To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC, ATLANTA FOODS INTERNATIONAL, RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS, SHEILA MARIE IMPORTS, DOUG JAY, RYDER TRUCK RENTAL, INC., PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.

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S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.

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DECISION & ORDER

Index No. 55391/2011
Return Date: March 2, 2015
Seq. Nos. 37, 38, 39

LEFKOWITZ, J.

The following papers were read on this motion (sequence number 37) by defendants Russell McCall's Inc. dba Atlanta Foods International and Doug Jay (hereinafter to be referred to as the "Atlanta defendants") for an order compelling defendant Ryder Truck Rental Inc. (hereinafter to be referred to as "Ryder"), to respond to the notices of discovery and inspection dated September 30, 2014 and November 28, 2014 and pursuant to those notices, to produce copies of all documents identified therein and, in the event Ryder is unable to produce any of the documents, that it submit an affidavit from an officer or employee with knowledge attesting to the fact that the documents are not available and setting forth the reasons said documents are not available and granting the Atlanta defendants such other and further relief as is just, proper and equitable.

Order to Show Cause dated December 15, 2014
Affirmation in Support; Exhibits A-H
Ryder's Affirmation in Opposition; Exhibits A-D
Plaintiffs' Affirmation in Partial Opposition; Exhibits A-H; Affidavit of Rugemer 1/2/15)

The following papers were read on this motion (sequence number 38) by the Atlanta defendants for a protective order declaring the depositions of Dan Crowley and Ken Swords to be concluded and that no further questioning of these witnesses is required or, in the alternative, permitting the witnesses to submit to a deposition on oral questions via video conference or, in the alternative, in the event these witnesses are required to return to New York that the cost of further depositions be borne by plaintiffs and that the court impose a limit as to the length of time any further questioning may be conducted and limit the scope of any further questioning and granting the Atlanta defendants such other and further relief as is just, proper and equitable.

Order to Show Cause dated December 15, 2014
Affirmation in Support; Exhibits A-N
Ryder's Affirmation in Opposition; Exhibits A-G
Plaintiff's Affirmation in Opposition; Exhibits A-M; Affidavit of Rugemer (1/2/15)

The following papers were read on this motion (sequence number 39) by plaintiffs for an order, among other things, striking the pleadings of the Atlanta defendants for, among other things, their alleged violation of numerous court orders, alleged bad faith, failure to produce Ken Swords and Dan Crowley for completion of their depositions and failure to provide discovery and for costs, sanctions and attorneys' fees and for such other and further relief as this court deems just, proper and equitable.

Order to Show Cause dated December 15, 2014
Affirmation in Support; Exhibits A-Z and AA-HH
Ryder's Affirmation in Opposition; Exhibits A-O
Atlanta Defendants' Affirmation in Opposition; Exhibits A-O;
Affidavit of Dan Crowley; Exhibits AA-DD

Upon the foregoing papers and the proceedings held on March 2, 2015 these three motions are determined as follows:

Motion Sequence Number 37:

The Atlanta defendants served a Notice for Discovery and Inspection dated September 30, 2014 on Ryder. This notice called for the production of, among other things, copies of all invoices issued by Ryder to defendant GFI Boston LLC (hereinafter to be referred to as "GFI Boston") between October 1, 2007 and August 31, 2011 as well as copies of all lease agreements, rental agreements, preventive maintenance agreements and fuel tax and/or fueling agreements between it and GFI Boston. By response dated October 7, 2014 Ryder responded that the notice of the Atlanta defendants contained demands that were overly broad, vague, unduly burdensome

and sought discovery outside the scope of this litigation. No documents were provided by Ryder pursuant to Atlanta's request. By letter dated November 28, 2014 the Atlanta defendants wrote to Ryder's counsel requesting that it provide the discovery sought.

The Atlanta defendants state that in its Decision and Order dated October 20, 2014 this court (Lefkowitz, J.), issued directives to them, compelling them to produce documents relating to the vehicles involved in the subject accident on May 22, 2009. They contend that, at the very least, the court's directives should have been issued to Ryder as well. The Atlanta defendants state that the tractor involved in the accident was owned by Ryder, rented by Ryder, maintained by Ryder and it displayed Ryder's DOT number. The Atlanta defendants contend that if the documents demanded by plaintiffs' counsel are deemed material and necessary, the directives for their production should apply primarily to Ryder.

