

Intrepidus, LLC v Bivins
2016 NY Slip Op 32272(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 651994/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Intrepidus, LLC,

Plaintiff,

- v -

Glenn J. Bivins, John Doe,
The Salisbury Fortress, LLC d/b.a
Attractive Approach, and
Profitable Media, LLC,

Defendants.

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Index No.
651994/2014

**DECISION
and ORDER**

Mot. Seq.
#007

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Intrepidus, LLC (“Plaintiff”) moves for an Order compelling defendant, Glenn J. Bivins (“Bivins”) to provide responses to Plaintiff’s April 8, 2016 Third Set of Discovery Demands (“Discovery Demands”) and documents that Plaintiff purportedly demanded during Bivins’ deposition. Bivins opposes.

As alleged in the Amended Complaint, “This action is brought by Intrepidus, the minority member of Seductive Approach, on behalf of and for the benefit of Seductive Approach, to seek damages against Bivins for his breach of fiduciary duty as managing member of Seductive Approach including his self-dealing and theft of corporate opportunity, waste of corporate resources, conversion, and fraud, as well as to enforce a non-compete covenant against Bivins pursuant to Seductive Approach's Operating Agreement.” Among other allegations, Plaintiff alleges that Bivins is alleged to have breached his fiduciary duty to Seductive Approach and “stolen the companies [sic] property by transferring it to another company, Salisbury Fortress, LLC.”

On or about August 6, 2014, Plaintiff filed an amended summons and complaint. On or about August 26, 2014, Bivins joined issue through the service of an answer. On March 6, 2015, the Parties engaged in a preliminary conference. On or about July 23, 2015, Plaintiff served Bivins with a First Set of Discovery Demands. On or about January 11, 2016, Plaintiff served Bivins with a First Set of Discovery Demands. On or about January 21, 2016, Bivins appeared for the first date of his deposition.

On or about February 1, 2016, Bivins appeared for his second date of his deposition.

On March 29, 2016, the parties appeared for a compliance conference. Pursuant to the compliance conference order, the Court ordered, among other things, Plaintiff to submit additional document demands by April 8, 2016, and Bivins to respond to those documents within 30 days. Additionally, the Court ordered Bivins to provide an affidavit describing the search for documents not provided.

On April 9, 2016, Plaintiff served Bivins with a Third Set of Discovery Demands.

A compliance conference was held on July 19, 2016. By Order dated July 19, 2016, Bivins was directed to respond the Discovery Demands, or to provide “a detailed affidavit describing all of his efforts to search for documents and serve such by 7/26/2016.”

On or about July 26, 2016, Bivins provided Plaintiff with a response to the Discovery Demands and a copy of an unsigned agreement between The Salsbury Fortress, LLC, and Bivins. Bivins objected to many of Plaintiff’s demands. Plaintiff claims Bivins’ failure to respond to many of Plaintiff’s demands and to provide an affidavit of what search he conducted “was substantially a blanket objection and no production.”

In this motion, Plaintiff seeks to compel Bivins to provide responses to Plaintiff’s April 8, 2016 Third Set of Discovery Demands and documents that Plaintiff purportedly demanded during Bivins’ deposition. The Court notes that no copies of Bivins’ deposition transcript is provided to the Court.

Specifically, Plaintiff alleges that Bivins' responses are deficient for the following reasons:

- (1) Bivins has failed to produce an affidavit relating to his search as the Court had directed.
- (2) Bivins has failed to produce documents relating to his personal hair cutting business. Plaintiff alleges that these documents are relevant to the "allegations of Bivins' mismanagement of Seductive Approach's funds, commingling of funds, and great likelihood that Bivins used his personal business to commit the fraud on Plaintiff." Plaintiff contends that "Bivins' records relating to any business venture he had in, especially one relating to personal style the potentially overlaps with Seductive Approach's services such as his hairstyling business, must be disclosed to Plaintiff." In addition, Plaintiff argues that "any and all relationships with the former co-defendants is relevant, including but not limited to Philip Schloss and Salsbury Fortress, LLC."
- (3) Bivins has failed to disclose the full extent of the businesses he engaged in, contracts he entered into, and clients he serviced. Plaintiff contends that responses to these demands are necessary in order for Plaintiff to "prove the claims against Bivins because ... such evidence speaks to his opportunities to commingle funds and would inevitably lead Plaintiff to additional discoverable evidence"
- (4) Bivins has failed to provide documentation relating to his finances as relating to his recent divorce proceeding. Plaintiff argues that "any of financial documentation relating to Bivins, especially documents that relate to his preexisting financial obligations that might give rise for Bivins to defraud Seductive Approach should be disclosed to Plaintiff."
- (5) Bivins has failed to disclose his financial records on the basis that such demands have been previously disclosed. Plaintiff argues, "Bivins' disclosed records current only until October of 2015 and has never provided Plaintiff with copies of cancelled checks, which would allow Plaintiff to investigate Bivins' business transactions. As such, Plaintiff is entitled to additional bank records, and copies of Plaintiff's cancelled checks."

- (6) Bivins has failed to disclose communications involving Dominic Romano, Esq. relating to a \$37,000 payment Bivins paid towards the settlement of this matter, which Bivins asserts was only to be held in escrow. Plaintiff argues, “These communications are material and necessary to Plaintiff’s case because such communications would essentially prove that Bivins is hiding funds that he has control over.” Plaintiff argues, “[T]he bank records Bivins has thus far disclosed show that he never maintained funds nearing that amount in his bank” and “Bivins, through counsel, disputes that he has any funds.” Plaintiff argues, “As such, Bivins’ communications indicating his ability to transfer such funds should be disclosed to Plaintiff.”
- (7) Plaintiff also seeks executed documents relating to Philip Schloss and/or Salsbury Fortress and “any communications with and documents Bivins executed with non-parties (i.e. Profitable Media, LLC and others) that relate to Bivins’ business and the Salsbury Fortress.” Plaintiff claims that Bivins had referred to the existence of an agreement between Bivins and Salsbury Fortress but has not provided a copy of the executed agreement.

Bivins opposes. He states that Plaintiff’s motion should be denied because “there is no admissible evidence that the Defendant has the documents counsel is now seeking,” “[s]ince the filing of this motion there have been two more depositions held, and the Defendant has explained that he has nothing further,” and “Mr. Davidoff has shown at this depositions [sic] that he has subpoenaed companies such as PayPal to get the documents he has requested.”

Bivins submits the attorney affirmation of Romeo Salta and an affidavit from Bivins, dated August 6, 2016. Salta states on January 4, 2016, he sent Plaintiff responses to Plaintiff’s document requests and interrogatories. Salta states that Bivins also produced disks “containing copies of dozens of emails responsive to various of the Demands and still in he [sic] Defendant’s possession, PayPal records in the possession of the Defendant, and bank statements spanning December 2012 to October 2015 for Glenn Jason Hair Design (the Defendant’s business and unrelated to this action).”

Salta states that on July 26, 2016, Bivins served responses to Plaintiff's Third Set Discovery Demands. Salta states, "Inasmuch as all documents in the possession of the Defendant had already been given to Plaintiff's counsel and the Third Request contained dozens of identical Requests already answered in January, no new documents were submitted other than a draft agreement between the Defendant and the former co-defendant, Phillip Schloss." Salta states that on July 31, 2016, he emailed Plaintiff's counsel an affidavit of Bivins, dated July 27, 2016, stating that he has no documents other than what has already been provided and that he did a search including his emails. Salta states that Bivins executed another affidavit on August 12, 2016, after his fourth deposition. In his August 12, 2016 affidavit, Bivins states:

I am the individually named defendant in the above-captioned action, and I make this Affidavit to explain what, if any, documents, as defined by the Plaintiff's Notices to produce, I have in my possession. In January of this year I submitted all the documents in my possession that responded to the Plaintiff's Notice to produce. Since then, the Plaintiff, through his attorney, has served further Notices to produce documents. My response to the last (the third Notice) are true and accurate. I have no documents, as defined by plaintiff, in my possession that are responsive to any of the Requests made in the Third Notice other than what I already submitted in response to prior Notices. I do not have any storage facilities, either in my home or outside of my residence, to keep documents, and I did a thorough search of my computer files and emails to see whether there are any responsive documents contained there. There are none.

Salta further claims that while Plaintiff bases its motion to compel on the testimony of Bivins at his deposition that he has certain documents, Plaintiff has never provided Bivins with a copy of the transcripts despite Bivins' demand.

In reply, Plaintiff maintains, "The need for these Requests naturally arose out of deposition testimony and unsatisfactory responses to previous Requests." Plaintiff continues to rely upon Bivins' deposition transcript but does not provide a copy of it for the Court's review.

Wherefore, it is hereby

ORDERED that the motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 4, 2016

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EILEEN A. RAKOWER, J.S.C.