SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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GCS SECOND AVENUE OWNER LLC,

Plaintiff,

- v -

MERCHANTS HOSPITALITY INC., ABRAHAM MERCHANT, ADAM HOCHFELDER

Defendant.

INDEX NO. 652348/2017

MOTION DATE 03/11/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95
were read on this motion TO COMPEL DISCOVERY.

This is a breach of contract case. Plaintiff GCS Second Avenue Owner LLC ("GCS") alleges that Defendant Merchants Hospitality Incorporated ("MHI"), Abraham Merchant ("Merchant") and Adam Hochfelder ("Hochfelder") (collectively Defendants) violated the terms of their May 29, 2014 Agreement to lend funds in the amount of $1,350,000 in exchange for entering into a joint venture agreement. This motion arises from a discovery dispute, in which MHI is seeking past "loan agreements" between GCS and non-parties to establish that the parties' agreement deviated from GCS's "usual" loan agreements.

For the reasons set forth below, the motion is denied.

Factual Background

In May 2014, MHI and GCS began discussions about a possible joint venture regarding the acquisition of properties located at 1802/1804-1805/1810 Second Avenue and 303-305 East 93rd Street. MHI had already begun negotiations with nonparties for

commercial real-estate transactions, including a long-term build-to-suit lease. To extend the closing dates of these other contracts, GCS contributed funds to MHI via the Agreement at issue in the case. A Lessee of the Property (GEMS), upon whose Lease GCS and MHI's potential joint venture was predicated, terminated their Lease three days before the closing date of the Property. The Joint Venture was cancelled as a result of this termination. GCS requested repayment of funds it had contributed to MHI. MHI refused.

GCS filed this action in 2017, alleging that MHI violated the terms of their Agreement by refusing to repay the funds.

Under the Preliminary Conference Order entered in this case discovery was scheduled to be completed on July 30, 2018. The deadline was extended to December 31, 2018 in the Compliance Conference Stipulation and Order. To allow for the completion of all depositions, discovery was then further extended to February 15, 2019. (NYSCEF 71 at 25).

Peter Duncan, GCS's managing member, was deposed on February 6, 2019. During the deposition, Mr. Duncan referred to the Agreement at issue as a "loan agreement." On February 15, the day discovery was scheduled to end, MHI sent a discovery demand seeking all contracts, agreements, promissory notes, loans between Plaintiffs and third parties. GCS objected to the demands on the grounds that they were untimely, irrelevant and not material. At the parties' request, the Court scheduled a Rule 14 telephone conference for February 28. During this telephone conference, the Court's law clerk advised that MHI had the ability to narrow its demands and could also submit a motion to compel, and expressed doubt as to the success of the motion. On

March 11, nearly two weeks after the conference, MHI simultaneously filed an amended discovery request and this motion to compel.

Legal Analysis

The documents belatedly requested by Defendants are not "material and necessary in the prosecution or defense of [this] action."[1] *See* CPLR §3101(a). The Court of Appeals has explained that the words "material and necessary" are to be interpreted "liberally." *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968). However, a party is not entitled to "uncontrolled and unfettered disclosure." *Gilman & Ciocia, Inc. v. Walsh*, 845 N.Y.S.2d 124, 125 (2d Dep't 2007). The proper test is one of "usefulness and reason." *Allen,* 21 N.Y.2d at 406. The determination whether information is "material and necessary" hinges upon whether it will "assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Id.* Additionally, the request for this information must be "appropriately tailored and reasonably calculated to yield relevant information." *Forman v. Henkin*, 30 N.Y.3d 656, 664 (2018). In sum, "the right to disclosure, although broad, is not unlimited." *Id.* at 662.

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[1] The Court notes that Defendants have not complied with the letter (or spirit) of the Court's discovery rules. As explained above, the Court granted two extensions of the discovery schedule, with the final end date for all discovery being February 15, 2019. (NYSCEF 71). Defendants had ample time to complete depositions *and* document discovery in advance of the deadline, but instead chose to wait until the deadline to serve follow-up demands after Mr. Duncan's deposition. And then, it waited two weeks after a conference with the Court's law clerk to narrow the request. And then, it filed the instant motion without giving the other side a chance to respond to the demands and failed to comply with dispute resolution procedure of Rule 14. In the circumstances, the Court finds that Defendants' revised requests were untimely. However, as noted in the text, the motion would be denied even if the disclosure had been requested in a timely manner.

Defendant's request for information about five unrelated loans and agreements with non-parties, which are not at issue in this case, will not "sharpen the issues." *Allen,* 21 N.Y.2d at 406. The demands span the course of thirty-three years, and production of these documents will not "reduce delay and prolixity," but rather increase it. *Id.*

Defendants apparently seek to establish a pattern or standard of "lending agreements" that Peter Duncan and GCS have previously entered into to attempt to illustrate that the Agreement at issue has deviated from GCS's usual pattern. However, Mr. Duncan's and GCS's dealings with non-parties in other transactions are not relevant to determining what the parties intended in the contract in *this* case. *See NBT Bancorp, Inc. v. Fleet/Norstar Financial Group, Inc.,* 192 A.D.2d 1032, 1033 (3d Dep't 1993) (asserting even if a pattern of conduct could be established that was relevant to a merger agreements with other parties, the pattern had "no bearing on the issue being litigated"); *Seltel, Inc. v. Channel Communications, Inc.,* 122 A.D.2d 628, 628 (1st Dep't 1986) (finding that "defendant may not prove plaintiff's inadequate performance under the contract at issue by showing its failure under other purportedly similar contracts....") The point of this case is to determine the meaning of the contract between the parties to the case, not to probe into contracts one of the parties may have entered into with other parties in other transactions. *World Wrestling Federation Entertainment, Inc. v. William Morris Agency, Inc.*, 204 F.R.D. 264, 265 (S.D.N.Y. 2001).

THEREFORE, it is:

ORDERED that Defendants' Motion to Compel discovery is Denied; it is further

ORDERED that the parties are to appear for a Pre-Trial/Status Conference on September 3, 2019 at 11:00 a.m.

This constitutes the decision and order of the Court.

8/12/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE