

**HRM Capstone Partnership, Inc. v Cantor Fitzgerald,
L.P.**

2019 NY Slip Op 30910(U)

March 21, 2019

Supreme Court, New York County

Docket Number: 655293/2017

Judge: Gerald Lebovits

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LBOVITS

PART

IAS MOTION 7EFM

Justice

-----X

INDEX NO. 655293/2017

THE HRM CAPSTONE PARTNERSHIP, INC.,

MOTION DATE 04/23/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

CANTOR FITZGERALD, L.P., CANTOR FITZGERALD & CO.

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38

were read on this motion to/for DISCOVERY

Arkin Solbakken LLP, New York (Thomas G. O' Brien, Lisa C. Solbakken, Robert C. Angelillo of counsel), for plaintiff.

Michael S. Popok, David A. Paul, Miguel A. Lopez, New York (Michael S. Popok, David A. Paul, Miguel A. Lopez of counsel), for defendants.

Gerald Lebovits, J.

As a preliminary matter, the court's order of August 14, 2018 — in which this court granted this motion to the extent of scheduling a preliminary conference for November 21, 2018 — is amended as discussed below. The parties could not resolve their disclosure disputes at the preliminary conference. This decision concerns the disputes as addressed in motion sequence 001.

Background

Plaintiff, HRM Capstone Partnership, Inc., a recruiting firm, was hired by defendants, Cantor Fitzgerald L.P. (CFLP) and Cantor Fitzgerald & Co. (CF&Co.) (collectively, Cantor), to find, on an exclusive basis, a suitable candidate for an executive position at Cantor's Healthcare Investment Banking unit.

Capstone commenced this breach-of-contract and account-stated action against Cantor. The complaint alleges that Cantor breached the executive-search agreement between the parties when Cantor failed to tender \$62,500 in fees to Capstone for finding Cantor's new head of compensation. Cantor asserts that it does not owe Capstone the placement fee and counterclaims for return of the \$100,000 retainer that Cantor had paid to Capstone for recruiting services.

On December 1, 2017, after the parties filed their required pleadings, Capstone served its first document request on Cantor and noticed the depositions of three of Cantor's employees. Cantor was required to respond to Capstone's document requests by December 26, 2017. The depositions were noticed to take place in the first half of January 2018.

On December 20, 2017, Cantor asked for a one-week extension to serve its response to Capstone's document requests. Capstone agreed to extend the deadline to January 2, 2018. Cantor also asked to meet and confer with Capstone's counsel about the timing of the depositions. Capstone responded by offering to hold depositions in February 2018 rather than January.

On January 9, 2018, Capstone served its first set of interrogatories on Cantor and requested the production of all non-privileged and responsive documents to its document requests and provide Cantor's employees' — Sage Kelly, Patricia Dreste, and Lori Pennay — availability for deposition. When it did not receive Cantor's response, Capstone sent a reminder email on January 16, 2018, informing Cantor that it was in default with regard to its document production obligations and had waived any objections to Capstone's December 1, 2017, document requests. (NYSCEF Document Number 25.) Cantor responded on January 19, 2018, informing Capstone that the document production was underway and that Cantor had no intention to waive its objection to Capstone's document requests. Cantor also said that it declined to commit to particular dates for its employees' depositions prior to further discussions with Capstone about timing.¹ (NYSCEF Document Number 26.)

Cantor emailed its response to Capstone's document requests on January 24, 2018. On January 29, 2018, Cantor emailed Capstone its responses to the interrogatories without verification. (NYSCEF Document Number 29.)

Capstone now moves under CPLR 3124 to compel (i) production of documents in responses to Capstone's first set of requests, (ii) production of Kelly, Dreste, and Pennay for depositions (iii) verification of Cantor's interrogatory responses.

Discussion

I. The Motion to Compel Production of Documents

Capstone's motion to compel production of documents is granted in part as to requests nos. 13 and 14, denied as to requests nos. 15, 16, 24, and 25, and denied without prejudice as to request no. 23.

CPLR Article 31 implements a strong policy for full disclosure of all evidence material and necessary in the prosecution or defense of an action. New York courts interpret "material and necessary" liberally to require disclosure, upon request, of any facts bearing on the controversy that will assist in sharpening the issues for trial. (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *R.C. Church of the Good Shepherd v Tempco Sys.*, 202 AD2d 257,

¹ Those depositions still have not been taken.

