

Falk v Nassau County
2018 NY Slip Op 33863(U)
July 19, 2018
Supreme Court, Nassau County
Docket Number: 600868/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X	-----X	TRIAL/IAS PART 12
JEFFREY P. FALK, on behalf of himself and all other similarly situated,		INDEX # 600868/17
Plaintiffs,		Mot. Seq. 3
-against-		Mot. Date 2.23.18
NASSAU COUNTY and NASSAU COUNTY DEPARTMENT OF ASSESSMENTS,		Submit Date 6.18.18
Defendants.		
-----X	-----X	

The following papers were read on this motion:	E File Docs Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	30
Answering Affidavits (Affirmations).....	46
Reply Affidavit.....	47

Plaintiff, Jeffrey Falk moves by notice of motion for an order pursuant to CPLR 3126, striking the answer of defendants Nassau County and the Nassau County Department of Assessments for failure to comply with their disclosure obligations or, in the alternative, pursuant to CPLR 3124 compelling defendants to respond to all outstanding discovery demands including (1) the plaintiff's first request to defendants for the production of documents and things dated November 20, 2017 (document demands), (2) the plaintiff's first set of interrogatories dated November 20, 2017 (interrogatories), and (3) plaintiff's demand pursuant to CPLR 3101(d) dated November 20, 2017 (expert demand).

Plaintiff contends that at the time this motion was made, some 60 days had passed since service of his demands, yet defendants had failed to provide any response. Plaintiff further contends that he sent no less than three good faith communications informing the defendants of delinquency. Plaintiff submits that the discovery demands are carefully tailored to the issues in this matter and are not unduly burdensome and, in any event, defendants have waived their unvoiced objections to the discovery demands pursuant to CPLR 3122 (a) by their wholesale

failure to respond. Plaintiff argues that the defendants' willful failure to provide discovery responses warrants an order striking the answer in this action.

In opposition, the County defendants state that since the time that the instant motion was made, the defendants have produced over three thousand pages of documents including emails, correspondence, legislative packages, calendars, public notices and transcripts of legislative proceedings and "the like." Defendants contend that despite their efforts to sort through the information and specify what documents refer to what demand, the plaintiff's fifty-four document demands, many with subparts, and all requesting "all documents" make it an insurmountable task to determine exactly what documents plaintiffs seek and renders the demand unreasonably burdensome.

In reply, plaintiff identifies by demand number the outstanding insufficiencies in defendant's responses.

CPLR 3101 sets the bounds of discovery and provides that "[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 . . ." The phrase "material and necessary" is accorded a liberal construction and requires "disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." (*Allen v. Cromwell-Collier Pub. Co.*, 21 NY2d 403 [1968]). In addition, the term necessary has been "held to mean 'needful' and not indispensable." (*Id.* at 407). Although, the rules contemplate a liberal interpretation of the breadth of disclosure, "[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims. (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d at 750)." (*D'Alessandro v. Nassau Health Care Corp.*, 137 AD3d 1195, 1196 [2d Dept 2016]).

"When 'an inspection, copying, testing or photographing' of an item or items is sought, CPLR 3120 (2) . . . requires that the seeking party set forth 'by individual item or by category, and . . . describe each item and category *with reasonable particularity*.'" (Siegel & Connors, *New York Practice*, 6th ed., 682-683 [2018] [emphasis added] ["Even under this new permission to demand by category, however, a demand may still be vacated in its entirety if it is found 'unduly burdensome.'"]). However, it is settled that a failure to respond waives objections except for those based upon impropriety or privilege. (See *Anonymous v. High School for Environmental Studies*, 32 AD3d 353 [1st Dept 2006] ["Such failure to object to the demand generally limits our review to the question of privilege under CPLR 3101(b)."]; see also *Briand Parenteau Inc. v. Dean Witter Reynolds, Inc.*, 267 AD2d 576, 699 [3d Dept 1999] [upon a failure to object, the court may only address issues of privilege and propriety of the request]).

With these general precepts in mind, the court addresses each of the categories at issue.

Plaintiff's Document Demands

Document demand numbers 5, 8, 11, and 12 request all documents related to legislative sessions, including notes taken by "any individual," concerning the several Nassau County Local Laws at issue in this action. In response, according to the plaintiff, defendants did not identify or provide any specific documents but provided a weblink, without any indication of where the responsive pages can be found. The responses actually indicate that "[t]ranscripts of legislative proceedings, both full legislature and committees may be obtained at [web address]" and object to the production of materials prepared by legislators. In light of the breadth of the requests, the court finds the response referring the requestor to the full transcripts of the legislative proceedings is reasonable under the circumstances.

Document demand numbers 13-19 request documents and communications relating to the monies collected as a result of payment of fees pursuant to the several Nassau County Local Laws. The defendants responded that they are "in the process" of reproducing the electronic data in a proper format. To the extent not already provided, defendants shall provide supplemental responses and relevant documents within 30 days of service of a copy of this order with notice of entry.

Document demand numbers 29-46 seek all documents "concerning or referring to" various budgets and costs relating to the Nassau County Local Laws at issue in this action from the years 2012-2017. Defendant's response states that "all County Budget documents, including the adopted budget, summary of the fiscal year and the County's Multi-year plan, can be obtained at [web address]." A number of these requests appear redundant. In any event, again, given the breadth of the requests, the court finds the response to be reasonable.

Document demand numbers 47-54, according to plaintiff, sought a variety of documents, which defendants objected to as unduly burdensome. Plaintiff has indicated a willingness to meet and confer to narrow the scope of these requests but no meet and confer has yet occurred. Accordingly, the court will reserve decision on compelling disclosure with respect to these demands until such meet and confer has occurred.

Plaintiff's Interrogatories

Interrogatories 4, 5, 6, and 7 ask the defendants to identify by name, residential address, business address, telephone number and title all persons who voted on whether to pass several Nassau County Local Laws. Defendants' responses indicate the number of legislators and the result of the votes, but not the identity of the voting members. Except where names have been provided, the responses indicate that the defendants did not maintain records of the particular legislator who voted on a particular item and point to the relevant page of the transcript of the proceedings. The court finds no discernable relevance to identifying the particular legislators

who voted for or against a particular item of legislation. Accordingly, the court finds the County's reliance on the transcript of the proceedings to be reasonable.

Interrogatories 8-24 seek the identity of documents relating to "any and all meetings" wherein the several Nassau County Local Laws and annual budgets were discussed. In response, the defendants object to the requests as unduly vague as "meeting" is not a defined term and the descriptions "any" and "all" are improper. Upon review of the demands and responses, the court narrows the requests to include only formal meetings of the legislature or any sub-committee thereof and directs the defendants to supplement its responses to these requests as so modified.

Interrogatories 25-37 encompass several responses that are, essentially, blank. With respect to those interrogatories that contain no responses, defendants are directed to supplement and provide answers. The remaining responses pointing the requestor to the budgetary documents are reasonable in light of the requests and can be further explored at deposition.

Interrogatories 41-43 request that defendants identify and describe the process and procedure in the cited year for generating a "Tax Map Verification Letter" as well as the time involved in each step and the tools and materials used. In response, defendants provided only a general description of the process. The details such as the time involved in each step are best left to deposition, without prejudice to post-EBT demands concerning the process, if necessary.

Interrogatories 49-50 ask the defendants to identify each computer, laptop, smartphone, tablet email address, and social media account used by the defendants to store, transfer or communicate information or documents, and which contain information, document or communications concerning the claims or defenses in this action. Plaintiff has indicated a willingness to meet and confer to narrow the scope of these requests but none has yet occurred. Accordingly, the court will reserve decision on compelling disclosure with respect to these demands until such time as a meet and confer is accomplished.

Claims of Privilege

In addition to the above, defendants objected to document demands 5, 8, 11 and 12 and interrogatories 1-3 and 51-54 to the extent that these discovery requests seek information that is protected by the principles of attorney client privilege and/or legislative immunity.

With respect to issues of legislative immunity, Article III, § 11 of the New York State Constitution, known as the Speech or Debate Clause provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The comparable provision of the Federal Constitution has been interpreted "broadly to effectuate its purposes, holding that any acts by members of Congress or their aides within the performance of their legislative functions are beyond judicial scrutiny. The clause not only shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court [citations omitted]." (*Matter of Straniere v. Silver*, 218 A.D.2d 80, 83 [3d

Dept. 1996], *affd.* 89 N.Y.2d 825). Although the Speech or Debate Clause is directed only towards members of either house of the legislature “a similar common law legislative privilege is applicable to government officials in the executive branch when engaged in legislative activities. (See, *Campaign for Fiscal Equity v. State of New York*, 179 Misc.2d 907, 910–911 [Sup. Ct., N.Y. County 1999], *affd.* 265 A.D.2d 277 [1st Dept. 1999]).” (*Humane Soc’y of New York v. City of New York*, 188 Misc. 2d 735, 738 [Sup. Ct. N.Y. County 2001]; *see also ACORN v. County of Nassau*, 2009 WL 2923435 [E.D.N.Y. Sept. 10, 2009]).

Courts have held that the immunity imparted by the Speech or Debate Clause extends not only to civil liability, but also functions as an evidentiary and testimonial privilege. (*Humane Soc’y*, 188 Misc.2d at 739). Indeed, “the immunity from suit derives from the testimonial privilege, [and] not the other way around.” (*SEC v. Comm. on Ways and Means*, 161 F. Supp. 3d 199 [S.D.N.Y. 2015] [quotations omitted]). The immunity extends to “anything generally done in a session of the House by one of its members in relation to the business before it” including, but not limited to “delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing material at committee hearings.” (*Id.* at 236 [quotations omitted]; *see also Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir.2007) [“We hold that legislative immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote]). Yet, not every activity of a legislator is part and parcel of the legislative process and each case must be evaluated in its own right. (*SEC*, 161 F. Supp. 3d at 237-238; *see also Harhay v. Town of Ellington Bd. Of Educ.*, 323 F.3d 206, 211 [2d Cir. 2003] [decisions concerning employment of a single individual held administrative, not legislative, in nature because no broad policymaking was implicated]).

Accordingly, defendants’ objections grounded on legislative privilege may well be proper. However, the defendants have failed to identify which, if any, responsive documents are being withheld on this basis. Plaintiff posits that a privilege log is necessary upon any claim of privilege. According to the relevant rule,

“[i]f, for any reason, the recipient of the notice wishes to withhold a document that appears to be within the category of documents demanded by the other side, the recipient must serve a notice on the seeking party reciting the fact that one or more of the documents sought are being withheld and setting forth the reasons that purport to justify the withholding. CPLR 3122(b).

This notice, commonly called a privilege log, must indicate the legal ground for withholding the document or documents and must also include four additional items: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.” CPLR 3122(b).

(Practice Commentaries, CPLR 3122:3 [McKinney]).

Compliance with this plain rule is mandatory and, accordingly, defendants are directed to provide a privilege log of any documents being withheld on the basis of privilege in compliance with CPLR 3122 (b) within 30 days of service of a copy of this order with notice of entry.

With respect to that branch of plaintiff's motion concerning CPLR 3101 (d) disclosures, defendants have stated that at such time when an expert is retained, plaintiff's attorney will be duly notified of the relevant information. Accordingly, there is no basis at this time to direct further response to plaintiff's demand for expert disclosure.

Finally, with respect to that branch of plaintiff's motion seeking to strike the answer or impose other sanctions, there are no grounds here to find that the defendants have acted with willful disregard of the orders of this court or have otherwise proceeded in bad faith. (See *Howe v. Jeremiah*, 51 A.D.3d 975 [2d Dept 2008] ["The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious."]; *Devito v. J&J Towing, Inc.*, 17 A.D.3d 624 [2d Dept 2005]). Therefore, sanctions are denied in the discretion of the court.

For the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion to strike the defendants' answer is **denied**; and it is further

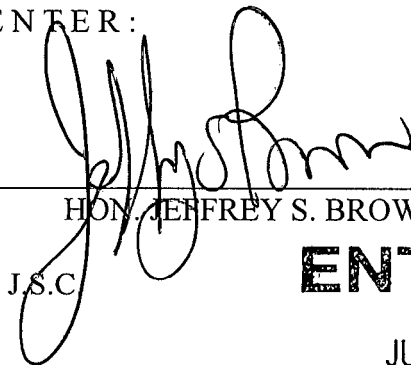
ORDERED, that the plaintiff's motion to compel pursuant to CPLR 3124 is **granted in part** and defendants are directed to supplement their discovery responses as herein provided within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED, that counsel are directed to appear for a status conference on **September 6, 2018 at 9:30 am.**

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 19, 2018

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

Attorneys for Plaintiff

ENTERED

JUL 24 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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