

Leakey v Setai Group LLC

2017 NY Slip Op 31806(U)

August 28, 2017

Supreme Court, New York County

Docket Number: 151298/2014

Judge: Erika M. Edwards

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

LAUREN LEAKEY,

Index No: 151298/2014

Plaintiff,

DECISION AND ORDER

-against-

THE SETAI GROUP LLC, JASON TURNER,
AMERICAN LEISURE MANAGEMENT OF NEW
YORK CITY, CORP., AND 40 BROAD SPA OWNER
LLC,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Opposition and Affidavits/Affirmations/ Memos of Law annexed	<u>2</u>
Reply	<u>3</u>

ERIKA M. EDWARDS, J.:

Defendants American Leisure Management of New York City, Corp.’s and 40 Broad Spa Owner LLC’s (collectively “Defendants”) motion to strike, vacate, or modify Plaintiff’s demand dated August 18, 2016, and for a protective order is GRANTED to the extent as put forth herein.

Defendants move to strike, vacate, or modify Plaintiff’s demand dated August 18, 2016, requesting, “all statements or affidavits that were obtained by Defendants and Defendants’ agents, servants, or employees, now in your possession, custody, or control, or in the possession, custody or control of any party you represent in this action, whether signed or unsigned, written, transcribed, or otherwise recorded.” Defendants argue that Plaintiff’s demand is overbroad, improper, and is not limited in time or scope. Furthermore, Defendants argue that the affidavits of non-party former employee witnesses ultimately sought by the demand are privileged as

attorney work product and seek a protective order. Plaintiff argues that the affidavits are not attorney work product and argues for the court to compel the production of the affidavits since the non-party witnesses have been unresponsive to Plaintiff's correspondence. Plaintiff fails to address the validity of the underlying demand.

This Court has the discretion to enter a protective order which "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). When discovery demands are overbroad, burdensome or lack specificity, the appropriate remedy is a protective order vacating the improper demands (*see Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 470 [2d Dept 2004]). "[T]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). However, a request for an entire category of documents without any reference or link to a claim at issue is impermissibly overbroad (*Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 278 AD2d 157 [1st Dept 2000]).

Additionally, attorney work product, which is subject to an absolute privilege, is limited to "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy" (*In re New York City Asbestos Litig.*, 109 AD3d 7, 12 [1st Dept 2013], citing *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190–191 [1st Dept 2005]). "Documents generated for litigation are generally classified as trial preparation materials unless they contain otherwise privileged communications, such as memoranda of private consultations between attorney and client" (*id.* at 12, citing *People v. Kozlowski*, 11 NY3d 223, 244 [2008]). "Trial preparation materials are subject to a conditional

privilege” and “may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means” (*id.* at 12-13; CPLR 3101[d][2]).

Here, Plaintiff’s demand for, “all statements or affidavits that were obtained by Defendants and Defendants’ agents, servants, or employees, now in your possession, custody, or control, or in the possession, custody or control of any party you represent in this action, whether signed or unsigned, written, transcribed, or otherwise recorded” is overbroad and lacks specificity. The demand seeks an entire category of documents without any reference or link to a claim at issue and it is not limited to time or scope. As such, Plaintiff’s demand, dated August 18, 2016, is vacated.

Furthermore, although Plaintiff’s demand is overbroad and lacks specificity, Plaintiff’s opposition to the instant motion makes it clear that the information she is seeking are written affidavits from former employee non-party witnesses. Defendants oppose production of these affidavits and argue that these non-party witness affidavits are privileged as attorney work product. However, these affidavits are not the product of counsel’s professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy. As such, these non-party witness affidavits are not subject to absolute attorney work product privilege, but are conditionally privileged because they qualify as trial preparation materials.

Lastly, this court declines to compel disclosure of the non-party witness affidavits at this time, since Plaintiff failed to meet her burden of showing the she is unable, without undue hardship, to obtain the substantial equivalent of the affidavits by other means. Defendants provided Plaintiff with the last known addresses and phone numbers of multiple former

employee non-party witnesses. Plaintiff concedes that she has information to believe that at least one non-party witness lives out of the state but Plaintiff failed to secure an open commission to take the deposition of this witness. Plaintiff also failed to show her due diligence of securing any witness for a deposition as Plaintiff has not served any non-party witness with a deposition subpoena. Furthermore, Plaintiff failed to support her conclusory argument that the non-party witnesses are unresponsive as Plaintiff failed to include any supporting documentation, such as a call log, returned letters, postal search, or affidavit from a private investigator detailing his or her due diligence to search for the witnesses. As such, the court grants Defendants' motion for a protective order. Nevertheless, to avoid additional motion practice, Defendants, at their discretion, may produce the non-party affidavits subject to redactions of any privileged or confidential information.

Accordingly, it is hereby

ORDERED that Defendants American Leisure Management of New York City, Corp.'s and 40 Broad Spa Owner LLC's motion to strike, vacate, or modify Plaintiff's demand dated August 18, 2016, and for a protective order is granted to the extent that Plaintiff's demand dated August 18, 2016 is vacated and Defendants American Leisure Management of New York City, Corp. and 40 Broad Spa Owner LLC are not compelled to disclose the affidavits of non-party witnesses without further sufficient application by Plaintiff.

This constitutes the decision and order of the court.

Date: August 28, 2017



HON. ERIKA M. EDWARDS, J.S.C.