In their notice for discovery and inspection dated November 28, 2014 addressed to Ryder, the Atlanta defendants paralleled the directives of this court's order dated October 20, 2014 with respect to plaintiffs' notice to produce electronically stored data. Specifically, the Atlanta defendants note that regarding plaintiffs' notice to produce listed as document # 1317 in the NYSCEF system, items numbered 5, 6, 7, 8 and 18 therein should be provided by Ryder. The Atlanta defendants further contend that Ryder should be compelled to provide the documents previously requested by plaintiffs in their notice to produce listed as document # 1322 in the NYSCEF system which sought all fuel tax filings for 2007 to 2009 for the subject tractor and trailer and to provide documents previously requested by plaintiffs in their notice to produce listed as document # 1336 in the NYSCEF system which sought documents filed pursuant to requirements of the US DOT and the Federal Motor Carrier Safety Administration.

This motion is opposed by Ryder. Ryder contends that the decision and order of this court dated October 20, 2014 is the law of the case and cannot be ignored by the Atlanta defendants. Ryder states that this court did not direct it, in that prior order, to provide any responses and now the Atlanta defendants are attempting to undo that ruling even though they failed to move to reargue/renew or to file an appeal from that order.

Ryder also states that it was not the motor carrier of the subject vehicle and was not issued any citations or violations as a result of the subject accident and it was not Ryder's responsibility (as owner only of the subject vehicle) to file fuel tax documents.

This motion is also opposed in part by plaintiffs who assert, among other things, that the motion by the Atlanta defendants is deficient in that it does not seek discovery of documents that will demonstrate that they were in control of defendant Sheila Marie Imports (hereinafter "Sheila Marie") and GFI Boston and that they should be viewed as the statutory employer of driver, defendant Daniel Burke (hereinafter"Burke").

The court finds that the Atlanta defendants failed to file a notice of appeal from this court's prior order dated October 20, 2014 and failed to move to reargue/renew. Therefore they are now precluded from prevailing on that branch of their motion seeking an order compelling

their co-defendants to produce the documents that were the subject of that previous order.

Previously Ryder has stated that it was not the motor carrier at the time of the subject accident and therefore it was not required to submit any fuel tax filings. Ryder similarly has stated that it is not in possession of documents required to be filed by the US DOT and the Federal Motor Carrier Safety Administration relating to vehicles involved in the subject accident. Ryder has previously provided copies of relevant lease/rental agreements relating to the subject vehicle involved in the subject accident. However, to the extent that in its latest notice (served before this court issued the Decision and Order dated October 20, 2014) the Atlanta defendants seek invoices issued by Ryder to GFI Boston between November 2008 and December 2009 Ryder should, if it has not already done so, provide these to the Atlanta defendants or, if these documents are not in its possession, Ryder should provide an affidavit from a person with knowledge as to why the invoices are not available or cannot be produced.

Motion Sequence Number 38:

The Atlanta defendants presently seek an order declaring the depositions of Dan Crowley conducted on August 5, 2014 and Ken Swords conducted on November 12, 2014 to be concluded. Among other assertions, the Atlanta defendants contend that plaintiffs' discovery demands to them are intended to harass, vex and unduly burden them and that they are not intended to produce meaningful, material or relevant information. They further note that they have produced more witnesses for depositions than any other party, some of their witnesses appearing to be deposed more than once.

The Atlanta defendants note that although both Crowley and Swords have been deposed and questioned by plaintiffs' counsel, plaintiffs' counsel contends that he requires additional time to depose each of these witnesses. The Atlanta defendants assert that plaintiffs' counsel has previously prolonged depositions with other witnesses including Greeley, Reed and Pawson. The Atlanta defendants state that plaintiffs' counsel is causing them needless expense by wasting the time and talents of two of their key employees. They further contend that the depositions of these two witnesses has been rendered moot by the court ordered depositions of Julian Friedman, CPA and Valerie Pawson, Esq., and the deposition of Doug Jay.

The Atlanta defendants further note that these witnesses came into New York from Atlanta to attend their deposition. They also contend that further questioning is unnecessary and, if this court should not declare their depositions concluded the court should issue an order limiting and regulating the questioning (for example, not permit questioning as to the relationship between the Atlanta defendants and other divisions that existed from 2007 onwards). The Atlanta defendants also ask that if these depositions are not declared concluded, that this court permit the continued depositions of Crowley and Swords via video conference or, at least, require plaintiffs' counsel to post a bond for security for costs to cover the expenses incurred by these two witnesses in having to return to New York for further questioning.

This motion is opposed by the defendants/third-party plaintiffs and Ryder. They contend

that while plaintiffs' counsel has not concluded his questioning of these witnesses, they have not had the opportunity to ask a single question of either of these witnesses.

The motion is also opposed by plaintiffs. They assert that they are entitled to have these two witnesses appear for partial depositions and plaintiffs are entitled to continue the depositions and continue discovery wherever it may lead. Plaintiffs assert that the Atlanta defendants' obstruction of the continuation of these depositions is yet another example of their lack of good faith and cooperation during the discovery process. Plaintiffs note that the CPLR does not impose a limitation on the length of depositions and they note that they are entitled to wide latitude in pretrial deposition questioning and may question anything that could be remotely relevant.

CPLR 3101 (a)(1) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by a party or the officer, director, member, agent or employee of a party". Parties are entitled to ask broad questions at depositions in an effort to ascertain the truth and to flush out the relevant issues that may assist them in the prosecution of their action (*Cambridge Med. P.C. v Adirondack Ins. Exchange*, 24 Misc 3d 1208 (A) [Civil Court, New York County, 2009]; *Seaman v Wyckoff Heights Med. Ctr.*, 8 Misc3d 628 [Supreme Court, Nassau County 2005; *affd in part*, 25 AD3d 598 [2d Dept 2008]). The court finds that insofar as plaintiffs assert that they were unable to ask all their questions of these two witnesses and defendants/third-party plaintiffs did not even have the opportunity to question these witnesses, the request of the Atlanta defendants to declare the depositions of these two witnesses to be concluded or, to issue an order limiting the questioning to be pursued in any further depositions, is improper. The court also declines to limit the deposition of either witness to a certain number of hours, days (*compare Farrakhan v N.Y.P. Holdings, Inc.*, 226 AD2d 133 [1st Dept 1996]).

CPLR 3103(a) provides that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Although the Atlanta defendants seek a protective order directing the depositions of Crowley and Swords be conducted via video conferencing in the event this court declines to declare their depositions concluded, this court notes that depositions of parties to an action are generally held in the county where the action is pending unless a party demonstrates that conducting his or her deposition in that county would cause undue hardship (*Chen v Zhi*, 81 AD3d 818 [2d Dept 2011]). In this case, the Atlanta defendants, headquartered in Atlanta, Georgia failed to show that the appearances of their witnesses for depositions in Westchester County, New York constitute an undue hardship. Therefore they are not entitled to a protective order (*compare LaRusso v Brookstone Inc.*, 52 AD3d 576 [2d Dept 2008]; *see also Born To Build, LLC v Saleh*, 115 AD3d 780 [2d Dept 2014]). The motion of the Atlanta defendants for a protective order should be denied in its entirety.

Motion Sequence Number 39:

Plaintiffs presently seek an order striking the pleadings of the Atlanta defendants due to their alleged violation of discovery orders, bad faith in the discovery process of this matter and failure to produce Ken Swords and Dan Crowley to complete their depositions. Plaintiffs further seek an order sanctioning the Atlanta defendants due to their alleged failure to make good faith disclosures and they seek costs, and attorneys fees against the Atlanta defendants. Lastly, plaintiffs seek an order conditionally striking defendants' answer unless they produce all records directed by this court to be produced that remain outstanding.

This motion is opposed by defendants/third-party plaintiffs and Ryder. They note to the extent plaintiffs have included them in their motion and seek to strike their answers, the motion is unsupported. They assert that they have responded to each demand served upon them by plaintiffs. They assert that plaintiffs' motion in regards to them is not only baseless but also frivolous and they seek an order of this court sanctioning plaintiffs for making another frivolous motion. They do agree with plaintiffs, however, to the extent that plaintiffs seek a continued deposition of Dan Crowley and Ken Swords.

This motion is also opposed by the Atlanta defendants. They note that they have complied with demands and court orders regarding discovery. They state that they have produced more than 100 different sets of documents in response to plaintiffs' demands, they have produced three witnesses for depositions and have obtained relevant discovery from Julian Friedman, CPA and Valerie Pawson, Esq., the accountant and lawyer for SM Foods, Inc. They state that anything they haven't provided already doesn't exist.

Among other things, the Atlanta defendants point out that in paragraph 28 of his affirmation, plaintiffs' counsel asks this court to strike their answer in its entirety or, in the alternative to preclude them from offering evidence at trial regarding whether they: (1) were operating the motor carrier responsible for the subject injury-causing truck; (2) completely dominated and controlled GFI Boston and SM Foods; and (3) abused the corporate form to such a degree that it warrants piercing the corporate veil. The Atlanta defendants state that these are the very issues on which plaintiffs bear the burden of showing corporate domination and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. The Atlanta defendants assert that plaintiffs are incapable of bearing their burden and seek to have the court absolve them from their obligations of proof in this case.

The last compliance conference held to date was on December 2, 2014. Although the Atlanta defendants state that plaintiffs now seek relief with respect to discovery demands which were served after December 2, 2014 the court notes that the briefing schedule issued as a result of the December 2nd conference specifically states that "[a]ny further requests for relief shall be included in this motion and no further requests. If not included, demands shall be waived".

On the same day as plaintiffs made the present motion, they served all defendants with another notice to produce, dated December 12, 2014. The notice required defendants to respond

thereto within 20 days of service. The notice seeks 50 documents many relating to Leslie Allen. Plaintiffs also served another set of interrogatories on all defendants dated December 12, 2014 and a notice to depose Leslie Allen on February 3, 2015. Plaintiffs state that upon information and belief Leslie Allen was and is an agent and/or employee of the Atlanta defendants in charge of all safety and motor carrier regulation compliance for the Atlanta defendants and all its divisions' trucking operations.

The court notes that after this motion was made, the parties continued in their demands for discovery. Defendants/third-party plaintiffs and Ryder responded (by two separate responses) to plaintiffs' notice to produce dated December 12, 2014 on or about January 5, 2015 stating that as to each and every document and/or information requested, they are "not in possession". Defendants/third-party plaintiffs and Ryder responded to plaintiffs' latest interrogatories on or about February 9, 2015 stating, for the most part, that the inquiries were not applicable to SM Foods, Ryder, GFI Boston or Burke.

The Atlanta defendants response to plaintiffs' latest interrogatories (with exhibits attached thereto) is dated January 23, 2015.

The court notes that plaintiffs served a notice to admit dated February 12, 2015 on defendant Russell McCall's Inc.

The court notes that the Atlanta defendants served a notice of discovery and inspection on Ryder and another one on SM Foods and on GFI Boston, both notices dated February 26, 2015 and notices to admit to GFI Boston and SM Foods each dated February 27, 2015. GFI Boston and SM Foods responded thereto on or about March 30, 2015 and John Greeley submitted an affidavit in support of the responses made by SM Foods.

On or about March 12, 2015, plaintiffs served 14 additional notices to produce on the various defendants some of which dealt with requests for documents relating to the logistical support for motor carrier operations including computer and software agreements. Some of these notices sought agreements between one of the defendants on the one hand and Comdata on the other hand.

The court finds that at this juncture, as plaintiffs and defendants/third-party plaintiffs agree, the depositions of Dan Crowley and Ken Swords should be continued. If they have not already done so, the parties should respond to any notices for discovery and inspection, noticse to admit, notices to produce and/or interrogatories served upon each by any other party to this action and if they have not already done so, the Atlanta defendants should provide to plaintiffs any documents they obtained via subpoena.

Proceedings on March 2, 2015 and Subsequent Letters to the Court:

At the proceedings plaintiffs' counsel requested leave to submit to this court an exhibit with documents (A-C) which he asserted specifically addressed the issues raised in these three

motions (sequences numbered 37, 38, and 39). Counsel for the Atlanta defendants objected to this request and noted he had not had an opportunity to review this exhibit. After the court granted the parties a brief recess to allow counsel for the Atlanta defendants to review the exhibit, and over the continued objection of counsel for the Atlanta defendants, the court accepted the exhibit.

