

Frat Star Movie, LLC v Elliot Tebele & FJerry LLC

2017 NY Slip Op 31877(U)

September 5, 2017

Supreme Court, New York County

Docket Number: 651496/2017

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

FRAT STAR MOVIE, LLC

Plaintiff,

-against-

ELLIOT TEBELE & FJERRY LLC,

Defendants.

Index No.: 651496/2017
DECISION/ORDER
Motion Sequence No. 001

Leader & Berkon LLP, New York City (Joseph G. Colao and Thomas K. Richards of counsel),
for plaintiff.

Hinckley & Heisenberg LLP, New York City (George R. Hinckley, Jr. of counsel), for
defendants.

Plaintiff sues for breach of contract claiming that defendants failed to satisfy the terms of a service agreement between the parties. According to plaintiff, defendants neglected to make plaintiff their "first priority" during a "promotional period" from December 1, 2016, through April 10, 2017. (Plaintiff's reply memorandum at 2; Plaintiff's exhibit B, ¶ 7.)

Defendants claim that they fully and satisfactorily completed services within the terms of the agreement about the work quality, timeliness of posts, and requisite collaboration between the parties. (Defendants' memorandum of law in opposition at 4.)

Plaintiff now moves to compel disclosure under CPLR 3124, seeking documents in plaintiff's document requests numbers 1-4, dated March 22, 2017, concerning defendants' contractual relationships with third parties from January 1, 2015, to the present. (Plaintiff's first request to defendants for the production of documents and things at 8.)

Plaintiff argues that defendants served their responses and objections to the document requests late. (Plaintiff's memorandum in support at 10.) Plaintiff served discovery requests on defendants with the summons and complaint on March 23, 2017. Defendants' responses were due on April 24, 2017. (Defendants' memorandum of law in opposition at 12.) When defendants did not object by April 24, plaintiff's counsel sent a copy of the document requests to defendants' counsel on April 28. (Defendants' memorandum of law in opposition at 9.) Defendants responded on April 30, 2017. (Defendants' memorandum of law in opposition at 11-12.) Plaintiff argues that because of this delay, defendants have waived the right to object to the document requests and thus that they must produce all relevant documents. (Plaintiff's memorandum of law in support at 10.)

Defendants oppose the motion and argue that the delay in serving responses and objections to plaintiff's document requests is "both understandable and excusable" because plaintiff served defendants Elliot Tebele and FJerry LLC with the document requests instead of

providing it to defendants' counsel. (Defendants' memorandum of law in opposition at 11.) Defendants ask the court to excuse the delay as permissible because defendant Tebele is an entrepreneur and not a lawyer, and did not know he needed to inform his counsel about the requests. (Defendants' memorandum of law in opposition at 8.) Defendant Tebele did not inform defendants' counsel of the document requests until plaintiff's requested response date of April 24 had passed. (Affirmation of George R. Hinckley, Jr. ¶ 2.) Defendants' counsel did not receive the requests until plaintiff sent the requests directly to defendants' counsel.

Plaintiff also argues that the documents are material and necessary adequately to prosecute its case. (Plaintiff's memorandum of law in support at 12.) The parties do not contest the adequacy of responses to plaintiff's document requests numbers 5-12.

Defendants argue that documents responsive to plaintiff's requests number 1-4 are unrelated to the current dispute. (Defendants' memorandum of law in opposition at 8.) Defendants claim that plaintiff wants a fishing expedition into defendants' confidential business records. (Defendants' memorandum of law in opposition at 10.)

I. Delay in Responses and Objections Permissible for Reasonable Excuse Under CPLR 3012.

Defendants have a reasonable excuse for the delay in serving responses and objections to plaintiff's document requests.

Under CPLR 3120 (1) (i), a party is required after the commencement of an action to serve another party with notice to produce "any designated documents." However, service of notice demanding discovery is not permitted when that service occurs "simultaneously with commencement of the action; service of a discovery and inspection notice on lay people who have not yet had an opportunity to consult counsel may well add to the confusion engendered by the receipt of a summons and complaint." (44A NY Jur 2d Disclosure § 319 [citing *Daviu v R.C. Audobon Car Service, Inc.*, 163 Misc 2d 404, 405 [Sup Ct, Bronx County 1994], cited with approval in David D. Siegel, *New York Practice*, § 36, at 49-50 [5th ed 2011].)

Parties must allow at least 20 days from the time of service of a discovery request for an opposing party to object to any disclosure requests. (CPLR 3122 [a] [1].) The court may use its discretion to disregard any delay or mistake "if a substantial right of a party is not prejudiced." (CPLR 2001.) Specifically, the court has the discretion to excuse minor noncompliance with time requirements under CPLR 3122. (*See Handel v Handel*, 26 NY2d 853, 855 [1970]; *Hirsch v Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 91 AD2d 1033, 1034 [2d Dept 1983].)

