

Rowe v AEG Live LLC
2016 NY Slip Op 30774(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 155902/2012
Judge: Kelly O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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ERIC ROWE,

Plaintiff,

-against-

AEG LIVE LLC, AEG LIVE PRODUCTIONS, LLC
AEG LIVE NY, LLC, STRIKE FORCE OF NEW
JERSEY, INC., MARIEL’S TOURS LLC, MARIEL’S
TOURS, INC., and ARMANDO PEREZ a/k/a PITBULL,

Defendants.
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DECISION/ORDER
Mot. Seq. 010

Index No.: 155902/2012

KELLY O’NEILL LEVY, J.:

Defendants Mariel’s Tours, LLC, Mariel’s Tours, Inc., and Armando Perez (hereafter “Artist Group”) filed this motion to compel discovery from co-Defendants AEG Live LLC, AEG Live Productions, LLC, AEG Live NY, LLC (collectively “AEG”), and Strike Force of New Jersey, Inc. (“Strike Force”) pursuant to CPLR 3124. AEG and Strike Force oppose the motion and Strike Force further cross-moves for costs and/or sanctions against Artist Group pursuant to 22 NYCRR 130.1.1(c) for filing a frivolous motion to compel. Artist Group’s motion is granted and Strike Force’s cross-motion is denied for the reasons set forth below.

Artist Group’s initial requests for production of documents were served upon AEG and Strike Force on April 21, 2015. The requests to AEG were nearly identical to those served upon Strike Force. In making this motion, Artist Group singles out certain requests that it contends were not fully complied with, in particular, email communications concerning: (i) Strike Force’s provision of security on the concert tour where the alleged incident at issue occurred, and (ii) Plaintiff, Eric Rowe, and the underlying incident. (Fleischer Aff. at ¶ 5.)

Artist Group argues that neither AEG nor Strike Force has produced responsive emails and that the corporate witnesses produced for deposition testified that they had not been asked to search for responsive emails and were unaware of whether anyone else had made such efforts. Strike Force argues that all properly-requested documents have been produced and Artist Group's request for emails was "so broad in scope that it fails to have any true meaning" and that Artist Group "should make a 'targeted' demand" for specific emails. (Strike Force Aff. at ¶ 9-11). AEG argues that the request is palpably improper because Artist Group seeks "information that is irrelevant, overbroad, vague and unduly burdensome." (AEG Aff. at ¶ 8).

As a threshold matter, the court must consider AEG's and Strike Force's argument that Artist Group's failure to submit a good-faith affidavit with the motion, as required by 22 NYCRR 202.7(a), warrants denial of the motion. While there is precedent for denying a motion solely for failure to submit the good faith affirmation, *see, e.g., Natoli v. Milazzo*, 65 AD3d 1309 (2d Dep't 2009), it is also well established that "failure to include the good faith affirmation may be excused...where 'any effort to resolve the present dispute non-judicially would have been 'futile.'"" *See Yargeau v. Lasertron*, 74 AD3d 1805, 1806 (4th Dep't 2010) (citing *Carrasquillo v. Netsloh Realty Corp.*, 279 AD2d 334, 334 (1st Dep't 2001)). Artist Group has met that burden through a detailed accounting of past failed efforts to resolve this dispute with opposing counsel. Accordingly, the lack of a good faith affirmation is not fatal to the motion.

Turning now to the merits, New York law allows objections to be raised within twenty days of service of a notice. CPLR 3122. Neither Strike Force nor AEG raised objections to Artist Group's requests during this time frame. When there are no timely objections to a discovery request, the court will only review the requests to ensure that they are not "palpably

improper.” See, e.g., *Saratoga Harness Racing Inc. v. Roemer*, 274 AD2d 887, 889 (3d Dep’t 2000).

CPLR 3101 requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” “The words ‘material and necessary’ as used in section 3101 must ‘be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.’” *Kapon v. Koch*, 23 N.Y.3d 32, 36 (2014) [(citing *Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968))]. See also *Anonymous v. High School for Environmental Studies*, 32 AD3d 353, 358 (1st Dep’t 2006). Both AEG and Strike Force make belated objections, but none that rise to the level of palpable impropriety and the court finds none. See, e.g., *Hillside Equities, LLC v. UFH Apartments, Inc.*, 297 AD2d 704 (2d Dep’t 2002).

“There is no requirement upon a party seeking to compel compliance with discovery requests other than to show that no response has been received.” See *All Boro Psychological Services, P.C. v. Allstate Ins. Co.*, 962 NYS2d 844, 845 (App. Term, 2d, 11th, and 13th Jud. Dists. 2013). Here, it is uncontested that documents have been served, but there is disagreement as to whether those documents are sufficient. Indeed, Strike Force seeks costs and/or sanctions, arguing that this motion to compel discovery is frivolous. AEG and Strike Force obviously cannot produce documents that do not exist, but Artist Group is entitled to more than what AEG and Strike Force have provided thus far. The court orders AEG and Strike Force to either produce the requested non-privileged documents and communications so as to be received on or before May 16, 2016, or, should they not have any of the requested documents or communications or should they not exist, AEG and Strike Force are each to provide an affidavit from a knowledgeable representative as to the searches conducted and the results reached.

Therefore, Artist Group's motion is granted and Strike Force's cross-motion seeking costs and/or imposing sanctions on Artist Group for filing a frivolous motion pursuant to 22 NYCRR part 130 is denied. However, as there has been no showing that Strike Force's filing of the cross-motion was frivolous, the court also declines to impose sanctions as requested by Artist Group. *See Global Events, LLC v. Manhattan Center Studios, Inc.*, 123 AD3d 449, 450 (1st Dep't 2014).

This constitutes the decision and order of the court.

ENTER:

Dated: April 26, 2016



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY