Butler v Friedman
2019 NY Slip Op 32272(U)
June 3, 2019
Supreme Court, Bronx County
Docket Number: 24304/2018E
Judge: John R. Higgitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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JOHNNIE L. BUTLER,

Plaintiff,

- against -

WARREN FRIEDMAN, LINDA A. FRIEDMAN and "JOHN DOE" and/or "JANE DOE," the first and last names being fictitious and unknown to plaintiff,

Defendants.

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DECISION AND ORDER

Index No. 24304/2018E

John R. Higgitt, J.

Upon the order to show cause signed May 14, 2019 and the affirmation and exhibits submitted in support thereof; defendants' May 24, 2019 affirmation in opposition and the exhibits submitted therewith; and due deliberation; plaintiff's application to compel defendants to respond to plaintiff's combined demands, demand for bill of particulars, demand for expert disclosure and notice for discovery and inspection is granted in part.

This action, commenced April 12, 2018, emanates from a May 31, 2016 motor vehicle accident. The complaint alleges that the Friedman defendants owned, leased, maintained, controlled and operated a vehicle, bearing New York State license plate number GGA3528, that came into contact with plaintiff's bicycle and, alternatively, that the Doe defendants operated such vehicle with the owner's consent. The Friedman defendants have denied all such allegations.

In June 2018, plaintiff served upon the Friedman defendants a notice to admit requiring defendants' admissions as to their ownership and operation of a vehicle bearing New York State license plate number GGA3528 on the date of the accident. The Friedman defendants admitted that defendant Linda A. Friedman was the registered owner of the vehicle, but denied all other allegations. Thereafter, in March 2019, plaintiff served various discovery demands.

Plaintiff's primary purpose in bringing the order to show cause is the identification of potential defendants, given the imminent expiration of the statute of limitations; accordingly, plaintiff's March

14, 2019 notice for discovery and inspection appears to be the operative demand requiring an expedited response (according to plaintiff), there being no demonstrated exigency with respect to plaintiff's other discovery demands (*see* CPLR 2214[d]).

The March 14, 2019 notice for discovery and inspection seeks, as is relevant here,[1] (1) the names and addresses of all individuals who operated a vehicle bearing New York State license plate number GGA352B[2] at any time during the day of the accident, (2) the names and addresses of all individuals who operated the vehicle at the time of the subject accident, (3) the identities of banks or creditors possessing an interest in the vehicle, and (4) the lessors and lessees of and leases pertaining to the vehicle.

Generally, "there shall be full disclosure [by a party] of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a][1]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). One method of obtaining disclosure is by discovery and inspection (*see* CPLR 3102[a]), on notice (*see* CPLR 3102[b]), by service by a party upon any other party of a notice seeking same (*see* CPLR 3120[1][i]). The recipient must respond within 20 days (*see* CPLR 3120[2]). If the recipient of such a notice objects to any part of it, the recipient shall do so in a timely writing (*see* CPLR 3122[a][1]). Should the recipient object or not respond, the party seeking disclosure may move pursuant to CPLR 3124 (*see id.*).

On a motion to compel the production of discovery pursuant to CPLR 3124, the movant bears the burden of establishing a basis for the production of the discovery sought (*see Troshin v Stella Orton Home Care Agency, Inc.*, 2018 NY Slip Op 30922[U] [Sup Ct, N.Y. County 2018]). Movant must "demonstrate that the ... 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" (*Brito-Amezquita v*

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[1] In response to the motion, the Friedman defendants responded substantively to paragraphs 3, 4, 5, 6 and 12 of the demands and objected to paragraphs 1, 2, 7, 8, 9, 10 and 11 of the demands.

[2] It appears that the license plate number stated in the demands, differing from that alleged in the complaint and notice to admit, is in error. Because the Friedman defendants did not complain about this error and it will not prevent them from responding meaningfully, it is disregarded (*see* CPLR 2001).

928 Columbus Holdings LLC, 2017 NY Slip Op 32514[U], at *4 [Sup Ct, N.Y. County 2017]); *Forman v Henkin*, 30 NY3d 656, 664 [2018] ["(T)he request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists."]). The opposing party bears the burden of establishing the materials are immune or exempt from discovery (*see Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451 [1st Dept 2012]). If the resisting party previously asserted a privilege or immunity from disclosure, movant must establish on its motion to compel such production that the privilege or immunity does not apply (*see id.*). Even if the resisting party failed to timely assert an objection to the material sought, if the court finds that the demands were palpably improper or sought privileged material, a response will not be compelled (*see Lea v N.Y.C. Transit Auth.*, 57 AD3d 269 [1st Dept 2008]). As to demands that are not palpably improper and that do not seek privileged information, if the party resisting disclosure failed to seek a protective order or otherwise timely object to production of the discovery sought, it will not be heard to object to the demand (*see Fiore v Bay Ridge Sanitarium, Inc.*, 48 Misc 2d 318 [Sup Ct, Kings County 1965]). Under the appropriate circumstances, the court may strike or limit discovery demands to which no timely objection was received (*see McMahon v Cobblestone Lofts Condo.*, 134 AD3d 646 [1st Dept 2015]). The court may also, on its own or upon motion, issue a "protective order denying, limiting, conditioning or regulating the use of any disclosure device [which] shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]).

Plaintiff asserts, "The delay in obtaining responses is in no way due to the actions of the plaintiff. Not producing discovery responses will greatly prejudice the plaintiff in that they may shed light as to additional parties that may be needed to be added before the statute of limitations runs on May 31, 2019" (Noble affirmation at para. 10). Plaintiff offers no further explanation why the discovery sought is relevant. Only upon reviewing the police accident report submitted by the Friedman defendants in response to the order to show cause and the demands does it become apparent that the

vehicle owned by defendant Linda A. Friedman is claimed to have left the scene of the accident. The entry in the report for the operator of the Friedman defendants' vehicle is blank.

The Friedman defendants assert that plaintiff has failed to demonstrate good faith, as required by 22 NYCRR § 202.7(a)(2). Plaintiff asserted that he had complied with the requirement by faxing a letter to the Friedman defendants on April 26, 2019 and, after counsel for the Friedman defendants was substituted on May 2, 2019, faxing the same letter (dated April 26, 2019 and addressed to the Friedman defendants' former counsel) to their incoming counsel, Lewis Brisbois Bisgaard & Smith LLP (Lewis Brisbois), on May 3, 2019 (Lewis Brisbois denies receipt of this fax). The first correspondence Lewis Brisbois received that was addressed to it was plaintiff's May 10, 2019 letter advising it that plaintiff intended to file the instant order to show cause on May 13, 2019 at 11:00 a.m. Instead, plaintiff filed the order to show cause the same day at 5:53 p.m.

Any motion relating to disclosure must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR § 202.7[a][2]). The good faith requirement applies by its terms to any discovery-related application, not just applications to strike pleadings or for particular sanctions for failure to disclose, and the regulation states that the motion cannot be filed without it. Such affirmation must provide a substantive description of the efforts undertaken to confer and avoid motion practice (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013]). Failure to do so is, standing alone, sufficient ground to deny the motion (*see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]).

"Good faith" contemplates communication between parties (*see Fulton v Allstate Ins. Co.*, 14 AD3d 380 [1st Dept 2005]), not communication ***at*** a party. Good faith entails "constructive dialogue" (*Nikpour v City of New York*, 179 Misc 2d 928, 930 [Sup Ct, N.Y. County 1999]), and "diligent effort" (*Baez v Sugrue*, 300 AD2d 519, 521 [2d Dept 2002]). The motion discloses no circumstances warranting disregard of this requirement (*cf. Lu Huang v Di Yuan Karaoke*, 28 Misc 3d 920 [Sup Ct, Queens

County 2010]).[3] Under the particular circumstances presented here, plaintiff's perfunctory affirmation was insufficient (*see Nouveau El. Indus., Inc. v N.Y. Marine & Gen. Ins. Co.*, 2018 NY Slip Op 30202[U] [Sup Ct, N.Y. County 2018]), as was the single letter plaintiff sent to the Friedman defendants (*see 241 Fifth Ave. Hotel, LLC*, *supra*). Plaintiff's efforts did not amount to "conferral," and plaintiff did not establish that conferral would have been futile (*cf. Suarez v Shapiro Family Realty Assocs., LLC*, 149 AD3d 526 [1st Dept 2017]). Further submissions by a movant may be sufficient, when viewing all submissions as a whole, to cure an initial deficiency in the good-faith showing (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st Dept 2017]); however, plaintiff did not seek to do so here.

The exchange of a discovery demand is not a good faith effort to avoid motion practice. If a party wishes to obtain discovery from another party, service of a written demand is *required* under CPLR 3120. Additionally, service of a discovery demand is not a good faith effort because it does not constitute a "conferral" with opposing counsel (*see Kelly v N.Y.C. Transit Auth.*, 162 AD3d 424 [1st Dept 2018] ["Defendant's motion was properly denied because it related to discovery, and defendant failed to submit an affirmation demonstrating its good faith effort to resolve the issues raised in the motion or that there was 'good cause why no such conferral . . . was held' (Uniform Rules for Trial Cts [22 NYCRR] § 202.7[a][2], [c]; *see Perez De Sanchez, supra*; *Molyneaux v City of New York*, 64 AD3d 406, 882 N.Y.S.2d 109 [1st Dept 2009])."]).

The court notes that, to the extent that, on the return date of the order to show cause, plaintiff indicated that he required that the Friedman defendants disclose the names and addresses of their employees, there is no indication that plaintiff has served a demand seeking such discovery (*see* CPLR 3120), and moving to compel a party's compliance with discovery that has not been demanded is

[3] Although plaintiff cites to the purported exigency created by the imminent expiration of the statute of limitations, it appears that plaintiff did not previously pursue this discovery from the Friedman defendants with particular vigor, despite having been made aware of the Friedman defendants' position through, among other things, participation in arbitration proceedings and non-party depositions.

improper (*see Canales v State of N.Y.*, 51 Misc 3d 648 [Ct Cl 2015]). Furthermore, plaintiff failed to demonstrate the relevance of the identity of the Friedman defendants' employees. The Friedman defendants indicated that the parties have already taken part in arbitration proceedings involving the taking of deposition testimony from at least one non-party witness; plaintiff did not indicate why such witness was inappropriate or insufficient, and it is apparent that plaintiff has not sought pre-action discovery to aid in bringing the action (see CPLR 3102[c]) or to identify potential defendants (*see Matter of Uddin v New York City Tr. Auth.*, 27 AD3d 265 [1st Dept 2006]; *Matter of Alexander v Spanierman Gallery, LLC*, 33 AD3d 411 [1st Dept 2006]).

Notwithstanding the absence of an affirmation of good faith, in light of the strong policy supporting open disclosure (*see Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740 [2000]), the need to foster the "judicious resolution of th[e] controversy" (*Germe v City of N.Y.*, 211 AD2d 480, 482-83 [1st Dept 1995] [citation omitted]), and the manifest relevance of the identity of the driver of the Friedman defendants' vehicle, the court finds that a response to paragraph 2 of plaintiff's March 14, 2019 notice for discovery and inspection (seeking the identities of permissive users at the time of the accident) is warranted, and that no further response is required at this time.

Accordingly, it is

ORDERED, that, within 20 days after service of a copy of this order with written notice of its entry, the Friedman defendants shall respond to paragraph 2 of plaintiff's March 14, 2019 notice for discovery and inspection; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the June 28, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 3, 2019

John R. Higgitt, A.J.S.C.