Because the court has the discretion to extend the time within which a party must object to disclosure requests, this court excuses defendants' delay in serving responses and objections to plaintiff's document requests. Defendants' excuse is reasonable because plaintiff initially provided defendants with its disclosure requests only by attaching the requests to the summons and complaint to lay defendants Elliot Tebele and FJerry LLC, creating confusion. Further, the delay did not prejudice plaintiff. Plaintiff's counsel sent the requests directly to defendants' counsel by email on April 28. Defendants acted expeditiously to submit their objections two days

after receiving the requests from plaintiff’s counsel, and began producing the requested documents. The delay in defendants’ serving responses and objections did not interfere with any deadlines or conferences set by the court, and was only six days after plaintiff’s due date. Because defendants’ delay did not prejudice plaintiff and was brief, the court will exercise its discretion to excuse defendants’ delay.

II. Whether Plaintiff’s Document Requests Are Material and Necessary

Plaintiff’s document requests numbers 1–3 are irrelevant, but document request Number 4 is relevant to this litigation. CPLR 3101 (a) requires the “full disclosure of all matter material and necessary in the prosecution or defense of an action” “In the absence of a timely motion for a protective order vacating plaintiffs’ notice of discovery and inspection, the items of said notice will not be scrutinized unless the notice is palpably improper.” (*Wood v Sardi’s Rest. Corp.*, 47 AD2d 870, 871 [1st Dept 1975].) A disclosure request is “palpably improper” if it is not relevant to the case at issue, of a confidential and private nature, overbroad, or overly burdensome to produce. (*Zimmer v Cathedral Sch. of St. Mary & St. Paul*, 204 AD2d 538, 539 [2d Dept 1994]; *Spancrete Ne., Inc. v Elite Assocs., Inc.*, 148 AD2d 694, 696 [2d Dept 1989]; *Muller v Sorensen*, 138 AD2d 683, 684 [2d Dept 1988].) Further, “[w]here discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it.” (*Berkowitz v 29 Woodmere Blvd. Onwers, Inc.*, 135 AD3d 798, 799 [2d Dept 2016] [internal citations omitted].)

Plaintiff claims that “[d]efendants’ third-party engagements materially interfered with their performance of the Services to plaintiff.” Because defendants had third-party engagements, defendants did not cooperate with plaintiffs on the promotional content defendants posted under the parties’ agreement. (Plaintiff’s reply memorandum of law at 4.) Plaintiff argues that it is entitled to explore “how and to what extent Tebele’s admitted shift in priority to third parties interfered with his performance of [s]ervices,” which allegedly caused \$250,000 in damages for plaintiff. (Plaintiff’s reply memorandum of law at 7-8.)

Defendants argue that plaintiff’s requests numbers 1–4 are “palpably improper” because they “seek a massive number of irrelevant documents, essentially calling for *all* defendants’ work product relating to *all* of its other clients.” (Defendants’ memorandum of law in opposition at 5.) Defendants assert that the requested documents are confidential business records. (Defendants’ memorandum of law in opposition at 8, 10.)

Plaintiff’s document requests dated March 22, 2017, numbers 1–3 are palpably improper because they are overly broad and seek irrelevant documents focused on defendants’ contractual obligations to any unrelated third parties with whom defendants have engaged for the last two and a half years. Plaintiff’s document requests numbers 1–3 request that defendants produce all communications or documents concerning any contracts or agreements, any social-media posts, and “any fees, payments or salary made to or received by Tebele or [defendant company] FJerry during the Time Frame [January 1, 2015, to present].” (Affirmation of Thomas K. Richards, Esq., Exhibit A ¶¶ 1-3.) Plaintiff is attempting to use defendants’ business records to show that plaintiff, in comparison to these unrelated third parties, received sub-par services from defendants. But whether defendants satisfied their contractual responsibilities to plaintiff does

not depend on whether defendants performed their obligations to third parties under other contracts. The court denies plaintiff's motion to compel defendants to produce the documents in document requests numbers 1-3.

Finally, although defendants argue that plaintiff's request number 4 is irrelevant and burdensome, the court disagrees. Plaintiff's document request number 4 reads in full: "Produce full account downloads, in accessible electronic form, of all data, including without limitation all social media posts, for all the Social Media Accounts, for the time period of December 1, 2016 to January 31, 2017." (Affirmation of Thomas K. Richards, Esq., Exhibit A ¶ 4.) Request number 4 requires information easily accessible to defendants, as it would be available to the general public. The documents to be produced are also material to the current litigation because the request includes defendants' posts made under the parties' contract. Thus, defendants must produce the documents requested in plaintiff's request number 4.

Accordingly, it is

ORDERED that plaintiff's motion to compel defendants to produce documents is denied in part and granted in part: The court denies plaintiff's motion to compel defendants to produce the documents in document requests, dated March 22, 2017, numbers 1-3, but defendants must produce the documents requested in plaintiff's request number 4; and it is further

ORDERED that defendants shall produce to plaintiff a response to plaintiff's document request number 4 on or before October 5, 2017; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 7, at 60 Centre Street, room 345, on November 1, 2017, at 11:00 a.m.

Dated: September 5, 2017



J.S.C.
HON. GERALD LEBOVITS
J.S.C.