

Park v Song

2019 NY Slip Op 32329(U)

July 30, 2019

Supreme Court, New York County

Docket Number: 650186/2017

Judge: Jennifer G. Schechter

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
COUNTY OF NEW YORK: PART 54

-----X
STEPHEN PARK, THOMAS YANG, PAUL LEE and
ANDREW CHANG, individually and on behalf of
KORILLA BBQ, LLC

Index No.: 650186/2017

DECISION & ORDER

Plaintiffs,

-against-

EDWARD SONG, DAVID IM, KORILLA EAST
VILLAGE TRUCK, INC., WHITE TIGER NAMED
KORILLA, LLC, LET GROUP, LLC, AEGIS 233 LLC,
and HARDY CHUNG,

Defendants,

-and-

KORILLA BBQ, LLC,

Nominal Defendant.

-----X
JENNIFER G. SCHECTER, J.:

Plaintiffs move to compel defendants to produce 15 categories of documents and to comply with various court orders. Defendants oppose the motion. The motion is granted in part.¹

Regarding the third category, plaintiffs are entitled to Aegis' 2018 tax return. While defendants claim Aegis is no longer operating, plaintiffs have recently called into question the veracity of this representation and have raised questions about the actual scope of Aegis' business. Since Aegis' financial records were not produced, its tax returns are required since there is no other source from which to glean its financial situation.

¹ Familiarity with this action is assumed. Capitalized terms not that are defined have the same meaning as in the court's October 10, 2018 decision (Dkt. 138).

Regarding the seventh category, plaintiffs are entitled to copies of checks, non-check payment instructions and deposit slips for all bank records that were produced. These records are in defendants' control because they have the authority to obtain them from the bank; they must do so and pay for the cost since this qualifies as party discovery.

Regarding part (a) of the eighth category and the tenth and eleventh categories, defendants must produce all POS records (from Revel or otherwise) for all Korilla-branded restaurants, which, if they exist, should have been produced pursuant to the court's April 10, 2018 order requiring production of all financial records (*see* Dkt. 68 at 4). This requirement is independent of (and indeed predated) defendants' ESI production obligations. That such records may not have been within the scope of the ESI protocol is of no moment. To the extent it would be more convenient for defendants to obtain these records directly from the POS companies, they may do so in lieu of attempting to locate them among their unproduced ESI. However, if defendants do this, they will have to pay whatever associated costs are incurred since the records are within their possession, custody and control. To be sure, this obligation only applies to restaurants in which, for instance, Edward Song is personally involved (e.g., where he owns equity, has management responsibilities or otherwise has the practical ability to obtain the documents). The other records must be obtained, perhaps, from his brother.² But since plaintiffs alleged, and defendants do not deny in their opposition, that Edward Song

² The court was previously prepared to order this production from his subpoenaed brother, but plaintiffs backed off due to reluctance to pay the required costs. Plaintiffs, of course, would be entitled to these records through party discovery if leave to amend is granted.

received Revel POS records sent to his personal email, plaintiffs have laid a sufficient foundation that he has the practical ability to obtain such records.

Regarding the fifteenth category, *both* plaintiffs and defendants must reproduce their documents with bates stamps in accordance with the June 4, 2019 order (Dkt. 184). This should have been done by July 15, 2019 (*see id.* at 1). The parties' explanations for why this was not done are baseless. The July 15 order further required defendants to produce bank records from the account referenced in the December 7, 2017 email (*see id.*). If this did not occur, defendants must produce those records.

For now, all other requested relief is denied. To the extent plaintiffs contend previously demanded documents really do exist but were not produced by defendants, plaintiffs may seek to lay a foundation at the depositions and make an appropriate motion if documents were indeed withheld. To the extent certain interrogatory answers were supposedly insufficient, all such questions may be asked at depositions, which defendants must be prepared to answer. To the extent plaintiffs seek further ESI from defendants beyond the scope of the agreed-upon protocol, at this juncture, their request is denied. The record on *this* motion does not justify the need for a further email production from defendants, the costs of which would be disproportionate to the amount in controversy and its relative importance. Plaintiffs may, of course, seek ESI from third-parties through subpoenas if they are willing to defray the costs.

That said, the court has reviewed the moving papers on plaintiffs' motion for leave to amend and, candidly, they paint a disturbing picture. But rather than speculate as to

whether there have been serious discovery violations and misrepresentations to the court about the scope of Edward Song's involvement in the broader Korilla business – an issue bearing on the merits of the case *and* the scope of documents that should have been produced as within his possession, custody or control – the court will defer making an assessment of whether further discovery is needed and whether the sanctions requested by plaintiffs are warranted. These issues may be further addressed at the forthcoming argument on September 5, 2019.

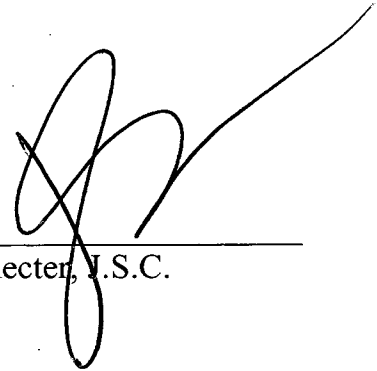
That said, for the avoidance of doubt, the parties must proceed with their depositions as currently scheduled. The court understands that plaintiffs' depositions will occur during the week of August 19. While the current deadline is September 13, the court further directs that Edward Song's deposition occur on or before August 30 so that his testimony may be brought to the court's attention at the September 5 argument to the extent relevant.

Accordingly, it is ORDERED that plaintiffs' motion to compel is granted in part to the extent set forth above, and defendants must (1) produce all such documents in their actual possession by August 7, 2019; and (2) with respect to documents in their custody or control, defendants must obtain them or request them in writing from whoever actually possesses the documents (e.g., banks, the POS company, business partners, etc.) by August 1, 2019; immediately provide copies of any such written requests to plaintiffs; and produce the documents to plaintiffs within three days of receipt; and it is further

ORDERED that any party who fails to make the requisite bates-stamped reproduction of their documents by August 15, 2019 will be precluded from introducing such documents at trial.

Dated: July 30, 2019

ENTER:



Jennifer G. Schecter, J.S.C.