255 Butler Assoc. LLC v 255 Butler LLC
2019 NY Slip Op 30372(U)
February 14, 2019
Supreme Court, Kings County
Docket Number: 511560/2015
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of February, 2019.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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255 BUTLER ASSOCIATES LLC,

Plaintiff(s),

- against -

255 BUTLER LLC, et. al.,

Defendant(s).

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DECISION AND ORDER

Index # 511560/2015

Mot. Seq. 14 & 16

The following e-filed papers numbered 458 to 674 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	458-70; 507-78
Opposing Affidavits (Affirmations)	586-90; 633-54
Reply Affidavits (Affirmations)	610-12; 657-65
Affidavit (Affirmation) Oral Argument Transcript	674

Defendants move for an Order pursuant to CPLR §3103 granting a protective order and vacating that portion of this Court's June 26, 2018 compliance conference order (hereinafter referred to as the "June 2018 Order") directing Defendants to produce approximately 46,000 records that were identified through application of the parties' agreed-upon ESI search terms, and also vacating that portion of the July 11, 2018 compliance conference order (hereinafter referred to as the "July 2018 Order") directing Defendants to produce un-redacted statements from their Cathay Bank account together with all cancelled checks.

Plaintiff moves for an Order pursuant to CPLR §3126 striking Defendants' answer with counterclaims, entering judgment in its favor, directing an inquest on damages, and awarding it attorneys' fees and costs based on its contention that Defendants never intended to conduct discovery in good faith.

Familiarity with the facts and allegations are presumed.

The June 2018 Order

The June 2018 Order directed Defendants to produce "all documents collected to date by Defendants' ESI consultants and limited by agreed upon search terms, on or before July 31, 2018, except for privileged documents or those which Defendants need not produce pursuant to Decision and Order dated June 7, 2018." The June 2018 Order resulted from a conference at which Plaintiff contended that Defendants' ESI production was grossly negligent because, among other things, Defendants' production failed to include certain emails that Plaintiff had in its possession (as a party to the communication) that were unquestionably responsive and non-privileged. As a result of Defendants' counsel's failure to provide a complete explanation as to why that may have occurred, the Court directed Defendants to produce all documents that "hit" the parties' agreed-upon search terms, which total approximately 46,000 documents, except those subject to privilege or a previous court order.

Now, in their motion for a protective order, Defendants argue that a re-review and production of 46,000 emails is unreasonable, unnecessary, and perhaps even unprecedented. Defendants submit that they have spent tens of thousands of dollars on e-discovery consultants who have, in accord with established practice, reviewed all 46,000 emails and concluded that all but 2,800 or so are completely irrelevant. That out of the 2,800 potentially relevant emails, Defendants state that they have produced "approximately 900 and have withheld on grounds of privilege approximately 500 or so."[1] Defendants further argue that there is no reason to question the "bona fides" of their process and it would be excessively burdensome and costly to require Defendants' consultants to do it all over again, and that they would be unable to accomplish said task by the deadline given in the June 2018 Order (which has since passed). In addition, Defendants explain that the missing emails may be attributable to an archiving of emails from the accounts of one of the designated custodians and a defendant herein, Solomon Akkad ("Solomon"), and that it would be prudent to await the completion of the review process of Solomon's emails before requiring Defendants to review and transmit 46,000 emails that are mostly irrelevant.

Plaintiff responds by pointing out that Defendants' initial production as a result of the parties' ESI agreement was a mere 126 documents, consisting of only 658 pages. For comparison's sake, Plaintiff states that it has produced approximately 25,000 documents totaling 136,513 pages which includes 659 non-privileged communications with the individual Akkad

[1] The Court is confused by this because the sum of 900 and 500 do not equal 2,800.

Defendants or their agents on which Plaintiff or its agents are copied. According to Plaintiff, Defendants' initial production only contained six of these communications, thereby omitting 653 communications which, by itself, indicates that Defendants have deliberately failed to produce responsive documents. Plaintiff also states that Defendants' production failed to include any drafts of the lease or communications concerning the negotiation thereof despite the fact that prior lease drafts were attached to emails dated January 7, 2013 and February 13, 2013 sent by Defendants' counsel to Plaintiff's counsel with Margaux Levy ("Levy") and Solomon copied. Plaintiff states that both Levy and Solomon are designated custodians under the parties' ESI agreement. Further, Plaintiff states that Defendants' production also omitted two critical documents–an email dated July 22, 2015 between the principals of the parties containing the draft WeWork sublease, and an email chain of the same date between the parties' respective counsel. Further, Plaintiff contends that Defendants have failed to produce entire categories of responsive documents, such as any documents concerning (1) Defendants' attempts to sell the property subsequent to the commencement of Plaintiff's lease;[2] (2) Defendants' allegations that it had an "agreement" with Plaintiff to convert the property into a hotel only; and (3) Plaintiff's subsequent decision to convert the premises into a shared work space. Plaintiff also expresses incredulity at the fact that Defendants produced only 15 documents pursuant to a search of documents containing the term "WeWork" where Defendants identified 11,883 "hits" that were narrowed to 2,591 documents based on date restrictions, and which were further narrowed to 416 documents by Defendants' ESI consultants.

With regards to Defendants' explanation that their ESI consultants had not reviewed emails that were in the archives of Solomon's email account and that a review of same may explain the missing emails, Plaintiff points out that some of the missing emails are emails that do not even include Solomon on the communication, or that include another designated custodian, such as Levy, and that therefore, such communications should have been produced. Plaintiff additionally contends that an investigation into how Defendants store their electronic communication should have been done before any emails were collected pursuant to the parties' ESI agreement. And that the months of delay caused by Defendants' and their counsel's failure to ascertain this information beforehand has resulted in prejudice to Plaintiff as Plaintiff has had to proceed with certain depositions of Defendants without the benefit of this discovery.

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[2] Plaintiff states that it can prove that documents exist evidencing the Akkad Defendants' attempt to sell the premises with the WeWork deal in place but without Plaintiff's lease, but Plaintiff does not specify the format of its "proof," whether it's electronic, written, or testimonial.

In response, Defendants contend that they are not deliberately withholding e-discovery. Since their initial production, Defendants state that they have produced approximately 1,000 documents. Defendants state that the fact that Plaintiff has more responsive documents than Defendants is not at all surprising since Plaintiff was the party obligated to build and develop the property. As the landlord, Defendants state that their role is, to a large extent, passive and that given the parties' respective roles under the lease, Plaintiff's document production would be more extensive. Defendants further argue that just because they failed to produce responsive documents concerning identified categories of documents, such as documents concerning the Notice of Default and Termination, does not mean that such documents exist and are being improperly withheld. Defendants contend that the affidavits from their two e-discovery consultants explaining the procedure for the review and production of documents directly refute such a contention. According to Defendants, there is no indication that the so-called "missing" documents are the result of any deliberate withholding rather than a function of the particulars of the Defendants' email system. That in fact, the bulk of the missing emails that Plaintiff complains of consist of emails between the parties which are within the possession of and fully available to Plaintiff.

In reply, Plaintiff argues that it clearly does not need copies of what it already has in its possession, but that the missing documents evidence Defendants' fallacious position that they have searched and produced "everything." Plaintiff argues that Defendants' counsel and e-discovery consultants fail to explain the following: (1) why their initial production failed to include the parties' lease and why the lease was later produced, after Plaintiff's inquiry, from the same document pool which Defendants initially claimed they had produced "everything;" (2) why prior lease drafts are still missing despite Solomon and Levy having received copies of them; (3) the failure to produce any documents/emails among the Akkad Defendants concerning the twenty alleged "defaults" reflected in the Notice of Default and Termination which Ariel Akkad ("Ariel") testified exists; (4) the failure to produce any documents/emails concerning the investigation, preparation, drafting, review and sending of the Notice of Default and Termination and why none are listed in Defendants' privilege log; and (5) why documents in the sole custody of Ariel or Levy comprise most of the production that is allegedly the result of Solomon's "lost" archive.

Plaintiff also contends that Defendants' attempt to dump their discovery responsibilities onto their e-discovery consultants is improper and sanctionable. According to Plaintiff, the affidavits of Defendants' ESI consultants reveal that they merely did what they were told to by

Defendants' counsel, which is patently insufficient in light of Defendants' and Defendants' counsel's admissions that they know nothing about ESI, including how it is stored and preserved. Specifically, that according to the affidavit of the consultant tasked with collecting the ESI, Jared Harary ("Harary") of vdiscovery, it is clear that vdiscovery only downloaded the data from Office 365 that Idea Nuova's unnamed IT consultant told them about, and then applied the search terms. Plaintiff points out that Harary's affidavit is silent on what, if anything, he or his agents did to investigate the locations of ESI of any of the custodians. Further, that Harary avers that he only spoke to the unnamed Idea Nuova IT consultant and not with any of the Akkad Defendants themselves. According to Plaintiff, Defendants' ESI consultants should have had a direct role in directing the collection process but, instead, they were spoon-fed limited ESI from an unknown IT consultant that works for Idea Nuova, a company owned by the Akkad Defendants. Plaintiff also points out that Defendants failed to even collect ESI from certain email accounts of two designated custodians as well as the cell phone data from Nathan and Benjamin Akkad and Levy.

In addition to the problematic collection of ESI, Plaintiff argues that Defendants' review of said ESI was improperly done. Specifically, that based on the affidavit of the consultant tasked with the review of the 46,000 documents, Drew Stern ("Stern") of Esquify, Plaintiff argues that Defendants' counsel improperly instructed Stern to produce only those documents Defendants believed to be "relevant" to the matters specifically identified in the pleadings, as opposed to documents that fairly respond to Plaintiff's document requests.

Based upon all of the foregoing as well as additional issues that will be explained below, Plaintiff moves to strike Defendants' Answer.

July 2018 Order

Paragraph 1 of the July 2018 Order directed Defendants "to produce unredacted bank statements from Cathay Bank Acct #0508029766 including copies of cancelled checks (front & back)." Paragraph 2 of the July 2018 Order directed Defendants "to produce documents evidencing the disposition of the Cathay Bank mortgage loan and unredacted Cathay Bank statements from Nov. 2013 through April 2014. If no such records or statements exist, [Defendants] must provide affidavit stating as such."

Defendants' instant motion seeks to vacate this portion of the July 2018 Order on the basis that Plaintiff previously sought to obtain this same information from Defendants by way of a motion to compel and that same was rejected by the Court pursuant to its Decision and

Order dated June 7, 2018 (hereinafter referred to as the "Cathay Bank Order"). According to Defendants, the Cathay Bank Order limited the production to information about the "available cash" in the Landlord's account. Thus, that the identities of the transferors and transferees are beyond the limited inquiry that was previously authorized by the Cathay Bank Order. Secondly, that even if the Court had not already ruled on this issue, the identities of the transferors and transferees as well as the disposition of the Cathay Bank mortgage are irrelevant to the issues in this case.

In response, Plaintiff submits that, although Defendants produced about 2,000 pages of documents pursuant to the Cathay Bank Order, Defendants withheld certain documents, redacted information from the documents produced and abused the "attorney's eyes only" ("AEO") designation by marking nearly every document AEO. According to Plaintiff, the Court remedied the foregoing by entering the July 2018 Order. Plaintiff contends that Defendants violated the July 2018 Order by, not only failing to comply with said order, but by adding even more redactions than before and maintaining the AEO or "confidential" designation on the majority of the documents, even those that can be found in the public domain. Plaintiff argues that the Landlord's bank statements, publicly filed commercial mortgage documents, day-to-day communications, and other information showing that the Akkad Defendants are depleting Landlord of its liquidity to render Landlord judgment-proof do not qualify for AEO treatment. That while this information may be harmful to Defendants' case, such information is not harmful to their business, which is leasing, and therefore, that same cannot be marked "AEO" or "confidential" under the parties' Confidentiality Order.[3]

In reply, Defendants contend that, with the exception of the items that are the subject of the instant motion, they are in compliance with the June 2018 Order, the Cathay Bank Order, and the July 2018 Order. Specifically, that Defendants produced the documents referenced in the Cathay Bank Order; re-reviewed and re-designated the bulk of documents as "confidential" from "AEO;" produced every one of the Cathay Bank account statements from inception; and produced documents reflecting Landlord's November 2013 mortgage with Cathay Bank.

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[3] Plaintiff states that the parties' Confidentiality Order provides that AEO designation is only "appropriate...where the Confidential Information is so extremely sensitive in the context of the case that there is a real danger that the party producing the information could be prejudiced if the information is disclosed under the protection provided by a "CONFIDENTIAL" designation." The examples given are "trade secrets, sensitive customer information, proprietary information, current marketing plans" or other competitive information.

Plaintiff's Motion to Strike Defendants' Answer and Counterclaims

Plaintiff moves to strike Defendants' Answer with Counterclaims on the grounds that Defendants have not engaged in discovery in good faith and have violated ten court orders. In addition to the issues raised above, Plaintiff contends that Defendants violated numerous court orders by failing to produce responsive documents by the deadline reflected in the order, by failing to produce responsive documents at all, or by failing to produce court-ordered documents.

In opposition to Plaintiff's motion, Defendants contend that, although there has been some "slippage" in the timetable set forth in the preliminary conference order and various compliance conference orders thereafter, this is not atypical in most cases and is hardly evidence of bad faith. Further, that Plaintiff has also not adhered to the original deadlines and, until recently, has failed to produce any of the text messages that it was obligated to provide under the original ESI Discovery Order. Defendants submit that they have substantially complied with all of their discovery obligations.

In reply, Plaintiff argues that Defendants have not complied with the June 2018 and July 2018 Orders and that Defendants' excuse for their non-compliance, that said orders were automatically stayed by CPLR §3103, is frivolous and without merit. Plaintiff points out that Defendants have "literally moved for 'protective orders' from Court Orders resolving discovery disputes as if they were interrogatories or document requests."

Discussion

The Court construes Defendants' instant motion as one to vacate or reargue certain portions of this Court's June 2018 and July 2018 Orders, rather than one for a protective order under CPLR §3103, which is a provision designed to allow a court to limit and regulate "the use of any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." A court order is generally not considered to be a "disclosure device." In sum and substance, Defendants contend that the Court erred in issuing certain directives, which the Court hereby addresses in turn:

The June 2018 Order

Defendants' motion to vacate that portion of the June 2018 Order requiring them to re-review the 46,000 "hits" must be denied.

Defendants failed to explain then, at the compliance conference, and still fail to explain how their production failed to yield certain emails in Plaintiff's possession that should have been produced had Defendants conducted a thorough ESI search and review process. Plaintiff's claim of missing emails, which has not been contradicted by Defendants, indicate one of only two possible scenarios: (1) that Defendants' ESI search and review process was poorly executed; or (2) that Defendants have deliberately withheld or destroyed documents, thereby obstructing their attainment. By way of the June 2018 Order, the Court granted Defendants a re-do, despite Plaintiff's protestations that it is inherently unfair, on the basis that Defendants' ESI search and review was merely negligent. Now, to seek vacatur of said order on the grounds that a re-review of 46,000 emails would be costly and burdensome is absurd especially given the fact that Defendants still cannot adequately explain why the missing emails were not a part of their initial ESI production. To the extent that compliance with the Court's directive will result in the production of largely irrelevant emails, the Court reminds the parties that they are free to stipulate to other terms that will result in Plaintiff obtaining the discovery that it seeks. Surely, Plaintiff does not seek to review a voluminous production of largely irrelevant emails. However, the onus is on Defendants to account for their previous deficient efforts and/or proffer a better do-over. The Court reminds Defendants that the Court's directive, which they now contend is unreasonable, shows leniency and was granted to Defendants upon a presumption that Defendants were not conducting discovery in bad faith.

Based on the foregoing, Defendants' motion to vacate the June 2018 Order is denied. Defendants are directed to comply with the June 2018 Order within 45 days of notice of entry.

The July 2018 Order

Defendants' motion to vacate that portion of the July 2018 Order requiring them to produce unredacted Cathay Bank records is also without merit and must be denied.

The July 2018 Order is clear and unambiguous. The directive for Defendants to produce unredacted Cathay Bank records was not issued in a vacuum. Rather, it was issued after a finding that the identities of the transferors and transferee were relevant to Plaintiff's claims or defenses. Specifically, that to the extent Defendants claimed loss of liquidity due to Plaintiff's conduct, and therefore, damages stemming from missed business opportunities, Defendants have put their cash flow directly at issue. It is Plaintiff's contention that Landlord has taken the Cathay Bank mortgage proceeds and merely transferred the proceeds to the Akkad Defendants' other business accounts, and thus, that their illiquidity is feigned. Clearly then, the identities of the transferors

and transferees are relevant to Plaintiff's defense on this issue, hence the directive contained in the July 2018 Order. To now argue that this portion of the July 2018 Order should be vacated on the basis that the redacted information is irrelevant, the same argument that was rejected by the Court at the conference, is borderline frivolous. Moreover, the Cathay Bank Order, which precedes the July 2018 Order, directed Defendants to produce the Cathay Bank statements. Defendants, on their own, redacted the identities of the transferors and transferees when producing said statements. Thus, the July 2018 Order directed Defendants to produce *unredacted* statements. Accordingly, contrary to Defendants' argument, the July 2018 Order clearly does not contradict the Cathay Bank Order.

Based on the foregoing, Defendants' motion to vacate the July 2018 Order is denied. Defendants are directed to comply with the July 2018 Order within 30 days of notice of entry.

Plaintiff's Motion to Strike Defendants' Answer and Counterclaims

"It is well established that in order to invoke the drastic remedy of striking a pleading pursuant to CPLR 3126 for noncompliance with a court order for disclosure, the court must determine that the parties' failure to comply was the result of willful, deliberate and contumacious conduct or its equivalent" (*Beard v Peconic Foam Insulation Corp.*, 149 AD2d 555, 556 [2d Dept 1989]).

Here, notwithstanding the Court's conclusion regarding the issues above, the record does not support the drastic measure of striking Defendants' answer, at least not at this time. Although Plaintiff cites a long list of Defendants' alleged violations of discovery orders, with the exception of the two issues already mentioned, the majority of the "violations" relate to Defendants' failure to adhere to certain discovery production deadlines. While deadlines should be adhered to, especially where the deadline is embodied in a court order, in this case, both sides have dutifully appeared for monthly status conferences and discovery has been advancing. This is a relatively complex case and, as the aforementioned issues indicate, the amount of discovery is significant. The production of discovery, for the most part, has been on a rolling basis. As such, the Court does not find Defendants' past delays to be deliberate or in bad faith.

However, Plaintiff raises several otherwise valid points. First, Plaintiff should not have to bear the cost of Defendants' poor ESI search and review process by having to pay their staff or experts again to re-review Defendants' production. The Court will therefore entertain an application for reasonable costs associated with Plaintiff having to re-review Defendants' ESI production at the appropriate time. Secondly, the Court finds that Defendants are not using the

AEO designation in good faith. Defendants proffer no reason why bank statements and documents that can be found in the public domain warrant an AEO designation. Accordingly, Defendants are deemed to have waived the use of the AEO designation. Finally, with regards to Plaintiff's claim that Defendants are failing to produce categories of documents, the Court can and will issue appropriate relief under CPLR 3126 either at the time of trial, such as the imposition of an adverse inference upon a showing that such documents exist, or by way of a preclusion order.

To the extent that the parties are still awaiting discovery responses from previous document demands and court orders, the parties shall exchange a list of currently outstanding discovery demands and confer before the next court conference on March 26, 2019.

To the extent not granted herein, Plaintiff's motion to strike Defendants' answer is denied.

This constitutes the Decision and Order of the Court.

E N T E R,

SYLVIA G. ASH, J.S.C.