SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

STEPHEN RADOSH,

Plaintiff,

-against-

SUNDEL FRANK, a/k/a SANDY FRANK and SANDY FRANK ENTERTAINMENT, INC.

Defendants.

----------X

DECISION/ORDER

Index No. 651937/2014
Motion Seq. No. 002

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract and an accounting, defendants Sundel Frank ("Frank") and Sandy Frank Entertainment, Inc. move for: (1) leave to amend their verified answer and affirmative defenses; and (2) a protective order striking plaintiff Stephen Radosh's ("Radosh") first request for admissions and first demand for production of documents; and (3) quashing Radosh's *subpoena duces tecum* and *ad testificandum*. Radosh cross-moves for an order striking the defendants' answer and affirmative defenses and attorney's fees. In the alternative, Radosh seeks an order resolving certain issues in his favor or precluding defendants from offering certain evidence at trial.

Radosh is an individual who provides directorial and creative services to distributors of syndicated format television programming. Sandy Frank Entertainment, Inc. is a distributor of syndicated television programming, and Frank is the company's sole shareholder, controlling director, and chief officer.

In the complaint, Radosh alleges that he entered into a contract with the defendants in 1994, whereby he agreed to develop formats for episodes of the television show, *Name That Tune*, for

certain foreign markets such as Brazil, Spain, Italy, Poland, and Vietnam. In exchange for Radosh's services, the defendants allegedly agreed to pay him 5% of the net revenues that they earned from distributing the episodes that he worked on. Radosh further alleges that the contract required the defendants to provide him with a "developed by" credit when his formats for episodes were used.

Radosh claims that the contract was signed by Frank on behalf of Sandy Frank Entertainment, Inc. He further alleges that Frank is personally liable for the contract based on a piercing the corporate veil theory.

Radosh contends that the defendants failed to pay him the amounts due under the contract beginning in 2010. The complaint contains three causes of action for: (1) breach of contract for failure to pay him 5% of the net revenues due under the contract; (2) an accounting; and (3) breach of contract for failure to provide a "developed by" credit. Radosh asserts that he suffered approximately $150,000 in damages based on the defendants' failure to pay him 5% of the net revenues due under the contract, and $1,000,000 in lost profits based on the defendants' failure to provide him with a "developed by" credit.

In the current motion, the defendants argue that they should be permitted to amend their answer to admit the existence of the contract. Frank submits an affidavit stating that he recently found a copy of the contract, and that he had not previously recalled its existence due to medical issues. The defendants also contend that they are entitled to a protective order striking Radosh's demands for documents concerning the net revenue that they received in connection with the episodes that Radosh worked on. They argue that these documents are not discoverable because they are immaterial and unnecessary to this action.

Radosh opposes the defendants' motion on the ground that it was never properly served. Radosh separately cross-moves to strike the defendants' answer and affirmative defenses based on the defendants' repeated failure to produce documents and comply with the Court's discovery orders.

Discussion

I. Defendants' Motion to Amend and for a Protective Order

Pursuant to CPLR § 3025, leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim. The determination of whether to allow the amendment is committed to the court's discretion, and the exercise of that discretion will not be overturned absent a showing that the facts supporting the amendment do not support the purported claim or claims. *Peach Parking Corp. v. 346 W. 40th St., LLC*, 42 A.D.3d 82 (1st Dep't 2007); *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107 (1st Dep't 1998). Where a court concludes that an application for leave to amend a pleading clearly lacks merit, leave is properly denied. *Peach Parking Corp.*, 42 A.D.3d at 82.

Radosh argues that the defendants' motion to amend and for a protective order should be denied because he was never served with the motion papers. CPLR § 2214(c) states that "[e]ach party shall furnish to the court all papers served by that party . . . Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct." Here, the defendants failed to submit an affidavit of service demonstrating that their motion papers were served on Radosh.[1] The defendants' motion to

[1] The Court notes that although this is an e-filing case, defendants' counsel has opted out of e-filing. While counsel may opt-out of e-filing if certain criteria are met, counsel may not use this filing status as an excuse for failing to file and serve motions in a timely manner.

amend and for a protective order is therefore denied without prejudice to renewal upon a showing of proper service of the motion papers.

II. Plaintiff's Cross-Motion to Strike or Preclude

CPLR § 3126 provides that a court may issue penalties such as the striking of a pleading or resolution of an issue against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Where a party has refused to comply with discovery orders, the "court has broad discretion in determining the nature and degree of the penalty to be imposed." *Pearl v. Pearl*, 266 A.D.2d 366, 366 (2d Dep't 1999).

In his cross-motion, Radosh argues that the defendants' answer should be stricken based on their failure to produce responsive documents and to comply with this Court's orders dated February 25, 2015, June 10, 2015, September 2, 2015, and November 4, 2015. In the alternative, Radosh seeks an order resolving certain issues in his favor and precluding defendants from introducing evidence contrary to his claims.

On February 25, 2015, I issued a preliminary conference order directing the parties to serve document demands by March 18, 2015 and to respond to document demands by April 10, 2015. In accordance with this order, Radosh served document demands on the defendants seeking financial information, including the amount of "revenue generated by the television show Name That Tune in foreign (i.e., non-U.S.) markets" and "any payments received by Frank" in connection with those shows.

Radosh asserts that the defendants never fully responded to his demand for financial information concerning the revenue made from the shows. In an affirmation, Radosh's counsel Stephen Arena states that the defendants' document production was insufficient because it consisted "solely of royalty statements previously provided to Plaintiff which merely set forth the amounts that the Defendants and their related entities had previously paid to Plaintiff."

On June 10, 2015, the Court held a compliance conference to resolve any discovery disputes between the parties. At the conference, the defendants argued that they should not be required to produce any financial information for Frank or his other business entities including "Sandy Frank Entertainment." Over the defendants' objection, I issued an order directing the defendants to make a supplemental production of all "documents re all relevant entities" by June 24, 2015, or alternatively to produce an affidavit stating whether they had made a diligent search for documents.

At the next compliance conference on July 22, 2015, defendants' counsel Suzanne Bracker advised the Court that her clients would not produce financial documents from all relevant entities as ordered, but would instead make a motion seeking a protective order to strike Radosh's document requests.

The defendants, however, did not make a motion for a protective order by the next conference on September 2, 2015. After that conference, I ordered the defendants to make their motion by September 8, a deadline that they failed to meet. On the date of the next conference, November 4, 2015, the defendants advised the Court that they had not yet made their motion. I then issued a second order directing the defendants to make their motion by November 5. In the order, I specifically stated that defendants' failure to make a supplemental production regarding all relevant entities, or make their motion for a protective order "may result in sanctions and/or preclusion."

On December 9, 2015, the parties appeared for a seventh discovery conference with the Court. On that day, Bracker informed the Court that the defendants' motion for a protective order had been properly filed and served in paper form, but that the motion papers had not yet been uploaded to the e-filing system. Radosh's counsel challenged Bracker's assertion that the motion had been properly filed and served. Given the parties' disagreement over the filing and service of

the motion papers, I granted Radosh permission to cross-move to strike the defendants' answer based on the defendants' failure to comply with discovery orders.

After reviewing the motion papers submitted, I find that the defendants did not file their motion in a timely manner or serve their motion properly on Radosh. Despite this Court's orders, the defendants failed to file any motion for a protective order by September 8 and the extended deadline of November 4. On December 9, 2015 (more than a month after the November 4, 2015 final, final deadline I set for filing a motion for a protective order) the defendants attempted to file their motion. The purported motion was deficient because it did not include a proper affidavit of service or accompanying exhibits.

At bottom, defendants violated my discovery orders dated February 25, 2015, June 10, 2015, September 2, 2015, and November 4, 2015. The defendants have refused to produce relevant documents as ordered by the Court, and failed to comply with court deadlines in seeking a protective order. The defendants have offered no reasonable excuse for their willful refusal to comply with discovery deadlines set in this case.

Where a party willfully refuses to make disclosure, CPLR 3126 authorizes the court to issue "an order prohibiting the disobedient party from supporting or opposing designated claims . . . [and] from producing in evidence designated things." CPLR 3126(2); *Sanchez v. City of New York*, 266 A.D.2d 127, 127 (1st Dep't 1999).

The central claim in this action is that the defendants breached a contract to pay Radosh 5% of the net revenues from 2010 and afterwards. To prevail on his breach of contract claim, Radosh must prove: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach; and (4) damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 526 (1st Dep't 2010).

Here, the defendants have repeatedly and unjustifiably refused to produce documents showing the net revenues that they received after 2010. Because these documents are directly relevant to Radosh's ability to prove his damages in connection with his claim to 5% of the defendants' net revenues from foreign markets for the episodes plaintiff worked on, I preclude the defendants from disputing Radosh's computation of damages of $150,000 for this cause of action.

Radosh must still prove liability on this claim, as well as both liability and damages on his second cause of action for accounting and third cause of action for breach of contract for failure to provide him with a "developed by" credit.

Radosh further argues that the Court should impose an adverse inference against Frank on the issue of whether he should be held personally liable for the contract under a piercing the corporate veil theory. As the parties did not specifically press this issue at their prior conferences with the Court, I deny Radosh's motion for an adverse inference or preclusion with respect to his claim for piercing the corporate veil, without prejudice to renew.

In reaching the above decision, I reiterate to the parties that "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and . . . that disregard of deadlines should not and will not be tolerated." *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.,* 5 N.Y.3d 514, 521 (2005).

Lastly, Radosh seeks an order imposing sanctions on the defendants and their counsel Suzanne Bracker. Section 130-1.1 of the Codes, Rules and Regulations of New York provides, in relevant part, that the court "may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Conduct is considered frivolous if "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *Id.*

During the course of discovery, defendant's counsel repeatedly made representations to the Court that a motion for a protective order would be filed, and made the further representation that the motion was in fact properly filed and served. However, the defendants' motion was never properly filed and served. I find that this conduct by Bracker is frivolous because it has delayed and prolonged the resolution of this litigation. *Preferred Equities Corp. v. Ziegelman*, 190 A.D.2d 659 (2d Dep't 1993); *Miller v. Cruise Fantasies, Ltd.*, 74 A.D.3d 919, 921 (2d Dep't 2010). Accordingly, Radosh's motion for sanctions and attorney's fees is granted only to the extent that counsel Suzanne Bracker is directed to pay Radosh's costs for making this cross-motion in the amount of $45 on or before July 22, 2016.

In accordance with the foregoing, it is

ORDERED that defendants Sundel Frank and Sandy Frank Entertainment, Inc.'s motion to amend their answer and affirmative defenses is denied; and it is further

ORDERED that defendants Sundel Frank and Sandy Frank Entertainment, Inc.'s motion for a protective order and to quash plaintiff Stephen Radosh's *subpoena duces tecum* and *ad testificandum* is denied; and it is further

ORDERED that plaintiff Stephen Radosh's cross-motion to strike the defendants' answer and affirmative defenses, preclude defendants from offering certain evidence, and attorney's fees is granted to the extent described above; and it is further

ORDERED that the Court having determined that counsel Suzanne Bracker has engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrative Judge, plaintiff Stephen Radosh is awarded the costs associated with making his cross-motion in the amount of $45 to be paid by counsel Suzanne Bracker on or before July 22, 2016; and it is further

ORDERED that the parties are directed to complete document discovery by August 5, 2016 and depositions by September 16, 2016; and it is further

ORDERED that the note of issue deadline is September 16, 2016; and it is further

ORDERED that the parties are directed to appear for a status conference at 60 Centre Street, Room 208, on July 20, 2016 at 2:15pm.

This constitutes the decision and order of this Court.

DATE : 7/1/16

SCARPULLA, SALIANN, JSC