SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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HARRISON MORGAN INVESTMENTS LLC,

Plaintiff,

-against- Index No. 153405/14

INFINITY Q. INC., AUDIO TOWN INC. and
URI VAHAB a/k/a ERIC VAHAB, Motion Seq. No. 003

Defendants.

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DONNA M. MILLS, J.:

Plaintiff Harrison Morgan Investments, LLC n/k/a Harrison Morgan Consultants, LLC moves, pursuant to CPLR 2221 (d), for leave to reargue the court's decision and order dated October 20, 2015 (hereinafter, the prior decision).

Background and Procedural History

Plaintiff is a limited liability company organized under the laws of New Jersey that maintains an office in Manhattan. Plaintiff seeks to recover monies loaned to defendants by plaintiff and for fraud based on a fraudulent scheme perpetrated by defendant Uri Vahab a/k/a Eric Vahab (Vahab). Plaintiff also seeks to pierce the corporate veil of defendants Infinity Q. Inc. (Infinity) and Audio Town, Inc. (Audio), and hold their owner, Vahab, personally liable. Nonparty Gadi Nachum (Nachum) is the sole member of plaintiff. Infinity and Audio are New York corporations with offices in Manhattan and the Bronx, respectively.

According to the complaint, Vahab, the sole shareholder of Infinity and Audio, advised Nachum that he was starting a new business, which would buy kitchen supplies and cabinets overseas, ship them in containers to New York, and sell them at a substantial profit. Plaintiff

alleges that Vahab fraudulently induced plaintiff to provide financing to defendants based on misrepresentations as to the use of the loan proceeds. Additionally, plaintiff asserts that Vahab did not use the proceeds for the new business, but rather took the proceeds for his own purposes. Plaintiff claims that it loaned Vahab the sum of $72,000, which was to be paid in full, plus 9% interest, upon demand on or before May 1, 2012. Specifically, plaintiff asserts that: (1) on November 28, 2011, plaintiff loaned Vahab $30,000 (check number 176, made payable to Infinity) (complaint, exhibit A); (2) on December 5, 2011, plaintiff loaned Vahab $10,000 (check number 180, made payable to Infinity) (*id.*, exhibit B); (3) on December 14, 2011, plaintiff loaned Vahab $20,000 (check number 181, made payable to Infinity) (*id.*, exhibit C); and (4) on January 3, 2012, plaintiff loaned Vahab $12,000 (check number 183, made payable to Audio) (*id.*, exhibit D).

Plaintiff claims that Vahab issued the following checks as repayment of the monies that plaintiff loaned to Vahab: (1) a check from Audio dated February 21, 2012 in the sum of $14,000 (check number 1535) (*id.*, exhibit E); (2) a check from Audio dated April 3, 2012 in the sum of $3,000 (check number 1697) (*id.*, exhibit F); and (3) a check from Audio dated April 7, 2012 in the sum of $3,000 (check number 1698) (*id.*, exhibit G). However, according to plaintiff, the checks were returned for insufficient funds. Plaintiff alleges that defendants have failed to repay the $72,000 and interest thereon to plaintiff to date.

Plaintiff asserts the following four causes of action against defendants: (1) money had and received; (2) unjust enrichment; (3) common-law fraud; and (4) piercing the corporate veils of Infinity and Audio. Additionally, plaintiff seeks punitive damages, in addition to reasonable collection costs and attorneys' fees.

Previously, plaintiff moved for an order amending the caption so that plaintiff's name was changed from "Harrison Morgan Investments LLC" to "Harrison Morgan Consultants LLC." In addition, plaintiff moved for discovery sanctions against defendants. Specifically, plaintiff sought an order: (1) pursuant to CPLR 3126 (3), striking defendants' answer or rendering a default judgment against defendants for their failure to comply with plaintiff's first set of interrogatories and appear for deposition; (2) pursuant to CPLR 3126 (1), resolving the issues to which the information is relevant in accordance with the claims of plaintiff; (3) pursuant to CPLR 3126, granting costs, disbursements, and attorneys' fees; or, in the alternative (4) compelling compliance with the outstanding discovery demands. Additionally, plaintiff requested dismissal of defendants' first, second, third, fourth, and sixth affirmative defenses.

In the prior decision, the court granted the branch of plaintiff's motion seeking to amend the complaint, but did not otherwise address the other branches of plaintiff's motion.

Arguments

Plaintiff now requests that the court decide the parts of its motion which sought discovery sanctions. Specifically, plaintiff seeks an order: (1) pursuant to CPLR 3126 (3), striking defendants' answer and rendering a default judgment for their failure to comply with plaintiff's first set of interrogatories and appear for deposition; (2) pursuant to CPLR 3126 (1), resolving the issues to which the information is relevant in accordance with the claims of plaintiff; (3) pursuant to 3126, granting it costs, disbursements and attorneys' fees; and (4) granting such other and further relief as is just and proper (Sieratzki affirmation in support, ¶¶ 2, 7).

In opposition, defendants contend that plaintiff cites no legal authority, and that there is no hint or suggestion that the court made an error in the prior decision.

Discussion

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

Inasmuch as the court inadvertently failed to address the branches of plaintiff's motion seeking discovery sanctions, the court grants leave to reargue the prior decision.

CPLR 3126 provides that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just." It is within the trial court's discretion to determine the nature and degree of the penalty (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). "The sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013] [internal quotation marks and citation omitted]).

"[T]here is a strong preference in our law that matters be decided on their merits" (*241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013] [internal quotation

marks and citation omitted]). However, "[a] court may strike an answer only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010] [internal quotation marks and citation omitted]; *see also Scher v Paramount Pictures Corp.*, 102 AD3d 471, 471 [1st Dept 2013]). Generally, "willfulness" may be inferred from a party's repeated failure to respond to demands and/or comply with disclosure orders, coupled with inadequate excuses (*Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000]). The burden then shifts to the opposing party to demonstrate a reasonable excuse (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]).

Here, plaintiff has not shown that defendants repeatedly failed to comply with discovery orders or plaintiff's demands. Defendants responded to plaintiff's first set of interrogatories on January 29, 2015, and supplemented their response on February 17, 2015. Under these circumstances, plaintiff has not shown that the drastic remedies of striking defendants' answer, awarding a default judgment against defendants, or issuing a resolving order under CPLR 3126 (1) would be warranted. In the absence of any evidence that defendants willfully failed to comply with discovery demands or orders, the court declines to award plaintiff attorneys' fees or costs (*see Davoli v New York State Elec. & Gas Corp.*, 248 AD2d 989, 989 [4th Dept 1998]).

Since plaintiff's motion for leave to reargue requests such further relief as is "just and proper" (Sieratzki affirmation in support, ¶ 2), the court considers whether to compel defendants to supplement their responses to plaintiff's first set of interrogatories.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The "'purpose of serving interrogatories is

to secure evidence'" (*Medaris v Vosburgh*, 93 AD2d 882, 882 [2d Dept 1983], quoting *Lubell v Work Wear Corp.*, 82 Misc 2d 1000, 1002 [Civil Court, Queens County 1975], *affd* 86 Misc 2d 1001 [App Term, 2d Dept, 2d & 11th Jud Dists 1976]). CPLR 3131 states that:

> "Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the deposition of a party. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded."

In addition, CPLR 3133 (a) states that:

> "Within twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity."

In this case, defendants did not respond to plaintiff's first set of interrogatories, which was served on November 26, 2014, until January 29, 2015 (Sieratzki affirmation in support, exhibit A). When the party served with the interrogatories fails to object within the time required by CPLR 3133 (a), the court's inquiry "is limited to determining whether the requested material is privileged under CPLR 3101 or the demand is palpably improper" (*Jefferson v State of New York*, 60 AD3d 1215, 1215 [3d Dept 2009] [internal quotation marks and citation omitted]; *see also McMahon v Cobblestone Lofts Condominium*, 134 AD3d 646, 646 [1st Dept 2015]; *Haller v North Riverside Partners*, 189 AD2d 615, 616 [1st Dept 1993]). "Inasmuch as there is no claim of privilege asserted herein, the question before [the court] is whether [plaintiff's] interrogatories are palpably improper, i.e., 'irrelevant, overbroad and burdensome'" (*Jefferson*, 60 AD3d at 1215 [citation omitted]).

