

**Integrated Voice & Data Sys., Inc. v Groh**

2015 NY Slip Op 32673(U)

August 3, 2015

Supreme Court, Erie County

Docket Number: 2014-809461

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

INTEGRATED VOICE & DATA SYSTEMS, INC., d/b/a  
COMTEL and COMTEL VOIP, INC.,

Plaintiffs.

- against

**COMMERCIAL DIVISION  
DECISION AND ORDER**

MICHAEL GROH,  
FRANK LEWANDOWSKI, and  
AT TECHNOLOGY, INC.,

INDEX NO. 2014-809461

Defendants.

**BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice**

**APPEARANCES: KAVINOKY COOK LLP**  
Deborah J. Chadsey, Esq., Of Counsel  
Attorneys for Plaintiff

**WOJTAN, VALONE & MELIN P.C.**  
Gary J. Wojtan, Esq., Of Counsel  
Attorneys for Defendants

**WALKER, J.**

Plaintiffs, Integrated Voice & Data Systems, Inc. d/b/a Comtel and Comtel VOIP, Inc. (collectively, "Comtel"), have applied, pursuant to CPLR §3126; 22 NYCRR §130-1.1 *et. seq.*; and §202.70 of the Uniform Civil Rules for the Supreme Court and the County Court, Rule 12, for an order imposing costs and sanctions against Defendants, Michael Groh ("Groh"), Frank Lewandowski ("Lewandowski"), and AT Technology, Inc. ("AT Technology"), and striking their Answers, dated September 11, 2014 (Lewandowski), September 15, 2014 (Groh), and September 29, 2014 (AT Technology) (collectively, "Defendants' Answers"). Comtel contends that Defendants have: (i)

unnecessarily and unduly delayed this action by failing to cooperate in the discovery process; (ii) failed to comply with this Court's Order, granted on April 28, 2015 and entered on May 13, 2015; (iii) failed to appear for the pretrial conference scheduled with the Court on June 2, 2015; and (iv) partaken in a pattern of bad faith acts aimed at delaying or otherwise obfuscating Defendants' obligations to comply with the rules of procedure.

### BACKGROUND

Comtel commenced this action on August 20, 2015. In it, Comtel contends that Defendants unlawfully misappropriated its confidential and proprietary business information and trade secrets. Groh and Lewandowski are former employees of Comtel who, at the time Comtel commenced the action, had left Comtel to be employed by AT Technology. Comtel and AT Technology are competitors. The Complaint, dated August 20, 2014, alleges six causes of action against the Defendants, including: misappropriation of trade secrets; unfair competition; tortious interference with contract; tortious interference with prospective contractual relationships; conversion; and breach of the duty of loyalty.

On September 18, 2014, Comtel served Defendants with Plaintiffs' First Notice for Discovery and Inspection (the "Demands") and notices to take the depositions of Groh and Lewandowski. The Demands sought the production of the following items for inspection and copying:

- all work computer(s), smart phone(s), iPad(s), USB(s), external hard drive(s) and/or other electronic devices used by Groh during the relevant time period;

- all work computer(s), smart phone(s), iPad(s), USB(s), external hard drive(s) and/or other electronic devices used by Lewandowski during the relevant time period;
- all personal computer(s), smart phone(s), iPad(s), USB(s), external hard drive(s) and/or other electronic devices used by Groh during the relevant time period;
- all personal computer(s), smart phone(s), iPad(s), USB(s), external hard drive(s) and/or other electronic devices used by Groh during the relevant time period<sup>1</sup>.

Having failed to receive a timely response to the Demands, on October 14, 2014, Comtel's counsel sent a letter to Defendants' counsel requesting a response and proposing dates for the scheduling of depositions. Comtel's counsel sent a followup email to counsel on October 23, 2014. Defendants' counsel failed to respond to both the letter and the email, which prompted Comtel to make a compel on November 5, 2014.

On December 15, 2014, following oral argument on the motion to compel, the Court granted the motion, in part, from the bench. The Court's decision was memorialized in a confirming Order, dated January 12, 2015 (the "Phase One Order") and is also reflected in the transcript of the December 15, 2014 proceedings attached thereto. The Phase One Order provides, in relevant part, as follows:

**ORDERED**, that . . . Lewandowski shall produce for inspection to Plaintiff's expert, all computer(s), smart phone(s), iPad(s), USB(s), external hard drive(s) and/or other electronic devices that he used or had available to him during the time period of May 2012 through June 2014; and it is further

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<sup>1</sup>In all circumstances, the "relevant time period" was defined as June 2012 to the date of the Demands.

**ORDERED**, that once Plaintiff's forensic expert has completed their forensic analysis, a document will be prepared to be shared only with counsel for the parties present and the Court; and it is further

**ORDERED**, that within twenty-one (21) days of service of this Order with notice of entry to Defendants' counsel, . . . Lewandowski shall produce such items for inspection to Plaintiff's forensic expert; and it is further

**ORDERED**, that Plaintiff's forensic expert shall have thirty (30) days from the date that . . . Lewandowski produces the items for inspection in which to complete their electronic forensic analysis; and it is further

**ORDERED**, that Plaintiff's forensic expert shall maintain a copy of the files retrieved from the items produced by . . . Lewandowski in their possession until the completion of proceedings; and it is further

**ORDERED**, that after the completion of phase one of the electronic forensic analysis, the parties shall notify the Court in writing if there are issues that need to be determined by the Court . . . (emphasis in original).

In accordance with the terms of the Phase One Order, on March 6, 2015, Comtel filed with the Court the affidavit of its forensics expert, Christopher D. Nowak, a Computer Forensic Examiner employed by DIGITS, LLC ("DIGITS"), sworn to on March 3, 2015 ("Nowak Affidavit"). The Nowak Affidavit details the manner in which DIGITS completed phase one of the electronic forensic analysis and determined that, *inter alia*, Lewandowski sent Comtel's clients' business information to Groh and to himself at their AT Technology office emails after he left Comtel's employment. The Nowak Affidavit forms the basis for Comtel to seek phase two of the electronic discovery contemplated by the Phase One Order.

Between March 6, 2015 and April 21, 2015, Comtel attempted to work with Defendants to proceed with phase two of the electronic discovery, but Defendants refused to produce any additional discovery. Accordingly, on April 21, 2015, Comtel made a further application to compel. The application also sought to have the Court compel Lewandowski to provide the password to his Time Warner email account, as ordered by the Phase One Order, with which he had failed to comply. While Defendants left Comtel with no choice other than to make the application, they did not oppose it.

On April 28, 2015, the Court emailed the parties' respective counsel that it had granted the application, and directed Comtel to submit a proposed order, which the Court ultimately issued on May 13, 2015 (the "Phase Two Order"). The Phase Two Order provides, in relevant part, as follows:

**ORDERED**, that . . . Lewandowski and Groh shall produce all AT Technology electronic devices utilized by . . . [them], including their AT Technology office computers and handheld electronic devices used in the course of their employment, whether owned by AT Technology or personally, for inspection to Plaintiffs' forensic expert; and it is further

**ORDERED**, that . . . Lewandowski shall produce all electronic devices used or made available to him during the time period of May 2012 through June 2014, as well as his username and password for the Time Warner e-mail account (mrmrsyp@roadrunner.com), as required by the terms of the Court's January 12, 2015 Order; and it is further

**ORDERED**, that within fourteen (14) days of service of this Order with notice of entry to Defendants' counsel, . . . Lewandowski and Groh shall produce such items for inspection to Plaintiffs' forensic expert (emphasis in original).

On May 13, 2015, Comtel served Defendants with the Phase Two Order with Notice of Entry and requested that Defendants produce the electronic devices identified therein. On May 20, 2015, Comtel's counsel sent Defendants' counsel a reminder email. Having not received a response to the May 13, 2015 letter or the May 20, 2015 email from Defendants' counsel, on May 26, 2015, Comtel's attorney again wrote to Defendants' counsel stating, *inter alia*, that Comtel would be compelled to make a further application to the Court if Defendants failed to respond by May 29, 2015.

On April 29, 2015, the Court scheduled a pretrial conference for June 9, 2015. The Court rescheduled the conference to June 2, 2015 - at Defendants' counsel's request - because counsel indicated he was unavailable on June 9, 2015. However, Defendants' counsel failed to attend the conference on June 2, 2015. Comtel's counsel appeared for the conference, but it did not proceed due to Defendants' counsel's absence.

As of the June 2, 2015 scheduled conference, Defendants had neither complied with the Phase Two Order or responded to Comtel's counsel's multiple inquiries made on May 13, 20, and 26, 2015. Accordingly, on June 4, 2015, Comtel made the instant application for sanctions.

On June 5, 2015, Defendants' counsel contacted Comtel's counsel's office to inform it that he would make arrangements to have Groh drop off the electronic devices that are the subject of the Phase Two Order directly at DIGITS on the morning of June 9, 2015. Late in the afternoon on June 8, 2015, Defendants' counsel informed Comtel's counsel that Groh would be unable to deliver the electronic devices to DIGITS the following day, as planned, because he needed to be in Rochester that day. Accordingly, the parties' respective counsel agreed that the drop off would be made on June 10, 2015. However, on June 9, 2015, Comtel confirmed that

Groh was in his office at AT Technology in the Town of Tonawanda, New York, on June 9, 2015, and that he had not traveled to Rochester, as had been reported to Comtel. Comtel's counsel informed Defendants' counsel of this revelation in a letter, dated June 9, 2015, to which counsel has not responded.

On June 10, 2015, Defendants finally delivered the electronic devices to DIGITS, which Comtel initially requested via the Demands served approximately nine (9) months earlier on September 18, 2014.

### DISCUSSION

The imposition of sanctions is governed by sections 130-1.1 *et. seq.* of the Rules of the Chief Administrative Judge ("Rules"). Sections 130-1.1(a), 130-1.1(c), and 130-1.2 of the Rules apply to this matter, and provide as follows:

#### Section 130-1.1(a)

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

#### Section 130-1.1(c)

For purposes of this Part, conduct is frivolous if:

. . . (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another . . . .

Section 130-1.2

The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of sanctions or both shall be entered as a judgment of the court. In no event shall the amount of sanctions imposed exceed \$10,000 for any single occurrence of frivolous conduct.

Similarly, CPLR §3126 provides, in relevant part, as follows:

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 pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party.

It took Defendants approximately nine (9) months to comply with the Demands. They did so only after leaving Comtel with virtually no option other than to make multiple applications to the Court - all of which were granted - and upon Comtel's significant expenditure of time and resources, none of which should have been necessary. Defendants often failed to pay Comtel the respect of simply responding to reasonable inquiries and sometimes failed to submit papers in opposition to Comtel's applications.

Over the course of this nine-month period, Defendants exhibited a pattern of dilatory conduct that is frivolous within the meaning of 22 NYCRR §130-1.1(c), and exhibits a wilful disregard of this Court's Orders, in violation of CPLR §3126. Moreover, the preliminary investigation performed by DIGITS demonstrates that Comtel's claims have merit, and

Defendants' defenses are, in many (if not all) respects, untenable.

Defendants' conduct has no basis in law or fact and appears to have been taken for the purpose of, *inter alia*, delaying this matter.<sup>2</sup> Moreover, such conduct has placed unnecessary burdens on Comtel and its attorneys, and has also constituted a misuse of judicial resources (*see Brancoveanu v. Brancoveanu*, 179 AD2d 614, 615 [2<sup>nd</sup> Dept 1992] [awarding \$10,000.00 in sanctions where "[t]he plaintiff's conduct in appealing from the order dated November 17, 1989, not only placed an unnecessary burden on the defendant in having to respond to it but also constituted a misuse of judicial resources"]<sup>3</sup>).

Accordingly, Defendants' Answers are hereby stricken, pursuant to CPLR §3126 (*see Kopin v. Wal-Mart Stores, Inc.*, 299 AD2d 937, 937 [4th Dept 2002] [defendant's failure 'to comply with two court orders directing disclosure, and its protracted delay in providing a partial response to the plaintiff[s'] discovery demands, ... supported an inference that its failure to provide disclosure was willful and contumacious']; *Nunn v. GTE Sylvania, Inc.*, 251 AD2d 1089, 1091 [4th Dept 1998] [plaintiff sustained its burden of proving willfulness where defendant withheld discoverable information, and failed to offer a reasonable excuse for its actions]; *Kubacka v. Town of N. Hempstead*, 240 A.D.2d 374 [2d Dept 1997] [court struck

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<sup>2</sup>Notwithstanding that this action is not complex, the one year anniversary of its commencement will occur in less than three (3) weeks, but Comtel is not yet in a position to conduct Defendants' depositions due to Defendants' ongoing delays.

<sup>3</sup>The Court does not include counsel's failure to attend the June 2, 2015 pretrial conference as an example of sanctionable conduct, because such failure was the inadvertent result of counsel having forgotten to accurately note the time the conference had been rescheduled.

defendant's answer following its repeated failure to comply with court orders directing disclosure]).

In addition, the Court imposes a sanction against Defendants (collectively) in the amount of \$1,500.00, in the form of a (partial) reimbursement of Comtel's legal fees in having had to make the instant motion (*see, O'Brien v. Occidental Chem. Corp.*, 266 AD2d 915, 915-16 [4th Dept 1999] [monetary sanctions imposed against plaintiff for deliberate frustration of discovery consisting of failing to comply with scheduling order, engaging in dilatory tactics regarding interrogatories, and providing erroneous or incomplete responses to discovery]; *Smith v. New York Tel. Co.*, 235 AD2d 529, 530 [2<sup>nd</sup> Dept 1997] [imposition of monetary sanction appropriate where plaintiff endured lengthy delays and was repeatedly forced to seek judicial intervention to secure discovery of items to which she was entitled]).

In light of the forgoing, it is hereby:


**ORDERED**, that Comtel's motion is granted; the Court hereby strikes Defendants' Answers, pursuant to CPLR §3126; Comtel is granted a permanent injunction against Defendants, as prayed for in the First and Second Causes of Action in the Complaint; and the trial currently scheduled to commence on February 1, 2016, shall be limited to the assessment of Comtel's damages, if any, relative to its remaining causes of action; and it is further

**ORDERED**, that the Court imposes a sanction against Defendants (collectively) in the amount of \$1,500.00, pursuant to 22 NYCRR §§130-1.1, 130-1.1(c), and 130-1.2, payable to Comtel.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall

not constitute notice of entry.

Dated: August 3, 2015  
Buffalo, New York

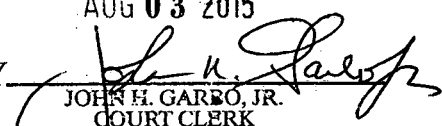


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**HON. TIMOTHY J. WALKER, J.C.C.**  
Acting Supreme Court Justice  
Presiding Justice, Commercial Division  
8<sup>th</sup> Judicial District

**GRANTED**

AUG 03 2015

BY   
JOHN H. GARO, JR.  
COURT CLERK