

**Great Bowery, Inc. v John Barrett Holdings, LLC**

2017 NY Slip Op 30116(U)

January 18, 2017

Supreme Court, New York County

Docket Number: 652382/2016

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

GREAT BOWERY, INC. (d/b/a Tim Howard  
Management),

Plaintiff,

-against-

JOHN BARRETT HOLDINGS, LLC,

Defendant.

Index No.: 652382/2016  
**DECISION/ORDER**  
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to compel and for sanctions.

<b>Papers</b>	<b>Numbered</b>
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law .....	2
Affirmation of Jordan D. Weinreich, Esq. in Support of Motion.....	3
Affirmation of Good Faith.....	4
Defendant's Memorandum of Law in Opposition.....	5
Plaintiff's Reply in Further Support of its Motion.....	6

*Sherman Wells Sylvester & Stamelman LLP*, New York (Jordan D. Weinreich of counsel), for plaintiff.

*Ballou Stoll Bader & Nadler, P.C.*, New York (Michael J. Sheppard & Gillian A. Bader of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff moves to compel disclosure under CPLR 3124. Plaintiff also moves for sanctions against defendant. According to plaintiff, defendant willfully failed to respond to plaintiff's disclosure requests, although no preliminary conference has been held yet.

Plaintiff is a talent agency that represents, among others, hair stylists, nail stylists, and makeup artists. Defendant operates a hair salon within the Bergdorf Goodman department store located at 754 Fifth Avenue in New York County. On or about April 30, 2015, plaintiff entered into an independent contractor agreement in which plaintiff would make its client, Marki Skrelja, available to provide hair-styling services for defendant (the Skrelja Agreement). On or about June 26, 2016, defendant entered into another independent contractor agreement with plaintiff in which plaintiff's client, Tracylee Percival, would provide manicure and pedicure services for defendant (the Percival Agreement). Plaintiff brought this suit against defendant for breach of contract. Defendant asserts two counterclaims alleging that the services plaintiff provided were not provided or was substandard and lacking.

Plaintiff sent its First Request for Interrogatories and its First Request for the Production of Documents on or around July 26, 2016. Plaintiff argues that defendant has not responded to its disclosure demands. Plaintiff asserts that defendant has not provided any information about how the services plaintiff provided were substandard or lacking.

In opposition to plaintiff's motion, defendant argues that plaintiff has not engaged in meaningful exchange with defendant to resolve the disclosure dispute. Defendant also argues that it has not willfully stalled in providing disclosure; rather, that it is trying to locate additional responsive information. According to defendant, many of its employees no longer work for defendant — making it difficult for defendant to find and collect the disclosure information plaintiff requests.

Defendant argues that plaintiff has failed to provide a good faith affirmation under 22 NYCRR 202.7 (a) (2). Thus, defendant contends, plaintiff's motion for sanctions against defendant is improper.

#### **I. Good Faith Affirmation Under 22 NYCRR 202.7 (a) (2)**

Plaintiff's good faith affirmation is sufficient. Plaintiff has stated the efforts it made under 22 NYCRR 202.7 (a) (2) to resolve its disclosure dispute with defendant.

Under 22 NYCRR 202.7 (a) (2), no motion relating to disclosure may be brought without an affirmation from counsel stating it has conferred with opposing counsel in good faith to resolve the disclosure dispute. When a party moves to impose a sanction under CPLR 3126, that party must submit an affirmation that the moving party has made a good faith effort to resolve the issues raised by the motion with opposing counsel. (*241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471 [1st Dept 2013], citing Uniform Rules for Trial Courts [22 NYCRR] § 202.7.) An affirmation must state the moving party's efforts to resolve the dispute with opposing counsel. (*Id.*)

Plaintiff's good-faith affirmation meets the requirements under 22 NYCRR 202.7 (a) (2). Plaintiff gives the court the specific and detailed efforts it made with defendant to resolve the disclosure dispute. After plaintiff consented to a three-week extension of defendant's responses, plaintiff contacted defendant three additional times regarding the disclosure responses. Plaintiff emailed defendant on September 6, 2016, after the deadline passed. Plaintiff spoke to defendant by phone on September 7, 2016, and sent another email on September 12, 2016. The email plaintiff sent on September 12, 2016, details the time of the communication, as evidenced by the email's time stamp. The September 12, 2016, email documents plaintiff's efforts to resolve with defendant regarding plaintiff's disclosure requests.

#### **II. Plaintiff's Motion to Compel Disclosure**

Plaintiff's motion to compel disclosure is granted.