In its original motion for leave to amend, strike, and/or compel, plaintiff stated that defendants' responses to interrogatories numbered 2, 3, 10, 12, 13, 14, 15, 17, 18, and 19 were

inadequate.[1] Therefore, the court shall focus on defendants' responses to these interrogatories.

Interrogatory No. 2

> "2. Identify and produce all statements between Plaintiff and any of the Defendants. For each statement, set forth: (i) the date of the statement; (ii) the location(s) when the statement was made; and (iii) was the statement oral or written. If in writing, provide a copy. If orally, set forth: (i) the date and location of the statement(s); (ii) to whom each statement was made; identify any individuals present at the time each alleged statement was made; and the sum and substance of the statement(s)."

In their response dated January 29, 2015, defendants responded that they did not have any such document in their possession, custody or control. On February 17, 2015, defendants supplemented their response, indicating that defendants do not recollect specific statements or dates, but recall "discussing approximately two times with Gadi [Nachum] the terms of the parties' deal approximately and that such discussions occurred roughly three (3) years ago. Defendant[s] also recall[] a later discussion (i.e. following the plaintiff's investment) during which [] Gadi [Nachum] indicated that he no longer wanted to be invested in the defendant[s'] transaction(s)."

As argued by plaintiff in its motion for leave to amend, strike and/or compel, defendants did not (1) identify the location(s) where the discussions occurred, and (2) the sum and substance of the discussions regarding the terms of the parties' deal that took place roughly three years ago. These parts of the interrogatory seek relevant information. Defendants are, therefore, directed to

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[1]In its reply on the motion for leave to amend, strike and/or compel, plaintiff stated that defendants' response to its second set of interrogatories was also inadequate. However, plaintiff did not seek this relief in its moving papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015] [internal quotation marks and citation omitted]).

supplement their response to that extent.

Interrogatory No. 3[2]

> "3. Identify and produce all statements between Gadi Nachum and Uri Vahab a/k/a Eric Vahab. For each statement, set forth: (i) the date of the statement; (ii) the location(s) of Uri Vahab when the statement was made; and (iii) was the statement oral or written. If in writing, provide a copy. If orally, set forth: (i) the date and location of the statement(s); (ii) to whom each statement was made; identify any individuals present at the time each alleged statement was made; and the sum and substance of the statement(s)."

In their responses, defendants stated that they did not possess any such documents, and did not recollect specific statements or the dates of any statements. Accordingly, the court finds that defendants have adequately responded to this interrogatory.

Interrogatory No. 10

> "10. State whether Defendants purchased [k]itchen supplies and cabinets and ship [sic] same to New York. If yes, provide all Documents and Writings relating to said purchase and shipment."

In their response dated January 29, 2015, defendants stated that the purchases were never fully consummated, and that some of the merchandise originally planned for purchase was shipped to Infinity. Defendants stated that documents relevant to the purchase would be produced for inspection to the extent not already in plaintiff's possession or included within the pleadings. In their supplemental response dated February 17, 2015, defendants provided the documents relating to the purchase and shipment. As a result, the court finds defendants' responses to be adequate.

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[2]Plaintiff does not make any arguments as to why the responses to Interrogatory Nos. 3, 10, 12, 13, 14, 15, 17, 18, and 19 are inadequate. Nevertheless, the court has compared the responses to the interrogatories.

Interrogatory No. 12

"12. Did Plaintiff provide Defendant Uri Vahab with check number 176?
i. If yes, when was that check deposited?
ii. What was the amount of said check?
iii. What is the name of the account the check was deposited into?
iv. How were those proceeds used?
v. Provide a copy of the front and bank [sic] of said check."

On January 29, 2015, defendants responded that the check was deposited, and that a copy of the front and back of the check would be provided for inspection, to the extent not already in plaintiff's possession or included within the pleadings. In their supplemental response dated February 17, 2015, defendants indicated that they did not recall the dates of the deposits or the accounts of deposit, nor the use of the proceeds, but referred to the subject document.

To the extent that defendants stated that copies of the check would be provided only to the extent that they were not in plaintiff's possession or included within the pleadings, the court finds this portion of their response to be proper (*see Cornex, Inc. v Carisbrook Indus.*, 161 AD2d 376, 377 [1st Dept 1990] ["we also find plaintiff's notice to produce documents improper, since, *inter alia*, much of the information sought is already in plaintiff's possession . . ."]; *City of New York v 330 Continental LLC*, 2010 NY Slip Op 31532 [U], *11 [Sup Ct, New York County 2010] ["(g)enerally a party should not be directed to produce documents that are already in the possession of the demanding party"]). However, defendants did not indicate whether plaintiff provided Vahab with check number 176. This portion of the interrogatory seeks relevant information. Therefore, defendants are directed to so state. Defendants have adequately responded to the other parts of the interrogatory.

Interrogatory No. 13

"13. Did Plaintiff provide Defendant Uri Vahab with check number 180?

i. If yes, when was that check deposited?
ii. What was the amount of said check?
iii. What is the name of the account the check was deposited into?
iv. How were those proceeds used?
v. Provide a copy of the front and bank [sic] of said check."

In their responses, defendants stated that they did not recall this check or have a record of this check being received. As such, the court finds that defendants have sufficiently answered this interrogatory.

Interrogatory No. 14

"14. Did Plaintiff provide Defendant Uri Vahab with check number 181?
i. If yes, when was that check deposited?
ii. What was the amount of said check?
iii. What is the name of the account the check was deposited into?
iv. How were those proceeds used?
v. Provide a copy of the front and bank [sic] of said check."

As with their response to interrogatory number 12, defendants stated, in their response dated January 29, 2015, that the check was deposited, and that a copy of the front and back of the check would be provided for inspection, to the extent not already in plaintiff's possession or included within the pleadings. In their supplemental response dated February 17, 2015, defendants claimed that they did not recall the date of the deposit, the account of deposit, or how the proceeds were used, but referred to the document.

To the extent that plaintiff is already in possession of a copy of the front and back of check number 181, the court will not require defendants to provide copies of the check. Nevertheless, defendants are directed to state whether plaintiff provided Vahab with check number 181, since defendants did not respond to this part of the interrogatory. This part of the interrogatory requests relevant information. Defendants have sufficiently responded to the balance of this interrogatory.

Interrogatory No. 15

"15. Did Plaintiff provide Defendant Uri Vahab with check number 183?
i. If yes, when was that check deposited?
ii. What was the amount of said check?
iii. What is the name of the account the check was deposited into?
iv. How were those proceeds used?
v. Provide a copy of the front and bank [sic] of said check."

In their response dated January 29, 2015, defendants stated that the check was deposited, and that a copy of the front and back of the check would be provided for inspection to the extent not already in plaintiff's possession or included within the pleadings. Defendants also stated that the proceeds were used to purchase consumer electronics, and the amount was returned, with a profit, to plaintiff. On February 17, 2015, defendants indicated that they did not recall the date of the deposit or the account of deposit, but referred to the document. In addition, defendants stated that they did not recall the specific electronics purchased, and that the profit and proof of payment are a check received and deposited by plaintiff, annexed to the complaint as exhibit E.

As discussed above, to the extent that plaintiff seeks copies of the check already in its possession, plaintiff is not entitled to additional copies from defendants. However, defendants did not indicate whether plaintiff provided Vahab with check number 183. Therefore, defendants are directed to so state. Defendants have sufficiently answered the balance of this interrogatory.

