

<b>Rubin v EFP Rotenberg, LLP</b>
2018 NY Slip Op 33258(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 651825/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

ROBERT M. RUBIN

Plaintiff,

- v -

EFP ROTENBERG, LLP,

Defendant.

-----X

INDEX NO. 651825/2015

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

**DECISION AND ORDER**

Defendant moves pursuant to CPLR 3103(a) for a protective order directing the parties to “enter into a confidentiality agreement in order to limit disclosure of information and documents produced in this action that constitute or contain confidential or proprietary information,” and pursuant to CPLR 3126 for a preclusion order. Plaintiff opposes the motion related to the protective order.

I. BACKGROUND

In August 2015, defendant served plaintiff with a demand for a verified bill of particulars and other discovery. In August 2017, it served additional discovery demands. A preliminary conference order was issued on July 18, 2017, directing plaintiff to respond to defendant’s discovery demands by September 30, 2017. After plaintiff failed to respond, the parties entered into a so-ordered stipulation dated November 1, 2017, directing plaintiff to provide a bill of particulars by November 30, 2017, and to respond to discovery by December 15, 2017.

After plaintiff again failed to respond, on February 28, 2018, the parties entered into another so-ordered stipulation, directing plaintiff to respond to defendant's discovery demands by March 30, 2018. Defendant alleges, without dispute, that plaintiff has not complied.

Plaintiff served defendant with discovery demands that defendant claims require the production of voluminous confidential documents. It thus seeks a protective order as the documents contain confidential and proprietary information, including "planning documents, engagement letters, documentation of substantive testing and analytical procedures performed, and documentation of internal controls," and advises that upon the signing of the protective order, it will produce the requested documents. It consents to the production of any confidential and/or proprietary documents that have been made public in the past. (NYSCEF 69, 71).

Plaintiff argues that there is no need for a protective order as the documents contain no trade secrets. Rather, they pertain to defendant's accounting procedures and were created in accordance with generally accepted accounting procedures. He also observes that defendant offers no proof that the documents contain trade secrets, alleges that defendant's motion is made in bad faith, and requests attorney fees in opposing the motion. Plaintiff does not address defendant's motion to preclude. (NYSCEF 75).

In reply, defendant denies that it characterized its documents as containing "trade secrets." Rather, they pertain to third parties and contain confidential and proprietary material and information, and its proposed confidentiality stipulation permits any party to challenge a designation of confidentiality. (NYSCEF 78).

## II. ANALYSIS

### A. Protective order

Pursuant to CPLR 3103(a), a protective order may be imposed "denying, limiting,

conditioning or regulating the use of any disclosure device” to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.” Such an order may be imposed where discovery documents may be subject to abuse if widely disseminated. (*Butt v New York Med. Coll.*, 7 AD3d 744, 745 [2d Dept 2004], citing *McLaughlin v G. D. Searle, Inc.*, 38 AD2d 810, 811 [1<sup>st</sup> Dept 1972]).

When the party resisting disclosure asserts that the requested discovery material contains confidential proprietary business information, its discoverability depends on a two-step analysis: the moving party must show that the discovery demands would compel it to disclose a trade secret, and the burden then shifts to the opposing party to show that the information sought is indispensable to its case. (*Conley & Son Excavating Co., Ltd. v Delta Alliance, LLC*, 120 AD3d 1604 [4<sup>th</sup> Dept 2014]). Trade secrets are those “not known by those outside the business, were kept under lock and key, were the product of substantial effort and expense, and could not be easily acquired or duplicated.” (*Id.* at 1605, quoting *Terwilliger v Max Co., Ltd.*, 64 AD3d 1232 [4<sup>th</sup> Dept 2009]).

Here, defendant asserts conclusorily and through its attorney only that the documents contain confidential and proprietary information. It thus fails to meet its burden of showing that a protective order is warranted. (*See e.g., New York State Businessmen’s Group, Inc. v Dalton*, 154 AD2d 801 [3d Dept 1989] [plaintiff did not meet burden of establishing that materials constituted trade secrets as it only offered conclusory statements in attorney affidavits that materials were confidential business records and trade secrets, which is insufficient]; *see also Hunt v Odd Job Trading*, 44 AD3d 714 [2d Dept 2007] [party seeking protective order failed to make minimal showing that demanded material contained trade secrets]; *Jackson v Dow Chem.*

*Co. Inc.*, 214 AD2d 827 [3d Dept 1995] [submission of affidavit of company's affidavit sufficient to shift burden to opposing party]).

### B. Preclusion

Pursuant to CPLR 3126, a party's refusal or willful failure to comply with an order for disclosure or willful failure to disclose documents that, in the court's determination, should have been disclosed, may warrant an order preventing the delinquent party from introducing evidence at trial. As the sanction of preclusion is a "drastic" remedy (*Kleinberg Elec., Inc. v City of New York*, 255 AD2d 248, 249 [1<sup>st</sup> Dept 1998]), and notwithstanding plaintiff's failure to oppose, plaintiff is given a final opportunity to provide the bill of particulars and other discovery responses. However, in light of his undisputed failure to respond to defendant's discovery demands, thereby necessitating the instant motion, plaintiff is not entitled to costs in the form of his attorney fees.

### III. CONCLUSION

Accordingly, it is hereby

ORDERED, that, defendant's motion for an order compelling a confidentiality agreement is denied, and it is directed to respond to plaintiff's discovery demands within 30 days of the date of this order; it is further

ORDERED, that defendant's motion to preclude is granted, and plaintiff is directed to provide a response to defendant's demand for a verified bill of particulars and discovery demands within 45 days of the date of this order; and it is further

ORDERED, that plaintiff's failure to comply timely with this order will result in sanctions, which may include the payment of fees and costs and/or a preclusion order.

12/13/2018

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

BARBARA JAFFE, J.S.C. JEFFE  
HON. BARBARA JAFFE