255 Butler Assoc. LLC v 255 Butler LLC
2019 NY Slip Op 32484(U)
August 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 August, 2019.

PRESENT:

HON. SYLVIA G. ASH,
Justice.
--X

255 BUTLER ASSOCIATES LLC,

Plaintiff(s),

- against -

255 BUTLER LLC, et. al.,

Defendant(s).
--X

DECISION AND ORDER

Index # 511560/2015

Mot. Seq. 22 & 23

The following e-filed papers numbered 794 to 911 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	794-822; 860-884
Opposing Affidavits (Affirmations)	823-845; 890-902
Reply Affidavits (Affirmations)	906-911
Affidavit (Affirmation) Oral Argument Transcript	

Before this Court are Plaintiff's two motions to strike Defendants' answer and counterclaims.

Pursuant to this Court's short form order dated June 26, 2018, Defendants were directed to produce "all documents collected to date by [Defendants'] ESI consultants and limited by agreed upon search terms....except for privileged documents or those which [Defendants] need not produce pursuant to Decision and Order dated June 7, 2018." The Court's direction stemmed from Defendants' failure to produce certain emails in the Plaintiff's possession that should have also been produced by the Defendants but for reasons unexplained by Defendants,[1] and despite their engagement of ESI experts, were not produced. The total number of emails that "hit" the parties' agreed upon search terms numbered 46,000. Defendants turned over approximately 37,000 emails

[1] Defendants attributed the non-production of these emails as being due to the "vagaries" of Defendants' email system.

withholding approximately 9,000 emails based on "presumptive" privilege or because they related to other properties, settlement discussions, financial statements and tax returns. Defendants also redacted certain information within the production of 37,000 emails.

By way of the instant motion to strike Defendants' pleadings, Plaintiff argues that Defendants were only permitted to withhold privileged documents and those subject to the Court's ruling in an order dated June 7, 2018 that certain categories of documents were irrelevant. Further, that Defendants are not permitted to redact financial and other business information within the 37,000 email production. Finally, it is Plaintiff's position that, because none of the so-called "missing emails" were found within the 37,000 email production, Defendants are deliberately withholding or have destroyed ESI evidence and, therefore, that their answer must be struck.

In response, Defendants contend that they have neither improperly withheld or destroyed any ESI evidence and that they have fully complied with the Court's previous order. Defendants argue that their production of the "hit emails" confirms the accuracy and truth of what Defendants have said all along–that the absence of these emails from their production has nothing to do with a sinister plot on the part of Defendants to conceal evidence and everything to do with the vagaries of Defendants' email system. Further, that in connection with Plaintiff's first motion to strike, Defendants submitted the affidavits of their two e-discovery experts, confirming that each had been instructed to perform a thorough search of the designated custodians' complete email accounts and not to conceal or withhold any documents relating to the Butler Street Property, and that Defendants' experts "did not see any indication that any emails were intentionally removed or deleted by any party to avoid the discovery obligations of this (or any) proceeding." In addition, with the instant motion, Defendants submit the affidavits of Ariel and Solmi Akkad, who each state that neither they nor any of their family members deliberately deleted or "destroyed" any emails from any of the accounts. Finally, Defendants contend that, while Plaintiff need not believe the truth of Defendants' statements, Plaintiff cannot seek to strike their answer and win on default because Plaintiff merely "believes" that Defendants are lying. Instead, that Plaintiff must convince the trier of fact that Defendants are lying.

After orally arguing the instant motion, Plaintiff filed a second motion to strike arguing again that Defendants' pleadings should be struck because the "missing emails" were not located within Defendants' ESI production. In addition, Plaintiff argues that Defendants have failed to fully comply with their discovery obligations. Specifically, Plaintiff contends that a chain of 21 emails among the Akkads were deemed "hot" and privileged but that their counsel was not copied on these emails.

Thus, that said emails cannot qualify as privileged communications. Second, that Defendants were to "provide documents sufficient to show prior transactions with shared office space providers similar to WeWork for the period prior to the notice to cure lease defaults, including date of transaction, terms, location and counterparty" pursuant to court order dated May 9, 2018 but that Defendants failed to do so. Third, that according to the parties' ESI agreement, Defendants were required to search all email accounts of all designated email custodians but that Defendants failed to search the personal email account ending in att.net for Margaux Levy ("Levy"), their counsel, and the gmail and hhequities email accounts for Solmi Akkad. Further, that Defendants did not provide any documents from a search of the email account of Michael Ghatalia ("Ghatalia"), the chief financial officer of Idea Nuovo. Fourth, that Defendants have not produced the cell phone data for Levy and Ghatalia as well as the call logs and metadata for the Akkads' cell phones, which are all required to be produced under the parties' ESI agreement. Fifth, that Defendants have not provided the metadata for a certain document referred to as the First Amendment to Operating Agreement which is required to be produced under the parties' ESI agreement. Fifth, that Defendants have failed to provide documents requested at the Akkads' deposition. And finally, that Defendants have not produced documents concerning Defendant 255 Butler LLC's liquidity.

In response, Defendants request that the Court curb what they view as Plaintiff's "discovery reign of terror." Defendants contend that they have fully complied with all of this Court's orders and addresses Plaintiff's contentions in turn. First, that they have only withheld emails from production that are either consistent with this court's previous orders or not subject to production under well the settled law of this State. And that while Plaintiff complains that Defendants have over-designated non-privileged documents, Plaintiff only gives one example of over-designation. Further, that the example given by Plaintiff is presumptively privileged because it is the forwarding of an attorney-client communication from one Akkad to another, and the discussion among the Akkads about that attorney communication. Second, Defendants contend they complied with the court order directing them to show prior transactions with shared office space providers similar to WeWork by producing a newspaper article that summarized the transaction. Defendants state that they were not required to produce every document relating to The Yard. Third, that Levy is an attorney who maintains a practice outside of her work for the Defendants. That she is not an employee of the Defendants and has refused to permit her att.net email account to be searched and that the same goes for her cell phone. With regards to Solmi Akkad's other email accounts, that he testified, at his deposition, that he does not use his other email accounts for business purposes. As for ESI from Ghatalia, that only eight separate documents contained the relevant search terms which have been provided to Plaintiff. Fourth, that where, as here, the parties' ESI agreement provisions are subject to abuse and

unreasonable requests, the agreement should not be dispositive of every discovery issue and request. While Ghatalia is a designated custodian and an Idea Nuova employee, absent any reason to believe that his cell phone contains relevant texts, that he should not be required to submit to his cell phone being searched. Further, that the First Amendment to Operating Agreement was obtained from Defendant landlord's transactional counsel in November 2018, so to the extent that Plaintiff wants the metadata associated with said document, Plaintiff should pursue it with said transactional counsel.

With regards to the outstanding requests from the Akkads' deposition, Defendants contend that some of Plaintiff's request call for legal conclusions and are not properly addressed to a fact witness. That Plaintiff's request for the owner of the domain name hhequities is irrelevant and that Defendants have provided the home addresses of the requested individuals.

Finally, Defendants submit that they have complied with their obligations concerning the Court's June 7, 2018 decision requiring Defendants to provide documents concerning landlord's "liquidity." That said decision limited the scope of discovery on this issue to "bank statements, loan agreements, note and mortgage, default notices and notices of acceleration." And that these documents were provided many months ago, including fully unredacted bank statements.

Upon review of the foregoing arguments and the parties' submissions, the Court decides as follows:

Plaintiff's motion to strike Defendants' answer on the grounds that they have destroyed or withheld evidence is granted solely to the extent that Defendants shall be precluded from using for any purposes at trial documents that they failed to produce in discovery. Plaintiff's motion is otherwise denied (motion sequence 22). Plaintiff's only argument in support of striking Defendants' answer is the fact that the "missing emails" were not found within the 46,000 "hit emails" that Defendants were directed to produce. However, contrary to Plaintiff's assertion, the fact that the "missing emails" were not a part of the "hit emails" does not establish that Defendants willfully destroyed evidence. While the Court finds Defendants' explanation for the "missing emails" to be unsatisfactory, having since compelled Defendants to produce everything, the fact that the "missing emails" were not found merely indicates that they were never part of the 46,000 "hit emails" to begin with.

With regards to Defendants' withholding of 9,000 emails and whether that is in violation of this Court's Order dated June 26, 2018, the Court finds that Plaintiff fails to establish that Defendants failed to comply with the Court's June 26, 2018 Order, which specifically carves out both privileged documents as well as those documents that Defendants need not produce as a result of this Court's Decision dated June 7, 2018.[2] It is well established that any party withholding discovery on the basis of privilege or on some other basis must provide a privilege log. If Defendants' privilege log is insufficient or reflects improper withholding, Plaintiff must provide specific examples so that the Court can address them. It is insufficient to merely point to the sheer number of documents withheld as evidence that Defendants are improperly withholding discovery.

By way of its subsequent motion to strike Defendants' answer (motion sequence 23), Plaintiff provided one example of a potentially improper withholding–the chain of 21 emails among the Akkads that were deemed "hot" and privileged but on which their counsel was not copied. With regards to this, the Court directs Defendants to submit these emails for in camera review within 30 days so that the Court can ascertain whether these emails are, in fact, privileged.

With regards to the remainder of Plaintiff's second motion to strike, the Court finds that, with the exception of the items covered by the parties' ESI agreement which are dealt with below, Defendants have substantially complied with their previous discovery obligations, and as such, Plaintiff's motion must be denied.

First, to the extent that Plaintiff requests **additional** documents concerning Defendants' transactions with shared office space providers, Plaintiff must make a further document demand. The same applies for Plaintiff's request for additional documents concerning 255 Butler LLC's liquidity. Plaintiff cannot bootstrap what are essentially new requests for specific documents to previous orders that resolved Plaintiff's previous (and specific) request for documents and thereafter complain that Defendants are not in compliance.

With regards to compelling Defendants to search Levy's personal email account and cell phone, the Court finds that Plaintiff must pursue Levy directly as Levy is not an employee of the Akkads and therefore not under their control.

[2] The June 7, 2018 Decision resolved a motion by Plaintiff to compel certain discovery denying in part and granting in part Plaintiff's motion.

With regards to that portion of Plaintiff's motion seeking to enforce the parties' ESI agreement, the Court finds that, absent good reason, the ESI agreement that the parties signed should be followed. To that end,.Defendants fail to explain why they should be relieved from providing the call logs and metadata for the Akkads' cell phones and the First Amendment to Operating Agreement if same is called for in the parties' ESI agreement. Although Defendants claim that having to provide metadata is unreasonable, Defendants fail to explain why this is so. Defendants also fail to adequately explain why having to execute an ESI search for Solmi Akkad's gmail and hhequities accounts is unreasonable. If Defendants do not use these accounts for business, then the search will be simple since, presumably, the yield will be zero. However, in this adversarial proceeding, Plaintiff is not required to take Defendants at their word that they do not use their gmail accounts for business purposes. Accordingly, Defendants shall complete their obligations under the parties' ESI agreement within 45 days.

With regards to the remaining items in Plaintiff's motion, Defendants have asserted that they have provided all of the requested items. As such, the Court directs Plaintiff to provide a deficiency letter to Defendants if, by the date of this decision, Plaintiff believes that items are still outstanding.

A status conference shall be held on Tuesday, November 12, 2019 at 10:00 a.m.

This constitutes the Decision and Order of the Court.

E N T E R,

SYLVIA G. ASH, J.S.C.