Interrogatory No. 17

"17. Identify the various checks Defendants issued to Plaintiff or Gadi Nachum in an attempt to pay back said loans, and provide copies of same (front and back)."

In their response dated January 29, 2015, defendants stated that the said checks would be provided for inspection to the extent not already in plaintiff's possession or included within the pleadings, and that other payments were made in cash.

To the degree that plaintiff seeks copies of defendants' checks that are already in its possession, plaintiff would not be entitled to these documents. However, defendants did not indicate which checks defendants provided to plaintiff or Nachum in an attempt to repay the loans. This portion of the interrogatory seeks relevant information. Therefore, defendants are directed to so indicate.

Interrogatory No. 18

> "18. Concerning the loans which were given by Plaintiff to Defendant, describe how Defendants used said loan proceeds and provide documentation regarding the use of said loan proceeds."

In their responses dated January 29, 2015 and February 17, 2015, defendants referred to their responses to Interrogatory Nos. 10, 15, and 16. Interrogatory No. 16 asked for "the terms of each loan Plaintiff provided to Defendants," to which defendants responded that the payment was made as an investment, and that no loans were made. Defendants' responses to Interrogatories Nos. 10, 15, and 16 make clear that the proceeds were used to purchase merchandise and consumer electronics. Defendants claim that no loans were made. Defendants also stated that the documents would be provided to the extent not already in plaintiff's possession (*see Cornex*, 161 AD2d at 377). Accordingly, defendants have adequately responded to this interrogatory.

Interrogatory No. 19

> "19. (a) Identify each and every meeting between Plaintiff and Defendant Uri Vahab concerning the loans made; and (b) set forth: (i) the date(s) of each meeting, and (ii) the location of each meeting; (iii) the purpose of each meeting; (iv) the sum and substance of what was said at each meeting; (v) the names of any other individuals present at each meeting; and (vi) identify and provide any and all Documents or Writings concerning each meeting."

In their response dated January 29, 2015, defendants only stated that they did not recall the date of each meeting between the parties. However, defendants did not respond to the part

requesting defendants to identify each and every meeting between plaintiff and Vahab concerning the loans made. Defendants also did not set forth the location of each meeting; the purpose of each meeting; the sum and substance of what was said at each meeting; the names of any other individuals present at each meeting; or identify and provide any and all documents or writings concerning each meeting. Plaintiff has targeted specific documents concerning the meetings about the loans with sufficient precision (*see Gruen v Krellenstein*, 233 AD2d 252, 253 [1st Dept 1996] ["Plaintiff's discovery demands... were not overbroad since they specified target documents with sufficient precision ... the use of the terms 'any' and 'all' within the context of specific document demands is acceptable"]). Therefore, defendants are directed to respond to these parts of the interrogatory.

Conclusion

Accordingly, it is

ORDERED that the motion (motion sequence number 003) of plaintiff Harrison Morgan Investments LLC for leave to reargue the court's decision and order dated October 20, 2015 is granted, and upon reargument, the court denies the branch of plaintiff's motion seeking an order striking defendants' answer or rendering a default judgment for failure to comply with plaintiff's first set of interrogatories dated November 26, 2014 and appear for deposition, the branch of plaintiff's motion seeking an order deeming the issues resolved in accordance with plaintiff's claims, and the branch of plaintiff's motion seeking costs, disbursements, and attorneys' fees; and it is further

ORDERED that defendants are directed to supplement their response dated February 17, 2015 to plaintiff's first set of interrogatories dated November 26, 2014, to the extent indicated

above, as to Interrogatory Nos. 2, 12, 14, 15, 17, and 19, within 30 days of the date of this decision and order; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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HARRISON MORGAN CONSULTANTS LLC,

Plaintiff,

-against- Index No. 153405/14

INFINITY Q. INC., AUDIO TOWN INC. and
URI VAHAB a/k/a ERIC VAHAB,

Defendants.
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And it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 4/18/16

ENTER:

J.S.C.