Towe v Arif
2018 NY Slip Op 31242(U)
June 18, 2018
Supreme Court, New York County
Docket Number: 155040/16
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Adam Silvera, Justice Part 22

PHILIP CRAIG TOWE,

Plaintiff,

-against-

MIAH ARIF, JONAH KATZ, and UBER TECHNOLOGIES, INC.,

Defendants.

INDEX NO. 155040/16

MOTION SEQ. NO. 001

SILVERA, J.:

BACKGROUND

Plaintiff Philip Craig Towe commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident on September 22, 2012 in which he was a cyclist who came into contact with the car door of a vehicle owned by defendant Miah Arif when the passenger, defendant Jonah Katz, opened the rear door of such vehicle. On the date and time of the accident defendant Arif was a driver using the Uber application of defendant Uber Technologies, Inc. and was completing a ride requested by defendant Katz through the Uber application of defendant Uber. Thereafter, plaintiff requested certain discovery, and now moves to strike defendant Uber's answer for failing to comply with discovery. Defendant Uber opposes and cross-moves for a protective order. Plaintiff opposes.

DISCUSSION

Plaintiff's motion to strike defendant Uber's answer for failure to comply with discovery is denied. "It is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both

deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1st Dep't 2002)(internal citations omitted). Here, plaintiff has failed to establish that defendant Uber's failure to provide the documents sought was deliberate and contumacious. It is undisputed that defendant Uber has responded to plaintiff's discovery requests, albeit with objections and a request for a confidentiality agreement. Thus, the instant motion, which seeks the harsh relief of striking defendant Uber's answer is denied and discovery is ordered below.

As to defendant Uber's cross-motion for a protective order, preliminarily, the Court notes that, as per the so ordered stipulation of Honorable Paul A. Goetz, dated April 24, 2017, defendant Uber stipulated to, and was ordered to, "make a motion for a protective order by 5/24/17". Notice of Motion, Exh. F, April 24, 2017 Stipulation. However, defendant Uber failed to make a timely motion as per the so ordered stipulation. Instead, defendant Uber took no action until plaintiff brought the instant motion to strike. Nonetheless, in considering defendant Uber's cross-motion on the merits, such cross-motion is decided as indicated below.

The Appellate Division, First Department, held that "[a]lthough the initial showing required by a party seeking a protective order against discovery of documents containing trade secrets is minimal, it still must be non-conclusory and give rise to a concern that plaintiff's competitors may gain some competitive advantage as a result of discovery of secret business procedures and information". *JPMorgan Chase Funding Inc. v Cohan*, 134 AD3d 455, 455 (1st Dep't 2015)(internal quotations omitted)(citing *Jackson v Dow Chem Co.*, 214 AD2d 827 [3rd Dep't 1995] which states "that a two-fold analysis must be satisfied before an order of confidentiality may be granted. The movant must first show that the discovery demanded would

require it to reveal trade secrets, which would then shift the burden to the nonmovant to show that the information was indispensable to support its case."). It has long been held that "the conclusory statements by...counsel...that the information sought constitutes trade secrets does not establish...entitlement to a confidentiality order. In that connection, the burden of proving that an item should not be produced during discovery is placed upon the party seeking to avoid such discovery." *New York State Electric & Gas Corp. v Lexington Ins., Co.*, 160 AD2d 261, 262 (1st Dep't 1990).

In the cross-motion, defendant Uber failed to provide nonconclusory statements regarding the necessity of a protective order. Plaintiff's demands sought, *inter alia*, the name and location of the Uber base associated with co-defendant Arif, a copy of any contract between the defendant Uber and co-defendant Arif, a copy of any training material provided by defendant Uber to co-defendant Arif, a copy of co-defendant Arif's application to defendant Uber, a copy of the "City Knowledge Test" given by defendant Uber to co-defendant Arif, a copy of the trip sheet or data collected by defendant Uber on November 13, 2015, a copy of all vehicle inspections or surveys conducted by defendant Uber of co-defendant Arif's vehicle, a copy of all documents setting forth the insurance requirements for defendant Uber's drivers in effect on November 13, 2015; and all driver recruitment materials used in 2014 and 2015. In support of its cross-motion, defendant Uber submits the affidavit of Matt Powers, a Senior Operations Manager in New York. Such affirmation states that the documents requested seek confidential and proprietary business information and trade secrets. The Powers affidavit further states that defendant Uber is a technology company that develops and licenses a mobile smartphone application enabling users to request transportation services from independent third party transportation providers such as co-defendant Arif. Such affidavit asserts that employees and

third-party companies must sign agreements with defendant Uber agreeing not to disclose any confidential information. However, defendant Uber explicitly argues that co-defendant Arif is an independent contractor, not an employee. Moreover, defendant Uber does not even allege that co-defendant Arif signed a non-disclosure agreement, or an agreement to keep any information confidential.

Specifically, defendant Uber alleges that the Uber ride receipt for defendant Katz's ride is a privileged trade secret that, if made publicly available, competitors would replicate the information and format used by defendant Uber in the receipt. However, such conclusory statement fails to allege how such information is a trade secret or how it is not already publicly available. It is undisputed that the user of the Uber application receives a copy of the Uber application receipt for their ride upon completion of the ride. Thus, such format and information on the receipt is publicly available to any person who downloads and uses the Uber application. As such defendant Uber has failed to establish that a protective order is necessary to protect the format of the ride receipt for co-defendant Katz's ride. Similarly, defendant Uber states that its Software License and Online Services Agreement and Drive Addendum is unique to its business and may be copied by competitors or future competitors. However, this conclusory assertion fails to establish how such an agreement is a trade secret or how competitors would gain a competitive advantage as a result of the disclosure.

As to the application submitted by co-defendant Arif to defendant Uber, defendant Uber states that such information is confidential based upon "general privacy laws to protect Ruiz's personal information". Notice of Cross-Motion, Exh. J, Powers Affidavit, ¶15. Notably, no person or business with the name Ruiz is a party to the instant action. Furthermore, defendant

Uber fails to establish how co-defendant Arif's driver's license, TLC licenses, New York State Registration, and certificate of insurance is confidential information or a trade secret.

Plaintiff also demands the trip sheet for November 13, 2015. Defendant Uber states that it is in possession of off-app/on-app data for co-defendant Arif for such date but contends that competitors may copy the app status features and format. However, aside from the conclusory statement in the Powers Affidavit, defendant Uber fails to even allege how the disclosure of such information would give competitors an advantage. Thus, defendant Uber's conclusory statements that plaintiff is seeking disclosure of trade secrets and confidential information is insufficient to establish entitlement to a confidentiality order or shift the burden to plaintiff. With the exception of the driver recruitment material, which is addressed below, defendant Uber has failed to address the remaining demands or offer even a minimal explanation as to why a protective order is necessary for the disclosure of such documents. Nor did defendant Uber allege that their competitors would gain some advantage by the disclosure of such specific documents. As such defendant Uber has failed to meet its burden with regards to these discovery requests.

As to plaintiff's request for driver recruitment material, defendant Uber states that such advertising or marketing information must be subject to a protective order, as disclosure would permit its competitors to capitalize on their research which is not publicly disclosed. Defendant Uber further contends that disclosure of this information could be used to obtain knowledge of their future business plans. Here, defendant Uber met its initial burden and the burden shifts to plaintiff to show that such information is indispensable to support his case. In opposition to the cross-motion, plaintiff erroneously asserts that defendant Uber did not address this discovery demand, such that plaintiff failed to establish that a protective order is unnecessary to protect

defendant Uber's market research. Thus, defendant Uber's motion for a protective order is granted only as to plaintiff's request for all driver recruitment material used in 2014 and 2015.

Accordingly, it is

ORDERED that plaintiff's motion to strike is denied in its entirety; and it is further

ORDERED that defendant Uber Technologies, Inc.'s cross-motion is granted solely as to #9 of plaintiff's Notice of Discovery and Inspection dated September 1, 2016, and a protective order is granted as to item #9 only in that plaintiff shall keep all driver recruitment materials used in 2014 and 2015 confidential; and it is further

ORDERED that the remainder of defendant Uber Technologies, Inc.'s cross-motion requesting a protective order is denied; and it is further

ORDERED that defendant Uber Technologies, Inc. shall produce the requested documents and information within 45 days from the date of this decision/order; and it is further

ORDERED that the parties shall appear on August 8, 2018 at 9:30am, in room 103 of 80 Centre Street, New York, NY, for a status conference; and it is further

ORDERED that within 14 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

Dated: June 18, 2018

ENTER:

Hon. Adam Silvera, J.S.C.