The scope of disclosure under CPLR 3101 is broad must be construed liberally and generously. (*Mann v Cooper Tire Co.*, 22 AD3d 24, 29 [1st Dept 2006].) CPLR 3101 provides:

“(a) Generally. There 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:  
(1) a party, or the officer, director, member, agent or employee of a party.”

The words “material and necessary” refer to requiring disclosure of any facts that bear on the controversy and will assist in preparing for trial. (*Allen v Crowell-Collier Publishing Co.*, 21 NY 2d 403, 406 [1968].)

Plaintiff argues that defendant produced answers to plaintiff’s interrogatories that were “basically non-responsive.” (Plaintiff’s Reply, at 4.) Plaintiff also states that defendants have not produced documents to plaintiff to date. (*Id.*) Plaintiff sent defendant 28 document requests. For each request, defendant responded in the following manner:

“Defendant hereby incorporates the above-noted general objections herein, and specifically refers, without limitation, to General Objections 3, 4, 5, 6, 8, 9, 10, 11, and 14 as particularly applicable herein. Notwithstanding the foregoing and without waiving such objections, to the extent that such documents exist and are in the possession custody or control of the Defendant and are not subject to the attorney-client privilege, the work-product doctrine, trial preparation privilege or otherwise immune or protected from disclosure, the Defendant refers Plaintiff to the documents produced herewith, as such documents were maintained in the ordinary course of business. Notwithstanding the foregoing and without waiving such objections, Defendant further states that, it reserves the right to further supplement this response and/or the document production.” (Defendant’s Memorandum of Law in Opposition, Exhibit 1.)

Plaintiff argues that defendant’s response is equivalent to no response. (Plaintiff’s Reply in Further Support, at 4.) According to plaintiff, defendant never produced any document to plaintiff. (*Id.*)

Plaintiff’s Interrogatory Nos. 1, 3-15 and Document Request Nos. 18-20 seek information about any payment defendant made. In lieu of a response, plaintiff states that it is willing to have defendant stipulate that defendant did not pay plaintiff under the Skrelja Agreement or the Percival Agreement. (Affirmation of Jordan D. Weinreich, Exhibit D.)

Plaintiff’s Interrogatory No. 42 and Document Request No. 21 seek information about any agreements defendant claims plaintiff breached, a detailed description of the manner in which plaintiff breached the agreements, and any fact to support that the agreements were breached. (Affirmation of Jordan D. Weinreich, Exhibit D.) Plaintiff’s Document Request Nos. 4-17 inquire into the communications between defendant’s employees and plaintiff concerning plaintiff’s performance under the Skrelkja and Percival agreement. (Affirmation of Jordan D. Weinreich, Exhibit E.)

Defendant’s only opposition to plaintiff’s motion is that it needs more time to comply.

Defendant must respond to plaintiff's Interrogatory Nos. 1, 3-15, 24 and Document Request Nos. 4-17, 18-20, 21 by February 22, 2017. Plaintiff and defendant must appear for a preliminary conference on March 29, 2017, at 10:00 a.m. in Part 7, room 583, at 111 Centre Street.

**III. Sanctions Under CPLR 3126 and 22 NYCRR 130.1**

Plaintiff seeks monetary sanctions against defendant to be reimbursed for plaintiff's costs and expenses incurred in filing this motion. That aspect of plaintiff's motion for sanctions under CPLR 3126 and 22 NYCRR 130.1 is denied.

Plaintiff could have filed its request for judicial intervention requesting a preliminary conference instead of filing this motion.

According to CPLR 3126 (3), "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information . . . the court may make such orders with regard to the failure or refusal as are just. . . ." (See *CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 317-318 [2014].) A court may impose sanctions under CPLR 3126 when a party intentionally or in bad faith fails to comply with a disclosure order. (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013].) A monetary sanction is warranted if counsel repeatedly delays the disclosure process and fails to comply with disclosure orders. (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1st Dept 1999].)

No preliminary conference has taken place. Defendant's behavior was not contumacious or in bad faith to warrant imposing a monetary sanction. In any event, defendant has not disobeyed any court order.

Plaintiff's motion for sanctions under CPLR 3126 and 22 NYCRR 130.1 is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted in part and denied in part. It is granted in that defendant must respond to plaintiff's Interrogatory Nos. 1, 3-15, 24 and Document Request Nos. 4-17, 18-20, 21 by February 22, 2017. It is denied in part in that no sanctions are warranted.

ORDERED that the parties appear for a preliminary conference on March 29, 2017, at 10:00 a.m. in Part 7, room 583, at 111 Centre Street.

Dated: January 18, 2017



**HON. GERALD LBOVITS**  
J.S.C.