In his affirmation in support of this exhibit, dated March 2, 2015, plaintiffs' counsel contends that the Atlanta defendants have concealed from this court that they have custody, possession and control of all compliance documents in this case through their agent Leslie Allen (Price) and the companies that she controls and operates on their behalf. Plaintiffs' counsel asserts in this affirmation, and he stated at the proceedings, that he discovered this information through the partial depositions of the witnesses of the Atlanta defendants, Dan Crowley and Ken Swords.

In this affirmation plaintiffs' counsel further asserts that all records provided by the Atlanta defendants thus far regarding the driver, defendant Daniel Burke, indicate that he was hired by the Atlanta defendants and not by GFI Boston. Plaintiffs' counsel also asserts that there has been a failure to provide Burke's entire Q-file (the driver qualification file which, according to plaintiffs' counsel, is mandated by federal law to be maintained by the employer/motor carrier) and he contends that the responses of the Atlanta defendants to his Interrogatories dated December 12, 2014 are deficient.

At the proceedings held on March 2, 2015 counsel for the Atlanta defendants stated that with respect to Burke, they have submitted all his records in their possession. He further stated that Leslie Allen is not an employee of the Atlanta defendants but rather an independent contractor who was hired by them for consultation regarding safety compliance issues. He stated that the Atlanta defendants would not be producing her.

At these proceedings counsel for the defendants/third-party plaintiffs noted that discovery motions in this matter were up to 37 and that he had to go back to his office and "bill the carrier for another motion". He asked the court to "make it stop".

By letter dated March 3, 2015 (with exhibit B appended thereto which counsel purports completes plaintiffs' exhibit and which contains copies of check stubs of GFI Boston which indicate payment for services provided by Quality Compliance Concepts in April 2009) counsel for the Atlanta defendants again voiced his objection to the submission stating that whether it was a sur-reply to plaintiffs' motion (sequence number 36) to renew and reargue or a reply affirmation with respect to motions numbered 37, 38, 39 it was submitted in violation of the applicable principles.

The court notes that in submitting a copy of the court-ordered transcript of the proceedings held on March 2, 2015, plaintiffs' counsel submitted yet another letter dated March 16, 2015 in which he submitted not only the transcript but a schedule he asserts demonstrates discovery previously ordered by the court that the Atlanta defendants have not provided. This

latter submission was, he argues, in support of his motion for sanctions against the Atlanta defendants. By letter dated March 16, 2015 the Atlanta defendants objected to this letter.

The court notes that counsel for the Atlanta defendants has clearly stated that these defendants cannot produce Leslie Allen for a deposition inasmuch as she is not their employee and that they have previously provided all documents relating to Burke in their possession.

In light of the foregoing it is:

ORDERED that the motion by the Atlanta defendants (motion sequence number 37) should be granted only to the extent that Ryder is directed to, on or before May 8, 2015, provide, if it has not already done so, copies of all invoices issued by it to GFI Boston between November 2008 and December 2009. If these documents are not in its possession, Ryder should provide an affidavit from a person with knowledge as to why these documents are not available or cannot be produced; and it is further,

ORDERED that the motion by the Atlanta defendants for a protective order regarding the depositions of Dan Crowley and Ken Swords (motion sequence number 38) is denied in its entirety and the Atlanta defendants are directed to produce these two witnesses for depositions to be concluded on or before May 8, 2015 and to be conducted in Westchester County at the offices of Diamond Reporting at 19 Court Street Plaza, White Plains, New York or at another Westchester County location as may be agreed to by the parties; and it is further,

ORDERED that the motion by plaintiffs (motion sequence number 39) for, among other things, an order striking defendants' pleadings, sanctions, costs and attorneys fees against the Atlanta defendants is denied. On or before May 8, 2015: the Atlanta defendants are directed to produce Dan Crowley and Ken Swords for continued depositions as herein above set forth; if they have not already done so, the parties should respond to any notices for discovery and inspection, notices to admit, notices to procduce and/or interrogatories served upon each, by any party to this action; and if they have not already done so, the Atlanta defendants should provide to plaintiffs any documents they obtained via subpoena; and it is further,

ORDERED that the compliance conference presently scheduled for April 28, 2015 is adjourned to May 18, 2015. All parties are directed to appear in the Compliance Part, Courtroom 800 on May 18, 2015 at which time the court expects to certify this matter as trial ready.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 13, 2015

HON. JOAN B. LEFKOWITZ, J.S.C.