

Frat Star Movie, LLC v Tebele
2018 NY Slip Op 32042(U)
August 17, 2018
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,

Defendant.

Index No.: 651496/2017
DECISION/ORDER
Motion Seq. 2 and 3

Leader & Berkon LLP, New York (Joseph G. Colao of counsel), for plaintiff.
Hinckley & Heisenberg LLP, New York (Christoph Heisenberg of counsel), for defendant.

Gerald Lebovits, J.

Motion sequence 02, in which plaintiff seeks to compel defendants to produce documents responsive to their discovery demands, and motion sequence 03, in which defendants seek to compel plaintiff to produce documents responsive to their document demands, are consolidated for disposition.

Plaintiff, Frat Star Movie, LLC (Frat Star), brings this CPLR 3124 motion seeking forensic examinations of (1) the mobile phone of Defendant Elliot Tebele, (2) the mobile phone of Elie Ballas – Tebele’s business partner and member of defendant FJerry LLC – and (3) the Apple iCloud accounts and/or any other cloud storage associated with Tebele’s phone, Ballas’ phone, and FJerry LLC. If the forensic examinations uncover any responsive text communications not previously produced or material portions of communications not previously produced, plaintiff also seeks defendants pay for the costs incurred by plaintiff in conducting forensic examinations.

Defendants, Elliot Tebele and FJerry, LLC, cross-moved under CPLR 3124 to compel plaintiffs to comply with outstanding discovery requests relating to the financial performance of Frat Star. They also want plaintiffs to turn over communications between Hunter Ryan and Grant Johnson.

This is a breach-of-contract action for damages resulting from defendant’s alleged breach of an agreement in which defendant agreed to promote plaintiff’s film, *Frat Star*, through defendant’s popular social media accounts. (See NY St Cts Electronic Filing [NYSCEF] Doc No. 42, exh. 2, Frat Star complaint, page 3, ¶ 1.)

This motion arises from the repeated failure of defendants to turn over text-message communications responsive to plaintiff’s discovery demands. For example, in plaintiff’s First Request for the Production of Documents and Things, request number five demands that defendants “[p]roduce all communications or documents concerning the Agreement, including, without limitation, all drafts or other versions created or in existence during the Time Frame.”

(NY St Cts Electronic Filing [NYSCEF] Doc No. 54, Frat Star mem. of law, page 4.) Then, in request number six, plaintiffs demands that defendants “[p]roduce all communications or documents concerning any Services performed under the Agreement.” (*Id.*) Defendants replied to both of these requests by stating that they would produce all responsive and non-privileged documents. (*Id.*)

The court notes that on multiple occasions now, defendants have represented that no other responsive text messages existed only then to turn over more responsive text messages a few days later. (NY St Cts Electronic Filing [NYSCEF] Doc No. 50, exh. 10.) These are text messages to which defendants would have had access from the inception of this litigation.

For example, on October 27, 2017, plaintiff’s counsel sent a deficiency letter to defendant’s counsel demanding communications between Tebele and Ballas. Plaintiff’s counsel sent two follow-up emails to defendants’ counsel before defendants’ counsel finally replied on January 4, 2018, in which he merely stated that he would confirm whether communications existed. (*Id.*) Then, in what can only be characterized as a pattern, plaintiff’s counsel again sent two follow-up emails – the first was sent on January 11, the second, the following day. (*Id.*) Finally, on January 16, 2018, defendant’s counsel stated that no text messages between Tebele and Ballas existed.

On February 1, 2018, however, plaintiff’s counsel presented to Tebele during his deposition a text message conversation that occurred between Ballas and Johnson. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 52, exh. 12.) That text conversation included a “screenshot” of a conversation between Tebele and Ballas. That screenshot was not turned over to plaintiffs even though the communication was responsive to plaintiff’s document demands. This occurred after defendant’s counsel had already said that no text messages between Tebele and Ballas existed. Soon after, on March 6, 2018, defendants turned over six more text messages that were also responsive to plaintiff’s document demands. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 53, exh. 13.)

