

Asphalt Maintenance Servs. Corp. v Oneil
2019 NY Slip Op 32562(U)
August 5, 2019
Supreme Court, Westchester County
Docket Number: 59242/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
ASPHALT MAINTENANCE SERVICES CORP. and
MARK REUSS,

Plaintiffs,

-against-

HENRY G. ONEIL, IMPERIAL ASPHALT AND
AGGREGATE DISTRIBUTOR INCORPORATED and
PALEEN CONSTRUCTION CORP.,

Defendants.
-----X

DECISION & ORDER

Index No. 59242/2016
Motion Date: Aug. 5, 2019

Motion Seq. No. 10

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order compelling defendants to provide minority application information and documents previously demanded; invoices for Paleen Construction Corp.; invoices for the disclosed entities that may be in defendants' accountant's possession; and a copy of the cover letter or other communication tendered to the Court with defendants' in camera submissions; and for such other and further relief as this Court may deem just and proper.

Order to Show Cause – Affirmation in Support – Letter to Judge- Exhibits A - F
Affirmation in Opposition
NYSCEF File

Upon the foregoing papers and the proceedings held on August 5, 2019, this motion is determined as follows:

Factual and Relevant Procedural Background

Plaintiffs commenced this action by filing a summons and verified complaint on July 6, 2016 (NYSCEF Doc. #1). Plaintiffs allege that defendant Henry, as a former employee, has *inter alia*, violated fiduciary obligations, misappropriated trade secrets, committed unfair competition and business practices, conversion and has tortiously interfered with plaintiffs' business relationships (NYSCEF Doc. #1). Plaintiffs seek compensatory and punitive damages and equitable remedies (NYSCEF Doc. #1). Defendant Paleen Construction Corp. was released from this case by the filing of a partial stipulation of discontinuance on February 10, 2017 (*see*

NYSCEF Doc. #52).¹ Defendants Henry G. Oneil and Imperial Asphalt and Aggregate Distributor Inc. filed their Answer on September 22, 2016 (NYSCEF Doc. #6).

The extensive procedural history of motion practice and numerous appearances in this case have been detailed in multiple prior Decisions and Orders and are also set forth in plaintiffs' Affirmation in Support of this motion and will not be repeated again herein, unless it pertains to this motion.

The Instant Motion

By this motion, plaintiffs seek an order compelling defendants to produce minority application information and documents previously demanded; invoices for Paleen Construction Corp. ("Paleen"); invoices for the disclosed entities that may be in defendants' accountant's possession; and to provide a copy of the cover letter or other communication tendered to the Court with defendants' in camera submission. Plaintiffs argue that defendants' prior production of minority certification information was incomplete and would contain relevant and necessary information to this action. As to invoices from Paleen, plaintiffs concede in their papers that they failed to include Paleen on the list they submitted to the Court for in camera review. However, they now argue that they need copies of those invoices because defendants do not deny that Paleen was one of their primary customers. While defendants produced courtesy copies of invoices, plaintiffs argue that defendants should be ordered to produce all invoices they have relating to Paleen. Plaintiffs further seek an order compelling defendants to produce all documents in their accountant's or other agent's possession relating to both the invoices and minority certification application documents. Furthermore, plaintiffs seeks copies of any communication that may have been delivered to the Court with defendants' in camera submission.

In opposition to the motion, defendants reiterate that Paleen is no longer a defendant in this action. They also state that defendants are in full compliance with all of the Court's prior discovery orders. Defendants also submit that plaintiffs' motion was not filed timely in accordance with the briefing schedule issued by the referee. As such, defendants argue that plaintiffs' motion should be denied on this procedural basis alone. Substantively, defendants argue that they timely submitted their client list for the Court's in camera review, provided invoices requested by the Court after its in camera review was completed and provided an affidavit of a diligent search as to any invoices not in defendants' possession or any invoices which could not be provided as a result of municipality bidding confidentiality rules. Defendants additionally submit that plaintiffs are now seeking discovery which is either the result of plaintiffs' own incomplete submission to the Court or which has already been ruled on by this Court in its Decision and Order dated February 26, 2019², which originally directed the parties' submissions for in camera review. Defendants aver that not only did they provide copies of all minority business applications that were in their possession, but they also provided duly

¹ This action was related to a separate action entitled *Henry G. Oneil, et al v Asphalt Maintenance et al*, Supreme Court, Westchester County under Index No. 69079/2015, which has been discontinued.

² See Decision and Order filed to NYSCEF as Doc. No. 236.

executed authorizations for plaintiffs to obtain these applications directly from the licensing authorities. Defendants also submit that plaintiffs could have sought these records by subpoena and did not do so.

Furthermore, defendants argue that plaintiffs concede that they forgot to include Paleen Construction Corp. on the in camera list of clients that they submitted to the Court and therefore it was plaintiffs' own error that caused the Court to not have a complete list when it conducted its in camera review. Accordingly, defendants submit that they have complied with all of the Court's prior discovery orders in providing all invoices in their possession, an affidavit of a diligent search as to invoices not produced and have provided plaintiffs with duly executed authorizations to directly obtain copies of the minority certification applications from the applicable licensing authorities. Defendants further argue that plaintiffs' current motion and prolonged litigation herein borders on harassment.

Analysis

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The term material and necessary in the statute must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*Matter of Kapon*, 23 NY3d 32, 38 [2014] quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Although the discovery statutes are to be construed "liberally" so that there should be disclosure of any material that is even arguably relevant (*see Shanahan v Bambino*, 271 AD2d 519 [2d Dept 2000]), "unlimited disclosure is not required, and supervision of disclosure is generally left to the Supreme Court's broad discretion" (*see, Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d 460, 461[2d Dept 2002]). The essential test is "usefulness and reason" (*see, Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746[2000] [internal quotation marks omitted]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

In order to expedite the completion of the discovery process in this action, which has been protracted and contentious, the Court has considered plaintiffs' motion on a substantive basis despite the fact that it was filed one day after the briefing schedule required. The Court also notes plaintiffs' letter requesting the Court's acceptance of their late filing. The Court has considered plaintiffs' request, in its discretion, and in the interests of not causing further unnecessary delays³.

It is axiomatic that a party may be required to produce only those items which are in his possession, custody or control (CPLR 3120; *Rosado v Mercedes-Benz of North America*, 103 AD 2d 395 [2d Dept 1984]). As defendants have provided copies of all minority business applications in their possession and also provided duly executed authorizations for plaintiffs to obtain these applications directly from the licensing authorities the Court finds that defendants have complied with their obligations with respect thereto.

³ See Letter of Robert A. Siegel dated June 11, 2019 filed to NYSCEF as Doc. No. 250.

In the present case, the Court issued an Order After In Camera Review⁴ directing defendants to conduct a diligent search and serve copies of all invoices for the customers who appeared on both client lists submitted by the parties for in camera review. Plaintiffs concede that they forgot to list Paleen on their list and Paleen was therefore not included in the Court's Order which directed defendants to provide copies of invoices. As defendants have not denied that Paleen was their customer, defendants are to conduct a diligent search of their records and provide plaintiffs with copies of all invoices for Paleen also. Defendants should also provide plaintiffs with a copy of any correspondence or cover letter that was submitted to the Court with their in camera submission.

The Court now turns to that branch of the motion which seeks copies of invoices for the disclosed entities that may be in defendants' accountant' possession. The party seeking disclosure has the burden to demonstrate that the method of 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 (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 at 1140 [2d Dept 2010]). The Court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (See *Mironer v City of New York*, supra; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Due to the stated inability of defendants to locate and produce all the invoices for the disclosed entities, any invoices maintained by defendants' accountant are necessary to determine the amount of plaintiffs' damages in the form of claims of lost business. Defendants shall provide an authorization for plaintiffs to obtain copies of the invoices for the disclosed entities directly from defendants' accountant. As to any further documentation sought by plaintiffs from defendants' accountant, namely minority certification documents, that branch of plaintiffs' motion is denied as defendants have previously provided plaintiffs with authorizations to obtain those directly from the licensing authorities.

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that on or before August 30, 2019, defendants are to conduct a diligent search of their records and provide plaintiffs with copies of all invoices for Paleen Construction Corp.; and it is further

ORDERED that on or before August 30, 2019, defendants shall serve plaintiffs with a copy of the correspondence or cover letter submitted to the Court with their in camera submission; and it is further

ORDERED that on or before August 30, 2019, defendants shall provide plaintiffs with an

⁴ See Order filed to NYSCEF as Doc. No. 239.

authorization for plaintiffs to obtain copies of the invoices for the disclosed entities, including Paleen Construction Corp., directly from defendants' accountant; and it is further

ORDERED that the branch of this motion seeking further documentation from defendants or defendants' accountant, namely minority certification documents, is denied in its entirety for the reasons set forth herein; and it is further

ORDERED that counsel for the parties are directed to appear for a conference in the Compliance Part, courtroom 800 at 9:30 a.m. on September 13, 2019; and it is further

ORDERED that plaintiffs shall serve a copy of this Order with notice of entry upon counsel for defendants within five (5) days of entry and shall file proof of service on NYSCEF within five (5) days of service.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
August 5, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Robert A. Siegel, Esq.
Attorney for Plaintiffs
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By NYSCEF

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By NYSCEF

cc: Compliance Conference Part Clerk