257-258 [1st Dept 1994]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 69-70 [2d Dept 1992].) “The failure of a party to challenge the propriety of a notice for discovery and inspection pursuant to CPLR 3120 within the time prescribed by CPLR 3122 forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper.” (*Marino v County of Nassau*, 16 AD3d 628, 629 [2d Dept 2005].) A request is palpably improper when it is “overly broad, unduly burdensome, irrelevant, or vague.” (*McMahon v Cobblestone Lofts Condominium*, 134 AD3d 646, 646 [1st Dept 2015].)

Cantor argues that Capstone’s requests nos. 13 through 16 are palpably improper. Request 13 seeks all documents identifying the employment dates for any managing director and director employees hired by Cantor after January 1, 2016. Request 14 asks for all documents identifying search firms or consultants that Cantor used to identify and obtain its managing director and director candidates. Request 15 seeks all agreements between Cantor and search firms concerning the search for these managing director and director candidates. And Request 16 asks for documents regarding the fees Cantor paid to search firms for these search services.

Capstone argues that it has requested these documents for two purposes. First, Capstone wants to challenge a putative internal Cantor policy of paying search firms less than 25% of the hired employee’s first-year salary — the salary percentage set by Capstone and Cantor’s original engagement agreement. Second, Capstone seeks to establish that CF&Co. breached the exclusivity clause of the engagement agreement by retaining other recruiters to search for and place managing director and director candidates within Cantor’s investment banking groups.

Request no. 13 is denied in part as overbroad. Capstone’s breach-of-contract claim seeks only the payment of fees for placing one individual, Michael Chang, as head of executive compensation. Information regarding *other* managing director and director placements is irrelevant to that claim. While Capstone asserts in its reply papers that Cantor refused to pay Capstone for Chang’s placement pursuant to a broader Cantor policy of paying search firms less than 25% of the hired employee’s first-year salary, Capstone fails to identify any information in the record supporting such an assertion.

At most, information regarding other placements might be relevant if Capstone were to defend against Cantor’s breach-of-contract counterclaim by contending that Cantor had itself breached the exclusivity clause of the engagement agreement. In that circumstance, though, the only relevant individuals would be managing directors and directors hired in Cantor’s Healthcare Investment Banking unit (the scope of Capstone’s engagement under the engagement agreement); and the only relevant period would be May 6, 2016 (the date of the agreement), until May 12, 2017 (the date Cantor definitively refused to pay Capstone).

Capstone’s document request no. 13 is therefore granted only as to managing director and director employees who began working in Cantor’s Healthcare Investment Banking unit between May 6, 2016, and May 12, 2017.

Capstone’s request no. 14 seeks all documents and communications identifying any search firm or consultant who identified, procured, or obtained managing director or director

candidates for Cantor. This request is denied in part as overbroad for the same reasons as request 13. Cantor is required instead to produce documents and communications identifying any search firm or consultant who identified or obtained managing director or director candidates for Cantor's Healthcare Investment Banking Unit between May 6, 2016 and May 12, 2017.

Capstone's requests nos. 15 and 16 are denied as seeking irrelevant materials. As discussed above, Capstone may pursue the identities of any other search firms and consultants that Cantor engaged between May 6, 2016, and May 12, 2017. The engagement agreements themselves, however, and the fees paid under those agreements, are not material or necessary to Capstone's breach of contract claim.

Capstone's request no. 23 seeks all documents and communications identifying the relationship between CFLP and CF&Co. and any ownership interest in, between, or among them. This request is denied without prejudice as overbroad. Capstone surely does not require *all* documents in Cantor's possession that identify the relationship between these two entities in order to determine whether CFLP is a proper defendant in an action arising out of the engagement of Capstone by Cantor. But this court has not yet been given sufficient information to determine what more narrow set of documents Cantor should be directed to produce to Capstone on this issue. The request is therefore denied, but without prejudice.

Capstone's requests nos. 24 and 25 seek all documents identifying the employer and employment titles of Kelly, Dreeste, Pennay, and Paul. This request is denied as unnecessary. Capstone argues that since Cantor's answer asserted that CFLP was not a proper party to the action, Capstone seeks these documents to determine whether any of the Cantor decision-makers involved in engaging Capstone were employed by CFLP. But Cantor has already provided interrogatory responses indicating that none of the four individuals whose employment is at issue are employed by CFLP.

To be sure, as Capstone points out on reply, there is an inconsistency between Cantor's interrogatory response regarding Dreeste (which states that she is employed by Cantor Securities.) and the verification page for the interrogatory responses (which states that she is employed by CF&Co). But Dreeste has been noticed for a deposition. Capstone may enquire about Dreeste's employment status at that deposition.

II. The Motion to Compel Production of Employees for Depositions

Capstone's motion to compel Cantor to produce Kelly, Dreeste, and Pennay for deposition is granted.

Under CPLR 3106, any party may take the testimony of any person by deposition upon oral or written questions at any time after an action is commenced. Leave of court is required if a deposition is to be served before a responsive pleading is due. Further, under CPLR 3107, a party desiring to take the deposition of any person upon oral examination shall give to each party 20 days' notice.

Capstone served Cantor with notices to depose Cantor's employees — Kelly, Dreste, and Pennay — on December 1, 2017. The depositions were each noticed to take place in the first half of January 2018. The parties have been unsuccessful in scheduling the deposition. Cantor, in its opposition papers, has not raised any objection to producing its employees for a deposition; they merely request that the depositions be scheduled once document discovery is complete. This court grants Capstone's motion to compel Cantor to produce its employees — Kelly, Dreste, and Pennay — for deposition within 45 days of service of this decision and order.

III. The Motion to Compel Verification of Interrogatory Responses

Capstone's motion to compel Cantor to verify its response to Capstone's interrogatories is granted.

Pursuant to CPLR 3133 (b), interrogatories shall be answered in writing under oath by the party served, if an individual, or, if the party served is a corporation, by an officer, director, member, agent or employee having the information. (*See Levinson v Steiner Digital Studios, L.L.C.*, 2013 NY Slip Op 31249 [U], *19 [Sup Ct, NY County 2013] ["Having failed to verify their supplemental responses to plaintiff's interrogatories, and absent any authority for the proposition that the objection is waived if a party fails to object in a timely manner to noncompliance with CPLR 3133(b), or that supplemental responses need not be verified if the original responses were, defendants must serve plaintiff with verified responses."].)

Capstone served its first set of interrogatories on CF&Co. and CFLP on January 9, 2018. (NYSCEF Document Number 24.) Cantor alleges that it has verified its response to Capstone and has annexed a verification page signed by Patricia Dreste, Director of Human Resources for CF&Co. (NYSCEF Document Number 35.) But CFLP's response to interrogatories is not verified according to CPLR 3133(b). Thus, Capstone's motion to compel Cantor to verify its response to Capstone's interrogatories is granted, and Cantor must verify its interrogatories within 10 days from service of this decision and order.

Accordingly, it is

ORDERED that Capstone's first set of document requests no. 13 is granted to the extent that Cantor is directed to produce all documents and communications identifying the employment dates of managing directors and directors hired by Cantor for its Hospital Investment Banking unit between January 1, 2016 to May 12, 2017, within 20 days of this decision and order; and it is further

ORDERED that Capstone's first set of document requests no. 14 is granted to the extent that Cantor is directed to produce all documents and communications identifying any search firm or consultant who identified, procured, or obtained managing director or director candidates for Cantor's Hospital Investment Banking unit between January 1, 2016 to May 12, 2017, within 20 days of this decision and order; and it is further

ORDERED that Capstone's first set of document requests nos. 15, 16, 24, and 25 are denied; and it is further

ORDERED that Capstone's first set of document requests no. 23 is denied without prejudice; and it is further

ORDERED that Capstone's motion to compel Cantor to produce its employees — Sage Kelly, Patricia Dreeste, and Lori Pennay — for a deposition is granted and the depositions must be held within 45 days of entry of this decision and order; and it is further

ORDERED that Capstone's motion to compel Cantor to verify its response to Capstone's interrogatories is granted, and Cantor must do so within 10 days of this decision and order; and it is further

ORDERED that the parties must appear for a compliance conference on May 15, 2019, at 10:00 a.m., in Part 7, room 345, at 60 Centre Street; and it is further

ORDERED that Capstone must serve a copy of this decision and order with notice of entry on Cantor.

3/21/19
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

HON. GERALD LEBOVITS
J.S.C.