The court is not convinced by the affidavit of Elie Ballas purporting to explain that defendants have turned over all responsive text messages. Although the court understands that some messages were not previously included in their responsive documents because of a glitch stemming from messages being sent in an SMS format as opposed to the usual MMS format, this excuse does not persuade. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 60, Ballas aff., ¶ 5.) Ballas’ affidavit “is insufficient to establish diligent efforts to retrieve the materials.” (*Mosley v Conte*, 2010 NY Slip Op 32424[U] [Sup Ct, New York County 2010], citing *Lewis v City of New York*, 17 Misc 3d 559, 567-570 [Sup Ct, Bronx County 2008]). As suggested in *Mosley*, “the affidavit of a computer expert following his or her examination . . . might have alleviated these problems. In their absence, the Court does not find the [Ballas] affidavit sufficiently comprehensive or persuasive about the existence of [electronically stored information] and/or the ability to recover lost or deleted documents of relevance.” (*Mosley*, 2010 NY Slip Op 32424 [U].)

In light of this pattern of defendants' representing that they have turned over all their responsive documents only then to turn over more responsive documents shortly after, plaintiff's motion for a forensic examination is granted. Once the forensic examination is conducted, the results should be turned into the court for an *in camera* review to determine whether any of the information is responsive to plaintiff's discovery demands. In following the First Department in 2012, the court recognizes that "the iPhone would disclose irrelevant information that might include privileged communications or confidential information." (*AllianceBernstein LP v Atha*, 100 AD3d 499, 500 [1st Dept 2012].) "In camera review will ensure that only relevant, non-privileged information will be disclosed." (*Id* [citations omitted].)

In the event the forensic examination and *in camera* review uncover more responsive documents, plaintiffs can renew their application for costs following the *in camera* review. (*See Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017] [allowing CPLR 3126 sanctions after a forensic examination uncovered additional documents that were responsive to discovery demands].)

Defendant's cross-move under CPLR 3124 to compel plaintiffs to produce accounting documents concerning profit, loss, and communications with investors regarding potential profitability and actual loss. They further seek to compel plaintiffs to produce communications between Ryan and Johnson.

Plaintiffs represent that they have already turned over all accounting documents responsive to defendants' document request and that no such other documents exist. They have also turned over communications between Javier Gonzalez, the film's line producer, and also Johnson about the budget of the film and represent that this is the only communication in their control responsive to defendants' request.

Defendants' motion to compel the production of accounting documents and communications with investors regarding potential profitability and actual loss is granted. Plaintiffs should turn over all responsive, non-privileged accounting documents and communications with investors. If plaintiff claims a privilege for any of these documents, they must provide a privilege log. If there are no further responsive documents, plaintiffs must represent so in an affidavit.

Defendants' motion to compel the production of communications between Ryan and Johnson will be held in abeyance pending the receipt of the communications between Ryan and Johnson to the court for an *in camera* review. Without seeing the text-message conversations listed in plaintiff's privilege log, there is no way to determine whether the communication was "for the purpose of furthering a common legal interest." (*Ambac Assur Corp v. Countrywide Home Loans, Inc*, 27 NY3d 616, 625 [2016].)

Continued failure by either party in their discovery obligations, such as responsive documents being produced after either party has represented that no further responsive documents exist, might result in a CPLR 3126 sanction.

ORDERED that plaintiff's motion to compel is granted to the extend provided below:

Plaintiff must notify defendant within 10 days of who they will choose to conduct the forensic examination.

Within 10 days of defendant's receiving notice of who will be conducting the forensic examination, they must schedule with plaintiff a date, time, and location to turn over to the forensic examiner the phone and associated iCloud accounts of Elliot Tebele, Elie Ballas, and FJerry LLC.

Within 30 days of defendant's turning over those items, the forensic examiner shall turn over to the court the results of the forensic examination for an *in camera* inspection.

ORDERED that defendant's cross-motion to compel is granted to the extend provided below:

Plaintiff must within 10 days turn over all responsive, non-privileged accounting documents and communications with investors. If a privilege is claimed, plaintiffs must provide a privilege log. If plaintiff wants to represent that there are no further responsive documents, they must represent so in an affidavit.

Plaintiff must within 15 days produce to the court the documents listed in plaintiff's privilege log, NYSCEF doc. No. 123, for an *in camera* inspection.

Dated: August 17, 2018

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