Hochheiser v Alin
2015 NY Slip Op 31395(U)
July 8, 2015
Supreme Court, Suffolk County
Docket Number: 28100-2013
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX NO. 28100-2013

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-29-14
ADJ. DATE 10-28-14
Mot. Seq. # 001 - MD; 002 - MG; 003 - MD

LEON J. HOCHHEISER, and LEON J. HOCHHEISER, CO., INC., Plaintiff(s), - against - STEVEN ALIN and PENSION DESIGN SERVICES, INC., Defendant(s).	**Ettelman & Hochheiser, P.C.** Attorneys for Plaintiff 100 Quentin Roosevelt Boulevard Suite 401 Garden City, New York 11530-4850 **Lamb & Barnosky, LLP** Attorneys for Defendants 534 Broadhollow Road, Suite 210 Post Office Box 9034 Melville, New York 11747-9034

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 4, 2014, and supporting papers, including Memorandum of Law; (2) Notice of Cross Motion by the defendant, dated May 15, 2014, and supporting papers; (3) Notice of Motion by the defendant, dated August 14, 2014, and supporting papers, including Memorandum of Law; (4) Affirmation in Opposition by the plaintiff, dated September 3, 2014, and supporting papers, including Memorandum of Law; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the plaintiffs' motion (seq. #001), which seeks an order of preclusion pursuant to CPLR 3126 and/or to compel a disclosure response to plaintiffs' December 27, 2013 First Request for Document Demands pursuant to CPLR 3124, is hereby denied; and it is further

ORDERED that the defendants' motion (seq. #002), which seeks a protective order pursuant to CPLR 3103(a), striking plaintiff's First Request for Document Demands, is hereby granted; and it is further

ORDERED that the defendants' motion (seq. #003), which seeks an order granting summary judgment against the plaintiffs and in favor of the defendants pursuant to CPLR 3212, is hereby denied; and it is further

ORDERED that counsel for plaintiffs shall promptly serve a copy of this Order upon counsel for defendants via First Class mail and shall promptly thereafter file the affidavit of such service with the County Clerk.

In this action, the plaintiff's allege that the defendants breached the parties' Agreement, and its amendments, related to sharing of fees for certain financial and actuarial services. In the course of this litigation, the plaintiffs served upon defendant a Request for Document Demands, dated December 27, 2013. Plaintiff now seeks an order of preclusion pursuant to CPLR 3126 and/or an order compelling defendants to response to plaintiffs' Demands. Defendants move for a protective order protective order pursuant to CPLR 3103(a), as well as for an order granting summary judgment in their favor pursuant to CPLR 3212.

Plaintiffs' Motion for Preclusion (seq. # 001) and
Defendants' Motion for a Protective Order (seq. # 002)

Where a party fails or refuses to obey an order for disclosure or wilfully fails to disclose information that the court finds should have been disclosed, CPLR §3126 permits courts to fashion such orders "as are just." (see CPLR §3126; *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 917 NYS2d 68 [2010]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 833 NYS2d 150 [2d Dept 2007]). The nature and degree of a penalty to be imposed on a motion under CPLR §3126 for alleged discovery violations is addressed to the broad discretion of the court (see *Wolf v Flowers*, 122 AD3d 728, 996 NYS2d 169 [2d Dept 2014]; *Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 945 NYS2d 756 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 938 NYS2d 101 [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, deliberate and contumacious (see *Javeed v 3619 Realty Corp.*, ___ AD3d ___, ___ NYS3d ___, 2015 NY Slip Op 05447 [2d Dept 2015]; *Wolf v Flowers*, 122 AD3d 728, 996 NYS2d 169 [2d Dept 2014]). *Dimoulas v Roca*, 120 AD3d 1293, 993 NYS2d 56 [2d Dept 2014]; *Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739, 945 NYS2d 756 [2d Dept 2012]; *Moog v City of New York*, 30 AD3d 490, 820 NYS2d 593 [2d Dept 2006]; *Assael v Metropolitan Tr. Auth.*, 4 AD3d 443, 772 NYS2d 364 [2d Dept 2004]).

Plaintiff's argument that defendants waived their right to challenge the demands for disclosure made in the notice of discovery and inspection is rejected. Although the failure of a party to challenge a notice for discovery and inspection within the time specified by CPLR 3122 forecloses inquiry into the propriety of the information sought, an exception exists as to demands which are palpably improper (see *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; *Giano v Ioannou*, 78 AD3d 768, 911 NYS2d 398 [2d Dept 2010]; *Otto v Triangle Aviation Servs.*, 258 AD2d 448,

684 NYS2d 612 [2d Dept 1999]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314, 619 NYS2d 769 [2d Dept 1994]). A disclosure request will be considered palpably improper if it is vague or is overly broad and burdensome (see *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545; *Velez v South Nine Realty Corp.*, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]; *Holness v Chrysler Corp.*, 220 AD2d 721, 633 NYS2d 986 [2d Dept 1995]; *Zambelis v Nicholas*, 92 AD2d 936, 460 NYS2d 360 [2d Dept 1983]).

CPLR 3120(2) requires that notices for discovery "shall set forth the items to be [produced] by individual item or by category, and shall describe each item and category with reasonable particularity." Supervision of disclosure is generally left to the sound discretion of the trial court (*Hirschfeld v Hirschfeld*, 69 NY2d 842, 514 NYS2d 704 [1987]; *Coven v Lutheran Med. Ctr.*, 2 AD3d 767, 769 NYS2d 412 [2d Dept 2003]; *Argumedo v 303 Tenants Corp.*, 246 AD2d 616, 667 NYS2d 305 [2d Dept 1998]).

A party in litigation may not use a notice of disclosure to conduct an impermissible fishing expedition (see *Fascaldi v Fascaldi*, 209 AD2d 578, 619 NYS2d 99 [2d Dept 1994]). The proper procedure requires that the party seeking discovery and inspection pursuant to CPLR 3120 initially make use of the deposition and related procedures provided by the CPLR to ascertain the existence of such documents (see *Haroian v Nusbaum*, 84 AD2d 532, 443 NYS2d 91 [2d Dept ; 1981). The proper procedure to be followed in order to compel the discovery of documents is to prepare and serve a notice for discovery and inspection which describes the documents sought with reasonable particularity, so as to permit the court, if necessary, to decide whether the documents in question should be shielded from discovery (see *American Reliance Ins. Co. v National General Ins. Co.*, 174 AD2d 591, 571 NYS2d 493 [2d Dept 1991]).

Notices for discovery and inspection are overly broad where they fail to specify the documents sought with "reasonable particularity" (see CPLR 3120[2]; *Degliuomini v Degliuomini*, 308 AD2d 501, 764 NYS2d 846 [2d Dept 2003]; *Finn v Town of Southampton*, 266 AD2d 429, 698 NYS2d 539 [2d Dept 1999]; *Fascaldi v Fascaldi*, 209 AD2d 578, 619 NYS2d 99 [2d Dept 1994]; *Fallon v CBS Inc.*, 124 AD2d 697, 508 NYS2d 209 [2d Dept 1986]). Further, a discovery notice is improper where it states broad categories of subject matter and asks for any documents relating to those categories without further specification (see *Harrison v Bayley Seton Hospital, Inc.*, 247 AD2d 513, 668 NYS2d 912 [2d Dept 1998]; *Fascaldi v Fascaldi*, 209 AD2d 578, 619 NYS2d 99 [2d Dept 1994]; *American Reliance Ins. Co. v National General Ins. Co.*, 174 AD2d 591, 571 NYS2d 493 [2d Dept 1991]).

Courts have held that the use of the descriptions "any," "all" or "any and all" renders the notice for discovery and inspection palpably improper (see *Hudson Valley Tree, Inc. v Barcana, Inc.*, 114 AD2d 400, 494 NYS2d 124 [2d Dept 1985]; *Jonassen v A.M.F., Inc.*, 104 AD2d 484, 479 NYS2d 81 [2d Dept 1984]; *Ganin v Janow*, 86 AD2d 857, 447 NYS2d 325 [2d Dept 1982]; *Haroian v Nusbaum*, 84 AD2d 532, 443 NYS2d 91 [2d Dept 1981]). Where a discovery demand is overly broad, pruning of the demand by the court will be inadequate to correct the demand's deficiencies (see *Jonassen v A.M.F., Inc.*, 104 AD2d 484, 479 NYS2d 81 [2d Dept 1984]; *Ganin v Janow*, 86 AD2d 857, 447 NYS2d 325 [2d Dept 1982]). In such situations, a protective order is properly granted without prejudice to plaintiffs' right to serve a new and proper notice after they have deposed the defendants to ascertain the specific documents pertinent to their causes of action (see *Carter v Andriani*, 88 AD2d 799, 450 NYS2d 494 [1st Dept 1982]).

While CPLR 3101(a) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action, it is equally true that unlimited disclosure is not required (*City of Mount Vernon v Lexington Ins. Co.*, 232 AD2d 358, 648 NYS2d 311 [2d Dept 1996]; *Ackerman v Landes*, 125 AD2d 620, 510 NYS2d 164 [2d Dept 1986]). The supervision of such disclosure is generally left to the sound discretion of the trial court (*Coven v Lutheran Med. Ctr.*, 2 AD3d 767, 769 NYS2d 412 [2d Dept 2003]; *Argumedo v 303 Tenants Corp.*, 246 AD2d 616, 667 NYS2d 305 [2d Dept 1998]).

While the "material and necessary" standard set forth in CPLR 3101 (a) is to be liberally construed (see *Shanahan v Bambino*, 271 AD2d 519, 706 NYS2d 139 [2d Dept 2000]), this does not mean that litigants have carte blanche to demand production of whatever documents they speculate might contain something helpful (see *Vyas v Campbell*, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). The party seeking disclosure must demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to discovery of information bearing on the claims (*id.*; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]; *Herbst v Bruhn*, 106 AD2d 546, 483 NYS2d 363 [2d Dept 1984]).

Pursuant to CPLR §3103(a), "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Since the supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court, absent an improvident exercise of that discretion, its determination will not be disturbed (see *Ramcharran v New York Airport Services, LLC*, 108 AD3d 610, 969 NYS2d 497 [2d Dept 2013]; *Lolly v Brookdale Univ. Hosp. & Med. Ctr.*, 45 AD3d 537, 537, 844 NYS2d 718 [2d Dept 2007]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 685 NYS2d 764 [2d Dept 1999]).

Here, the plaintiff's eight page Request for Documents, which is replete with the terms "any" and "all," is clearly overly broad and, therefore, palpably improper (*Fallon v CBS Inc.*, 124 AD2d 697, 508 NYS2d 209 [2d Dept 1986]). Consequently, the plaintiffs' motion for an order of preclusion is denied, and the defendants' motion for a protective order is granted.

Defendants' Motion for Summary Judgment (seq. # 003)

It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance by the Court to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*id.*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]). Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepcos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and

considered in a light most favorable to the opposing party (see *Dowsey v Megerian,* 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department,* 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo,* 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]).

In relevant part, CPLR 3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." When a party moving for summary judgment makes a prima facie showing of entitlement to summary judgment, it becomes incumbent upon the party opposing the motion to come forward with evidentiary facts rebutting that showing and demonstrating the existence of a triable issue of fact (*Federal Deposit Ins. Corp. v Hyer*, 66 AD2d 521, 413 NYS2d 939 [2d Dept 1979], *app dismd without op*, 47 NY2d 951 [1979]; *Braun v New York Life Ins. Co.*, 55 AD2d 99, 389 NYS2d 927 [4th Dept 1976], *affd* 42 NY2d 1020, 398 NYS2d 657 [1977]; *Henri-Lynn Realty, Inc. v Huang*, 159 AD2d 486, 552 NYS2d 357 [2d Dept 1990]).

Notwithstanding defendants' contentions to the contrary, there exist questions of fact as to the parties' respective understandings concerning the fee splitting arrangement under their various Agreements and amendments thereto, including the parties' oral agreement under which they started operating in 1987. Therefore, summary judgment in favor of the defendants is denied.

This constitutes the Decision and Order of the Court.

Dated: July 8, 2015

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION