Capacity Group of NY LLC v Duni
2018 NY Slip Op 33896(U)
October 23, 2018
Supreme Court, Nassau County
Docket Number: 601202/17
Judge: Anna Anzalone
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SUPREME COURT STATE OF NEW YORK

PRESENT: ***Honorable Anna R. Anzalone***
Justice of the Supreme Court

CAPACITY GROUP OF NY LLC, **TRIAL/IAS, PART20**

NASSAU COUNTY

Plaintiff,

Index No. 601202/17

- against - **Motion Seq. No.: 5,6**

MICHAEL A. DUNI,

Defendant.

The following papers read on this motion:
Defendant's Notice of Motion.....1

(Sequence No. 5)

Plaintiff's Affirmation in Opposition and Notice of Cross Motion.....2

(Sequence No. 6)

Co-defendant's Michael A. Duni and Christopher Duni's branch of the motion (Sequence No. 5) for an Order pursuant to CPLR §3126 striking plaintiff's complaint or precluding plaintiff from bringing forth evidence at trial in terms of plaintiff's damages due to plaintiff's failure to comply with this Court's Order is denied. Co-defendant's branch of the Motion (Sequence No. 5) for an Order, pursuant to CPLR§3124 and CPLR§3126, compelling plaintiff to respond to co-defendants discovery demand is granted. Co-defendant's branch of the Motion (sequence No. 5) for an Order extending the Note of Issue filing deadline is hereby denied as premature. This matter has not yet been certified ready for trial, and thus no such deadline has been set for plaintiff to make such a filing.

Plaintiffs', Capacity Group of NY, LLC ("CGNY") cross-motion for an Order striking defendants' answer pursuant to CPLR §3126 on the ground that defendants have failed to provide any meaningful discovery in violation of court orders is denied, however, defendant is directed to produce documents as indicated in this Order.

This matter stems from a dispute between former co-workers at CGNY, which is an insurance brokerage firm. The original summons and complaint was filed on February 1, 2017. CGNY was formed in February 2008. The complaint alleges that CGNY was formed in February 2008, pursuant to a written operating agreement. Defendant Michael Duni was appointed president and manager of CGNY. The complaint further alleges that Michael Duni was removed as CGNY's president and manager in May 2015. The original summons and complaint requested declaratory judgment holding that Michael Duni was not CGNY's president and had no right to enter CGNY's offices. The plaintiff filed an Order to Show Cause seeking injunctive relief and this Court granted plaintiff a temporary restraining order and enjoined the defendant from representing that he is the president of CGNY and entering the offices of CGNY. After conferencing the matter, the Court conducted a two-day hearing on the issues raised in the plaintiff's Order to Show Cause. This Court in a decision dated April 7, 2017 and entered April 11, 2017, vacated the restraint granted in the Order to Show Cause. Additionally, the parties entered into a stipulation whereby the defendant agreed that he shall not at any time use the title president of CGNY, including but not limited to such title on emails or other correspondence, or on website profiles that the defendant controls, such as his Linkedin account, and the plaintiff agreed to discontinue without prejudice, Count 1 (Duni is not president) .

On April 7, 2017, Michael Duni filed an answer and counterclaim alleging that he was entitled to an award of money damages due to CGNY's purported wrongful denial of access to

its office, and on May 22, 2017, defendant filed a reply to the counterclaim denying all material allegations. A preliminary conference was held on April 28, 2017 and an Order to schedule discovery was signed. On July 23, 2018, CGNY filed an amended complaint with leave of court adding Christopher Duni as a defendant.

Defendant claims that in accordance with the Preliminary Conference Order dated April 28, 2017 defendant served their demand for discovery and inspection upon CGNY and no response was ever received. A compliance conference was held on August 14, 2017 which indicated that discovery responses were due on or before September 15, 2017, and defendant claims that CGNY failed to respond once again. Defendant claims there were numerous email correspondences with Joseph Baratta, defendant's attorney regarding the failure to respond. Defendant claims that CGNY's noncompliance is willful, contumacious and in bad faith. Another compliance conference was held on May 18, 2018 whereby both parties were directed to respond to previously served discovery demands including those that were served on prior counsel within 20 days. Plaintiff CGNY responded to defendant's demands for Discovery and Inspection in a document dated May 31, 2018. Defendant further claims that on May 31, 2018, CGNY improperly objected to many of defendant's demands and included 2,994 pages of unsorted and unlabeled documents. In response to nearly every one of defendant's discovery demand, CGNY stated, "see documents Bates Stamped CGNY000001-002994". Defendant claims that upon review of the nearly 3000 pages of unsorted documents, few were relevant to any of defendant demands or related to his litigation. The court notes that upon review of plaintiff's responses, at least one-half of the responses indicate that plaintiff objects to the request on the basis that the request is vague, ambiguous, overbroad and burdensome, and indicated: "without waiving said objections, see documents Bates Stamped CGNY00001-

002994." The Court determines that this response was not organized and labeled so that the response could easily identify the requested document.

CPLR§ 3122 (c) states:

Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.

The statute does not indicate that a party can produce documents which are non-responsive and place the burden of determining which document on relevant to the receiving party. Additionally, the statute specifically indicates that the documents shall be labeled to correspond to the categories in the request.

The drastic sanction to strike a pleading is not available unless a party has shown that the opposing party's default is willful and contumacious, and prejudicial to the moving party. *Nudelman v. New York City Transp. Auth., 172 A.D.2d 503, 567 NYS2d 503 (2nd Dept., 1991).* Before a Court may impose the drastic remedy of striking a pleading or preclusion of evidence for discovery violations, it must determine that the offending party's actions were willful, deliberate, and contumacious. *Tung Wa Ma v. New York City Transit Authority, 113 AD3d 839, 979 NYS2d 162 (2nd Dept., 2014).*

CPLR §3101 provides that there shall be full disclosure of all evidence "material and necessary" in the prosecution or defense of an action, regardless of the burden of proof. *Harrison v. Bayley Seton Hosp., Inc., 219 AD2d 584, 631 NYS2d 182 (2nd Dept., 1995).* The words "material and necessary" are to be liberally interpreted. *Allen v. Crowell-Collier Pub. Co., 21 NY2d 403, 288 NYS2d 449 (1968).* Evidence which includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay is considered material and necessary. *Id.* However, discovery demands cannot be overly broad and burdensome. *Rabinowitz v. St. John's, 24 Ad3d 530 (2nd Dept., 2005).*

This court does not find that striking the pleading would be an appropriate sanction in this case. Plaintiffs are hereby directed to respond within 30 days from the date of this Order to the defendants' demand for Discovery and Inspection in accordance with CPLR §3122(c) by labeling their responses to the particular request. Failure to comply with the foregoing shall result in striking of the pleadings and/or preclusion of evidence at trial upon proper application to the Court.

Plaintiff's cross motion for an Order striking defendant's answer pursuant to CPLR § 3216 on the grounds that defendants have failed to provide any meaningful discovery in violation of court order is denied. Plaintiff asserts that defendant served a written response on July 14, 2017 that identified numerous responsive documents in their possession, and none of these documents were annexed to the response as indicated. Plaintiff asserts that on June 26, 2018 they requested the defendant to cure this omission of documents. Plaintiff asserts they still have not received said documents. Defendants are directed to produce said documents within 30 days of the date of this Order. Failure to comply with the foregoing shall result in striking of the pleadings and/or preclusion of evidence at trial upon proper application to the Court. Any issues not specifically addressed are deemed denied.

Counsel for defendant shall file and serve a copy of the order with notice of entry upon Plaintiff within (15) days of this Order.

This constitutes the Decision and Order of the Court.

DATED: October 23, 2018 ENTER:

Mineola, New York

Anna R. Anzalone

HON. ANNA R. ANZALONE

ENTERED

OCT 29 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE