffs' Demands, and contend that Defendants are engaged in dilatory tactics by virtue of their failure to produce all of the documents and ESI requested. Plaintiffs argue that the fact that some of the documents produced are relevant to the issue of personal jurisdiction should not relieve Defendants of their obligation to respond fully to Plaintiffs' demands.

Joel/S&S oppose Plaintiffs' motion, noting that they promptly provided hundreds of documents to Plaintiffs which, Plaintiffs concede, are relevant to the jurisdictional issue raised in the Court's Prior Order. Irwin opposes Plaintiffs' motion, submitting that many of the documents sought are not relevant to the jurisdictional issue, or to the allegations in the Complaint generally, and that he does not have dominion or control over others.

RULING OF THE COURT

CPLR § 3124 provides as follows:

If 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 § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Workman v. Town of Southampton*, 892 N.Y.S.2d 481, 482 (2d Dept. 2010), quoting *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (2d Dept. 2008). The court has broad discretion to supervise disclosure to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice. *Eber Bros. v. Ribowsky*, 266 A.D.2d 499, 500 (2d Dept. 1999).

The Court denies the motion. Plaintiffs have received extensive discovery which, by their own admission, contains information that supports their position that the Court has personal jurisdiction over Irwin. Under these circumstances, and in consideration of the Prior Order, the Court concludes that Defendants have complied with their discovery obligations and denies the motion.

In light of the foregoing, with respect to the Prior Motion (motion sequence number 1), which is on the Court's motion calendar on November 12, 2014, the Court directs counsel for Defendants to submit their supplemental submissions on or before October 17, 2014, directs counsel for Plaintiffs to submit Plaintiffs' supplemental submissions in opposition on or before October 31, 2014 and directs Defendants to submit any reply submissions on or before November 10, 2014. The Court reminds counsel for the parties of their required appearance before the Court for a conference on November 12, 2014 at 9:30 a.m.

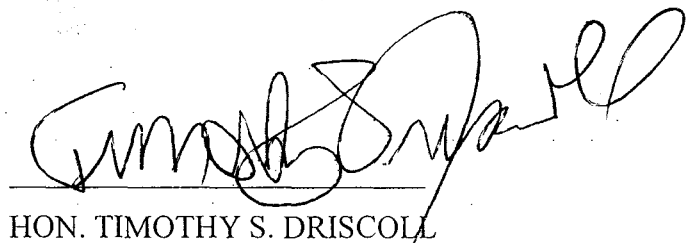
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on November 12, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY
September 25, 2014



HON. TIMOTHY S. DRISCOLL

ENTERED
OCT 07 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE